Court File No. C51296

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

BRIEF OF AUTHORITIES OF THE APPELLANT

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC# 34701O
Tel. 416 601-7856
Fax: 416 868-0673

Lawyers for the Appellant The Toronto-Dominion Bank

INDEX

Court File No. C51296

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Applicants

BRIEF OF AUTHORITIES OF THE APPELLANT

INDEX

TAB 1

H. L. (E.)
1911

BARNES v. NUNNERY COLLIERY COMPANY, LIMITED.

vessel was "winked at" by the employer; in other words that it was not a prohibition at all.

For these reasons I think the appeal ought to be dismissed.

Order of the Court of Appeal affirmed and appeal dismissed.

Lords' Journals, December 11, 1911.

Solicitors for appellant: *H. G. Campion & Co., for Arthur Neal & Co., Sheffield.*

Solicitors for respondents: *Bell, Brodrick & Gray, for Parker Rhodes & Co., Rotherham.*

[HOUSE OF LORDS.]

H. L. (E.)
1911
Dec. 4.

DE BEERS CONSOLIDATED MINES, LIMITED . . . . APPELLANTS;

AND

BRITISH SOUTH AFRICA COMPANY . RESPONDENTS.

Mortgage—Clog on Equity of Redemption—Debentures—Floating Charge.

By an agreement made between the plaintiff company and the defendant company, after reciting that the plaintiff company contemplated an issue of mortgage debentures, it was agreed that an existing advance made by the defendant company to the plaintiff company under a prior agreement should remain outstanding until the issue of the debentures and that debentures for the amount of the advance should be accepted by the defendant company in satisfaction of the debt; that the debentures should be secured by a floating charge on the plaintiff company's undertaking; that the defendant company should make a further advance of a fixed amount to the plaintiff company against debentures for that amount; and that in consideration of the assistance thus rendered and to be rendered the plaintiff company should grant to the defendant company an exclusive right to work in perpetuity all the diamondiferous ground in the territories of the plaintiff company. The further advance was made and debentures in accordance with the agreement were issued by the plaintiff company to the defendant company for the total amount of the advances. These debentures had since been paid off, but the defendant company insisted upon the grant of the mining licence. The plaintiff company impeached the validity of the stipulation for a licence on the ground that it was a clog on the equity of redemption under the debentures :—

Held, upon the construction of the agreement, reversing the judgment of the Court of Appeal, [1910] 2 Ch. 502, that it imposed upon the plaintiff company an absolute and immediate obligation to grant a licence but no absolute or immediate obligation to issue debentures; consequently that the stipulation for the licence was not part of the mortgage transaction and was not a clog on the equity of redemption.

Whether the doctrine against clogging the equity of redemption applies to debentures secured by a floating charge, quære.

APPEAL from an order of the Court of Appeal (1) affirming a judgment of Swinfen Eady J. (2)

The facts of the case are fully stated in the judgment of Lord Atkinson. The following short summary of the facts is sufficient to shew the nature of the dispute between the parties.

The appellants, hereinafter referred to as De Beers, were a company incorporated under the Limited Liability Laws of the Colony of the Cape of Good Hope, having its head office in Kimberley. The respondents, hereinafter called the Chartered Company, were a company incorporated by Royal Charter dated October 29, 1889, which prohibited the company from granting any monopoly of trade. The Chartered Company owned lands believed to be diamondiferous in Northern and Southern Rhodesia, but up to the present time no diamonds had actually been found thereon. Under two agreements dated April 20, 1892, and December 7, 1892, De Beers from time to time advanced to the Chartered Company sums amounting in the aggregate to 212,000*l.*, and in pursuance of the December agreement De Beers accepted in respect of these advances mortgage debentures of the Chartered Company of the nominal value of 212,200*l.* secured by a floating charge on the company's undertaking. These debentures had long since been paid off and nothing was now due from the Chartered Company to De Beers.

By the December agreement the Chartered Company in consideration of the assistance rendered and to be rendered by De Beers to the Chartered Company under that and the prior agreement agreed to grant to De Beers an exclusive licence to work in

(1) [1910] 2 Ch. 502.

(2) [1910] 1 Ch. 354.

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.

perpetuity all the diamondiferous ground in the Chartered Company's territories.

After payment off of the debentures De Beers claimed to be entitled to a grant of this exclusive licence. The Chartered Company thereupon commenced an action in the Chancery Division to impeach the validity of the agreement for a licence on the grounds (1.) that it was ultra vires their charter; (2.) that it was a clog upon the equity of redemption under the debentures. De Beers counterclaimed for specific performance of the agreement.

The question of the clog turned primarily upon the question whether upon the construction of the December agreement the stipulation as to the licence and the stipulations as to the issue of debentures were parts of one transaction or were separate and independent transactions. The material provisions of this agreement are sufficiently set out in Lord Atkinson's judgment. The charter and the agreements of April and December are also set out in extenso in the report of the case before Swinfen Eady J.

Swinfen Eady J. and the Court of Appeal held that the proper law of the agreements was English and not Roman-Dutch, and that by English law the stipulation as to the licence was void as being a clog on the equity of redemption; but they held further that the licence was not a monopoly of trade within the prohibition in the charter; and they gave judgment for the respondents upon the claim and counter-claim.

1911. July 3, 4, 6, 17. *Upjohn, K.C.*, *Jenkins, K.C.*, and *J. W. M. Holmes*, for the appellants. Assuming that the agreement of December 7, 1892, is governed by the law of England, this transaction does not fall within the doctrine against clogging the equity of redemption, first, because this was not a mortgage transaction to which the doctrine has any application, and, secondly, because, assuming that it was, upon the construction of the agreement the stipulation for a mining lease was independent of the mortgage transaction. As to the first point, hitherto this equitable doctrine has only been applied to a mortgage in the ordinary sense of the term; that is to say, a mortgage of specific property whereby to the extent of the charge the mortgagor has been deprived of the ownership of the property and the power of disposing of it. The property charged may be real or personal, including in personal property shares and debentures, and the mortgage may be legal or equitable, but it must be a mortgage of specific property. The doctrine has no application to the issue of loan capital by a commercial company upon the terms found in the trust deed in this case. These debentures are to be secured by a floating charge upon the undertaking of the Chartered Company and the company is to be at liberty to deal in the course of business with its assets until the time comes for enforcing the charge. The debentures contain no fixed time for payment, but the company may give six months' notice of its intention to pay off, and at the end of that time the principal moneys become payable with a bonus or premium of 10 per cent. The other events in which the principal moneys become payable are, stated shortly, if the company makes default or if it comes to an end. That is not an ordinary mortgage to which the doctrine applies, but belongs to a totally different class of commercial transactions of recent origin. The observations of Lord Halsbury and Lord Macnaghten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (1) shew that this doctrine ought not to be extended beyond the cases to which it has always been applied. The doctrine was invented in the seventeenth century to prevent fraud and oppression: *Talbot* v. *Braddill* (2); *Mellor* v. *Lees* (3); *Toomes* v. *Conset* (4); *Vernon* v. *Bethell* (5); but it has now become crystallized into an absolute law of property and is quite independent of any circumstance of that kind. It has no foundation in reason and frequently operates to defeat a fair bargain made by parties negotiating at arms' length and on equal terms. Many of the incidents of these commercial transactions run at right angles to this doctrine against clogging. For example, it is an established practice of limited companies to issue irredeemable debentures. If the doctrine applies to those securities they must be void, inasmuch as the doctrine

(1) [1904] A. C. 323.
(2) (1683) 1 Vern. 183.
(3) (1742) 2 Atk. 494.
(4) (1745) 3 Atk. 261.
(5) (1762) 2 Eden, 110.

H. L. (E.)
1911

DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.

prevents a mortgage from being irredeemable, for redemption is of the very essence of a mortgage as mortgages are understood in equity: *Noakes & Co., Ld.* v. *Rice* (1); and see *Talbot* v. *Braddill* (2); *Morgan* v. *Jeffreys.* (3) For many years the validity of irredeemable debentures was not doubted, but at length it was suggested that they might be open to question by reason partly of the doctrine against clogging and partly of the law against perpetuities. That doubt was, however, removed by s. 14 of the Companies Act, 1907 (re-enacted by s. 103 of the Companies (Consolidation) Act, 1908), which declared that a condition making debentures irredeemable should not invalidate the debentures. Again, it is common practice to insert in debentures a stipulation, such as exists in the debentures in this case, that they shall be paid off at a premium. But if these are mortgage transactions to which the doctrine applies that stipulation is at variance with the doctrine, which says that when the mortgage is paid off the mortgagee is entitled to nothing beyond his principal, interest, and costs: *Noakes & Co., Ld.* v. *Rice.* (1) Further, the expression "equity of redemption" is not apt as applied to an issue of debentures creating merely a floating charge, at any rate until the charge ceases to float and a receiver is appointed, for until the time comes for enforcing the security it cannot be said whether any property will be subject to the charge. These floating charges are a modern creation—their validity was first established less than half a century ago by *In re Marine Mansions Co.* (4) and *In re Panama, New Zealand, and Australian Royal Mail Co.* (5)—and in considering whether this doctrine ought to be extended to an entirely new class of transactions where there is no suspicion of fraud or oppression weight will be given to the fact that it violates the great principle of freedom of contract: *Albion Steel and Wire Co.* v. *Martin.* (6)

As to the second point, upon the construction of the agreement of December 7, 1892, there was no obligation upon the Chartered Company to issue debentures; nothing beyond a contemplation that they would do so. If they did issue debentures, the De

(1) [1902] A. C. 24.
(2) 1 Vern. 183.
(3) [1910] 1 Ch. 620.
(4) (1867) L. R. 4 Eq. 601.
(5) (1870) 5 Ch. 318.
(6) (1875) 1 Ch. D. 580, 584.

Beers Company were bound to accept them in respect of the existing debt of 112,000*l.* and the further advance of 100,000*l.*; but if they did not choose to issue debentures, the De Beers Company remained unsecured creditors for the existing debt and were not bound to make the further advance. But in clause 6 there was an immediate binding obligation on the Chartered Company to grant a mining lease to De Beers in consideration of the assistance rendered and to be rendered by the latter to the former. It matters not whether the charge was created at the date of the trust deed or at the date of the issue of the debentures; whichever date is taken the charge did not affect the mining lease, but only the reversion expectant on the lease. The two transactions were not contemporaneous and were independent transactions, and upon this question it is immaterial whether the collateral bargain which is impeached is antecedent or subsequent to the mortgage transaction. The bargain for the lease in this case operated before the relationship of mortgagor and mortgagee was created and was no part of the mortgage security, and therefore it could not be a clog on the equity of redemption. In *Drew* v. *Power* (1) it was held that a beneficial lease granted as an inducement to the lessee to lend money to the lessor was void, but that decision was founded upon the usury laws, which have been long since repealed, and has nothing to do with the doctrine against clogging. Even if De Beers had refused, when the time came, to make the further advance or to take up the debentures, that refusal would be no answer to an action for specific performance of the agreement for the lease, because a merely partial failure of consideration is not a bar to such an action: *Oxford* v. *Provand.* (2) *Bradley* v. *Carritt* (3), which may be called the high water mark of the doctrine, has no bearing on the present case. Admittedly in that case there was a mortgage of specific shares and the question was whether the shares were prejudicially affected by the collateral bargain. Here the question is whether the lease was the subject of the mortgage at all.

Sir Robert Finlay, K.C., Levett, K.C., W. E. Hollams, and *G. H. Allen,* for the respondents. The doctrine against clogging

(1) (1803) 1 Sch. & Lef. 182. (2) (1868) L. R. 2 P. C. 135.
(3) [1903] A. C. 253.

