

at law and in equity of the Owner in and to the abovementioned Twelve and One-half (12 1/2%) percentum gross royalty or share of production from any well or wells that may be drilled upon the said lands, or any part thereof (hereinafter referred to as "the Gross Royalty") TO HAVE AND TO HOLD the same with all and every benefit that may or can be derived from the same unto the Trustee, its successors and assigns forever subject only to the terms of this Trust Agreement.

OWNER'S COVENANT RE LEASE

25. The Owner hereby covenants and agrees with the Trustees that, in the event that any lease that may be in existence as at the date of this Agreement is cancelled for any reason or in the event that no lease is in existence as at the date of this Trust Agreement, he shall and will in negotiating any lease or other instrument for developing the said lands reserve unto the Trustee the full 12 1/2% Gross Royalty hereby assigned to the Trustee.

17 Both the trial judge and the Court of Appeal in *Hetherington* interpreted clause 2 as pertaining only to royalties from the lease existing at the time of execution of the agreement (in that case to Rio Bravo). The trial judge interpreted clause 25 as evidencing an intention that the assigned royalty included existing and future leases, and read clause 2 in that context. The Court of Appeal agreed with the interpretation of clause 2, but interpreted clause 25 as being applicable only in circumstances where the original lease was "cancelled".

18 The Court of Appeal held at page 9:

Clause 25 has no application to the facts of either case before us. The Rio Bravo lease existed when each royalty trust Agreement was entered into. The Rio Bravo leases were never cancelled but expired through effluxion of the primary term of the lease. We cannot accept that clause 25 is nugatory if the royalty assigned under clause 2 is limited to the Rio Bravo lease. The limited circumstances which would trigger clause 25 never occurred, and accordingly its powers of substitution never arose.

19 The Court of Appeal also rejected arguments that there were ambiguities in the Agreement (at page 9). They concluded that the Hetherington Gross Royalty Trust Agreement attached only to the royalties payable under the Rio Bravo leases, and not to subsequent leases.

20 The next case in the Gross Royalty Trust series is *Scurry-Rainbow Oil Ltd. v. Kasha*, [1993] A.J. No. 579. Lefsrud, J. interpreted a different granting clause in the Kasha Gross Royalty Trust Agreement. There, clause 2 was similar to clause 2 in this case and in *Hetherington*, but continued:

In the event that the lease hereinbefore mentioned is cancelled, terminated or in any manner whatsoever brought to an end, the Owner agrees that the petroleum, natural gas and related hydrocarbons or any or all of them in and under the said lands shall continue to be subject to a twelve & a half (12 1/2) percentum gross royalty and the said twelve & a half (12 1/2) percentum gross royalty shall be subject in all respects to the trust herein created and it is further agreed that any Owner's royalty payable under any future lease of petroleum, natural gas or related hydrocarbons or any or all of them under the said lands without expressly providing for the payment of a twelve and a half (12 1/2) percentum owners gross royalty of the leased substances free and clear of all charges, restrictions or covenants of any kind whatsoever.

21 Lefsrud, J. concluded that Kasha "clearly and unequivocally, expressed his intention that any Owner's royalty payable under any FUTURE (emphasis added) lease of the said lands would be subject to the GRTA and he covenanted ... that any future lease of the said lands would expressly provide for the payment of a free and clear 12 1/2% Owner's Gross Royalty" (at para. 28).

22 Next came *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1993] A.J. No. 227. In that case, Hunt, J. (as she then was) was asked to interpret several gross royalty trust agreements, and determine whether interests in land were created and whether the agreements applied to royalties under leases which came into effect subsequent to the lease existing at the time the agreements were executed. In the Burden case (Fisher No. 2 Gross Royalty

Trust), the form was identical to the form here and in **Hetherington**. In Fletcher (Kolstad Gross Royalty Trust), the form was different, and provided:

For the purpose of effectually securing unto the Trustee the said gross royalty, the Assignor hereby transfers, assigns, sets over and conveys unto the Trustee the full undivided Twelve and one-half per cent (12 1/2%) share or interest in and to the said lands and covenants that he will upon the request of the Trustee for the same, execute and deliver unto the Trustee a formal transfer thereof in the form prescribed by the Land Titles Act for the Province of Alberta to enable the trustee to perfect legal title to the interest therein hereby assigned, and the assignor further covenants that until such time as the Trustee shall require such formal transfer he does and will hereafter stand possessed of his entire interest in the said lands in trust for the Trustee as to an undivided Twelve and one-half per cent (12 1/2%) interest therein, provided that in the event of cancellation, surrender or other termination of the said Lease nothing herein contained shall preclude the Assignor from granting a Lease or Leases covering the said lands for such considerations and upon such terms an [sic] conditions as he shall in his sole discretion deem fit saving and excepting only that such Lease or Leases shall expressly reserve unto the Assignor a gross royalty of production of petroleum, natural gas, natural gasoline and related hydrocarbons in an amount of not less than Twelve and one-half per cent (12 1/2). In the event the Lessor shall grant a lease or leases of the said lands pursuant to the provisions of this clause, the Assignor covenants that he will contemporaneously therein notify the Lessee therein named of the provisions of this Agreement and any such Lease shall be substituted for the purposes of this Agreement for the said Lease as hereinbefore defined and the royalty thereby reserved shall be deemed to have been assigned to the Trustee for the purposes of this Agreement up to the full amount of Twelve and one-half per cent (12 1/2%) of the gross production of leased substances from the said lands and any gross royalty thereby reserved in excess of Twelve and one-half per cent (12 1/2%) of such production shall not be subject to the provisions of this Agreement.

23 In Noble (Crichton Gross Royalty Trust), the form was again different, and provided:

Section 1.01. The Grantor doth grant unto the Trustee, upon the trusts herein contained, an undivided gross 12 1/2% interest in all the substances in, on or under the said lands (subject to the said Lease) and in all the substances produced and saved therefrom, free of all costs and expenses.

The Grantor conveys and agrees that he will not himself produce, or permit any other person to produce, nor enter into any agreement which would permit the production of, any of the substances therefrom unless there be reserved, assured and transferred to the Trustee such gross 12 1/2% thereof, free of all costs and expenses, and accordingly the Grantor doth hereby assign, transfer and set over unto the Trustee upon the trusts herein contained all the Grantor's right, title and interest in and to the royalty to reserved under the said Lease, including the right (if any) to elect the mode of payment thereof as therein provided.

It is the intention of the parties that the interest in the said substances herein conveyed and transferred to the Trustee represent at all times a royalty interest of 12 1/2% of the substances produced and saved from the said lands whether under the said Lease or otherwise.

The said royalty interest, all proceeds therefrom when received by the Trustee, the covenants of the Grantor herein, and all other rights conferred upon the Trustee hereby and hereinafter referred to as the "Trust Property".

24 Hunt, J. held that the Kolstad and Crichton Agreements applied to subsequent leases. It was not necessary for her to determine that issue regarding the Fisher No. 2 Agreement, as the original lease there had not terminated by the effluxion of time and the issue there was whether the Agreement created an interest in land. She held that all Gross Royalty Trust Agreements in that case created interests in land, and her decision on that point was upheld on appeal.

25 Next came **Barrett v. Krebs**, [1995] A.J. No. 16. The Gross Royalty Trust Agreement there was the same as here and in **Hetherington**. The Plaintiffs raised two contractual arguments which they argued took them out of **Hetherington**, argued for rectification, sought to rely on estoppel and argued fiduciary obligations. Hunt, J. rejected

all arguments, but struggled with the interpretation of clause 25, stating "I confess that I am at a loss to know under what circumstances a lease could be said to be "cancelled" for the purposes of Clause 25" (at para. 76). She further stated at para. 79:

"Notwithstanding my puzzlement about how this lease could ever be said to be "cancelled", thereby triggering Clause 25, I feel that the Court of Appeal's decision in *Hetherington* binds me to the proposition that (whatever cancellation might mean) where the lease has expired due to non-production at the end of the primary term, Clause 25 is not engaged, and the lessor has no obligation in those circumstances to obtain a reservation of royalty to the trustee under a new lease."

26 The Court of Appeal was invited to revisit the *Hetherington* interpretation in *Barrett v. Krebs*, [\[1995\] A.J. No. 753](#). They refused to do so, and stated at paras. 18-21:

18 The distinction drawn by the Court in *Hetherington* between termination by overt act and termination by the natural and normal operation of a term in the lease is comprehensible, albeit difficult, because it can fairly be argued that the trust was not to apply to entirely new leases after the term of the existing lease but only to leases made because the owner or the lessee found a way to cancel the old lease prematurely.

19 If this issue were tried before 50 different judges, I dare say some would agree with this Court in *Hetherington*, some would agree with Hunt, J. I suspect that one's experience and memory of how these documents were viewed by investors 30 years ago may be a factor. But, as Hunt, J. observed in *Scurry Rainbow*, the commercial context, viewed carefully, is not decisive.

20 In the end, this is hardly an issue respecting which I would say the Court has made a clear error, and that the error has caused a clear injustice. I would deny leave.

21 I would add that, despite all the argument, a finding like that in *Hetherington* is, at bottom, a finding of fact about the true intent of the parties. While I accept that it has, in these special circumstances, substantial precedential force, it, like all findings of fact, can be distinguished by a trial judge who hears new evidence of a commanding nature to the opposite effect.

27 The concluding words of the judgment are significant, and the issue in this lawsuit is essentially whether there is "new evidence of a commanding nature" to distinguish *Hetherington* as to the "true intent of the parties".

28 While *Hetherington* has "substantial precedential force", it is clear that it does not of itself decide this case. The specific facts will be determinative.

29 The Plaintiffs here assert that the evidence in their case supports a claim for rectification of the Gross Royalty Trust Agreement in that the true intention of the parties was to transfer and assign not only the royalties under the existing Imperial Oil lease, but also to assign the royalties under any subsequent leases of the mineral rights in question.

ISSUES

30 Since this is a summary judgment application on behalf of the Defendants, the issue for me to decide is whether the Plaintiffs have established a genuine issue for trial.

Relevant Law on Motion

31 There is a myriad of cases on summary judgment and when it is and is not available. The parties do not differ in any significant way on their views of the onus and test to be met to establish an entitlement to summary judgment under Rule 159(2) and (3). The Defendants cite *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*, [\[2006\] A.J. No. 207](#), [2006 ABCA 69](#), wherein various tests are described: that it must be "plain and obvious that the plaintiff cannot succeed" and that it must be "beyond doubt" that the action will fail. There, it is noted at paras. 24

that "when a chambers or case management judge must necessarily assess the quality and weight of evidence to come to a decision, the failure of the case is not beyond doubt."

32 The prohibition against the chambers judge assessing the weight and quality of the evidence can also be found in *Liu v. Tangirala*, [\[2004\] A.J. No. 555](#), [2004 ABCA 171](#). There the Court of Appeal set aside summary judgment on the basis that the chambers judge erred by assessing the weight and quality of the evidence. They concluded that the evidence was "sufficient to meet the low threshold required to defend a summary judgment application" (at para. 3).

33 In *Aguone v. Galion Solid Waste Material Inc.*, [\(1998\), 156 D.L.R. \(4th\) 222](#), the Ontario Court of Appeal considered Ontario's summary judgment Rule 20, and stated that: "The Court will never assess credibility, weigh the evidence, or find the facts. ... Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact" (at para. 32).

34 *Pioneer Exploration Inc. (Trustee of) v. Euro-Am Pacific Enterprises Ltd.*, [\[2003\] A.J. No. 1305](#), [2003 ABCA 298](#) is also cited, but that case deals with summary judgment by the Plaintiff, and not summary dismissal by the Defendant. It is not helpful to the issue in this case.