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.

the equity of redemption is this, that when the transaction is one of loan secured by a charge on property, whether real or personal, and whether it be a floating charge or a charge on one definite thing, there cannot be in the same transaction any stipulation which will prevent the borrower on paying off the loan from getting back the property charged in the same condition as that in which it was at the time of the transaction. It must be in the same transaction: *Noakes & Co., Ld.* v. *Rice* (1); but that does not necessarily mean at the same moment; if in substance it is one transaction the doctrine applies: *Browne* v. *Ryan.* (2) In this case the crucial date is not, as the appellants suggested, the date when the debentures were created, but the date of the agreement of December, 1892. At that time there was an agreement for a security which in equity was as good a charge as if a trust deed had been executed at that moment, and, there being in that instrument a stipulation which prevents the property on redemption coming back to the borrower in the same state, that is a clog on the equity of the redemption. Upon the appellants' construction this 112,000*l.* would remain unsecured and the property might have been dissipated before the debentures were issued. The doctrine against clogging has been four times affirmed by this House. It is a vicious mode of argument to say that it was originally designed to prevent oppression and that there is no danger of oppression in this case, for it applies to all cases. The observations of Lord Macnaghten in *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (3) were addressed not to this doctrine, which he says is perfectly sound, but to the rule that there shall not be in the contract of lending any condition that the lender may purchase the mortgaged property. That rule, no doubt, is connected with the doctrine against clogging, but he treats it as a separate rule. The point made by the appellants as to irredeemable debentures has no bearing on the case; it is a mere question of words. An irredeemable debenture is not really a debenture at all. It is not an instrument to secure a loan of money, but is an instrument conferring a perpetual annuity

(1) [1902] A. C. 24. (2) [1901] 2 I. R. 653.
(3) [1904] A. C. 323.

in consideration of a payment of money made at the time of issue. Then it is said that this antiquated rule of equity ought not to be applied to a commercial transaction of this character. But the commercial understanding is universal that a debenture is an instrument giving a security for a loan, and, if there is a rule with reference to charges securing a loan, it applies to debentures just as much as to charges on land. To say that the security is a floating one is irrelevant. There is a charge on the whole of the property from the time of the agreement to give the debentures, and the mere fact that the mortgagor is at liberty to deal with the mortgaged property in the course of his business makes no difference with regard to the nature of the charge; the only difference is that when the charge is enforced it attaches to the property as it then exists: *In re Florence Land and Public Works Co.* (1); *In re Standard Manufacturing Co.* (2); *Simultaneous Colour Printing Syndicate* v. *Foweraker.* (3) The principle that on redemption the borrower is entitled to have back the property as it was applies equally whether the charge is floating or not. The test is, Is there a right of redemption? There is none the less a right of redemption because the subject-matter of the charge is constantly changing; and upon redemption the borrower is entitled to have back the mortgaged property in its then condition freed from any clog. Then it is said that the application of the doctrine to these commercial transactions would render the payment of any premium illegal; but the observations of Lord Davey in *Noakes & Co., Ld.* v. *Rice* (4) and *Bradley* v. *Carritt* (5) shew that a mortgage may provide for the payment of a bonus or premium. That therefore is not within the mischief of the doctrine.

Upjohn, K.C., in reply, referred to *Governments Stock and Other Securities Investment Co.* v. *Manila Ry. Co.* (6), *Illingworth* v. *Houldsworth* (7), and *Evans* v. *Rival Granite Quarries, Ld.* (8), as to the meaning of a floating charge.

Counsel for the respondents then contended that clause 6 of

(1) (1878) 10 Ch. D. 530.
(2) [1891] 1 Ch. 627.
(3) [1901] 1 K. B. 771.
(4) [1902] A. C. 24, 33.
(5) [1903] A. C. 253, 266.
(6) [1897] A. C. 81.
(7) [1904] A. C. 355.
(8) [1910] 2 K. B. 979.

H. L. (E.) 1911

DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.

the agreement was ultra vires inasmuch as it purported to grant a monopoly of trade contrary to clause 20 of their charter.

EARL LOREBURN L.C. intimated that the House disagreed with this contention, being of opinion that clause 6 of the agreement did not grant any monopoly of trade, and would take time to consider the question whether the clause was void as being a clog on the equity of redemption.

Dec. 4. LORD ATKINSON. My Lords, this is an appeal from an order of the Court of Appeal dated July 5, 1910, affirming a judgment of Swinfen Eady J. dated February 10, 1910, in favour of the respondents, in an action in which the respondents were plaintiffs and the appellants were defendants, and dismissing the appellants' counter-claim.

The facts of the case, so far as it is necessary to state them, are as follows.

The appellants are a company registered and incorporated under the Limited Liability Laws of the Colony of the Cape of Good Hope, having their head office in Kimberley in the said Colony.

The respondents are a company incorporated by Royal Charter dated October 29, 1889, for the purposes mentioned in the said charter. A deed of settlement was duly executed on February 3, 1891, by the members of the company, and approved in pursuance of the provisions of this charter. A supplemental Royal Charter was granted to the respondents on June 8, 1900, and a supplemental deed of settlement in conformity therewith was duly executed by them.

The said charter provides (by clause 20) that nothing in the charter shall authorize the company to set up or grant any monopoly of trade, provided that the establishment of, or the grant of concessions for, banks, railways, tramways, docks, telegraphs, waterworks, or other similar undertakings, or the establishment of any system of patent or copyright approved by the Secretary of State, shall not be deemed monopolies for such purpose, and (by clause 24, sub-clause 5) the company is specially authorized and empowered to carry on mining and other industries, and to make concessions of mining, forestal, or other rights.

In the argument the appellants were for convenience called De Beers, and the respondents the Chartered Company. The latter company had before the year 1892 acquired from native chiefs or owners, not from the Crown, large tracts of land north and south of the river Zambesi, in Northern and Southern Rhodesia, in South Africa, some of which lands were believed to be diamondiferous. This company was in April, 1892, indebted to De Beers in the sum of 80,500*l.* It required more money to carry on its operations, and had in contemplation the project of issuing first mortgage debentures, to be secured by a trust deed specifically charging all its lands and mineral rights in South Africa, but neither the time nor the amount of the issue had been then fixed upon or determined.

The company in this state of things entered into a contract with De Beers, dated April 20, 1892, whereby it was, amongst other things, provided: (1.) That the latter should, on the execution of the agreement, and also upon the first of each succeeding calendar month of the then current year, advance to the Chartered Company the sum of 3500*l.*, so that the total amount of the latter company's indebtedness to De Beers should, on December 1, 1892, amount to 112,000*l.* (2) That the Chartered Company should repay this sum to De Beers on January 1, 1893, with interest in the meantime at the rate of 6 per cent. on the amount of their original indebtedness (80,500*l.*) from the date of the agreement and on the subsequent advances from the dates when the same should respectively be made. (3.) That in the event of the Chartered Company determining to issue debentures, as contemplated, De Beers should be entitled to require debentures, being part of this issue, to be issued to them, at whatever might be the rate of issue, in satisfaction of this sum of 112,000*l.* and accrued interest thereon; and that, if De Beers should so require, the Chartered Company should grant to them exclusive licence to work all the diamondiferous ground in their territories south of the Zambesi on certain conditions therein specified, De Beers paying the royalties therein mentioned. (4.) That should there be no issue of debentures by the Chartered Company, or there being such

H. L. (E.)
1911

DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.

Lord Atkinson.

an issue De Beers should not desire to exercise their option to have any of the same issued to them, but should desire to obtain the exclusive right to work the above-mentioned diamondiferous lands, they should be at liberty to decline to take payment of the sum of 112,000*l.* for a period of five years, that same should be retained by the company, bearing interest at the rate of 6 per cent. per annum, and that at the end of this period of five years, whether or not the payment of the principal sum of 112,000*l.* be then demanded or not, De Beers should be entitled to a grant in perpetuity of the licence above mentioned.

As far as this agreement is concerned, it is clear that the respondents were not bound to issue debentures; that De Beers were not bound to take any of the debentures in satisfaction of their debt; that it was entirely optional with De Beers whether or not they should claim a grant of the above-mentioned licence, at all events, until after the loan had stood out unsatisfied in whole, or in part, for a period of five years; and further that the obtaining of the licence was in no way conditional either upon the issue of debentures by the Chartered Company, or upon the acceptance of them by De Beers in satisfaction in whole or in part of their debt. These latter were plainly two independent transactions. The monthly advances were made by De Beers.

The Chartered Company desired to construct, or to promote the construction of, a railway from Vryburg to Mafeking, and required for that purpose a loan of 100,000*l.* They accordingly entered into an agreement in writing with De Beers, dated December 7, 1892, and described as supplemental to the agreement of April 20, 1892, described as the principal agreement.

Upon the construction of this agreement the most important point in the case turns. The agreement begins by reciting (1.) that De Beers will, before December 31, 1892, have advanced to the Chartered Company 112,000*l.*; (2.) that in connection with the construction of this railway from Vryburg to Mafeking and its general operations the Chartered Company contemplated an issue of first mortgage debentures for 750,000*l.*, to bear interest at the rate of 6 per cent. per annum, and that they had applied to De Beers to accept an issue at par of first mortgage debentures, part of this issue of 750,000*l.*, in payment and satisfaction of the said sum of 112,000*l.*, and had also applied to De Beers in view of the construction of the above-mentioned railway to lend to them a further sum of 100,000*l.* to be secured by an issue at par of first mortgage debentures, a further portion of the contemplated issue of the 750,000*l.*, to all of which De Beers had agreed.

It then proceeds to provide that the sum of 112,000*l.* should not be repaid as provided by the principal agreement, i.e., on January 1, 1893, but should continue outstanding on loan until the first mortgage debenture issue should be made by the Chartered Company, and should carry interest at 6 per cent. per annum until the date when interest on the first mortgage debentures commenced to run; that upon the said first mortgage debenture issue being made, part of the same to the nominal value of 112,000*l.* should be allotted and issued to De Beers, upon which event, and the payment of all interest on this sum up to the date when the interest on the debentures had commenced to run, De Beers should give a receipt for the said sum of 112,000*l.*, and all interest thereon.

It further provided that the first mortgage debentures for 750,000*l.*, i.e., the whole issue, and interest thereon at the rate of 6 per cent. per annum were to be secured by a floating charge upon the entire assets and undertaking of the Chartered Company, and a further and better charge on certain lands therein mentioned which the company then were or thereafter might become entitled to, on the completion of the above-mentioned railway, the floating charge, however, to be so framed that the Chartered Company should be at liberty, in the course of its business and operations and for the purpose of carrying on the same, to manage, deal with, work, and turn to account by sale, lease, or otherwise such assets as it might deem expedient, subject to this, that the Chartered Company was not to be at liberty to execute any mortgage or other charge in priority to the first mortgage debentures for 750,000*l.* and the interest thereon.

It further provided that De Beers should advance the sum of 100,000*l.* when required by the Chartered Company in instalments at an average rate not exceeding 10,000*l.* per month as required for the purpose of the aforesaid railway as against the issue of these debentures for 100,000*l.* And paragraph 6 provides that

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.
Lord Atkinson.

in consideration of the assistance rendered and to be rendered by De Beers to the Chartered Company as appearing in these two agreements the Chartered Company should grant to De Beers exclusive licence to work all diamondiferous grounds to which they were then or might thereafter become entitled, north or south of the Zambesi, subject to the payment of royalties therein mentioned. It is admitted that the sum of 100,000*l.* mentioned in this agreement was advanced as stipulated, the first instalment on July 1, 1893, and the remainder from time to time afterwards. It would appear to me that it could neither be successfully contended that this sixth paragraph did not contain a present unconditional agreement to grant the licence to work the diamondiferous land of the Chartered Company therein specified, irrespective of whether or not debentures were issued as contemplated; nor that from the date of the supplemental agreement the lands of the company on North and South Rhodesia did not become in equity subject to, and burdened with, the rights and interests contracted by that paragraph to be vested in De Beers.

The debenture trust deed was not executed till June 27, 1894. The Chartered Company were, of course, parties to it. It contained, amongst others, a provision to the effect that the charge created by it was a floating security, and accordingly that the company, in the course of its business and operations and for the purpose of carrying on the same, might sell, exchange, convey, appropriate, lease, surrender, manage, deal with, work, turn to account the property charged or any part or parts thereof, and give effect to concessions of mining or other rights in such manner as the company might think fit, save that they should not create any mortgage or charge in priority to the security thereby constituted. A provision (paragraph 13) was introduced that the security thereby constituted should be enforceable in certain events, six in number, named in it. It gave to the trustees a power of sale, with a provision (paragraph 16) that the money, the proceeds of the sale, should in the first instance be applied towards the payment of the arrears of interest due on the debentures, pari passu, and, secondly, to the payment of the principal due on the same, pari passu; and that on such payment being made, a memorandum thereof should be indorsed by the trustees on the debentures.

The form of the debenture is given in the schedule to this deed. In this it is provided that the issue of 250,000*l.* mortgage debentures and 500,000*l.* debenture stock of the company should rank and carry interest, pari passu, on the premises charged, as a floating security. By one of the conditions set out upon it (paragraph 10) power is given to the company to pay off the debenture on giving six months' notice, and by paragraph 11 the principal moneys secured are only made payable on the non-payment of interest or the happening of one of the several events named. Should the interest be regularly paid and none of these events occur, the principal moneys were to remain outstanding, no day being fixed for payment or redemption of them.

The debentures were to the amount of 212,000*l.* issued to De Beers some time after the date of the deed. They were paid off long before this action was instituted. The Chartered Company now contend that the agreement contained in the sixth paragraph of their agreement of December 7, 1892, to grant to De Beers an exclusive licence to work their diamondiferous ground in North and South Rhodesia was a clog on the equity of redemption in the property and undertaking, which remained in them after the issue of these mortgage debentures to De Beers and others, and was therefore void; that on the payment to De Beers of the debentures held by them the property mortgaged was thereby redeemed; and that the Chartered Company were entitled to have it restored to them free from the burden of this licence. Much reliance was placed by counsel for the company in argument on the application to the agreement of December 7, 1892, and especially to its first paragraph, of the well-known doctrine of Courts of Equity, that in equity everything should be taken to be done which ought to be done. That doctrine cannot, in its application to contracts, however, be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.
Lord Atkinson.

to do, and nothing more and nothing less is to be taken, in equity, to be done. So that the very first point to be considered in this case, necessarily, is the true construction of the contract of December 7, 1892—the determination of what the parties to it had respectively bound themselves to do.

First it is, in my view, as I have already indicated, clear that paragraph 6 of that contract imposed upon the Chartered Company an immediate and absolute obligation to grant the licence therein mentioned. And, second, I think that paragraphs 1, 2, and 4 of that agreement do not impose upon the Chartered Company an immediate or absolute obligation to issue or allot to De Beers 112,000*l.* mortgage debentures in payment of the debt due to them. Their obligation fell far short of that. It amounted, in my opinion, to this, and this only.

The Chartered Company bound themselves, if and when they issued or allotted these 750,000*l.* mortgage debentures, to issue and allot to De Beers in payment of this debt debentures, portion of 750,000*l.*, of the nominal amount of 112,000*l.* It was, in my view, left optional with the Chartered Company, at, and after, the time they were so absolutely bound to grant the licence, whether or not they would or would not mortgage their property to De Beers in the manner proposed. If that be so, the contract to grant the licence to work the diamondiferous land, and the creation of the mortgage, are not two parts of one and the same transaction, but entirely independent contracts, and the grant of the licence could not, therefore, have formed, and did not form, part of the security pledged for the payment of the mortgage debt. On the contrary, the property charged by the mortgage debentures would be the undertaking, i.e., the assets of the company, burdened and encumbered with the prior obligation, superior to the mortgage security, to grant the licence; so that upon payment of the mortgage debt this licence would remain valid and binding, unaffected by the redemption, because it was not so pledged.

No doubt the consideration mentioned in paragraph 6 for the grant of the licence is "the assistance rendered and to be rendered by De Beers to the Chartered Company as appearing in the principal agreement and that agreement." It was urged in argument, as I understood, that these words only covered the past loan of 112,000*l.*, the future loan of 100,000*l.*, and the obligation to leave the first outstanding for the stipulated time, but even if they covered in addition the contract of De Beers to take mortgage debentures when issued in payment of their past debt, the omission or refusal of the Chartered Company to issue the debentures, even if they were bound to issue them, would not invalidate the contract to grant the licence, since the failure of the consideration would then only be partial.

The stipulation contained in the first paragraph of the December agreement that the loan of 112,000*l.* should continue outstanding until the first mortgage debenture issue was made was relied upon to shew that the Chartered Company were bound to issue these debentures, else the loan might never be paid, a result which it could not be supposed the parties ever intended. It by no means necessarily follows, however, that such a result would be brought about, even if the issue of the debentures was optional and the Chartered Company omitted to issue them.

The contract must, I think, be held to mean that the loan should remain outstanding until the issue was in fact made, or until a reasonable time had elapsed for the making of it. If the Chartered Company refused before the lapse of that time to make the issue, or omitted after its lapse to make it, then, in either of these events, De Beers would be free to call in the loan. I do not know if the first point was developed as fully, or pressed as strongly, in argument before the Court of Appeal as it was before your Lordships. It appears to me, however, to be a good point, fatal to the respondents' contention in reference to the debentures for the sum of 112,000*l.*, because, as I have said, in my view the obligation of the Chartered Company was as to grant of the licence present and absolute, and as to the issue of the debentures optional, and that the contracts of the parties in reference to these two matters were not different parts of one transaction, but separate agreements, each independent of the other, the former contract, therefore, forming no part of the consideration given for the mortgage.

There was much discussion on the origin and history of this equitable doctrine of the clogging of an equity of redemption,

H. L. (E.) 1911

De Beers Consolidated Mines, Limited v. British South Africa Company.

Lord Atkinson.

the oppressive circumstances out of which it originally arose, the evils it was designed to remedy, and its inapplicability to such a security as is created by the mortgage debentures out of a commercial company. Several authorities were cited to shew what were the precise nature and incidents of the floating charge created by such instruments, including the cases *Governments Stock Investment Co.* v. *Manila Ry. Co.* (1), *Illingworth* v. *Houldsworth* (2), *Evans* v. *Rival Granite Quarries, Ld.* (3), and special attention was directed to the description given by Lord Macnaghten of this floating charge at p. 86 of the first mentioned report, and by Buckley L.J. at p. 999 of the last mentioned.

Lord Macnaghten said: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking ceases to be a going concern, or until the person in whose favour the charge is created intervenes." And Buckley L.J. says: "A floating security is not a future security; it is a present security which presently affects the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security."

In the present case the charge never so crystallized, and it would appear to me that such statements of the law as these, that "on repayment of all that is properly payable on the

(1) [1897] A. C. 81. (2) [1904] A. C. 355.
(3) [1910] 2 K. B. 979.

security of the property charged, the whole of that property must be restored to the borrower unfettered and undiminished by anything created in favour of the lender, as part of the consideration for the loan"; that "the corollary applies to all cases where there is a right to redeem, and is incident to or part of that right"; that "the sole question is, is there a right to redeem," however applicable to ordinary mortgages of land or chattels, are scarcely applicable to a case where the mortgagee never had possession, actual or constructive, of any of the property, never had any estate in it vested in him, or any specific charge upon it created in his favour. In the view I take of the meaning of the agreement it is not necessary to decide this point. The case of *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Ld.* (1) certainly does not rule it, for in that case, as appears from the report in [1902] 2 Ch. at p. 481, mortgage debentures were not issued by the borrowing company to the lender. On the contrary a certificate of 30,000*l.* first mortgage redeemable debenture stock was handed over to the mortgagee in exchange for 5000*l.* and the stock was subsequently transferred to the lender, a specific charge being thus created in the latter's favour on this particular stock. The alleged clog in that case was a stipulation that the lender should have an option to purchase the whole or any part of the stock at any time within twelve months at 40 per cent. This was the very kind of device to acquire the mortgaged property absolutely, against which the Courts of Equity set their face.

I fully concur, however, with the observations of Lord Macnaghten, who, after dealing fully with the origin and history of this doctrine as disclosed in the authorities, is reported at p. 327 of the report in the House of Lords to have spoken as follows: "Speaking for myself, I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from an impecunious landowner in the toils of a crafty money-lender." No case was cited directly ruling the point. The *Jarrah Case* (1) is the nearest

(1) [1904] A. C. 323.

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.
Lord Atkinson.

authority, but if one were free to deal with the matter on principle and apart from authority, I should, speaking for myself, incline to the opinion that the facts (1.) that no specific charge is, in the first instance, created by these mortgage debentures; (2.) that the mortgagor is free to deal, in the ordinary course of business, with the assets subject to the floating charge; (3.) that the debenture-holder has no right similar to the right of foreclosure possessed by an ordinary mortgagee, and can never recover more in money than the amount of his debenture, render the doctrine of clog inapplicable to such transactions; but, of course, I preserve an open mind upon the subject.

The only other point argued was raised upon the 20th clause of the charter, to the effect that the grant of the exclusive right to dig and work the diamondiferous lands of the company over so vast an area as that of Northern and Southern Rhodesia was a monopoly prohibited by the following express words of the clause: "Nothing in this, our charter, shall be deemed to authorise the company to set up or grant any monopoly of trade," and was, therefore, ultra vires and void.

It is perfectly clear that the grant or licence by a proprietor of land to some person to use and exercise exclusively over that land some of his own proprietary rights is not a monopoly of trade within the meaning of such a clause as this. I accordingly am of opinion that the judgment appealed against was erroneous and should be reversed, and this appeal be allowed with costs.

EARL OF HALSBURY. My Lords, I had intended to distinguish, so far as I could, the ordinary case of a mortgage from that to which from time to time it has been likened, though I think only by analogy,—the case of floating securities, debentures, and so on, which are well known commercial documents, and which play a most important part in the commerce of this country.

My Lords, the extremely lucid, and to my mind convincing, argument that has just been delivered by my noble and learned friend Lord Atkinson renders it unnecessary for me to go through the narrative that he has put before your Lordships. I entirely and heartily agree with the conclusions at which he has arrived. I only wish to say—and this is the only reason why I interpose at all—that it must not be supposed that the effect of this decision or of anything that we are saying is in any way to affirm the proposition that debentures or floating securities of the nature of debentures are necessarily affected by this equitable doctrine which, I agree, is now part of the jurisprudence of this country. That does not necessarily involve that everything that has been by analogy called a mortgage is within the ambit of that doctrine. Against that I should utterly protest; and there is no part of the judgment which my noble and learned friend has just delivered with which I more heartily agree than that wherein he has pointed out that which is, to my mind, a sufficient distinction between an ordinary mortgage and a floating charge. But the effect of what he has done in disentangling the somewhat entangled arrangements that were made here is that, if we were to attempt to deal with that doctrine, and to shew the limitations within which that doctrine forms part of the law of England, I am afraid it might be said, and said with justice, that any such expression of opinion was obiter because it did not arise in the case. Of course it would be undesirable for us to give judgment on a matter which is practically not before us; and therefore I only say that I entirely and heartily concur in my noble and learned friend's judgment.

EARL LOREBURN L.C. My Lords, I have had the advantage of reading the opinion of Lord Atkinson, which fully deals with the facts of this case and relieves me from that task. Accordingly I will state the reasons which constrain me to differ from the order of the Court of Appeal as briefly as I can; for the difference relates only to one point.

What the plaintiffs, a chartered company, ask in this action is that two agreements made between them and the De Beers' Company, the defendants, shall be declared ultra vires and void in so far as they purport to confer upon De Beers an exclusive licence to work diamondiferous ground in the company's territory. The point really turns upon the effect of the agreement dated December 7, 1892.

H. L. (E.)
1911
DE BEERS CONSOLIDATED MINES, LIMITED v. BRITISH SOUTH AFRICA COMPANY.
Earl Loreburn L.C.

There is nothing in the contention that these agreements created a monopoly contrary to the charter, and none of the learned judges has adopted it. But the Court of Appeal, affirming Swinfen Eady J., have decided that the provision for a diamond mining licence is invalid because it amounts to a clog on the equity of redemption.

Now your Lordships are unquestionably bound by this rule of equity, and I have no intention of evading it, but I must point out, that if it is to govern this case, then one party to an honest and, in morals as well as business, perfectly unimpeachable contract, is enabled to get rid of its obligation. That would be a deplorable consequence to flow from an equitable rule.

I cannot help thinking that there is some danger lest this doctrine may be stretched beyond the necessities which gave rise to it and become an aid instead of a hindrance to unjust dealing. But I am glad to arrive at the conclusion that the present case does not fall within it at all, and for the following reason. When a mortgage is paid off the property secured is as free and the owner must be as free to dispose of it as if there had never been a mortgage at all, and any device to prevent full redemption when the sum due is paid off will be void. Now it appears to me (I say it with all respect) that when the mortgage or charge in the present case came into being, either in law or in equity, the diamondiferous land which was included in the mortgage was already subject to this licence, and so the right to work the diamondiferous land never was included in the mortgage or charge.

The agreement of December 7 in effect, so far as material, provided as follows: The Chartered Company granted to De Beers an exclusive licence to work all their diamondiferous land at once and unconditionally. On the other hand De Beers were to leave their past advances to the Chartered Company still on loan, to add to those advances, and in discharge of all their advances to accept debentures if and when the Chartered Company should issue them. The Chartered Company, even if bound to issue debentures, certainly were not bound to issue them at once, and, if issued, the debentures were to be then secured by a floating charge upon the entire assets and undertaking of the Chartered Company including, of course, the diamondiferous lands. Meanwhile the company were free to sell or lease or charge their property. It was a general agreement providing for quite a variety of things with which we are not concerned.

In this state of things it seems to me that nothing was included, or intended to be included, in the floating charge, except the assets and undertaking which should belong to the Chartered Company whensoever the debentures might be issued and the security created. If there were at that date any incumbrance upon, or any contract already affecting, such assets or undertaking, then the floating charge would be subject to such incumbrance or contract. In this case there was such a contract granting a licence to work the diamondiferous land, and when, two years or so after the licence was granted, the debentures were issued and the floating charge created, it was created subject to the licence. Paying off the debentures released the whole of the property charged. It did not indeed release the Chartered Company from the burden of this licence, for the excellent reason that the charge was subject to the licence. The licence was not a clog on the equity of redemption, because when the redemption took place everything which had been charged was restored to the mortgagor.