35 *Suncor Inc. v. Canada Wire and Cable Ltd.*, [\[1993\] A.J. No. 4](#), *Jager Industries Inc. v. Canadian Occidental Petroleum Ltd.*, [\[2000\] A.J. No. 994](#), [2000 ABQB 592](#) and *Stoddard v. Montague*, [\[2006\] A.J. No. 446](#), [2006 ABCA 109](#) are cited for the principle that a summary judgment application should be decided on the evidence or facts before the judge at the time of the application, and not on what the plaintiff hopes the evidence or facts might be at trial. I note that Forsyth, J. in *Suncor* refused summary judgment the basis that the law was evolving and that it might move in the direction the plaintiffs hoped by the time of trial (at pages 8-9). Rooke, J. notes in *Jager Industries* that the applicant has a high test to meet on a summary judgment application - a strong *prima facie* case - and the respondent has a minimal test to demonstrate an arguable case (at para. 65). In *Stoddard*, the Court of Appeal noted:

If all the plaintiff does is assert that evidence will or may come out at trial and that the pleadings and allegations made during argument support issues for trial, he or she will not be successful in preventing summary dismissal in the face of overwhelming evidence that the alleged perpetrators were not negligent, did not cause the injuries complained of, and met the relevant standard of care." (At para. 20).

36 The Plaintiffs cite *Allied Signal Inc. v. Dome Petroleum Ltd.*, [\[1991\] A.J. No. 626](#) (Q.B.) which holds that a defendant must show that the claim has "no reasonable prospect of success" (at page 8).

37 The more recent decision of the Court of Appeal in *Tottrup v. Clearwater (Municipal District No. 99)*, [\[2006\] A.J. No. 1532](#), [2006 ABCA 380](#) notes that there are different types of summary judgment applications. One type deals with the factual merits of the case, and the Court of Appeal uses words such as "plain and obvious", "clear" and "beyond real doubt" as the standard which must be met by the moving party. They refer to the Supreme Court of Canada decision in *Guarantee Co. of North America v. Gordon Capital Corp.*, [\[1999\] 3 S.C.R. 423](#) where it stated that a plaintiff must show a "real chance of success" to avoid summary dismissal (at para. 27).

38 In other types of summary dismissal applications, the facts may be clear and undisputed. The ultimate outcome may depend on the interpretation of a statute or document, or an issue of law arising out of undisputed facts. There, "the test for summary judgment is not whether the issue of law is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court" (at para. 11). "Trials are primarily to determine questions of fact" (at para. 12).

39 What type of summary judgment application is this?

40 The Defendants say that the application is closer to the latter type - where the outcome depends on the interpretation of a document. The Plaintiffs say that the facts are not clear and undisputed: that there are factual

issues surrounding the intention of the parties when the Gross Royalty Trust Agreement was executed that require a trial.

41 I have no doubt at all that Douglas Wetter's affidavit of November 15, 2006 meets the burden on the Defendants that they have a strong *prima facie* defence to the Plaintiffs' claim, based on **Hetherington**. The onus thus switches to the Plaintiffs to demonstrate, on a balance of probabilities, that there is a genuine issue to be tried, or that they have a real chance of success.

Plaintiffs' Position

42 While the Plaintiffs concede that **Hetherington** is a substantial impediment to their chances of success, they point to their arguments and evidence on rectification as providing the genuine issue to be tried. As evidence of the intention of the parties at the time of execution of the Gross Royalty Trust, they put forward the affidavits of the plaintiffs Ruth Thorvaldson and Beatrice Steinke, and of Mary Hammer, Computershare Trust's manager of Oil and Gas Royalties.

43 Ms. Steinke deposes in her affidavit of July 13, 2007:

3. As a result of various discussions I had with my parents, I am convinced that they wanted the Gross Royalty Trust to last forever so that their descendants could obtain the benefit of the units allotted to them in the Gross Royalty Trust.
4. I recall my parents often mentioning how happy they were able to leave points in the trust to each of their eight children, and their descendants. Their desire was to have each of the eight children have one unit in the trust. My parents clearly told me that the one point given to me by them was to be part of my inheritance. Subsequently I also purchased a quarter of a point in the Gross Royalty Trust from two of my sisters, Ruth Thorvaldson and Dorothy MacLean. I believe that I paid \$16,000 for each of these quarter point interests.
5. When the trust began generating royalty in the late 1950s or early 1960s, my parents took great joy in knowing that the Gross Royalty Trust they had established was able to provide a source of income for their children.
6. I sincerely hope the Court does not make an Order terminating the Gross Royalty Trust. I am convinced that such an Order would be contrary to what my parents would have wished.

44 Ms. Thorvaldson deposes in her affidavit of May 18, 2007:

3. As a result of various discussions I had with my parents, I am convinced that they wanted the Gross Royalty Trust to last forever so that their descendants could obtain the benefit of the units allotted to them in the Gross Royalty Trust.
4. I personally recall many conversations with my parents that the unit in the trust which they had given to me was my inheritance, to be handed down to my children, and in turn, their children. I also recall my parents telling me that they were giving my brother Herb their land, but that my sisters and I would inherit their house and royalties arising from their land.
5. I sincerely hope the Court does not make an Order terminating the Gross Royalty Trust. I am convinced that such an Order would be contrary to what my parents would have wished.

45 Ms. Hammer deposes that she reviewed the Wetter Gross Royalty Trust Agreement file, and found several letters. These are argued by the Plaintiffs to be significant as to the settlors' intentions; one being a letter to Guaranty Trust (presumably a successor to Prudential) from H.W. Wetter (the settlors' son and the executor of August Wetter's estate) dated April 5, 1979. He noted that his parents had apparently misplaced their certificates,

and:

It is the wish of my mother to divide these units equally among the eight (8) children of her family. Could you also outline what procedures would have to be followed in order to divide all units registered to August and Ernestina (sic) Wetter equally into 8 individual certifications, and at what cost."

46 Guaranty Trust replied that "it would be possible to divide your parents' holdings into eight certificates, each for 10/40ths of one unit."

47 It also appears from the documents attached to Ms. Hammer's affidavit that on August 22, 1983, Ms. Steinke was recorded as having acquired additional units in the Trust. This may be confirmatory of Ms. Steinke's statement that she purchased units from two of her sisters, and may also be confirmatory that there was a common belief that the Trust was still in effect in 1983, even though the Imperial Oil lease had ended.

Analysis of Plaintiffs' Evidence

48 There is no direct evidence from August or Ernestina, as they are long dead. There is no direct evidence from Prudential, and there are no documents from the time of the Agreement that shed any light on the intention of the parties, other than the Agreement itself, and the lease with Imperial Oil.

49 It is obvious from the exchange of correspondence between the Wetters' son H.W. and Guaranty Trust that in 1979 some members of the Wetter family believed that the Gross Royalty Trust had not been terminated or expired or lapsed, and that there was still some value to the units in the Trust. This was over a decade after production had ceased, revenues had stopped and the Imperial Oil lease had been discharged from title. The Wetter family belief was presumably shared by Guaranty Trust, or it would have taken steps to wind up the trust as the revenue stream had dried up many years earlier. In the absence of a belief in the continuation of the Trust, they would not likely have advised H.W. Wetter as to unit transfer requirements in 1979, or kept recording transfers as late as 1983, when Ms. Steinke was recorded as having acquired further units.

50 This correspondence, together with the affidavit evidence from two of the Wetter's daughters, are argued by the Plaintiffs to create a genuine issue to be tried as to the true intention of August and Ernestina and Prudential when they executed the Agreement.

51 The evidence of Ms. Steinke and Ms. Thorvaldson is clearly hearsay as to their parents' beliefs and intentions. They can testify as to what their parents did, but not what they said. The beliefs of the daughters as to what their parents wanted is not relevant. The beliefs and understanding of the rest of the Wetter family - apart from August and Ernestina - are not relevant to the interpretation of an agreement entered into between August and Ernestina and Prudential, or to the understanding and intentions of August, Ernestina and Prudential at the time of the Agreement. What their parents may have said to them after the fact is hearsay, and is subject to the usual exclusionary rules regarding hearsay evidence.

52 Additionally the evidence of Ms. Hammer as to H.W. Wetter's letter is hearsay. It may be evidence of H.W. having written to Guaranty Trust, but it is hearsay as to Ernestina's intentions and her subsequent conduct.

Hearsay Admissibility

53 Is any of the hearsay admissible? Without the daughters' evidence of intention, we are left only with the post-agreement conduct as a guide to interpretation and the intention of the parties. In reality, it is only post-agreement conduct of the parties after 1967 that may be relevant, as until that time, the Trust was clearly in existence and royalties from the original Imperial Oil lease were being paid to the unitholders. The post-agreement conduct can be described as Ernestina having her son H.W. write to Guaranty Trust in 1979, and Guaranty Trust treating the Wetter Gross Royalty Trust as still being in existence in 1979 and again in 1983 by recording Ms. Steinke's acquisition of further units.

54 The Plaintiffs admit that this is all the evidence they have so far, and candidly doubt that there will be any further evidence at trial.

55 As to hearsay, the principled approach as set out in *R. v. Khelawon*, [2006] 2 S.C.R. 787 is to be followed. Any out of court statement is treated as hearsay, mainly because of the inability to cross-examine on it. While hearsay is presumptively inadmissible, the principled approach allows evidence that is sufficiently reliable to be admitted as an exception to the hearsay rule, so long as that evidence is considered necessary. Two ways of satisfying the reliability test are discussed. One is to show that there is no real concern about whether the statement is true or not because of the circumstances in which the statement came about, such as with dying declarations, spontaneous utterances and statements against pecuniary interest. The other is where its truth and accuracy can be sufficiently tested in other ways, such as where the statement is in the form of testimony in other proceedings, or from prior statements. These examples are intended to be illustrative, and not exhaustive (see paras. 61-66).

56 Here, the necessity requirement is likely satisfied. August and Ernestina have died, and are not available to testify. Their statements to their children may be the only evidence, or almost all of the evidence from them, as to their intentions at the time of the Agreement.

57 As to reliability, the only way of testing the statements is in some way other than by cross-examination. Thus, the circumstances around the statements being made are highly significant.

58 As a result of this analysis it is certainly arguable that the hearsay evidence would be admissible. It appears to meet the necessity requirement under *Khelawon*, and the circumstances of the statements and correspondence may be such as to satisfy the reliability test. That would still leave the assessment of the weight and quality of the evidence as to the relevant issues to be determined.

59 Assuming that the hearsay evidence is admitted, is any of it material to the issues at trial? The answer to that question depends on a determination as to what "genuine" issues there may be for trial (if any). Here, I am satisfied that if there are any genuine issues of trial they relate to the Plaintiffs' plea for rectification.

Rectification

60 The Plaintiffs in *Barrett v. Krebs* sought rectification. They did not succeed. The circumstances in that case are very similar to the case at bar. There, Betty and Emil Krebs executed a Gross Royalty Trust Agreement with Prudential in 1953, in the same form as here and in *Hetherington*. The petroleum and natural gas had been leased to Rio Bravo, which later became Canadian Superior Oil of California. Various royalty certificates were issued by Prudential between 1954 and 1966. Significantly, certificates had been issued to the four Krebs children on February 22, 1960. The Rio Bravo lease had expired on January 17, 1960 because there had been no drilling. However, the Krebs had given Canadian Superior a top lease (option) in January, 1959, and Canadian Superior exercised that option on February 10, 1960.

61 By 1966, the field in which the Krebs' mineral interests were contained unitized, and royalties began to come to Prudential. The royalties were distributed by Prudential to the unitholders, who included Emil and Betty and the four Krebs children. Emil died in 1984 and shortly after that, more certificates were issued to the Krebs children. Betty became the sole owner of the mineral rights title and ultimately transferred them to her children. The children and Betty subsequently sought a declaration that the Gross Royalty Trust Agreement had expired, following the *Hetherington* decision.

62 The Plaintiffs, who were the unitholders in the Trust, vainly tried to distinguish *Hetherington*, but in the alternative sought rectification, pointing to the conduct of Emil and Betty and Prudential after the execution of the Gross Royalty Trust Agreement. There, as here, there was no direct evidence of intention available from any of the settlors or the trustee. There was some ambiguous hearsay, but that was ultimately ruled inadmissible by Hunt, J. (as she then was).

63 The Plaintiffs there (as do the Plaintiffs here) relied on *Hart v. Boutilier*, (1916) 56 D.L.R. 620 (S.C.C.) and *Peter Pan Drive-In Ltd.*, (1978) 93 D.L.R. (3d) 221 (Ont. H.C.); aff'd [1980] O.J. No. 3491, 106 D.L.R. (3d) 576; leave to appeal to S.C.C. refused 32 N.R. 538, for the basic principles of rectification and the specific point that subsequent conduct can be relevant in a rectification case. That point is not disputed by the Defendants here.

64 Rectification is not a remedy that is easily obtained. A useful starting point is the statement of Wachowich, J. (as he then was) in *C.D.I.C. v. Canadian Commercial Bank*, (1990) 105 A.R. 368 at 378:

To justify the court in correcting a mistake in an instrument the evidence must be clear and unambiguous that a mistake has been made, that the instrument does not represent the parties' common intention, what the common intention was and that the alleged intention to which it is desired to make the agreement conformable continued concurrently on the parties' minds down to the time of the execution of the instrument.

65 Many of the cases focus on the standard of proof required to support a plea of rectification: "proof beyond reasonable doubt" (*The M.F. Whalen v. Point Anne Quarries, Ltd.*, (1921) 63 D.L.R. 545 (S.C.C.); "evidence which leaves no 'fair and reasonable doubt'" (*Hart v. Boutilier, supra*); "convincing proof" (*Joscelyne v. Nissen and Another*, [1970] Q.B. 86 (C.A.), *Farm Credit Corp. v. Lacombe Nurseries Ltd.*, (1992) 125 A.R. 17 (Alta. C.A.), *Augdome Corporation Ltd. v. Gray*, (1974) 49 D.L.R. (3d) 372 (S.C.C.); "more than sufficient evidence" (*Augdome. Goldec Hamms Manufacturing Ltd. v. Goldec International Equipment Inc.*, [2003] A.J. No. 673, 2003 ABQB 467 refers to all of these tests, without choosing one.

66 *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678, [2002] S.C.J. No. 20, the last word from the Supreme Court on the standard of proof, did not directly resolve the issue, but a unanimous court (on rectification) stated at paragraph 47 that "The Court should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof."

67 In *M.F. Whalen*, the Supreme Court noted that it needed to be shown that "the parties did agree upon something which did not appear in the writing ... that is to say the intention to contract in this sense continued concurrently in the minds of both parties down to the time the document went into operation" (at page 568).

68 As to whether the parties must have actually agreed on the specific term for which rectification is sought, and simply incorrectly worded their written agreement, *Peter Pan Drive-In* held that "it is not necessary to show that there was an expressed antecedent agreement in order to found a successful claim for rectification." In that case, there was no discussion on that point, although Eberle, J. stated that "It seems obvious to me that the point was so clear ... that discussion was unnecessary" (at page 4).

69 However, in *Peter Pan*, Eberle, J. declined to follow *Glascar Ltd. v. Polysar Ltd.*, (1975), 9 O.R. (2d) 705 (Ont. H.C.) and he distinguished *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.*, [1973] 2 O.R. 57 (Ont. C.A.). It is interesting that Eberle appears to have ignored Brooke, J.A.'s statement in *H.F. Clarke* that "In order for a party to succeed on a plea of rectification, he must satisfy the Court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote them down incorrectly. It is not a question of the Court being asked to speculate about the parties' intention ... " (at pages 20-21).

70 *Hart v. Boutilier*, (1916), 56 D.L.R. 620 (S.C.C.) is also relied on by the Plaintiffs to support their contention that rectification can be used to have an agreement conform to the parties' intention in circumstances where there has been no express agreement on the term in question. In particular, the Plaintiffs rely on the statement of Duff, J. (as he then was) at page 630:

The power of rectification must be used with great caution; and only after the Court has been satisfied by evidence which leaves no "fair and reasonable doubt" (*Fowler v. Fowler* (1859), 4 DeG. & J. 250, at 264, 45 E.R. 97), that the deed impeached does not embody the final intention of the parties. This evidence must

make it clear that the alleged intention to which the plaintiff asks that the deed be made to conform, continued concurrently in the minds of all the parties down to the time of its execution; and the plaintiff must succeed in shewing also the precise form in which the instrument will express this intention.

That statement was quoted by the Supreme Court (without comment) in *Augdome Corporation* at page 383-384.

71 After *Peter Pan*, the Ontario Court of Appeal dealt with rectification in *Pedlar People Ltd. v. Zygocki*, [1979] O.J. No. 1023 (Ont. C.A.) where they reaffirmed *H.F. Clarke*. The Ontario Court of Appeal also quoted with approval the statement of Lord Denning in *Frederick E. Rose (London) Ltd. v. Wm. Pim Junr. & Co., Ltd.*, [1953] 2 All E.R. 739 (Eng. C.A.) at pages 747-48. There, Lord Denning stated that "Rectification is concerned with contracts and documents, not with intentions ... [a party] is allowed to prove, if he can, that they agreed something different; but not that they intended something different."

72 *Helmele Estate v. McGillivray*, [1996] S.J. No. 247 (Sask. Q.B.), cited by the Plaintiffs, is to a similar effect as *Peter Pan*, wherein Dielschneider, J. stated that:

(13) The party seeking rectification must establish:

(1) that the common intention as to the terms of the document existed at the time of the execution (There does not have to be a concluded agreement between the parties prior to the written document of which rectification is being sought. Rectification will be granted where it is established the parties had a common intention which due to mistake was not in fact expressed in the written document).

(2) that due to mutual mistake, the document as written does not express this common intention.

(3) that if rectified the document would express this common intention.

(14) There is an onus on the party seeking rectification to satisfy the court, beyond a reasonable doubt, of the above. In deciding the matter the court is entitled to consider all evidence, parole and otherwise, of the parties' intentions, subsequent as well as antecedent to the written document. (See *Bercovici v. Palmer*, 59 D.L.R. (2d) 513 (Sask. C.A.), *Joscelyne v. Nissen*, (1970) 1 All E.R. 1213 (C.A.), *Peter Pan Drive-In Ltd. V. Flambro Realty Ltd.* (1979), 93 D.L.R. (3d) 221 (Ont. H.C.).

73 What should not be lost sight of is that rectification is an equitable remedy available to prevent a written document from being used as an engine of fraud or misconduct equivalent to fraud. As the Supreme Court noted in *Performance Industries* "Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. ... What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not." (at para. 31).

74 Rectification is a different remedy than implying terms into a contract. Terms may be implied only where they do not contradict the express terms of the Agreement. In this case, the express terms of the Agreement provide that Agreement came to an end on the expiry of the Imperial Oil Lease, being the interpretation given in *Hetherington*. A term to the contrary effect cannot be implied in the face of the clear written agreement. Thus the Plaintiffs' only hope is for rectification.

75 The Plaintiffs argue that rectification is available in situations where there was no express antecedent agreement on the term. The closest case to that position is *Peter Pan*. Essentially, the Plaintiffs argue that there was a common intention to create a Trust that would recover royalties from not only the Imperial Oil lease, but subsequent leases as well, and that rectification is available to redraft an agreement that will have that effect. Either clause 2 should be redrawn to assign royalties from future leases, or clause 25 should be redrawn to expand on "cancellation" and expressly cover all types of termination. These changes, they say, flow from the parties' alleged intention that the assignment of royalties apply to subsequent leases.

76 I am doubtful that the law of rectification goes that far. The traditional view is that rectification is consistent in the quotation from Lord Denning: rectification is about agreements, not intentions. However, it is not inconceivable that rectification could be used to restructure an agreement which has produced an unintended result. Parties enter into agreements with a purpose and a result in mind. It is unclear whether rectification can be used to redraft an agreement where a future occurrence and potential result from that occurrence were not discussed or even contemplated by that parties when the agreement was made. That seems to be more in the area of implied terms than for rectification.

77 Nevertheless, this is an application for summary judgment. It may be that the law is broader than the traditional view, or heading in that direction. For the purposes of this application, all the Plaintiffs need to do to avoid summary judgment against them is to show that they have a reasonable prospect of success in establishing that Ernestina and August and Prudential all intended the Agreement to have the effect of applying to subsequent leases. For the purposes of trial, the Plaintiffs will have to establish that the law permits rectification where there has been no express agreement on such terms but the effect of the agreement entered into is contrary to the common intent of the parties, permitting revisions to accomplish the purpose.

78 With respect to the standard of proof required to achieve rectification, I confess to having difficulty distinguishing among the subtleties of "beyond reasonable doubt" or "leaving no fair and reasonable doubt" or "convincing proof" or "more than sufficient evidence". The trend in the cases appears to be away from the criminal standard. It is in any event clear that more than a balance of probabilities is required. The difficulty with definitions is that they are easier to create than to understand.

79 This is not the trial of the matter, however. It is a summary judgment application. In these circumstances it is not necessary for me to determine the standard of proof for rectification. I must determine if the Plaintiffs have satisfied me that they have a reasonable prospect of success or that there is a genuine issue to be tried. The standard of proof required for rectification is somewhere between the balance of probabilities and the criminal standard. For the purposes of this application, the Plaintiffs are entitled to benefit of the lowest standard on them, which would be a balance of probabilities.

80 The key questions to answer are: have the Plaintiffs established on the evidence before me that they have a real chance of success in establishing, on at least a balance of probabilities, that August and Ernestina Wetter and Prudential intended the Gross Royalty Trust to apply to subsequent leases? Or have they established that there is a "genuine issue to be tried"?

Analysis on Rectification

81 There is no evidence of what was said or done at the time of execution of the Agreement in 1950. There is no evidence of any kind to suggest that the parties expressly contemplated what might happen if the existing Imperial Oil lease ended. There is also no evidence that the parties discussed or even contemplated the subtleties of clause 25 and the distinctions the Alberta Courts have made between the expiry of the lease through the passage of time and lack of production, and through voluntary termination. It would in my view be highly unlikely that such a discussion or contemplation even occurred at the time.

82 There is certainly no evidence that August and Ernestina and Prudential expressly agreed that the Agreement would apply to subsequent leases. There is no contemporaneous evidence available to demonstrate the discussions among the parties, or to discover whether the parties specifically discussed clauses 2 or 25 and if so, what they discussed.

83 What is known is that August and Ernestina owned the mineral rights in fee simple. They had leased part of the mineral rights to Imperial Oil. They did not transfer any of the mineral rights to the Wetter Gross Royalty Trust. They assigned royalty rights to the Trust. While Court rulings have subsequently held that they transferred an interest in land to the Trust, it is clear that they retained title, subject to whatever interest they had transferred. It must be that

all parties intended that something less than a fee simple interest in the minerals was to be conveyed to the Trust. Otherwise, it would have been very straightforward to transfer the minerals, or a portion of them (such as the same minerals that had been leased to Imperial Oil). That was not done.

84 The Plaintiffs argue that the parties intended the same result as was found in *Scurry-Rainbow v. Kasha* and *Scurry-Rainbow v. Galloway Estate* (other than as to the Fisher No. 2 Gross Royalty Trust, which used the same form as here). In other words, the Trust would be entitled to a 12 1/2% royalty on production of the hydrocarbons described in the Imperial Oil lease while it was in existence, and the same royalty on any of the same substances which may be produced after the expiry or termination of the Imperial Oil lease.

85 Presumably, the Plaintiffs seek to have either clause 2 or clause 25 of the Agreement rectified to conform to the wording in the Kasha Gross Royalty Trust, or the Halvard Kolstad Gross Royalty Trust Agreement, or the Crichton-Ponoka Gross Royalty Trust Agreement (the latter 2 being part of the *Galloway Estate* case).