I think, therefore, that this appeal should be allowed and judgment entered for the defendants.

I wish to add that I agree with what Lord Atkinson and Lord Halsbury have said as to the point whether the doctrine under discussion applies to floating charges.

LORD GORELL. My Lords, I concur. I will only add that the Court of Appeal based their decision upon the equitable doctrine of the clogging of an equity of redemption, but, for reasons given by the noble Lords who have preceded me, it is unnecessary to express a final opinion on this point. I may say, however, that I question the applicability of this doctrine to the case of floating debentures when the mortgagor is left able to deal with the assets included in the charge and there is no specific charge created in the first instance, but the charge crystallizes on a subsequent event, and the debenture-

H. L. (E.) 1911 DE BEERS CONSOLIDATED MINES, LIMITED *v.* BRITISH SOUTH AFRICA COMPANY.

holders cannot recover more than the amounts payable under the debentures.

Order of the Court of Appeal reversed and action dismissed: By consent, without prejudice to future proceedings by the appellants to enforce the agreement in question, no order on counter-claim: The respondents to pay the costs in the Courts below and of the appeal to this House: Cause to be remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, December 4, 1911.

Solicitors for appellants: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondents: *Coward & Hawksley, Sons & Chance.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1911 *Nov.* 13.

DANIEL MORGAN . . . . APPELLANT;

AND

WILLIAM DIXON, LIMITED . . . . . . RESPONDENTS.

Employer and Workman—Workman requiring Presence of his own Medical Attendant at Examination—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *clause* 4.

A workman who had given notice of an accident within the meaning of the Workmen's Compensation Act, 1906, refused to submit himself for medical examination by a medical practitioner provided by his employers except upon the condition that his own medical attendant should be present throughout the examination. There were no special circumstances which required the presence of the medical attendant:—

Held, affirming the decision of the Court of Session, 1911 S. C. 403 (Lord Shaw of Dunfermline dissenting), that in the absence of special circumstances the workman was not entitled as of right to have his medical attendant present at the examination.

Held, secondly, that whether a request for the presence of the medical attendant was under the circumstances reasonable is a question of fact to be determined by the arbitrator under the Act.

Per Lord Shaw of Dunfermline, dissenting, that the workman had a

TAB 2

Meagher, Gummow and Lehane's

Equity
Doctrines and Remedies

Fourth Edition

R P Meagher
BA LLB (Syd)
A Judge of Appeal, Supreme Court of New South Wales

J D Heydon
BA (Syd) MA BCL (Oxon)
A Judge of Appeal, Supreme Court of New South Wales

M J Leeming
BA LLB PhD (Syd)
Barrister at Law
Lecturer (part-time) in Equity, University of Sydney

With a Foreword from the First Edition by

The Right Honourable Sir Frank Kitto, KBE

A Justice of the High Court of Australia, 1950–1970
Sometime Chancellor of the University of New England

Butterworths LexisNexis
Australia
2002

(1882) 21 Ch D 9; [1881–5] All ER Rep Ext 1690 discussed in the previous chapter. Thus also is the doctrine of an equitable mortgage explicable: any contract to give a mortgage creates not a hypothecation but an equitable mortgage conferring a right to foreclose.[34] Similarly, a contract to assign is often treated as an assignment. In *Frederick v Frederick* (1721) 1 P Wms 710 at 713; 24 ER 582 at 583; 1 Str 455; 93 ER 632, A agreed with the Court of Aldermen to take up his freedom of the city within one year, in consideration of his marriage to B. He married B and died after the year without taking up his freedom. It was held that his personalty was distributable as if he were a freeman. Lord Macclesfield LC said:

> [W]here one for a valuable consideration agrees to do a thing, such executory contract is to be taken as done; and . . . the man who made the agreement shall not be in better case, than if he had fairly and honestly performed what he agreed to.

In *Simultaneous Colour Printing Syndicate v Foweraker* [1901] 1 KB 771 a company, for valuable consideration, agreed to issue debentures. Wright J held that an execution creditor who levied execution on goods intended to be subject to the charge created by the debenture had to yield priority to the debenture holders, although no debenture had formally been sealed or issued. Again, a contract for valuable consideration immediately to assign future property can have, at law or in equity, no effect other than that of a contract to assign the property if and when it comes into existence; but, at the moment the property does come into existence, equity treats as done that which ought to be done, fastens onto the property, and as a consequence a contract to assign becomes in equity a completed assignment. If a contracting party has, for valuable consideration, agreed to enter into an arrangement under which he is to be a *cestui que trust* equity will compel the execution of the trust in his favour; in such cases equity banishes the distinction between a perfectly created trust and an agreement to create a trust.

[3-210] It is to be noted that the applicability of the maxim is limited to circumstances where that which ought to be done can be done; the maxim does not require one to believe that equity will regard as done that which no court (of law or equity) would ever order to be done. Therefore, it can be availed of, not by everybody, but only by those who would have the right to seek in equity the enforcement of the contract. This is often expressed by saying with approximate accuracy that in cases of contract the maxim depends on the specific enforceability of the contract.

That is why in the preceding paragraph it is said that equity "often" rather than "always" regards as done that which ought to be done in cases of contract. Thus in *Re Anstis* (1886) 31 Ch D 596 at 605–6[35] Lindley LJ said:

34. E I Sykes and S Walker, *The Law of Securities*, 5th ed, Law Book Co, Sydney, 1993, Ch 4.

35. Approved and applied by Eve J in *Re Plumptre's Marriage Settlement* [1910] 1 Ch 609 at 619; cf *Tottenham Hotspur Football & Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17; [1974] 1 WLR 113, criticised M Albery (1974) 90 *LQR* 149. *Re Plumptre* has attracted much academic discussion, the latest contribution to which is probably D Wright "Trusts Involving Enforceable Promises" (1996) 70 *ALJ* 911.

> Equity, no doubt, looks on that as done which ought to be done; but this rule, although usually expressed in general terms, is by no means universally true. Where the obligation to do what ought to be done is not an absolute duty, but only an obligation arising from contract, that which ought to be done is only treated as done in favour of some person entitled to enforce the contract as against the person liable to perform it.

This explains why volunteers are unable to take advantage of the maxim. Further, the doctrine cannot be utilised so as to subvert the whole law of contract. As Lord Atkinson said in *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52 at 65–6; [1911–13] All ER Rep 882 at 886:

> That doctrine cannot, in its application to contracts, . . . be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken, in equity, to be done.

Moreover, Ashburner demonstrated[36] that even the proposition that the right to invoke the remedy in contractual cases depends on the availability of specific performance is true only if "specific performance is understood to connote that remedy in either its primary or its secondary sense". For example, the contract in *Frederick v Frederick* (1721) 1 P Wms 710; 24 ER 582; 1 Str 455; 93 ER 632 was not specifically performable in the primary sense of that term: if the contract were wholly executory, no decree of specific performance of it would be possible; it was specifically performable only in the secondary sense of that term, viz in the sense that the contract being performed on the promisee's side, an injunction would be available to restrain the promissor from resiling from his promise. Finally, there are at least some cases (for example the assignment of future property where the contract no longer subsists at the time the property comes into existence) where the basis of the doctrine cannot depend on the availability of specific performance even in this extended sense, that is, because no contract then exists. Although there is no clear authority to this effect, it seems that the maxim operates in this situation, the court regarding the assignor as still bound, not because he remains contractually bound, but because he is morally bound by virtue of his earlier enjoyment of the consideration which passed from the assignee: *Re Lind; Industrials Finance Sydnicate Ltd v Lind* [1915] 2 Ch 345 at 360; [1914–15] All ER Rep 527 at 531; *Re Gillott's Settlement; Chattock v Reid* [1934] Ch 97 at 108–9; [1933] All ER Rep 334 at 339–40; and see [6-270]–[6-325].

Equity imputes an intention to fulfil an obligation

[3-215] This doctrine, "of very limited application",[37] is one basis of the doctrines of satisfaction, ademption and performance, which are considered in Chapters 31, 32 and 33.

36. W Ashburner, *Principles of Equity*, 2nd ed, D Browne (ed), Butterworths, London, 1933, pp 258–9. See also *Hewett v Court* (1983) 149 CLR 639 at 665–6; 46 ALR 87 at 106–7.
37. P H Pettit in *Halsbury's Laws of England*, 4th ed, 1992 reissue, vol 16, p 687.

TAB 3

HALSBURY'S

Laws of England

FOURTH EDITION
REISSUE

LORD MACKAY OF CLASHFERN
Lord High Chancellor of Great Britain
1987–97

Volume 16(2)

2003

LexisNexis™ UK

(7) EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE

561. Equity looks on that as done which ought to be done. Equity looks on that as done which ought to be done or which is agreed to be done, but this maxim does not extend to things which might have been done; nor will equity apply it in favour of everybody, but only of those who had a right to pray that the thing should be done[1]. Thus, where the obligation arises from contract, that which ought to be done is treated as done only in favour of some person entitled to enforce the contract as against the person liable to perform it[2]. The true meaning of the maxim is that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been[3], but the contract itself is not varied. The doctrine does not make for the parties contracts different from those they have made for themselves[4].

The leading examples of the application of the maxim are in cases where land has been directed to be turned into money, and vice versa; and where a contract remains executory on one side but has been executed on the other. The application of the maxim in cases of the first kind gave rise to the doctrine of conversion which had the effect of altering the very nature of things, to make money land, and, on the contrary, to turn land into money[5]. This doctrine was shorn of much of its practical importance by the Administration of Estates Act 1925[6], and was partially abolished by the Trusts of Land and Appointment of Trustees Act 1996[7].

1 *Burgess v Wheate, A-G v Wheate* (1759) 1 Eden 177 at 186 per Clarke MR. As to the maxim that equity imputes an intention to fulfil an obligation see para 754 post.

2 *Re Anstis, Chetwynd v Morgan, Morgan v Chetwynd* (1886) 31 ChD 596 at 605, CA, per Lindley LJ; *Re Plumptre's Marriage Settlement, Underhill v Plumptre* [1910] 1 Ch 609 at 619; and see *Hobbs v Marlowe* [1978] AC 16 at 42, [1977] 2 All ER 241 at 257, HL, per Lord Simon of Glaisdale.

3 1 Fonblanque's Treatise of Equity (5th Edn, 1820) p 419; Story, Equity Jurisprudence s 64(g). See also *Re E Dibbens & Sons (in liq)* [1990] BCLC 577. The rule was said by Lord Hardwicke LC to hold in every case except in dower: *Crabtree v Bramble* (1747) 3 Atk 680 at 687.

The analogy between legal and equitable estates did not, however, in strictness apply as regards dower, which was incident to the legal estate: see para 555 note 2 ante.

4 'The doctrine cannot in its application to contracts ... be permitted to turn the conditional into the absolute, the optional into the obligatory, or to make for the parties contracts different from those they have made for themselves. What a party to a contract ought to do, within the true meaning of this doctrine, is what he has contracted to do, and nothing more and nothing less is to be taken in the equity to be done': *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52 at 65–66, HL, per Lord Atkinson; *Wood Preservation Ltd v Prior (Inspector of Taxes)* [1968] 2 All ER 849, [1969] 1 WLR 1077; affd [1969] 1 All ER 364, [1969] 1 WLR 1077 at 1094, CA.

5 *Lechmere v Earl of Carlisle* (1735) 3 P Wms 211 at 215 per Jekyll MR; *A-G v Hubbuck* (1884) 13 QBD 275 at 289, CA per Bowen LJ. As to the application of the maxim to contracts for the sale of land see paras 611–612 post.

6 See the Administration of Estates Act 1925 s 33 (now as amended); and EXECUTORS AND ADMINISTRATORS.

7 See the Trusts of Land and Appointment of Trustees Act 1996 s 3(1); and para 701 et seq post.

562. Application of the maxim. Where, for example, possession is held under an agreement for a lease, of which specific performance would be ordered, the parties are treated in equity as being in the same position with regard to their respective rights as if a lease had been granted[1]; and likewise where a tenant has entered into possession under an agreement which is embodied in a consent order of the court[2]. Similarly, money which would have been payable under a contract if the defendant had not wrongfully prevented anything from becoming due will be treated as a debt in equity, although it is not a debt at law[3].

TAB 4

Bell Canada v. The Plan Group et al.