86 To resist summary judgment against them, the Plaintiffs must establish that they have a reasonable prospect of establishing, on proof higher than a balance of probabilities, that the parties to the Agreement intended the result in *Kasha*, and in the Halvard Kolstad and Crichton-Ponoka aspects of *Galloway Estate*, and not the result in *Hetherington*, or at least that there is a genuine issue to be tried.

87 Is there any evidence of the common intention of the parties?

88 For the purposes of this application, I will assume that the hearsay evidence of Ruth Thorvaldson, Beatrice Steinke and Mary Hammer will be admitted, and that the evidence is true. There are reasonable arguments under *Khelawon* that the evidence is necessary, and there are reasonable arguments as to reliability having regard to the circumstances of the statements. It should be noted, however, that similar hearsay was rejected at trial in the *Barrett* case. However, *Barrett* was decided before *Khelawon*, and hearsay may generally be more admissible now than was the case when *Barrett* was decided. However, admissibility does not necessarily mean acceptance of the evidence by the trier of fact, and if admitted, the trier of fact would ultimately have to decide the weight to give such evidence.

89 Also admissible for the purposes of this application is the evidence of subsequent conduct of the parties, which may be relevant in trying to ascertain their intentions at the time of the Agreement.

90 From the hearsay evidence of what was said by August and Ernestina to Beatrice and Ruth, it appears that they wanted the Gross Royalty Trust to "last forever" so that their descendants could obtain the benefit of the units.

91 Beatrice and Ruth also claim that their parents considered the units to be part of the daughters' inheritance. Ruth's evidence goes further, saying that she was told that she and her sisters would inherit "their house and royalties arising from their land".

92 As noted above, evidence of the daughters' beliefs is not relevant for the purposes of rectification, nor is evidence of their subsequent conduct. However, Prudential and Ernestina appear to have considered that the Wetter Gross Royalty Trust was still in existence in 1979 and as late as 1983 when Guaranty Trust recorded the acquisition of further units by Beatrice.

93 A major difficulty with the hearsay evidence of the daughters is that it is not unequivocal. The statements to them are as consistent with the hopes that production under the Imperial Oil lease would continue forever as it is with being evidence of an intention that the Agreement apply to subsequent leases. The evidence is vague, and there is no evidence of timing, although some of the discussions referred to took place while August was still alive. He had died by 1979, so it would be reasonable to assume that the discussions took place before then. Any statements before the expiry of the Imperial Oil lease would be of little assistance, but for the purposes of this application, I will assume that there is a reasonable prospect of Ruth and Beatrice being able to establish that the statements, or at least some of them, were made after 1967 when Imperial Oil discharged its lease.

94 There is no evidence that anyone was aware of the fact that the Imperial Oil lease had expired. Presumably, everyone knew that there were no royalty payments coming in, but there is no evidence of any meetings of unit holders, correspondence to any of the parties, or any other evidence that gave anyone actual knowledge that the Imperial Oil lease had ended, and had been discharged from title. There is no evidence as to the knowledge August or Ernestina had about petroleum and natural gas leases, and whether or not they understood the circumstances under which the Imperial Oil lease would expire. There is no evidence that either August or Ernestina understood that there would never be further royalties from Imperial Oil under the original lease.

95 As such, the statements attributed to August or Ernestina are as consistent with the Gross Royalty Trust applying only to the Imperial Oil lease, as with the Gross Royalty Trust applying to subsequent leases.

96 Beatrice's allegation that after the discussions with her parents, she bought units from two of her sisters, does not support rectification. It supports her view that at the time, she believed that the units had value. To the extent that she got that view from her parents, issues of estoppel and misrepresentation might arise. However, it is not her parents that are seeking to have the Trust declared terminated, so estoppel does not arise here. And misrepresentation would be an action against her parents, or perhaps Prudential, but those issues are not before me and do not assist with the Plaintiffs' plea for rectification.

97 The documents introduced by Ms. Hammer show actions on the part of both Ernestina and Guaranty Trust. Accepting them at face value (and admitting them despite the hearsay aspects), they provide evidence that Ernestina and Prudential's successor believed at that time that there was still value to the units, and that the Trust still existed. That could be relevant evidence of intention, if there were also evidence that Ernestina knew that the Imperial Oil lease had expired and if there were to be any future royalties, they would have to come from a subsequent lease.

98 There is no evidence that Ernestina had that knowledge. As a consequence, her statements through her son H.W. are also consistent with a belief that there could still be royalties under the Imperial Oil lease.

99 This is all the evidence there is. It is not expected that there will be more at trial. There is some evidence that August and Ernestina intended the Wetter Gross Royalty Trust to continue for a long time, and that future generations of Wetters would benefit from it. There is some evidence that Ernestina and Prudential (or its successor) believed, at a time after the Imperial Oil lease had expired, that the Trust was still in effect, and that there may be future revenues.

100 Against this evidence, there is a void in evidence as to what the actual intention of the parties was in 1950 with respect to whether the Trust would apply to leases other than the Imperial Oil lease.

101 None of the evidence adduced so far on the part of the Plaintiffs can be said to be clear or unequivocal as to the parties' intentions at the time as to subsequent leases, and what their oral agreements may have been prior to them being recorded in the written Agreement.

RESULT

102 Is the existence of some evidence, however, enough for the Plaintiffs to survive this application?

103 The answer is a reluctant yes. The evidence before me does not demonstrate to me that the Plaintiffs have a reasonable prospect of proving what they need to prove on a balance of probabilities, let alone on the higher standard required for rectification. A balance of probabilities is not likely approached, even accepting the hearsay evidence of Ruth and Beatrice and the hearsay of the correspondence from August's executor. The actions of Guaranty Trust in 1979 do little to show the intention of the responsible parties at Prudential in 1950. Even giving the Plaintiffs the benefit of the doubt, rectification requires substantial proof, which in my view has not been made out.

104 The evidence in this case is weaker than the evidence in *Barrett*. There, the settlors had knowledge of the expiry of the original lease, and took steps consistent with a belief that the Trust applied to subsequent leases. Here, there is no evidence of such knowledge or any actions in the face of such knowledge.

105 While each case turns on its own facts, it is illustrative that Hunt, J. in *Barrett* found that stronger evidence than is present here was insufficient to found rectification in that case.

106 From my review of the evidence, and giving the Plaintiffs the benefit of admitting all of the hearsay, using the lowest possible standard of proof, and the broadest possible parameters for the application of rectification, I do not think that the Plaintiffs have established a reasonable prospect of success.

107 However, this view comes from my analysis of the evidence, the weight to be given to it and consideration of the sufficiency of such evidence. That analysis takes me into the tasks a chambers judge is not allowed to perform on a summary judgment application.

108 The *Murphy Oil* decision is thus problematic for a moving party where there is some evidence, however scant, that might support the Plaintiffs' claim. If the chambers judge on a Rule 159 motion has no ability to assess the quality of the evidence, or weigh the evidence in opposition to the motion, the motion is doomed to fail if the opposing party can adduce some evidence, or point to some evidence, which supports their position. It matters not whether that evidence is insufficient to meet any burden of proof. While the "reasonable chance of success" test may not be met, the need to weigh evidence gives the "genuine issue for trial" necessary to defeat summary judgment.

109 In that regard, the civil practice is to be contrasted with the criminal law practice of leaving defences to a jury. In a jury trial, the test of allowing a defence to be put to the jury is governed by the "air of reality" test. To allow a defence to go to the jury, the trial judge must be satisfied that there is a sufficient evidentiary foundation for the defence. Otherwise, the jury does not get to consider the defence.

110 The air of reality test is whether "a properly instructed jury acting reasonably could acquit the accused on the basis of the defence" based on the evidence foundation (*R. v. Cinous*, (2002), 162 C.C.C. (3d) 129, at para. 2).

111 In criminal cases, the trial judge acts as a gatekeeper for evidence and argument. In a civil case, under Rule 159, the chambers judge's role is more limited. *Murphy Oil* gives the judge no power to weigh the evidence. The only cases to be screened from a trial judge are those where there is absolutely no evidence which may support the claim or defence (as the case may be) or no arguable legal dispute if the facts are clear.

112 In that regard, my task here is essentially to determine whether there is any evidence to support the Plaintiffs' claim for restitution. Having found that there is some evidence, my hands are tied on a summary judgment motion. This case might be more suitable for a summary trial, where some weighing of the evidence can take place. While a test on the sufficiency of the evidence similar to the "air of reality" test may be an arguable improvement to the process of keeping matters where there is no reasonable prospect of success from consuming the time and cost of going to trial, that is not the current state of the law on summary judgment applications as they relate to the evidence.

CONCLUSION

113 As a result, the Defendants' application for summary dismissal is dismissed. The Plaintiffs have met the low threshold of establishing that there is some evidence capable of supporting their plea for rectification.

114 Costs should be in the cause unless there are circumstances of which I should be aware. The parties may speak to me within 30 days from this date of these reasons on costs.

R.A. GRAESSER J.

End of Document

Tab 20

 Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,
[2002] 1 S.C.R. 678

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie, Arbour and LeBel JJ.

2000: December 14 / 2002: February 22.

File No.: 27934

[\[2002\] 1 S.C.R. 678](#) | [\[2002\] 1 R.C.S. 678](#) | [\[2002\] S.C.J. No. 20](#) | [\[2002\] A.C.S. no 20](#) | [2002 SCC 19](#)

Performance Industries Ltd. and Terrance O'Connor, appellants/respondents on cross-appeal; v. Sylvan Lake Golf & Tennis Club Ltd., respondent/appellant on cross-appeal.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA (94 paras.)

Case Summary

Contracts — Equitable remedies — Rectification of contract — Written contract not reflecting prior oral agreement — Whether equitable remedy of rectification available — Whether lack of due diligence a bar to rectification.

Damages — Punitive damages — Written contract not reflecting prior oral agreement owing to fraud of one of parties — Whether trial judge's award of punitive damages should be restored.

The respondent operated an 18-hole golf course. The appellant O entered into negotiations with B, the respondent's principal, for a joint venture. The trial judge found that B and O made an oral agreement, which included an option on the 18th fairway for a specific residential development to be undertaken by B. During the negotiations, B discussed with O photographs and plans of a double row of houses clustered around a cul-de-sac along the length of the 18th fairway. When O's lawyer reduced the terms of the oral agreement to writing, the option clause accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 yards), the clause as written allowed only enough land for a single row of houses (110 feet). [page679] When B sought to exercise the option, O insisted on the written terms, despite knowing that these terms did not accurately reflect the prior oral option agreement. The respondent commenced the present action against the appellants for rectification of the agreement or damages in lieu thereof, punitive damages and solicitor-client costs. The trial judge held that the respondent was entitled to rectification of the option clause, awarding damages in lieu assessed on the basis of the loss of profit on a fully built residential development. Punitive damages were assessed at \$200,000. The Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

Held: The appeal and cross-appeal should be dismissed.

Per McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ.: The necessary preconditions to obtaining the equitable remedy of rectification of the contract are met in this case. First, the respondent has shown the existence and content of the prior oral agreement. There was a definite project in a definite location to which O and B had given their definite assent. Although the parties did not discuss a metes and bounds

description, they were working on a defined development proposal. O's numbers (110 x 480) can be accepted, while rejecting the error created by his apparently duplicitous substitution of feet for yards in the write-up of the option clause. Second, it was found that O had fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. Third, the precise terms of rectification are readily ascertained, namely to change the word "feet" in the phrase "one hundred ten (110) feet in width" to "yards". Fourth, there is convincing proof of B's unilateral mistake and O's knowledge of that mistake. B's version of the oral agreement was sufficiently corroborated on significant points by other witnesses and documents. While as an experienced businessman, B ought to have examined the text of the option clause before signing the document, due diligence on the part of the plaintiff is not a (fifth) condition precedent to rectification. Lack of due diligence may be taken into account in the exercise of a discretion to refuse the remedy, but here lack of due [page680] diligence was offset by the finding of fraud against O, and rectification was therefore properly granted.

In the absence of an error of principle, or a factual record that supports the appellants' criticisms, the findings in the courts below on the amount of compensatory damages must stand. Damages for breach of the contract, as rectified, include losses flowing from the special circumstances known to the parties at the time they made their contract.

The award of punitive damages in this case should not be restored as it does not serve a rational purpose. Only in exceptional cases does tort attract punitive damages. An award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation. In this case, neither the making of a punitive damages award nor the \$200,000 assessment meets the test of rationality.

Per LeBel J.: Subject to the comments on punitive damages in Whiten, the majority reasons were agreed with. Rectification of the contract was properly ordered, but punitive damages would fulfill no rational purpose in this case.

Cases Cited

By Binnie J.

Applied: *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18; referred to: *Hart v. Boutilier* (1916), 56 D.L.R. 620; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29; *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9; *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11; *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351; *Augdome Corp. v. Gray*, [1975] 2 S.C.R. 354; *I.C.R.V. Holdings [page681] Ltd. v. Tri-Par Holdings Ltd.* (1994), 53 B.C.A.C. 72; *Gordeyko v. Edmonton* (1986), 45 Alta. L.R. (2d) 201; *Kerr v. Cunard* (1914), 16 D.L.R. 662; *Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253; *Rumble v. Heygate* (1870), 18 W.R. 749; *Bloom v. Averbach*, [1927] S.C.R. 615; *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757; *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298; *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419; *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315; *Farah v. Barki*, [1955] S.C.R. 107; *May v. Platt*, [1900] 1 Ch. 616; *Central R. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99; *United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd.* (1988), 22 B.C.L.R. (2d) 322; *Dalon v. Legal Services Society (British Columbia)* (1995), 10 C.C.E.L. (2d) 89; *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Burrard Drydock Co. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307; *Corbin v. Thompson* (1907), 39 S.C.R. 575; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633; *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268; *Kinkel v. Hyman*, [1939] S.C.R. 364; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

By LeBel J.

Referred to: Whiten v. Pilot Insurance Co., [\[2002\] 1 S.C.R. 595](#), [2002 SCC 18](#).

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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal [\(2000\)](#), [255 A.R. 329](#), [185 D.L.R. \(4th\) 269](#), [6 B.L.R. \(3d\) 24](#), [\[2000\] A.J. No. 408](#) (QL), [2000 ABCA 116](#), setting aside the punitive damages award but dismissing the appellants' appeal in all other respects from a judgment of the Court of Queen's Bench [\(1999\)](#), [246 A.R. 272](#), [49 B.L.R. \(2d\) 284](#), [page682] [\[1999\] A.J. No. 741](#) (QL). Appeal and cross-appeal dismissed.

David R. Haigh, Q.C., and Brian Beck, for the appellants/respondents on cross-appeal. Lowell Westersund and Munaf Mohamed, for the respondent/appellant on cross-appeal.

Solicitors for the appellants/respondents on cross-appeal: Burnet, Duckworth & Palmer, Calgary. Solicitors for the respondent/appellant on cross-appeal: Fraser Milner Casgrain, Calgary.

The judgment of McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ. was delivered by

BINNIE J.

1 In this appeal the Court is called on to deal with rectification of a contract for a real estate development dream that turned into a nightmare for the warring partners. Houses were to have been built along the 18th fairway of the Sylvan Lake Golf Course, within commuting distance of Red Deer, Alberta. It did not happen because the parties fell out over the amount of land to be included in the development contract.

2 There was a written contract but the respondent's President did not bother to read it before it was signed. Had he done so, the error in reducing the parties' prior oral agreement to writing would likely have been detected and the development would have gone ahead. The appellants, who rely on the written document, say that a party who fails to exercise due diligence in its business affairs should be refused the equitable remedy of rectification. That is their strongest argument.

3 The principal witness and "directing mind" of the appellant Performance Industries Ltd. ("Performance"), which stands firm on the written document, is Terrance O'Connor. For him, the joint venture ended with his actions being characterized by the trial judge as "fraudulent, dishonest and deceitful" [\(1999\)](#), [246 A.R. 272](#), at para. 114. The trial

judgment made him personally liable (jointly and severally with his company Performance Industries Ltd.) for \$1,047,810, including a [page683] \$200,000 award of punitive damages, plus costs on a solicitor-client basis. He and his company appeal to this Court on various errors of law, few of which were argued before the trial judge.

4 For his erstwhile partner, Frederick Bell, whose corporate vehicle is Sylvan Lake Golf & Tennis Club Ltd. ("Sylvan"), his commercial aspirations have been trapped in the courts for seven years. This was because, so the trial judge found, O'Connor swore false affidavits, refused to produce relevant documents, gave false testimony in the course of two separate trials, and did "everything in his power to prevent the truth from coming to light" (para. 115). Bell is now said to be a spent force, "divorced [and lacking] the initiative or drive and determination to proceed with such a development at his present age" (para. 90). Bell obtained a \$200,000 punitive damage award at trial, but this was disallowed by the Alberta Court of Appeal ([\(2000\), 255 A.R. 329, 2000 ABCA 116](#)). In its cross-appeal, his company, Sylvan, seeks restoration of that award.

5 Because of the punitive damages issues, this appeal was heard concurrently with Whiten v. Pilot Insurance Co., [\[2002\] 1 S.C.R. 595, 2002 SCC 18](#), judgment which is being released concurrently with this judgment.

6 In my view, for reasons which differ somewhat from the memorandum of judgment handed down by the Alberta Court of Appeal, appeal and cross-appeal should be dismissed both with costs on a party-and-party basis.

I. Facts

7 Sylvan had operated a 171.53 acre, 18-hole golf course since 1979 under a lease which gave it a right of first refusal in the event the owner decided to sell the land. On November 3, 1989, a purchaser unrelated to O'Connor or Performance offered to [page684] purchase the golf course property for \$1.3 million. Sylvan then had until December 31, 1989 to make the purchase on the same terms and conditions. The outside offer triggered the chain of events that led to this action.

8 O'Connor was familiar with the Sylvan Lake Golf Course, having played it frequently and having hosted his corporate tournament at that site for some years.

9 O'Connor, unbeknownst to Bell, had approached the landowner with a view to purchasing the leased golf course property, without result. He had obtained a financing commitment as early as March 31, 1989, from the Federal Business Development Bank ("FBDB"). On learning that Sylvan had exercised its right of first refusal, O'Connor approached Bell with an offer of financial assistance, which was declined. However, when Bell's former partner dropped out, and Sylvan's efforts to finance the purchase of the golf course through other means proved unsuccessful, Bell went back to O'Connor. Bell testified that at that meeting he discussed with O'Connor how Bell wanted to secure another five years of operation of the golf course with a chance at the end of that time to secure his retirement by the development of the 18th hole for residential development. Negotiations for a joint venture ensued near the end of November or early December 1989.

10 After a number of preliminary meetings, O'Connor spent about two and a half hours at Bell's home during the December 16-17 weekend. The two men met at length in O'Connor's truck a day or two later. The trial judge found that Bell and O'Connor came to a verbal agreement on the terms of their joint venture. They would pool their resources plus a \$700,000 mortgage from the FBDB to purchase the property. Sylvan (Bell) would thereafter operate the facilities for five years for its own account without any day-to-day involvement of O'Connor. In brief, at the conclusion of five years, Sylvan would be bought out by Performance [page685] (O'Connor) for an agreed sum less any money then outstanding on the FBDB mortgage.

11 For present purposes, the only contentious issue was the option for a residential development to be undertaken by Bell (or a third party) "along the 18th fairway". O'Connor and Bell did not discuss a metes and bounds description of the optioned land, but Bell testified, and the trial judge accepted, that he showed O'Connor photographs and plans of the sort of development he had in mind, namely a double row of houses (i.e., on both

sides of a street) clustered around a cul-de-sac along the length of the 18th fairway (480 yards). A photograph of a comparable golf course development where Bell had lived in the Bayview area of Toronto formed part of the negotiations (and was marked at trial as Exhibit 1, Tab 67). O'Connor agreed to option the land to permit such a development, otherwise (as the trial judge found) Bell would not have agreed to the five-year joint venture. The parties agreed that the purchase price of the optioned land would be \$400,000 by a third party (or \$200,000 if the existing owner Sylvan (Bell) chose to develop the parcel).

12 As part of the agreement, O'Connor undertook to have his lawyer reduce the verbal terms to writing. In due course, a document was produced. Clause 18, the option, accurately specified the 480-yard length of the proposed development, but instead of sufficient width to permit a double row of houses (approximately 110 yards), clause 18 allowed only enough land for a single row of houses (110 feet). This misstatement of the oral agreement was thus pleaded in para. 9 of the Statement of Claim:

Paragraph 18 of the December 21st, 1989 written Agreement did not accurately reflect the terms of the oral agreement made between Performance and Sylvan in that it misdescribed the width of the lands subject [page686] to the Agreement as "One Hundred and Ten (110 ft.) feet in width east to west", when the width of the lands comprising the 18th hole was approximately 110 yards in width east to west. [Emphasis in original.]

Bell had in mind a development of about 58 homes on about 11 acres. O'Connor's draft allowed 3.6 acres. Bell testified, and the trial judge accepted, that he had specifically told O'Connor during the negotiations that a single row housing development (which is all that clause 18 would permit) would "be a waste of land and an uneconomic use of the 18th hole" (para. 42).

13 Clause 18 of the Joint Venture Agreement, as drawn up by O'Connor's lawyer, provided as follows:

18. The parties agree that sale of a portion of the lands for development of residential housing is contemplated by both of them within the term of Sylvan's tenancy. Such portion of the lands is: one hundred ten (110 ft) feet in width east to west and approximately four hundred eighty (480 yds) yards in length north to south, and abutted by the eastern border of the lands along its entire length. The parties agree that, if they are presented with an appropriate offer, those lands will be sold to a third party developer. It is agreed that such appropriate offer will offer the sum of at least four hundred thousand (\$400,000) dollars cash for those lands and provide for the continued, uninterrupted existence of the golf course consisting of no less than six thousand two hundred fifty (6250 yds) yards in length with all eighteen fairways well divided, defined and reasonably wide (for reference sake the parties agree that the fairways of the golf course are, at the date of this agreement, for the most part well divided, defined and reasonably wide). [Emphasis added.]

14 On December 21, 1989, O'Connor and Bell signed the Joint Venture Agreement as well as the documentation to finance the purchase of all of the land. The documents were then delivered to the solicitor for Sylvan, who reviewed it, and suggested revisions, which led to the signing of an amended Joint Venture Agreement on December 27, 1989. Sylvan's solicitor testified at trial that he did not [page687] discuss the optioned property dimensions with Bell, and Bell said he never read the option clause. All copies of the documents had been left with his lawyer. O'Connor's solicitor was not called to testify, an omission that caused the trial judge to draw the adverse inference that if the lawyer had testified, it would not have assisted O'Connor.

15 O'Connor knew from Bell's comment during the negotiations that he would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing. Anything less would be "a waste". O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 feet for 110 yards.

16 In 1990, Bell experienced some "cash flow difficulties" that led to a modification to the financial terms of the

Agreement, but pressed ahead with plans for the potential development. For a time in 1992, he worked with UMA Engineering Ltd. He subsequently retained Norman Truth, a development consultant, who produced alternative plans and sketches for developments of 50 and 58 houses along the 18th fairway. Truth estimated the 58-house project on or about 10.9 acres would net \$820,100. In some respects, Bell was looking for more land than O'Connor had verbally agreed to. The proposals would, as contemplated from the outset, involve a measure of realignment of the 18th fairway. Bell therefore left these development proposals with O'Connor, who said he would review them. In the meantime, the lands in the golf course had been annexed to the Town of Sylvan Lake and there was potential for development of the entire 171.5 acres, much to O'Connor's benefit.