[Indexed as: Bell Canada v. The Plan Group]

Court of Appeal for Ontario, Goudge, Gillese and Blair JJ.A.
July 7, 2009

Arbitration — Arbitration agreement — Interpretation — Parties entering into agreement in 1999 containing arbitration clause which provided that disputes would be arbitrated under Arbitration Act, 1991 and "then-current" rules of Arbitration and Mediation Institute of Ontario — Arbitration clause also providing that failing to file notice of arbitration within 12 months after occurrences supporting claim constituted irrevocable waiver of claim — Dispute arising in 2005 — Applicant delivering notice to respondent demanding arbitration but not filing notice of request to arbitrate with Institute — Application judge finding that filing of notice with Institute was not required — Standard of review of application judge's decision being correctness — Decision not correct — Application judge erring in applying 1999 rules of Institute rather than current rules of Institute and in interpreting "file" in waiver provision as meaning "serve" or "deliver" notice on other side.

The arbitration clause of a 1999 agreement provided that a single arbitrator would conduct the arbitration "under the *Arbitration Act, 1991* (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc." and that "Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim." In 2005, the applicant delivered a notice demanding arbitration but did not file a notice with the Institute. The respondent took the position that, in order to begin arbitration, the applicant had to deliver to the respondent and file with the Institute a written notice of request to arbitrate. It relied on arts. 11 and 13 of the current rules of the Institute (the "Current Rules"). The applicant brought an application for an order appointing an arbitrator. The application judge applied the rules that were in effect when the agreement was negotiated (the "1999 Rules") and found that the arbitration clause did not require a party commencing arbitration to file a notice of request to arbitrate with the Institute. The respondent appealed.

Held, the appeal should be allowed.

Per Blair J.A. (Goudge J.A. concurring): The decision under appeal was a final order because it finally determined the only issue raised in the application. Leave to appeal was not required.

The issues raised on appeal tended toward questions of law, attracting review on a standard of correctness. Even if it could be said that the standard was palpable and overriding error, the decision could not stand. The application judge failed to give meaning and effect to an important term of the arbitration clause, namely, the requirement that the arbitration was to be conducted under the "then-current" rules of the Institute. The "then-current" rules meant the Current Rules. The Current Rules call for an arbitration administered by the Institute and commenced by the filing of a notice of arbitration with the Institute. The application judge also erred in interpreting the phrase "to file" in the waiver provision as meaning "to deliver" or "to serve" the notice on the other side. The clear meaning of the waiver provision was that the notice was to be filed with the Institute. The application judge's error skewed his interpretation of the balance of the arbitration clause. Instead of leading him to conclude that the parties had agreed to an arbitration procedure to be administered by the Institute, his erroneous interpretation served to bolster his conclusion that the type of arbitration agreed to was not one that was to be administered by the Institute and that the clause was to be interpreted largely in light of the application of the 1999 Rules.

Per Gillese J.A. (dissenting): The application judge's interpretation of the arbitration clause was reviewable on a standard of reasonableness. In any event, his interpretation was not only reasonable, it was correct. The arbitration clause specified that the arbitration was to be conducted in accordance with the *Arbitration Act, 1991*, S.O. 1991, c. 17 and the then-current Institute rules. The agreement also provided that Ontario law governed. In 1999, when the agreement was executed, and at the time of the dispute in 2005, the *Arbitration Act, 1991* was the Ontario law that applied to the agreement. Section 23(1) of the Act provided that an arbitration may be commenced by service on the other parties of a notice demanding arbitration under the agreement. Thus, in 2005, the arbitration clause did not require a party commencing arbitration in respect of a dispute under the agreement to file a notice of request to arbitrate with the Institute. The waiver provision did not detract from that reasoning.

Buck Bros. Ltd. v. Frontenac Builders Ltd. (1994), 19 O.R. (3d) 97, [1994] O.J. No. 1592, 117 D.L.R. (4th) 373, 73 O.A.C. 298, 34 C.P.C. (3d) 76, 50 A.C.W.S. (3d) 533 (C.A.), **apld**

Housen v. Nikolaisen, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31, 2002 SCC 33, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, J.E. 2002-617, 219 Sask. R. 1, 10 C.C.L.T. (3d) 157, 30 M.P.L.R. (3d) 1, 112 A.C.W.S. (3d) 991; *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.*, [2008] M.J. No. 241, 2008 MBCA 87, 295 D.L.R. (4th) 146, 231 Man. R. (2d) 1, [2008] 9 W.W.R. 249, 46 B.L.R. (4th) 174, 168 A.C.W.S. (3d) 83; *Tamarack Capital Advisors Inc. v. SEM Holdings Ltd.*, [2006] B.C.J. No. 1657, 2006 BCCA 349, 229 B.C.A.C. 229, 54 B.C.L.R. (4th) 80, 33 C.P.C. (6th) 330, 150 A.C.W.S. (3d) 971, **consd**

Other cases referred to

942925 Alberta Ltd. v. Thompson, [2008] A.J. No. 194, 2008 ABCA 81, 432 A.R. 177, 165 A.C.W.S. (3d) 663, 47 B.L.R. (4th) 1; *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.*, [2008] B.C.J. No. 111, 2008 BCCA 35, 37 B.L.R. (4th) 241, 64 R.P.R. (4th) 165, 77 B.C.L.R. (4th) 154, 165 A.C.W.S. (3d) 533, 251 B.C.A.C. 92; *Alberta v. Western Irrigation District*, [2002] A.J. No. 1085, 2002 ABCA 200, 312 A.R. 358, 33 M.P.L.R. (3d) 62, 116 A.C.W.S. (3d) 673; *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723, [1999] O.J. No. 69, 116 O.A.C. 257, 44 C.L.R. (2d) 1, 85 A.C.W.S. (3d) 317 (C.A.); *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116, 144 D.L.R. (4th) 1, 209 N.R. 20, J.E. 97-632, 50 Admin. L.R. (2d) 199, 71 C.P.R. (3d) 417, 69 A.C.W.S. (3d) 586, REJB 1997-00386; *Casurina Limited Partnership v. Rio Algom Ltd.*, [2004] O.J. No. 177, 181 O.A.C. 19, 40 B.L.R. (3d) 112, 128 A.C.W.S. (3d) 491 (C.A.); *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. ¶1-1176 at 595, 1 A.C.W.S. (2d) 169; *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094, 228 D.L.R. (4th) 179, 172 O.A.C. 312, 35 B.L.R. (3d) 41, 35 C.P.C. (5th) 55, 123 A.C.W.S. (3d) 217 (C.A.); *Dancap Productions Inc. v. Key Brand Entertainment, Inc.*, [2009] O.J. No. 572, 2009 ONCA 135, 55 B.L.R. (4th) 1, 68 C.P.C. (6th) 34, 246 O.A.C. 226; *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, 2007 SCC 34, 284 D.L.R. (4th) 577, 366 N.R. 1, J.E. 2007-1426, 34 B.L.R. (4th) 155, 44

C.P.C. (6th) 205, 158 A.C.W.S. (3d) 870, EYB 2007-121973; *Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116, [2007] S.C.J. No. 3, 2007 SCC 3, 275 D.L.R. (4th) 577, 356 N.R. 211, [2007] 3 W.W.R. 1, J.E. 2007-213, 68 Alta. L.R. (4th) 1, 401 A.R. 329, 28 B.L.R. (4th) 169, 58 C.L.R. (3d) 4, 29 M.P.L.R. (4th) 1, 153 A.C.W.S. (3d) 583, EYB 2007-112458, affg [2005] A.J. No. 221, 2005 ABCA 104, [2005] 10 W.W.R. 1, 41 Alta. L.R. (4th) 205, 363 A.R. 201, 6 M.P.L.R. (4th) 25, 138 A.C.W.S. (3d) 271; *Dreco Energy Services Ltd. v. Wenzel*, [2008] A.J. No. 944, 2008 ABCA 290, [2008] 10 W.W.R. 445, 48 B.L.R. (4th) 43, 93 Alta. L.R. (4th) 260, 440 A.R. 273, 170 A.C.W.S. (3d) 182; *Dumbrell v. Regional Group of Companies Inc.* (2007), 85 O.R. (3d) 616, [2007] O.J. No. 298, 2007 ONCA 59, 279 D.L.R. (4th) 201, 220 O.A.C. 64, 25 B.L.R. (4th) 171, 55 C.C.E.L. (3d) 155, 154 A.C.W.S. (3d) 1097; *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, [1997] O.J. No. 3921, 103 O.A.C. 324, 40 M.P.L.R. (2d) 107, 74 A.C.W.S. (3d) 297 (C.A.); *Glimmer Resources Inc. v. Exall Resources Ltd.*, [1999] O.J. No. 1357, 119 O.A.C. 78, 87 A.C.W.S. (3d) 679 (C.A.); *Gottardo Properties (Dome) Inc. v. Toronto (City)*, [1998] O.J. No. 3048, 162 D.L.R. (4th) 574, 111 O.A.C. 272, 46 M.P.L.R. (2d) 310, 81 A.C.W.S. (3d) 409 (C.A.); *Greenfield Ethanol Inc. v. Suncor Energy Products Inc.*, [2007] O.J. No. 4660, 2007 ONCA 823, 162 A.C.W.S. (3d) 533 affg [2007] O.J. No. 3104, 159 A.C.W.S. (3d) 474 (S.C.J.); *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, 2005 SCC 25, 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, J.E. 2005-845, [2005] R.R.A. 275, 262 Sask. R. 1, 24 Admin. L.R. (4th) 1, 29 C.C.L.T. (3d) 1, 8 C.P.C. (6th) 199, 138 A.C.W.S. (3d) 852; *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] O.J. No. 380, [1932] 4 D.L.R. 580 (C.A.); *IWA — Forest Industry Pension Plan (Trustees of) v. Aspen Planers Ltd.*, [2006] B.C.J. No. 1523, 2006 BCCA 336, 228 B.C.A.C. 242, 56 B.C.L.R. (4th) 1, 54 C.C.P.B. 121, 26 E.T.R. (3d) 93, 151 A.C.W.S. (3d) 710; *MacDougall v. MacDougall*, [2005] O.J. No. 5171, 262 D.L.R. (4th) 120, 205 O.A.C. 216, 144 A.C.W.S. (3d) 103 (C.A.); *Palumbo v. Research Capital Corp.* (2005), 72 O.R. (3d) 241, [2004] O.J. No. 3633, 190 O.A.C. 83, 35 C.C.E.L. (3d) 1, [2005] CLLC ¶210-003, 133 A.C.W.S. (3d) 462 (C.A.); *Petty v. Telus Corp.*, [2002] B.C.J. No. 376, 2002 BCCA 135, 164 B.C.A.C. 152, 33 C.C.P.B. 111, 111 A.C.W.S. (3d) 1143; *Robichaud, Williamson, Theriault and Johnstone v. Pharmacie Acadienne de Beresford Ltée*, [2008] N.B.J. No. 45, 2008 NBCA 12, 328 N.B.R. (2d) 205, [2008] I.L.R. I-4680, 290 D.L.R. (4th) 294, 164 A.C.W.S. (3d) 85; *Ryan v. Sun Life Assurance Co. of Canada*, [2005] N.S.J. No. 24, 2005 NSCA 12, 249 D.L.R. (4th) 628, 230 N.S.R. (2d) 132, 18 C.C.L.I. (4th) 204, 136 A.C.W.S. (3d) 744; *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (S.C.J.); *United Gulf Developments Ltd. v. Iskandar*, [2008] N.S.J. No. 317, 2008 NSCA 71, 69 R.P.R. (4th) 176, 168 A.C.W.S. (3d) 309, 267 N.S.R. (2d) 318; *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083, 2007 ONCA 205, 222 O.A.C. 102, 29 B.L.R. (4th) 312, 56 R.P.R. (4th) 163, 156 A.C.W.S. (3d) 95; *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201, 44 B.L.R. (3d) 165, 132 A.C.W.S. (3d) 1046 (C.A.); *White v. E.B.F. Manufacturing Ltd.*, [2005] N.S.J. No. 518, 2005 NSCA 167, 239 N.S.R. (2d) 270, 12 B.L.R. (4th) 1, 144 A.C.W.S. (3d) 1029; *Woolcock v. Bushert*, [2004] O.J. No. 4498, 246 D.L.R. (4th) 139, 192 O.A.C. 16, 50 B.L.R. (3d) 85, 36 C.C.E.L. (3d) 211, 3 C.P.C. (6th) 25, 134 A.C.W.S. (3d) 756 (C.A.)

Statutes referred to

Arbitration Act, 1991, S.O. 1991, c. 17, ss. 2(1), 6, 23, (1)

APPEAL from the judgment of Wilton-Siegel J., [2008] O.J. No. 1633, 71 C.L.R. (3d) 205 (S.C.J.) interpreting an arbitration clause.