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17 Time went by. In May 1993, Bell again contacted O'Connor, who promised to review the proposal, but did not respond either then or even after a later meeting arranged by Bell's wife. The clock was running because the option required the development to be completed by December 31, 1994. Finally, by letter dated June 8, 1993, O'Connor's lawyer advised Bell that "[i]t is very unlikely that Performance Industries Ltd. will approve of any development plan which is not strictly in line with the Agreement".

18 Bell testified that at that point, for the first time, he read clause 18 and realized that it did not conform to the oral agreement. O'Connor, he concluded, had slipped in a change of dimensions that turned a viable project into "a waste of land". Bell says he was incensed. He attended at O'Connor's office for what he described as a heated meeting.

19 Attempts were made to resolve the dispute, but O'Connor continued to insist that Bell's right to develop the property was limited under clause 18 of the Agreement to a strip of land 110 feet wide on the easterly boundary of the golf course adjacent to the 18th hole. Bell continued to insist that O'Connor live up to the verbal agreement, which would require 110 feet being read as 110 yards.

20 In December 1994, the 5-year duration of the joint venture coming up for expiry, O'Connor tendered the funds required to buy out Sylvan's interest. Bell refused to allow Sylvan to relinquish possession of the land, and O'Connor commenced an action for specific performance. The Alberta Court of Queen's Bench granted an order for specific performance and O'Connor assumed possession of the property and built a clubhouse at the 18th hole. Also in late 1994, Sylvan commenced the present action against Performance and O'Connor for rectification of the Agreement or damages in lieu thereof, punitive damages and solicitor-client costs.

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II. Judicial History

A. Alberta Court of Queen's Bench [*\(1999\), 246 A.R. 272*](#)

21 Wilkins J. noted that the onus was on the plaintiff "to establish both that Bell was mistaken as to the description of the development property when he signed the Agreement and that O'Connor knew of his mistake" (para. 66).

22 In the view of Wilkins J., "O'Connor's conduct in attempting to take advantage of the mistake he knew Bell to have made in signing the Agreement is equivalent to a fraud or a misrepresentation amounting [to] fraud or sharp practice" (para. 87). He concluded that "[i]t would be unjust, inequitable and unconscionable for this court not to offer redress to Bell in the face of that conduct" (para. 87). Accordingly, it was "clear from the evidence" that Bell is entitled to rectification of clause 18 of the Agreement. Sylvan was awarded damages in lieu of specific performance of the rectified Joint Venture Agreement.

23 The compensatory damages were assessed on the basis of "the amount of money that Bell would have been entitled to [receive] had he been permitted to complete the residential development of the 18th hole in accordance with the terms of the rectified clause 18" (para. 92). Wilkins J. was satisfied that a development of 58 houses could

have "been constructed and substantially marketed prior to December 31, 1994" (para. 93). In the result, he assessed damages on the basis of the 58-lot development on the 480-yard 18th fairway in the amount of \$820,100. From this he subtracted \$200,000 (being the amount Sylvan (Bell) would have had to pay Performance (O'Connor) to exercise the \$400,000 option) for a net of \$620,100.

24 With respect to punitive damages, Wilkins J. reiterated that he found "the actions of O'Connor to be tantamount to fraud, equivalent to a misrepresentation in the nature of fraud, and sharp practice" (para. 109). O'Connor's "actions demand an award which will stand as an example to others [page690] and at the same time assure that [he] does not unduly profit from his conduct" (para. 109). Wilkins J. stated that "[this] latter statement is the only proper basis for an award of punitive damages" (para. 109) in this case. Accordingly, O'Connor's punitive damages should be awarded "at least to the extent of disgorging the base profit he has realized by his improper conduct" (para. 110). Punitive damages were assessed at \$200,000. For their misbehaviour in the conduct of the action, the defendants (now appellants) were required to pay solicitor-client costs.

25 O'Connor argued that he should not be personally liable for any judgment against Performance in favour of the plaintiff, but Wilkins J. rejected this argument "in its entirety" (para. 119). He said that every step taken in furtherance of this joint venture was directed by O'Connor, as was every attempt to defeat Bell's legitimate interests in the protracted litigation. "Surely there could never be a clearer case in which the court must pierce the corporate veil and attribute" (para. 119) liability personally to O'Connor. And so he did.

B. Alberta Court of Appeal ([2000](#), [255 A.R. 329](#), [2000 ABCA 116](#))

26 In a per curiam decision, the Court of Appeal upheld Wilkins J.'s rulings that the Agreement could be rectified and that the corporate veil could be lifted. It also upheld the damages award, with the exception of the award for punitive damages, which it set aside. The order for solicitor-client costs was similarly upheld.

27 With respect to compensatory damages, the Court of Appeal was "not prepared to interfere with the award of damages in this case" (para. 27). It [page691] did, however, describe the trial judge's award as "generous" (para. 27).

28 The Court of Appeal agreed with the trial judge that "the misconduct of the defendants was so outrageous that punishment and deterrence [were] required" (para. 28), but that punitive damages "should be awarded only if they achieve some rational purpose" (para. 28). In the Court of Appeal's view, the "substantial and generous compensatory damages awarded" (para. 29) by the trial judge satisfy both the punishment and deterrence objectives in this case. The Court of Appeal was also of the view that this was not a case where it was necessary to award punitive damages to ensure that the defendant does not profit from his misconduct. O'Connor would have profited under the Agreement even if he had not misbehaved. Accordingly, the Court of Appeal set aside the punitive damages award. In all other respects, the appeal was dismissed.

III. Analysis

29 When reasonably sophisticated businesspeople reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification. Nor does a falling out between business partners usually attract an award of punitive damages. This case is unusual because of the findings of fraud and deceit made against the appellant O'Connor by the trial judge. The appellants are therefore obliged to try to make their case, if at all, out of the mouth of Bell, with such help as they can find in the law books for their position.

30 Counsel for the appellants (who was not counsel at trial) seeks to raise three issues, which he describes as follows: (1) the relationship between the plea of [page692] unilateral mistake and the remedy of rectification (particularly where the mistake is the product of the plaintiff's own negligence); (2) the kind of pleading and proof that a plaintiff who seeks rectification must offer, as well as the proper standard of proof to apply in rectification

cases; and, (3) the proper method of quantifying damages ordered in lieu of rectification in cases where the subject matter of the rectified contract is an option for the sale of land. The respondent, as stated, cross-appeals against the quashing of the award of punitive damages.

A. Rectification of the Contract

31 Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other: *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), at p. 630; *Ship M. F. Whalen v. Pointe Anne Quarries Ltd.* (1921), 63 S.C.R. 109, at pp. 126-27; *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 133 D.L.R. (4th) 550 (Ont. C.A.), at p. 558; G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 867; S. M. Waddams, *The Law of Contracts* (4th [page693] ed. 1999), at para. 336. In *Hart*, supra, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.

B. Preliminary Objection

32 The respondent says the appellants ought not to be allowed to argue various objections to rectification that were not raised at trial. The alleged uncertainty about the terms of the prior oral agreement, for example, is an issue that did not come into bloom until after the appellants had lost in the Alberta Court of Appeal. There is some merit in this objection. Unless the parties have fully addressed a factual issue at trial in the evidence, and preferably in argument for the benefit of the trial judge, there is always the very real danger that the appellate record will not contain all of the relevant facts, or the trial judge's view on some critical factual issue, or that an explanation that might have been offered in testimony by a party or one or more of its witnesses was never elicited. As Duff J. put it in *Lamb v. Kincaid* (1907), 38 S.C.R. 516, at p. 539:

A court of appeal, I think, should not give effect to such a point taken for the first time in appeal, unless it be clear that, had the question been raised at the proper time, no further light could have been thrown upon it.

33 In my view, the appellants' contentions on the rectification issues are fact-based, but are manageable on the evidentiary record and raise important issues of law and equity. The Court is free to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the [page694] opposing party and where the refusal to do so would risk an injustice.

34 Here the respondent sought and obtained an equitable remedy to rectify a situation which need never have arisen had Bell properly read the draft document in December 1989. He who seeks equity must do equity. If equitable relief had been wrongfully granted, we should not close our eyes to a fatal objection because of counsel's oversight at trial. The facts vital to the appellants' new legal position are readily ascertainable in the evidence and the necessary findings are implicit, if not always explicit, in the trial judge's reasons.

C. The Conditions Precedent to Rectification

35 As stated, high hurdles are placed in the way of a businessperson who relies on his or her own unilateral mistake to resile from the written terms of a document which he or she has signed and which, on its face, seems perfectly clear. The law is determined not to open the proverbial floodgates to dissatisfied contract makers who want to extricate themselves from a poor bargain.

36 I referred earlier to the four conditions precedent, or "hurdles" that a plaintiff must overcome. To these the appellants wish to add a fifth. Rectification, they say, should not be available to a plaintiff who is negligent in reviewing the documentation of a commercial agreement. To the extent the appellants' argument is that in such circumstances the Court may exercise its discretion to refuse the equitable remedy to such a plaintiff, I agree with them. To the extent they say the want of due diligence (or negligence) on the plaintiff's part is an absolute bar, I think their proposition is inconsistent with principle and authority and should be rejected.

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37 The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement. Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, *supra*, at para. 336). The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.

38 The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available. This requirement closes the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available: Hart, *supra*, at p. 630; Ship M. F. Whalen, *supra*, at pp. 126-27.

39 What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud... . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself [page696] of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken": *McMaster University v. Wilchar Construction Ltd.* (1971), 22 D.L.R. (3d) 9 (Ont. H.C.), at p. 19. See also *Montreal Trust Co. v. Maley* (1992), 99 D.L.R. (4th) 257 (Sask. C.A.), per Wakeling J.A.; *Alampi v. Swartz* (1964), 43 D.L.R. (2d) 11 (Ont. C.A.); *Stepps Investments Ltd. v. Security Capital Corp.* (1976), 73 D.L.R. (3d) 351 (Ont. H.C.), per Grange J. (as he then was), at pp. 362-63; and Waddams, *supra*, at para. 342.

40 The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (Hart, *supra*, per Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that -- and only that -- which the parties had already orally agreed to.

41 The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (Ship M. F. Whalen, *supra*, at p. 127), or "evidence which leaves no 'fair and reasonable doubt'" (Hart, *supra*, at p. 630), or "convincing proof" or "more than sufficient evidence" (Augdome

Corp. v. Gray, [\[1975\] 2 S.C.R. 354](#), at pp. 371-72). The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and [page697] with hesitation scrapes over the low end of the civil "more probable than not" standard.

42 Some critics argue that anything more demanding than the ordinary civil standard of proof is unnecessary (e.g., Waddams, *supra*, at para. 343), but, again, the objective is to promote the utility of written agreements by closing the "floodgate" against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification.

43 It was formerly held that it was not sufficient if the evidence merely comes from the party seeking rectification. In *Ship M. F. Whalen*, *supra*, Duff J. (as he then was) said, at p. 127, "[s]uch parol evidence must be adequately supported by documentary evidence and by considerations arising from the conduct of the parties". Modern practice has moved away from insistence on documentary corroboration (Waddams, *supra*, at para. 337; Fridman, *supra*, at p. 879). In some situations, documentary corroboration is simply not available, but if the parol evidence is corroborated by the conduct of the parties or other proof, rectification may, in the discretion of the court, be available.

44 It is convenient at this point to deal with the trial judge's findings in relation to these traditional requirements. I will then turn to the appellants' proposed fifth precondition -- due diligence on the part of the plaintiff.

(1) The Existence and Content of the Prior Oral Agreement

45 The appellants' principal argument against rectification is that the alleged prior oral agreement is void for uncertainty. Reliance is placed on *I.C.R.V. Holdings Ltd. v. Tri-Par Holdings Ltd.* [\(1994\), 53 B.C.A.C. 72](#), where rectification of an agreement to purchase a recreational vehicle park was refused because, per Finch J.A. (now C.J.B.C.), at para. 7, the parties never agreed on "the precise location of [page698] the eastern boundary", and *Gordeyko v. Edmonton* (1986), [45 Alta. L.R. \(2d\) 201](#) (Q.B.), where Stratton J. (as he then was) found the evidence uncertain about a notice period envisaged by the prior oral agreement. See also *Kerr v. Cunard* (1914), 16 D.L.R. 662 (N.B.S.C.). Appellants' counsel quotes Lord Denning's "pithy" observation that: "[a] mistake made by one party to the knowledge of the other is a ground for avoiding a contract, but not for making one" (*Byrnlea Property Investments Ltd. v. Ramsay*, [1969] 2 Q.B. 253 (C.A.), at p. 265).

46 I agree with the appellants that on this point the trial judge's reasons are somewhat unsatisfactory, but this appears to be because the "uncertainty" argument now made against rectification was not before him. The issue of uncertainty of subject matter was raised neither in the pleadings nor at trial. The trial judge directed his reasons to the points that he believed were in controversy. As to the appellants' new arguments, one may echo the words of James, V.C., in *Rumble v. Heygate* (1870), 18 W.R. 749 (Ch.), who said, at p. 750, that the objections to the agreement in that case on the basis of uncertainty of quantity of land and of its site "are mere shadows which vanish when examined by the light of common sense".

47 The Court should attempt to uphold the parties' bargain where the terms can be ascertained with a reasonable level of comfort, i.e., convincing proof. Here the trial judge predicated his award of compensatory damages on the finding that the optioned land could accommodate 58 single family houses located along the 480 yard length of the 18th fairway. There is no argument about the 480 yards. O'Connor himself plucked the 480 figure from the length of play listed on the Sylvan Lake Golf [page699] Club score card. O'Connor's number for the width of the development (110) may also be accepted. The issue is whether the number was intended to express yards or feet. The trial judge appears to have concluded that the dispute about the depth of the residential development (which is all that divided the parties) came down to a simple choice between Bell's version (Plan A) and O'Connor's version (Plan B). Both plans were predicated on the length of the 18th fairway, namely 480 yards. Plan B, which O'Connor had described in the document, contemplated a single row of houses on a development plan 110 feet deep. Bell's Plan A was based on two rows of housing separated by a road allowance, in a configuration similar to that shown in the aerial

photo of the Bayview development discussed by Bell and O'Connor at their December 16-17 meeting. Plan A called for a depth of about 110 yards. If Plan B's 110-foot depth is tripled to 110 yards, the acreage under option would be roughly tripled from about 3.6 acres (Plan B) to about 10.9 acres (Plan A), which accommodates the 58 lots plus the standard municipal road allowance. The problem in I.C.R.V. Holdings, supra, was that the parties never agreed on the boundary. Here the trial judge concluded that there was agreement even though the parties did not express themselves to each other in lawyerly language. This not infrequently happens: Bloom v. Averbach, [1927] S.C.R. 615, per Lamont J., at p. 621:

It is suggested that had the letters been handed to a lawyer to prepare a formal contract therefrom, he would not have been able to determine what assets were to be included in the term "building, machinery and fixtures," or what were to be covered by "stock, etc." It may be that he would not, but that is not the test. The test is, did the parties themselves clearly understand what was comprised in each. In other words were their minds ad idem as to these expressions? [Emphasis added.]

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48 The trial judge thus found that the parties had made a verbal agreement with reference to a residential development along the 18th hole. It was more than an agreement to agree. He concluded that there was a definite project in a definite location to which O'Connor and Bell had given their definite assent.

49 Although the parties did not discuss a metes and bounds description, they were working on a defined development proposal. O'Connor cannot complain if the numbers he inserted in clause 18 (110 x 480) are accepted and confirmed. The issue, then, is the error created by his apparently duplicitous substitution of feet for yards in one dimension. We know the 480 must be yards because it measures the 18th fairway. If the 110 is converted from feet to yards, symmetry is achieved, certainty is preserved and Bell's position is vindicated.

(2) Fraud or Conduct Equivalent to Fraud

50 The notion of "equivalent to fraud" as distinguished from fraud itself, is often utilized where "the court is unwilling to go so far as to find actual knowledge on the side of the party seeking enforcement" (Waddams, supra, at para. 342). The trial judge had no such hesitation in this case. He characterized O'Connor's actions as "fraudulent, dishonest and deceitful" (para. 114).

51 The trial judge was persuaded not only of the terms of the prior oral agreement and of Bell's mistake but "beyond any reasonable doubt" of O'Connor's knowledge of that mistake. He states (at para. 79):

This court is satisfied beyond any reasonable doubt that O'Connor knew of Bell's mistake and he chose to permit Bell to sign it in the mistaken belief that it represented the verbal agreement. He did so with the full intention that he would in the future rely on the terms of the Agreement to thwart or reduce any plan by [page701] Bell to develop an increased area of the golf course for residential development.

52 O'Connor thus fraudulently misrepresented the written document as accurately reflecting the terms of the prior oral contract. He knew that Bell would not sign an agreement without the option for sufficient land to create the "Bayview" layout development with two rows of housing as specified in the prior oral contract. O'Connor therefore knew when Bell signed the document that he had not detected the substitution of 110 feet for 110 yards. O'Connor knowingly snapped at Bell's mistake "to thwart or reduce any plan by Bell to develop an increased area of the golf course for residential development". Bell's loss would be O'Connor's gain, as O'Connor (Performance) would come into sole ownership of the optioned land as of December 31, 1994.

53 Although on occasion the trial judge describes O'Connor's conduct as "equivalent to a fraud", and elsewhere he describes it as actual fraud, his reasons taken as a whole can only be characterized as a finding of actual fraud.

(3) Precise Terms of Rectification

54 It follows from the foregoing that "the precise form" in which the written document can be made to conform to the oral agreement would be simply to change the word "feet" in the phrase "one hundred ten (110) feet in width" to "yards".

(4) Existence of "Convincing Proof"

55 The trial judge made his key findings in respect of the prior oral agreement, Bell's unilateral mistake and O'Connor's knowledge of that mistake to a standard of "beyond any reasonable doubt".

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56 He also found that Bell's version of the verbal agreement was sufficiently corroborated on significant points by other witnesses (including his wife, his former partner, his lawyer and, subsequently, the development consultants), and documents (including his lawyer's notes and the plan of the Bayview Golf Course development discussed in mid-December 1989).

D. Bell's Lack of Due Diligence

57 The appellants seek, in effect, to add a fifth hurdle (or condition precedent) to the availability of rectification. A plaintiff, they say, should be denied such a remedy unless the error in the written document could not have been discovered with due diligence.

58 O'Connor says that Bell's failure to read clause 18 and note the mixture of yards and feet should be fatal to his claim because the Court ought not to assist businesspersons who are negligent in protecting their own interests. Alternatively, the effective cause of Bell's loss is not the fraudulent document but Bell's failure to detect the fraud when he had an opportunity to do so.

59 I agree that Bell, an experienced businessman, ought to have examined the text of clause 18 before signing the document. The terms of clause 18 were clear on their face (even though many readers might have misread a description of land that mixed units of measurement as clause 18 did here). He had time to review the document with his lawyer. He did so. Changes were requested. He did not catch the substitution of 110 feet for 110 yards; indeed, he says he did not read clause 18 at all.

60 The trial judge, at para. 76, accepted the evidence of Bell's lawyer who admitted that he had not directed his mind to the limitations of the size of the development parcel found in clause 18, nor had he made any note of bringing those to [page703] Bell's attention which would have been his normal practice.

He could offer no explanation for why he had not done so other than the fact that his focus on receipt of the Agreement signed by Bell was to ensure the completion and registration of documentation to facilitate the closing of [the purchase] on or before December 31, 1989. This court accepts the evidence offered by Mr. Hancock and that of Bell that they at no time discussed the description of property contained in clause 18.

61 It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer. Rectification should not become a belated substitute for due diligence.

62 On the other hand, most cases of unilateral mistake involve a degree of carelessness on the part of the plaintiff. A diligent reading of the written document would generally have disclosed the error that the plaintiff, after the fact, seeks to have corrected. The mistaken party will often have failed to read the document entirely, or may have read it too hastily or without parsing each word. As the American Restatement of the Law, Second: Contracts (2d) (1981)

points out in its commentary under s. 157 ("Effect of Fault of Party Seeking Relief"), "since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence". Comment B discusses "[f]ailure to read writing". "Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms." But this proposition is qualified by that Comment's further statement that the "exceptional rule" in s. 157 (which permits rectification or "reformation" of the contract) applies only where there has been an agreement that preceded the writing. "In such a case, a party's negligence in failing to read the writing [page704] does not preclude reformation if the writing does not correctly express the prior agreement".

63 One reason why the defence of contributory negligence or want of due diligence is not persuasive in a rectification case is because the plaintiff seeks no more than enforcement of the prior oral agreement to which the defendant has already bound itself.

64 The commentary in the American Restatement is consistent with the Canadian case law. For example, in *Beverly Motel (1972) Ltd. v. Klyne Properties Ltd.* (1981), 126 D.L.R. (3d) 757 (B.C.S.C.), the vendor signed documents, already signed by the purchaser, in the office of the purchaser's solicitor that conveyed two lots, the single lot (with a motel) that the vendor had offered for sale and the adjacent residentially zoned vacant lot. Of that group of individuals, only the purchaser noted the error (on the day of signing) and he was "pleased and surprised" another lot had been included. He snapped at the offer but he had played no role in inducing the mistake. Gould J. conceded (at pp. 758-59), "[i]t is quite true that if they [the three shareholders of the vendor] had read the legal description in the documents with any care, they would have caught the error. Obviously they did not so read the legal description, and that is understandable, although careless, because they were with their own solicitor, present in the purchaser's solicitor's office, and both solicitors were obviously giving the impression that the final documents were in order and ready for signature". Gould J. ordered that the second lot be conveyed back to the original vendor because it was "unfair, unjust or unconscionable" (p. 760) for the purchaser "to hold the legal advantage he ha[d] gained" (p. 759). Gould J. acknowledged that the presence of a solicitor can help explain why a party might not himself read the written document. In the present case, Bell left the documentation up to the lawyers without appreciating that he had given his lawyer [page705] insufficient information to check O'Connor's figures. He had, at that time, no reason to question O'Connor's integrity.

65 If want of due diligence had been a good defence to rectification, relief would likely have been refused in *Big Quill Resources Inc. v. Potash Corp. of Saskatchewan* (2001), 203 Sask. R. 298, 2001 SKCA 31; *Stepps Investments*, supra, per Grange J., at p. 362; *Prince Albert Credit Union v. Diehl*, [1987] 4 W.W.R. 419 (Sask. Q.B.); *Montreal Trust*, supra, at p. 262; *Windjammer Homes Inc. v. Generation Enterprises* (1989), 43 B.L.R. 315 (B.C.S.C.).

E. Discretionary Relief

66 I conclude, therefore that due diligence on the part of the plaintiff is not a condition precedent to rectification. However, it should be added at once that rectification is an equitable remedy and its award is in the discretion of the court. The conduct of the plaintiff is relevant to the exercise of that discretion. In a case where the court concludes that it would be unjust to impose on a defendant a liability that ought more properly to be attributed to the plaintiff's negligence, rectification may be denied. That was not the case here.

F. Fraud

67 There is, on the facts of this case, a more fundamental reason why the appellants' complaint about Bell's lack of due diligence provides no defence. O'Connor did more than "snap" at a business partner's mistake. O'Connor undertook as part of the verbal agreement to have a document prepared that set out its terms. According to the [page706] trial judge, he not only breached that term, it became part of his fraudulent scheme to have the document wrongly state the terms of the option, to fraudulently misrepresent to Bell that it did accurately set out their verbal

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agreement, to allow Bell to sign it when O'Connor knew Bell was mistaken in doing so, then to delay any response to Bell's development proposals (and thus bring the error to Bell's attention) until it was almost too late for the development to proceed. O'Connor admitted providing his lawyer with the erroneous metes and bounds description in clause 18. It should not, I think, lie in his mouth to say that he should not be responsible for what followed because his fraud was so obvious that it ought to have been detected.