Matthew P. Gottlieb and *James D. Bunting*, for appellant.
Neal J. Smitheman and *Antonio Di Domenico*, for respondent.

BLAIR J.A. (GOUDGE J.A. concurring): —

I. *Background*

[1] Bell and The Plan Group entered into an Alliance Agreement on February 1, 1999, concerning joint projects for the delivery of services to customers on cabling projects in the Greater Toronto Region. The Agreement contained a two-step dispute resolution process, found in s. 22. The parties were first to engage in good faith discussions using "their commercially reasonable efforts to settle the dispute" (s. 22.1). Thereafter, if those discussions failed, the parties were to resort to arbitration (s. 22.2).

[2] Section 22.2, the arbitration clause — the interpretation of which is at the heart of this appeal — reads as follows:

> Bell and [The Plan Group] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 21.1 hereof.[1] *A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [The Plan Group] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered into any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.*[2]

(Emphasis added)

[3] The second sentence of the arbitration clause (which I shall refer to as the "conduct of arbitration provision") stipulates that the arbitration will be conducted under the *Arbitration Act, 1991*, S.O. 1991, c. 17 "and the then-current rules" of the Institute. In this regard there are two sets of rules that were considered by the application judge — those that were in effect at the time the Agreement was negotiated (the "1999 Rules") and those that were in effect at the time the dispute arose between the parties (the "Current Rules").

1. This appears to be a mistake. The reference should be to s. 22.1.

2. I have italicized the two provisions in the Agreement that are central to the appeal.

[4] In 2005, a dispute arose between Bell and The Plan Group in relation to certain work performed under the Agreement for the Greater Toronto Airport Authority. Invoices exceeding $40 million in value were at the heart of the dispute. The differences could not be resolved through "commercially reasonable efforts to settle". Accordingly, on August 26, 2005, The Plan Group delivered to Bell a draft notice demanding arbitration. On December 14, 2005, it delivered a final notice demanding arbitration. No notice to arbitrate the dispute was — nor has one ever been — filed with the Institute, however. The last sentence of the arbitration clause (which I will refer to as the "waiver provision") specifies that a failure to file a notice of arbitration in time will constitute an irrevocable waiver of the claim.

II. *The Positions of the Parties*

[5] Bell has repeatedly taken the position that, in order to commence the arbitration, The Plan Group must deliver to Bell and file with the Institute a written notice of request to arbitrate. This position is based upon s. 22.2 of the Agreement and the requirements of arts. 11 and 13 of the Current Rules. Article 11 provides for the submission of disputes under agreements to arbitration "by delivering a written Notice of Request to Arbitrate to the respondent". Article 13 specifies that "The arbitration *is deemed to have commenced* when a Notice of Request to Arbitrate . . . *has been filed with the Institute* and the initial filing fee has been paid" (emphasis added). Bell also relies on art. 5, which says that, "By agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute," and the stipulation in art. 3 that, "To the extent that the Rules conflict with the Act, the provisions of the Rules shall apply."

[6] The Plan Group contends, on the other hand, that no notice of arbitration need be filed with the Institute for the arbitration to be commenced. It submits that none of the Rules of the Institute apply to govern the initiation or commencement of the arbitration and that the Rules are only engaged after the arbitrator has been chosen and only to the extent that the Institute's rules pertain to the procedural conduct of the arbitration. The arbitration may be commenced in any way permissible under the Act, The Plan Group argues, and it has complied with s. 23(1)3 of the Act by delivering provisional and final notices demanding arbitration upon Bell.

[7] Underlying all of these arguments is the real issue between the parties. It is Bell's position that as a result of The Plan Group's failure to file a notice of arbitration with the Institute, its complaints are time-barred by virtue of the closing sentence

of s. 22.2 cited above. For reasons that are not entirely clear on the record, this issue has not been addressed directly. Instead, it has been equated by the parties — and by the application judge — with the issue of how the arbitration is to be commenced.

III. *Law and Analysis*

Interlocutory / final order

[8] The Plan Group argues that the judgment below is interlocutory in nature and, therefore, that Bell requires leave to appeal, which it has not sought. I disagree. The decision is a final order because it finally determined the only issue raised in the application before the application judge.

[9] The Plan Group's theory is that the practical and legal result of the decision is to confirm that an arbitration proceeding has already been commenced, given the declaration that the filing of a notice of arbitration was not necessary to commence the arbitration. The decision was therefore an intervention by the court to assist in the conduct of the arbitration in order to ensure that the arbitration was being conducted in accordance with the arbitration clause in the Agreement, as contemplated by s. 6 of the *Arbitration Act, 1991*. So far as is relevant, s. 6 provides:

> *Court intervention limited*
>
> 6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. To assist the conducting of arbitrations.
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

[10] The Plan Group accordingly submits that the decision below was simply interlocutory in nature, within the context of an ongoing arbitration proceeding; it did not finally determine any substantive matter in the arbitration.

[11] There is no merit in this argument. It misconceives the nature and purpose of the interlocutory/final order dichotomy, which is to act as a gatekeeper for appeals to a higher court in the particular proceeding before the courts. An application, like an action, is a free-standing proceeding.

[12] The classic explanation of whether an order is final or interlocutory is that of Middleton J.A. in *Hendrickson v. Kallio*, [1932] O.R. 675, [1932] O.J. No. 380 (C.A.), at p. 678 O.R.:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties — the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by

> the application,[3] but it is interlocutory if the merits *of the case* remain to be determined.

(Emphasis added)

[13] Here, the merits *of the case* — *i.e.*, of the application proceeding before the court — have been determined.

[14] In my view, the decision of this court in *Buck Bros. Ltd. v. Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97, [1994] O.J. No. 1592 (C.A.) is determinative of this issue. There, Morden A.C.J.O. made it quite clear that ancillary proceedings are not relevant in determining whether an order of a judge is final or interlocutory.

[15] In *Buck Bros.*, the application judge ordered that whether a condition precedent for arbitration had been met should be determined, not by the court, but by a panel of arbitrators appointed in accordance with the arbitration agreement. An appeal was launched, but the responding party moved to have the appeal quashed. The argument was that the order under appeal was interlocutory, because the real subject-matter of the litigation between the parties was still to be determined on the merits in the arbitration, and therefore the appeal was not properly before the court.

[16] Morden A.C.J.O rejected this argument. At p. 100 O.R., after citing the passage from *Hendrickson v. Kallio* set out above, he said:

> In one sense, it can be said that the order in question does not determine "the real matter in dispute between the parties" (which is the right of the moving parties to be paid fair and equitable consideration by the responding parties and, if so, its amount, or, something less than this, whether the condition precedent to commencing an arbitration proceeding has been met). I do not think, however, that, in the circumstances, the order is interlocutory. I read the passage from *Hendrickson v. Kallio* as referring to "the real matter in dispute between the parties" *in the proceeding which is before the court* and not in some other proceeding which may, or may not, then be in existence. In accordance with this interpretation, I read "the litigation" in "the very subject matter of the litigation" as referring to the proceeding in which the order in question is made. Similarly, I read "the case" in "if the merits of the case remain to be determined" as also referring to the proceeding in which the order is made.

(Emphasis in original)

[17] Contrary to the submission of The Plan Group, the decision of the British Columbia Court of Appeal in *Tamarack Capital Advisors Inc. v. SEM Holdings Ltd.*, [2006] B.C.J. No. 1657, 54 B.C.L.R. (4th) 80 (C.A.) does not conflict with *Buck Bros*. In

---

3 "Application" here is used in the sense of "motion". See *Buck Bros., infra*, at p. 100 O.R.

Tamarack, the proposed appeal was from an order dismissing a motion for a stay of the action. It was not a final order because it did not determine a substantive matter in the litigation; it had merely refused to stay the proceeding.

[18] I conclude that the judgment of Wilton-Siegel J. here is a final order. Leave to appeal from it is not necessary.

Standard of review

[19] The parties disagree on the standard of review applicable to the application judge's interpretation of the Agreement. Bell submits that the interpretation of the Agreement is a question of law and therefore is reviewable on a standard of correctness. The Plan Group argues that the interpretation of the Agreement involves questions of mixed fact and law, and that this court cannot intervene absent palpable and overriding error.

[20] The historical view is that the interpretation of a contract is a question of law and reviewable on the standard of correctness. However, the standard of appellate review in matters of contractual interpretation is not as straightforward as it once appeared to be, and there has been considerable debate about it in the jurisprudence since the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31.

[21] *Housen* is considered to be the leading authority on the standard of appellate review, directing that the applicable standard of review will depend upon the nature of the question — whether the alleged error is one of law, mixed fact and law, or fact. But, it is fair to say that appellate courts across the country have sent mixed signals about the standard of review in contract interpretation cases in the post-*Housen* era. In British Columbia, the general approach seems to be to treat contractual interpretation as a matter of mixed fact and law attracting review on a deferential basis.[4] In Alberta, on the other hand, the opposite appears to be the case. The interpretation of contracts is considered to be a question of law, giving rise to a standard of correctness.[5] New Brunswick and Nova Scotia appear to hold to the

---

4 See, *e.g.*, *Petty v. Telus Corp.*, [2002] B.C.J. No. 376, 164 B.C.A.C. 152 (C.A.); *IWA — Forest Industry Pension Plan (Trustees of) v. Aspen Planers Ltd.*, [2006] B.C.J. No. 1523, 56 B.C.L.R. (4th) 1 (C.A.); *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.*, [2008] B.C.J. No. 111, 77 B.C.L.R. (4th) 154 (C.A.).

5 See, *e.g.*, *Double N Earthmovers Ltd. v. Edmonton (City)*, [2005] A.J. No. 221, 363 A.R. 201 (C.A.), affd [2007] 1 S.C.R. 116, [2007] S.C.J. No. 3; *Alberta v. Western Irrigation District*, [2002] A.J. No. 1085, 312 A.R. 358 (C.A.); *Dreco Energy Services Ltd. v. Wenzel*, [2008] A.J. No. 944, 440 A.R. 273 (C.A.); *942925 Alberta Ltd. v. Thompson*, [2008] A.J. No. 194, 432 A.R. 177 (C.A.).

traditional view that the standard of review in contractual interpretation is correctness, while recognizing that a trial judge's findings of fact and drawing of factual inferences should be accorded deference.[6]

[22] Steel J.A. addressed the current status of this dialogue in *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.*, [2008] M.J. No. 241, 295 D.L.R. (4th) 146 (C.A.), at paras. 34-36, where she said:

> Until recently, interpretation of a contract was considered a question of law reviewable by an appellate court on a standard of correctness.
>
> At present, however, the standard of appellate review will depend on the nature of the question, whether it is a question of law, a question of fact or a question of mixed fact and law. *A question of law attracts the correctness standard, while a palpable and overriding error must be found with respect to a question of fact or mixed fact and law.* See *Housen*. . .
>
> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law.

(Citations omitted; emphasis added)

[23] I generally agree with Steel J.A.'s summary, except for her categorical statement — purportedly reflecting *Housen* — suggesting that questions of mixed fact and law always attract the palpable and overriding error standard. In my view, *Housen* does not stand for such a definitive statement, nor does the jurisprudence in this court.

[24] It must be remembered, particularly when considering the appropriate standard of review for questions of mixed fact and law, that the court in *Housen* did not tackle that subject in the context of contractual interpretation. It did so *clearly and explicitly* in the context of a negligence action, an entirely different brand of case.

[25] The distinction between these two types of cases is meaningful for these purposes, it seems to me. Whereas the application

---

6 See, *e.g.*, *Robichaud, Williamson, Theriault and Johnstone v. Pharmacie Acadienne de Beresford Ltée*, [2008] N.B.J. No. 45, 328 N.B.R. (2d) 205 (C.A.), at para. 16; *Ryan v. Sun Life Assurance Co. of Canada*, [2005] N.S.J. No. 24, 230 N.S.R. (2d) 132 (C.A.), at para. 15; *White v. E.B.F. Manufacturing Ltd.*, [2005] N.S.J. No. 518, 239 N.S.R. (2d) 270 (C.A.), at para. 16; *United Gulf Developments Ltd. v. Iskandar*, [2008] N.S.J. No. 317, 267 N.S.R. (2d) 318 (C.A.), at para. 5.

of legal principles to the facts in a negligence action is very much a fact-driven exercise, the interpretation of a contract — leaving aside the factual issues that may underlie the task — is not; it is very much a legal exercise. In my view, Lang J.A. of this court accurately summarized the effect of *Housen* in *MacDougall v. MacDougall*, [2005] O.J. No. 5171, 262 D.L.R. (4th) 120 (C.A.), at para. 25, when she said:

> The leading authority on standard of review is *Housen v. Nikolaisen*. *Housen* does not address directly the standard of review for the interpretation of a contract. Rather, it canvasses the standard of review in a case involving the application of the law of negligence to findings of fact. *In that context*, it distinguishes among questions of fact, questions of law, and questions of mixed fact and law concluding that questions of fact are reviewed on the standard of palpable and overriding error and questions of law on the standard of correctness. Where the question of fact and of law are inextricably intertwined so that the question is one of mixed fact and law, the trial judge's finding is entitled to deference.

(Citations omitted; emphasis added)

[26] In determining the proper standard of review, however, it is important to keep in mind the distinction between the nature of the question addressed by the trial court (*i.e.*, a question of fact, a question of law, or a question of mixed fact and law) and the standard of appellant review of the trial court's disposition of that question. The distinction does not matter if the trial court was answering a question of fact (where the standard of appellant review is palpable and overriding error) or a question of law (where it is correctness). But the distinction *is* important where the question addressed was one of mixed fact and law. To say that a matter raises a question of mixed fact and law, by itself, does not mean that the standard of appellate review is necessarily one of palpable and overriding error. As *Housen* tells us, at para. 36, "[m]atters of mixed fact and law lie along a spectrum". Thus, where the question at issue is determined to be one of mixed fact and law, the appellate court must take a further step and go on to locate the precise question at the proper point on the *Housen* spectrum in order to determine the applicable standard of appellate review.

[27] Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined — where the facts dominate, as it were — it falls more towards the factual end of the spectrum, and significant deference must be accorded. Contractual interpretation, in my opinion, is generally the type of case that falls within the former category, negligence one that generally falls into the latter.

[28] In my view, this distinction between the nature of the question to be determined and the standard of appellate review to be applied to that determination can help in clarifying a number of cases that might otherwise be misunderstood. For example, in *Casurina Limited Partnership v. Rio Algom Ltd.*, [2004] O.J. No. 177, 181 O.A.C. 19 (C.A.), at para. 34, Feldman J.A. concluded that "The construction of a written instrument is a question of mixed fact and law." She did not say, however — nor should she be understood to have said, I think — that a deferential standard of appellate review must *always* be applied to the interpretation of a contract. Indeed, in *Palumbo v. Research Capital Corp.* (2005), 72 O.R. (3d) 241, [2004] O.J. No. 3633 (C.A.), Laskin J.A. observed, at para. 32, that "The standard of review of the interpretation of a contract provision ordinarily is correctness".

[29] The palpable and overriding error standard of review, it seems to me, is designed to afford deference to trial judges in their essential fact-finding functions, including the drawing of inferences from the facts and the determination of issues where law and facts are inextricably intermixed. We leave it to trial judges to sort these matters out with good reason. They have seen and heard the witnesses and are attuned to the dynamics of the trial. In *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), at para. 292, this court articulated the policy reasons for giving such deference to trial judges:

> The "palpable and overriding" standard demands strong appellate deference to findings of fact made at trial. Some regard the standard as neutering the appellate process and precluding the careful second hard look at the facts that justice sometimes demands. This viewpoint is tenable only if facts found on appeal are more likely to be accurate than those determinations made at trial. If findings of fact were to be made on appeal they might be different from those made at trial. Most cases that go through trial and onto appeal will involve evidence open to more than one interpretation. Merely because an appellate court might view the evidence differently from the trial judge and make different findings is not, however, any basis for concluding that the appellate court's findings will be more accurate and its result more consistent with the justice of the particular case than the result achieved at trial.

[30] The exercise of interpreting a contract is not essentially a fact-finding exercise, however. As the authorities cited above have noted, there may be questions involving the determination of the factual context in which the contract was negotiated, or considerations of extrinsic evidence, that evoke the fact-finding functions. Those decisions are to be addressed from the palpable and overriding error perspective. In substance, though, the exercise of interpreting a contract is a legal exercise, calling upon the

learning and training that judges and lawyers acquire over years of experience. Apart from the truly factual aspects that may underlie the task, trial judges have no particular advantage over appellate judges in the art of contractual interpretation.

[31] In my view, certainty in contract is an important policy value underlying the construction of contracts. This factor alone is sufficient to push the standard of review in such cases towards correctness and away from deference. At the very least, contractual interpretation is an exercise that generally falls much more towards the error of law end of the *Housen* spectrum, once the factual issues referred to above have been resolved or if — as is the case here — they are not in dispute. The Supreme Court of Canada has yet to consider the standard of review in contractual interpretation cases post-*Housen*. I am not entirely persuaded that it makes sense to take one type of analysis (the *Housen* analysis) that is designed to discourage appellate courts from re-trying *the factual issues* in cases and apply its analytical paradigm (the facts/mixed fact and law/law spectrum) to what is essentially *a legal exercise*.

[32] In any case, I am satisfied that the decision of the application judge must be set aside in this case, whether the standard of review is properly one of correctness, or palpable and overriding error.

[33] In my view, the issues raised on appeal tend toward questions of law, attracting review by this court on a standard of correctness. There were no underlying evidentiary or factual issues of a contested nature that the application judge was required to resolve. The arbitration clause was to be interpreted in light of its own wording in the context of the Agreement as a whole and having regard to the 1999 Rules and the Current Rules. There was no dispute as to what these Rules were. The application judge was in no better position than we are to ascertain the meaning of the arbitration clause in those circumstances.

[34] Even if it can be said that the standard is palpable and overriding error, the decision cannot stand. In *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, at para. 110, the Supreme Court of Canada observed that "clearly wrong" and "unreasonable" are the "functional equivalents" of palpable and overriding error. Respectfully, in my view, the arbitration clause cannot reasonably bear the interpretation endorsed by the application judge.

[35] The errors in the application judge's reasoning manifest themselves particularly in two areas: (i) in his failure to give meaning and effect to an important term of the arbitration clause, namely, the requirement in the conduct of arbitration

provision that the arbitration was to be conducted "under . . . the then-current rules [of the Institute]"; and (ii) in his interpretation of the phrase "to file" in the waiver provision as "to deliver" or "to serve" the notice upon Bell, which cannot be sustained.

[36] I turn briefly now to a review of the relevant principles of contractual interpretation before resuming the analysis of the errors in the application judge's reasons, and the interpretation of the arbitration clause itself.

Principles of contractual interpretation

[37] Little, if anything is to be found in the application judge's reasons about the principles of interpretation he invoked. Broadly speaking, however — as this court noted in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007), 85 O.R. (3d) 254, [2007] O.J. No. 1083 (C.A.), at para. 24 — a commercial contract is to be interpreted

> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.

(Footnotes omitted)

[38] In addition, as Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.*, [1999] O.J. No. 1357, 119 O.A.C. 78 (C.A.), at para. 17, each word in an agreement is not to be "placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement". Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that — while apparently logical at one level — does not make sense given the overall wording of the document and the relationship of the parties. Yet that is precisely the effect of accepting The Plan Group's interpretation of the word "conduct" in the arbitration clause and of minimizing or eliminating the import of the words "the then-current rules [of the Institute]".

Interpreting the arbitration clause

[39] For ease of reference, I set out the text of s. 22.2 of the Agreement — the arbitration clause — again here:

> Bell and [The Plan Group] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 21.1 hereof.[7] *A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [The Plan Group] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered into any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.*

(Emphasis added)

[40] I understand The Plan Group's argument to be the following. Arbitrations are governed by the provisions of the *Arbitration Act, 1991*, except to the extent that the parties have contracted out of those provisions, expressly or by implication. With that proposition, I do not quarrel. The Plan Group goes on to submit, however, that they and Bell have not contracted out of the provisions of the Act with respect to the commencement of arbitration proceedings; instead, they agreed only that the arbitrator, once appointed by the parties, would "conduct" the arbitration by applying only the Institute's procedural rules, that is, that portion of the Institute rules dealing with the procedural "conduct" of the arbitration by the arbitrator. The parts of the Institute's rules relating to commencement of the arbitration, the administration of the arbitration generally, and anything other than procedural conduct, have no application. Accordingly, The Plan Group properly commenced the arbitration, they say, by delivering a preliminary and final notice of request to arbitrate to Bell in accordance with s. 23(1)3 of the Act which permits arbitration to be commenced in that fashion.

[41] The application judge accepted this argument. Respectfully, I do not think it is tenable. As I have mentioned, his interpretation fails to give meaning to an important term in the arbitration clause specifying that the arbitration would be conducted under the "then-current rules" of the Institute, and

---

7 This appears to be a mistake. The reference should be to s. 22.1.

further, assigned an unsustainable interpretation to the word "file" in the waiver portion of the clause.

Failure to give effect to the phrase "the then-current rules [of the Institute]"

[42] The application judge did not apply the Current Rules. His interpretation failed to give meaning and effect to a critical term of the parties' agreement calling for conduct of the arbitration under "the then-current rules [of the Institute]". Early in his reasons, at para. 19, the application judge recognized that, "[v]iewed on its own, the second sentence in the Arbitration Clause constitutes a straight-forward agreement to comply with the provisions of both the Act and *the rules of the Institute from time to time*" (emphasis added). He added that he "[saw] no reason not to give effect to the express wording of this provision". That is not what he did, however. In this respect, he erred in law by misapplying, or failing to apply, the principle that a contract is to be interpreted in a manner that gives meaning to all of its terms and avoids an interpretation that renders one or more of its terms ineffective.

(i) *The application judge's focus on "conceptual approaches"*

[43] Some background is necessary to understand how the application judge arrived at this result. The error stems in large part, in my view, from his undue focus on the parties' "conceptual approaches" to the arbitration rather than on the wording of the arbitration clause itself. Indeed, he was persuaded that "*The issue on this application [turned] on* which of such conceptual approaches is applicable" (at para. 15; emphasis added). Instead of asking himself what the clear wording of the conduct of arbitration provision meant — viewed in the context of the arbitration clause and the Agreement as a whole, and the Institute rules — he embarked upon a search for the proper "conceptual approach" to the type of arbitration agreed to by the parties.

[44] The application judge's approach led him to ground his interpretation on a set of Institute rules (the 1999 Rules) that had no direct application and, even to the extent they provide "context" to the interpretive exercise, they did not support the interpretation he adopted. That error reinforced the narrow interpretation of the arbitration clause he embraced, premised on his erroneous conclusion as to the nature of the arbitration the parties had agreed to. This, in turn, led to his refusal to give effect to the set of Institute rules that were applicable (the Current Rules) because — in his view — they represented a "fundamental

change" from that flawed view of the nature of the arbitration process agreed to.

[45] An understanding of the two concepts put forward is therefore important to provide insight into his reasoning process. The two different conceptual approaches were summarized by the application judge at paras. 16 and 17 of his reasons:

> Plan says that the parties did not agree that the Institute would administer any arbitration under the Agreement. It submits that the parties agreed only to be bound by the procedural rules of the Institute (whether the 1999 Rules or the Current Rules) that apply in the conduct of an arbitration after the appointment of an arbitrator, and only to the extent that the arbitrator chooses to apply them. Accordingly, Plan submits that the rules of the Institute do not apply to determine the method of initiating arbitration. It also argues that the Arbitration Clause permits an arbitration to be commenced by any means recognized under law, including delivery of a notice demanding arbitration, using the language of paragraph 23(1)3 of the Act.
>
> Bell argues that the parties agreed that (1) the Institute is to administer any arbitration under the Agreement; and (2) any such arbitration must be commenced by filing a Notice to Arbitrate with the Institute. Bell relies on the reference in the second sentence of the Arbitration Clause to the "then-current rules" of the Institute, and the substitution of the Current Rules for the 1999 Rules including, in particular, section 5 of the Current Rules. Bell says that, collectively, these provisions have the result that the parties are bound by the Current Rules of the Institute in their entirety including, in particular, the provisions respecting commencement of an arbitration.

[46] The application judge adopted The Plan Group's conceptual approach.

[47] I do not mean to suggest that the different conceptual approaches to the arbitration clause are meaningless. They shaped a good part of the debate between the parties. However, the meaning of a document is not determined by the conceptual approaches taken by the parties to it; it is the meaning of their written document that sheds light on their chosen conceptual approach. Here, the application judge tackled the interpretative exercise in the reverse. He ascertained what he believed to be the proper "conceptual approach" to the arbitration clause by relying on a set of Institute rules that had no application (the 1999 Rules). He then used that conceptual approach to interpret the arbitration clause in a way that would justify his refusal to give effect to the set of Institute rules that did apply (the Current Rules).

[48] But, as outlined below, the structure of the arbitration clause read as a whole, and in the context of the 1999 Rules and the Current Rules, simply does not support the conceptual approach and interpretation advanced by The Plan Group and adopted by the application judge, in my opinion.