68 "[F]raud 'unravels everything': Farah v. Barki, [\[1955\] S.C.R. 107](#), at p. 115 (Kellock J. quoting Farwell J. in May v. Platt, [1900] 1 Ch. 616, at p. 623).

69 The appellants' concept of a due diligence defence in a fraud case was rejected over 125 years ago by Lord Chelmsford L.C. who said, "when once it is established that there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector, 'You, at least, who have stated what is untrue, or have concealed the truth, for the purpose of drawing me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty': Central R. Co. of Venezuela v. Kisch (1867), L.R. 2 H.L. 99, at pp. 120-21.

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70 Lord Chelmsford's strictures were quoted and applied by Southin J. (as she then was) in United Services Funds (Trustees of) v. Richardson Greenshields of Canada Ltd. [\(1988\), 22 B.C.L.R. \(2d\) 322](#) (S.C.), where she observed that "[c]arelessness on the part of the victim has never been a defence to an action for fraud" (p. 335).

Once the plaintiff knows of the fraud, he must mitigate his loss but, until he knows of it, in my view, no issue of reasonable care or anything resembling it arises at law.

And, in my opinion, a good thing, too. There may be greater dangers to civilized society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which requires us all to be on perpetual guard against rogues lest we be faced with a defence of "Ha, ha, your own fault, I fool you". Such a defence should not be countenanced from a rogue. [p. 336]

See also Dalon v. Legal Services Society (British Columbia) [\(1995\), 10 C.C.E.L. \(2d\) 89](#) (B.C.S.C.). To the same effect is Spencer Bower and Turner, *The Law of Actionable Misrepresentation* (3rd ed. 1974), at p. 218:

A man who has told even an innocent untruth, by which he has induced another to alter his position, -- much more one who has fraudulently lied with that object and result, -- has debarred himself from ever complaining in a court of justice, any more than he could in a court of morals, that the representee acted on the faith of his misstatement in the manner in which he, the representor, intended that he should. He can never be heard to resent the fact that another believed the lie that was told for the very purpose of inspiring that belief, or plead as an excuse that, if the representee had not been such a fool as to trust such a knave, no harm would have been done.

71 The appellants having failed to establish that due diligence on the part of the plaintiff is a precondition to rectification, or to shake the trial judge's findings with respect to the traditional preconditions [page708] discussed above, their appeal on the rectification issues must be rejected.

G. Damages in Lieu of Rectification

72 The trial judge awarded \$620,100 in compensatory damages representing the loss of profit on a fully built residential development on the 18th fairway. The appellants argue that damages should be limited to the difference between the market value of the land and the option price of \$400,000. They say compensatory damages should not include the "reasonably expected profit" from a 58-lot housing development.

73 The finding of fact is, however, that the parties specifically contemplated (even on O'Connor's evidence) that the optioned land would be put to the use of residential housing. Damages for breach of the contract, as rectified, therefore must include losses flowing from the special circumstances known to the parties at the time they made their contract: *Brown & Root Ltd. v. Chimo Shipping Ltd.*, [1967] S.C.R. 642, at p. 648; *General Securities Ltd. v. Don Ingram Ltd.*, [1940] S.C.R. 670; *Burrard Drydock Co. v. Canadian Union Line Ltd.*, [1954] S.C.R. 307; *Corbin v. Thompson* (1907), 39 S.C.R. 575; *Asamera Oil Corp. v. Sea Oil & General Corp.*, [1979] 1 S.C.R. 633, at p. 655. In *New Horizon Investments Ltd. v. Montroyal Estates Ltd.* (1982), 26 R.P.R. 268 (B.C.S.C.), Nemetz C.J.B.C. observed, at pp. 272-73:

[T]he plaintiff's damages should be assessed by reference to the profits which both parties contemplated the plaintiff would make but for the breach. It is not necessary that this contemplation include a precise pre-estimate or calculation of these losses, only a "... contemplation of circumstances which embrace the head or type of damage in question".

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74 The appellants then contend that even if the trial judge selected the correct measure of damages, he ought to have applied a higher discount for contingencies, particularly the contingencies that (1) Sylvan (Bell) lacked the financial resources to exercise the option and fund the project, and (2) the project could not in any event have been completed by the end of 1994, as required. In essence, they argue that in assessing damages, the court must discount the value of the chance of profit by the improbability of its occurrence, and call in aid the observation of Crocket J. in *Kinkel v. Hyman*, [1939] S.C.R. 364, at p. 383:

For my part, I can find no authority ... justifying any court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.

75 It is at this point, I think, that the appellants' argument runs afoul of the rule against raising new fact-based issues on appeal. The trial judge has found as a fact that the respondent contracted for the opportunity to build a residential development on about 10.9 acres of prime land. It was wrongfully deprived of that opportunity. The trial judge set out to assess the value of that lost opportunity (which was, of course, potentially worth considerably less than a certainty). The appellants' trial counsel took little issue with the damages claim as advanced by Sylvan, and did not adduce much of an evidentiary record to the contrary, whether by calling his own witnesses, or through cross-examination of the respondent's witnesses, to challenge significantly the expert evidence of Trough and others. Trough may have been overly optimistic and his figures generous, but his evidence was uncontradicted.

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76 The Alberta Court of Appeal characterized the compensatory award as "substantial and generous" (para. 29) but concluded that: "Despite our reservations, we are not prepared to interfere with the award of damages in this case" (para. 27). In the absence of an error of principle, or a factual record that supports the appellants' criticisms, this Court ought not to interfere with the concurrent findings in the Alberta courts on the amount of compensatory damages.

H. Should the Award of Punitive Damages Be Restored?

77 The respondent in its cross-appeal seeks restoration of the \$200,000 award of punitive damages disallowed by the Alberta Court of Appeal. Principles concerning the award and assessment of punitive damages were canvassed at the hearing of this appeal, heard the same day as *Whiten*, supra, reasons in which are released concurrently.

78 It is sufficient to apply the principles developed in *Whiten* without repeating the underlying analysis.

79 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency". The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour: *Whiten*, supra, at para. 36, and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196.

80 The misconduct found against O'Connor was his contemptuous disregard for Bell's rights under the verbal agreement of December 1989, together with his subsequent use of the written document (which he knew misstated their verbal agreement) leading up to and including court proceedings filed January 4, 1995, to obtain possession of the golf [page711] course property and thereby to destroy the value of Bell's option to develop the agreed-upon residential project.

81 Torts such as deceit or fraud already incorporate a type of misconduct that to some extent "offends the court's sense of decency" and which "represents a marked departure from ordinary standards of decent behaviour", yet not all fraud cases lead to an award of punitive damages.

82 O'Connor's fraud was a condition precedent to Bell's successful claim to rectification, for which his company will now receive compensatory damages of \$620,100. Payment of \$620,100 hurts. The question is whether more punishment is rationally required by way of retribution, deterrence or denunciation (*Whiten*, supra, at para. 43).

83 *Whiten* emphasizes that defendants should have "advance notice of the charge sufficient to allow them to consider the scope of their jeopardy as well as the opportunity to respond to it" (*Whiten*, supra, at para. 86). Here, punitive damages in the sum of \$1,020,100 were expressly sought in the Amended Amended Statement of Claim and the basis for the claim was "disgorgement of the profits the Defendants will enjoy as a result of the [plaintiff's] unilateral mistake". The trial judge, as stated, awarded \$200,000 in punitive damages.

84 The applicable standard of appellate review for "rationality" was articulated by Cory J. in *Hill*, supra, at para. 197:

Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant [page712] so outrageous that punitive damages were rationally required to act as deterrence?

85 *Whiten* affirms that "[t]he 'rationality' test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of its quantum" (para. 101).

86 I agree with the Alberta Court of Appeal that the award of punitive damages in this case does not serve a rational purpose.

87 O'Connor's fraud was, of course, reprehensible. Indeed, fraud is generally reprehensible, but only in exceptional cases does it attract punitive damages. In this case, the trial judge, at para. 109, thought punishment above and beyond the payment of generous compensatory damages was required for two reasons, namely that O'Connor's actions (1) "demand an award which will stand as an example to others" and (2) "at the same time assure that O'Connor does not unduly profit from his conduct". These are both legitimate objectives for the award of punitive damages (*Whiten*, supra, at paras. 43 and 111). However, it must be kept in mind that an award of punitive damages is rational "if, but only if" compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation.

88 This was a commercial relationship between two businessmen. One tried to pull a fast one on the other. There was no abuse of a dominant position. O'Connor's misconduct was planned and deliberate and he persisted in it

over a period of four and a half years, but in the end the courts did their work and Bell obtained full compensation plus costs on a solicitor-client basis, all of which undoubtedly had a punitive effect on O'Connor. In addition, O'Connor is stigmatized with a judicial finding (now upheld by two appellate courts) that he acted in a way that [page713] was "fraudulent, dishonest and deceitful". His conduct has been soundly denounced and he has been required personally to pay a large amount of money in compensation. The respondent is unable to identify any aggravating circumstances that would not be present in almost any case of business fraud except that O'Connor was found to have behaved abominably in the conduct of the litigation. However, as stated, the trial judge excluded this consideration from the award of punitive damages because he identified it as the basis for his award of solicitor-client costs.

89 The trial judge's second reason for punitive damages was to ensure that O'Connor "[did] not unduly profit from his conduct" (para. 109). But in fact O'Connor did not profit at all from his misconduct. The source of his development profits was the prior oral contract. Whatever Performance (O'Connor) made after paying \$620,100 compensatory damages to the respondent rightfully belonged to them under the terms of the (rectified) agreement. As discussed earlier, the verbal agreement of December 1989 contemplated that after five years, O'Connor's company, Performance, would acquire the golf club lands (minus the optioned lands if the option had been exercised) to develop as it wished for its own account. While on the whole O'Connor's conduct in this matter was found to be reprehensible, his behaviour also had some redeeming qualities. Early on in the project, for example, O'Connor picked up Bell's share of mortgage interest when Bell was not able to afford to contribute the amount that he had agreed to pay. The conflict between Bell and O'Connor should not be caricatured as a battle between good and evil.

90 It may be true, as the trial judge found, that O'Connor's profits on the balance of lands not [page714] subject to the option will "recover all or more of the amount of damage for loss of profit awarded against him in favour of Bell" (para. 109), but, with respect, that is not a rational reason to punish O'Connor further. Those profits are not the fruit of misconduct directed at Bell.

91 Finally, the assessment of \$200,000 coincides with the payment that Sylvan (Bell) was obliged to pay in order to exercise the option, and which the trial judge properly took into account in his assessment of compensatory damages. This figure has no rational relationship to the appellants' potential development profits on the balance of the golf course land, on which there was no evidence. Moreover, it is a payment that the appellants, under the rectified agreement, were entitled to keep.

92 As pointed out in *Whiten*, supra, at paras. 98 and 100, and *Hill*, supra, at para. 197, punitive damages are not "at large", and both the award and the assessment of quantum must meet the test of rationality. In this case, with respect, neither the punitive damages award nor the \$200,000 assessment survives that test.

IV. Conclusion

93 I would therefore dismiss the appeal and cross-appeal both with costs on a party-and-party basis.

The following are the reasons delivered by

LeBEL J.

94 Subject to my comments on punitive damages in *Whiten v. Pilot Insurance Co.*, [\[2002\] 1 S.C.R. 595](#), [2002 SCC 18](#), I agree with Binnie J.'s reasons. I would dispose of the appeal and cross-appeal as he suggests. Rectification of the contract was properly ordered, but punitive [page715] damages would fulfill no rational purpose in this case.

Tab 21