(ii) *The structure of the arbitration clause*

[49] The structure of the arbitration clause and the sequence in which it evolves are themselves of some significance. In fact, the parties outline their concept of the arbitration at the very outset of the clause. They do not agree that they will arbitrate their disputes by first appointing their arbitrator and then leaving it to the arbitrator to "conduct" the procedural aspects of the arbitration and the hearing in accordance with the procedural portion of the rules of the Institute. Rather, in the first two sentences of the arbitration clause, they agree (a) to resolve their disputes by arbitration, (b) to resort to a single arbitrator to do so, and (c) to have the arbitration conducted by the single arbitrator "under the *Arbitration Act, 1991* (Ontario) and *the then-current rules* [of the Institute]". That is their "conceptual approach" to their dispute-resolution mechanism: a single-decision-maker arbitration held under the Act and the rules of the Institute in effect at the time the dispute arises.

[50] The parties *then* turn their attention to a number of specifics about the arbitration process. They will themselves select the arbitrator from a panel of knowledgeable persons (contrary to the application judge's reasoning, this does "carve out" a right that would otherwise be governed by the rules of the Institute). The arbitrator's decision will be final and binding, and enforceable. The arbitration will take place in Toronto. The arbitrator will not be empowered to award punitive damages. Finally, the parties create what is in effect a limitation period for the bringing of claims which is tied to the filing of a notice of arbitration.

[51] I see nothing in the structure or development of the arbitration clause itself to suggest that the applicable rules of the Institute are to be limited to procedural rules to be applied by the arbitrator. Indeed, had the parties intended that to be the case, they would have said "under the then-current rules [of the Institute] *pertaining to the procedural conduct of the arbitration and the hearing by the arbitrator*". They did not do so.

(iii) *The arbitration clause in context: The Agreement, the 1999 Rules and the Current Rules*

[52] This view is buttressed by the language of the arbitration clause in the context of the Agreement and the rules of the Institute in effect at the time the Agreement was negotiated (the 1999 Rules).

[53] A major flaw in The Plan Group's reasoning is to assume — as the application judge appears to have concluded — that the parties agreed to be bound (i) by a particular bundle of rules

that could conveniently be amputated from the 1999 Rules (Part IV — Conduct of the Arbitration) and (ii) by any future changes to that specific bundle of rules only. That is not the case, however. The 1999 Rules may be of some assistance as an interpretive aid — they provide part of the context or factual matrix existing at the time the Agreement was negotiated — but they do not apply to this arbitration directly, nor did the parties ever agree that they would apply to any arbitration other than one that happened to be commenced during the period when they were in force. The parties did not agree in the arbitration clause to be bound by any particular set of rules. They agreed only that that the arbitration would be conducted under whatever set of Institute rules were operative at the time the arbitration in question took place.

[54] The Agreement itself was for a five-year term which was renewable.[8] The parties had therefore agreed to a long-term contractual relationship. They clearly contemplated that disputes arising during that relationship would be resolved through arbitration conducted under the rules of the Institute and that those rules could change from time to time during the term of the Agreement.

[55] Moreover — to the extent they may provide some guidance — the 1999 Rules do not support the amputation approach to the "conduct" of the arbitration or the lack of involvement of the Institute. The application judge drew comfort from the fact that the 1999 Rules are conveniently divided in four Parts: Part I — General; Part II — Commencing the Arbitration; Part III — The Arbitrators; and Part IV — Conduct of the Arbitration. He found reinforcement for The Plan Group's conceptual approach to the arbitration in these separate divisions of those Rules and, in particular, Part IV — Conduct of the Arbitration. The logic does not work, however.

[56] First, it would be purely fortuitous if successor Institute rules continued to be similarly structured and divided. While it happened that the 1999 Rules were conveniently divided into parts and that Part IV was conveniently entitled "Conduct of the Arbitration", the Current Rules are not divided in that fashion and there is no obvious successor to Part IV. The Current Rules consist of 49 individual rules and two schedules. How the application judge understood the parties would determine what were revisions to or changes in the procedural rules in Part IV in such circumstances is unknown.

---

8 That it was ultimately not renewed is immaterial.

[57] Second, the view that rules relating to the conduct of the arbitration can be separated into those that are "procedural" and those that are not makes no sense. Rules relating to the conduct of arbitrations are in essence procedural in nature. They are not "substantive". They provide for the process or procedure to be followed by the parties in having the substantive nature of their dispute resolved by the arbitrator. Indeed, the set up of the 1999 Rules themselves is incompatible with the notion that only Part IV relates to "the conduct of arbitrations" (in spite of the title to that Part). The 1999 Rules are entitled "Rules of Procedure for the Conduct of Arbitrations". In art. 1(d), they define themselves — taken in their entirety — as meaning "these *Rules for the conduct of arbitrations of the Institute*" (emphasis added). Thus, when the parties agreed that the arbitration would be conducted "under . . . the then-current rules [of the Institute]", they were agreeing — so long as the 1999 Rules remained in effect, in any event — that it would be conducted under "these Rules for the conduct of arbitrations of the Institute", which, as worded, necessarily refers to the Rules as a whole.

[58] Third, both the 1999 Rules and the Current Rules provide for the arbitration to be administered by the Institute. Rule 5 of the Current Rules expressly states that by agreeing to arbitration under the Rules, the parties agree that the arbitration shall be administered by the Institute. Article 3.1 of the 1999 Rules likewise stipulates that where parties have provided for arbitration under the auspices of the Institute, the arbitration is to take place in accordance with the rules in effect at the date of commencement of the arbitration. In both instances, then, once the parties agree to conduct the arbitration under the rules of the Institute, they accept that the arbitration will be administered by the Institute. This is consistent with the jurisprudence indicating that where parties agree to use the rules of an institutional arbitration body, they cannot cherry pick the rules they wish to apply and ignore the rest; they are bound to follow all of the rules: see, *e.g.*, *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (S.C.J.).

[59] In short, neither the 1999 Rules nor the Current Rules are amenable to be adopted by parties intending to administer their arbitration privately. Had the parties wished to adopt an arbitration mechanism that borrowed already-existing arbitration rules but maintained a privately administered arbitration, they could easily have done so, for example, by resorting to the UNCITRAL Arbitration Rules or the CPR Institute for Conflict Prevention & Resolution — Non-Administered Arbitration Rules.

Both those regimes permit such an opt-in or opt-out. The rules of the Institute do not.

[60] Fourth, even the opening provision in Part IV of the 1999 Rules envisages the conduct of the arbitration "in all respects" — that is, not just what is touched on in Part IV — to be governed by the Act, the Rules and the parties' agreements. Article 10.1 states:

> Subject to Article 2.1, the arbitration shall be *conducted in all respects* in accordance with the provision of the *Arbitration Act*, these Rules, the Arbitration Agreements and any other agreement of the parties applicable to the conduct of the proceedings.

(Emphasis added)

[61] Finally, the provisions of Part IV clearly contemplate the involvement of the Institute in overseeing the arbitration — again, refuting the notion that the arbitration was to be a "non-administered" arbitration with the parties borrowing only the procedural-conduct related rules of the Institute for the purposes of their own arbitration. Notices, statements and written communications may be sent to the other parties "at the address set out on the records of the Institute" (art. 11.1). The parties are jointly and severally liable for costs and expenses of the arbitration, "including the administrative fees of the Institute" (12.1). The arbitrator or the Institute "may request supplementary deposits for the costs and expenses" (12.2). After the completion of the arbitration and delivery of the award, "the Institute shall provide an accounting" (12.3). Significantly, "the Institute", as well as the arbitrator, "may extend or abridge any time prescribed by these Rules" (14.2). Finally, the Institute's Schedule of Fees completes Part IV.

[62] With respect, I am at a loss to understand how the framework of the 1999 Rules — even if Part IV of those Rules alone is to be considered — can be said to support the non-administrated arbitration interpretation adopted by the application judge. But that is the interpretation that led to his failure to apply the Current Rules.

[63] After a lengthy analysis of the arbitration clause in light of the 1999 Rules, the application judge then went on to consider whether the legal result would be any different with regard to the Current Rules. He answered that question in the negative because he concluded that the application of the Current Rules would result in a fundamental change from Plan Group's "conceptual approach", which he had accepted as applicable following his analysis of the impact of the 1999 Rules. At paras. 21, 56 and 59 of his reasons, he said:

> For the reasons set out below, I find that the Arbitration Clause did not mandate delivery and filing of a Notice of Arbitration in compliance with sections 4.1 and 4.3 of the 1999 Rules in order to initiate an arbitration. Instead, I find that the Arbitration Clause contemplated that after commencement of the arbitration and the appointment of the arbitrator, the arbitrator would apply the 1999 Rules during the proceedings.
>
> . . . . .
>
> Moreover, even if they had agreed to the possibility of a change of some nature to the fundamental conceptual approach in the Arbitration Clause by means of a revision of the 1999 Rules, there is no basis for concluding that the parties agreed to the involvement of the Institute in the administration of any arbitration under the Agreement, which is implied by Bell's position.
>
> . . . . .
>
> In summary, I do not think that the Court can find that the parties agreed to be bound by any revisions to, or replacement of, the 1999 Rules beyond revisions to, or changes in, the procedural rules in Part IV of the 1999 Rules in the absence of either (1) wording in the Arbitration Clause that is more extensive than the phrase relied upon by Bell or (2) other contextual evidence, both of which are lacking in this proceeding.

[64] For the reasons I have articulated, these conclusions are unsustainable.

(iv) *The effect of the term "the then-current rules" of the Institute*

[65] In the end, the application judge refused to apply the Current Rules. In doing so, he ignored, and failed to give effect to, the clear and unequivocal language of the arbitration clause stipulating that the arbitration was to be conducted under "the then-current rules" of the Institute. The "then-current rules" cannot mean anything other that the Current Rules in the context of this arbitration. The Current Rules call for an arbitration administered by the Institute and commenced by the filing of a notice of arbitration with the Institute.

[66] Four provisions of the Current Rules, in particular, are important for determining whether commencement of arbitration under the Agreement requires a party to file a request to arbitrate with the Institute. They are:

> 3. (a) The Rules shall apply where the parties have agreed that the National Arbitration Rules of the ADR Institute of Canada apply. . . . To the extent that the Rules *conflict with the Act, the provisions of the Rules shall apply* except to the extent that the parties may not lawfully contract out of the provision of the Act . . . [9]

[9] The latter caveat has no relevance to the case at bar.

> 5. By agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute. . . .
>
> 11. Where a dispute falls under an arbitration clause or agreement, a party, as claimant, *may submit that dispute to arbitration by delivering* a written Notice of Request to Arbitrate to the respondent . . .
>
> 13. The arbitration is *deemed to have commenced* when a Notice of Request to Arbitrate . . . has been *filed with the Institute and the initial filing fee has been paid*. The Institute shall notify the parties when an arbitration has been commenced and shall deliver to them a Notice of Commencement of Arbitration.

(Emphasis added)

[67] Clearly, where the Current Rules govern the arbitration — as in my view they do here — a dispute under an agreement is submitted to arbitration by delivering a notice of request to arbitrate to the other party, but the arbitration is not deemed to have been "commenced" for purposes of its administration until that Notice is filed with the Institute and the initial filing fee paid. The Plan Group has not taken that step.

[68] Were the arbitration governed by the 1999 Rules, The Plan Group would be in a different position. While ss. 4.1 and 4.4 of those Rules call for the filing of a notice of arbitration with the Institute, the 1999 Rules also provided that in the event of a conflict between them and the *Arbitration Act*, the Act prevailed. Section 23(1)3 of the Act stipulates that an arbitration may be commenced in any way recognized by law, including where "[a] party serves on the other parties a notice demanding arbitration under the agreement". That is what the Plan Group did here.

[69] But this arbitration is not to be conducted under the 1999 Rules. It is to be conducted under the Current Rules, which provide that *they* trump the Act (s. 3(*a*)) and which require a notice of request to arbitrate to be filed with the Institute before the arbitration is deemed to have been commenced (s. 13).

The waiver provision

[70] The second major error of the application judge is found in his treatment of the words "failure *to file* a notice of arbitration" (emphasis added) in the waiver provision of the arbitration clause, which states [at para. 3]:

> Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.

[71] The concept of "filing" the notice of arbitration signals that it is to be deposited or placed with an organization or institution overseeing the proceeding. The application judge equated

it, however, with "delivering" the notice to, or "serving" it upon, the other side. In the context of a legal document relating to the resolution of disputes, "filing" cannot be properly or reasonably interpreted to bear such a meaning.

[72] The application judge addressed the meaning of the phrase "failure to file a notice of arbitration" only incidentally. He did so in the course of his lengthy examination of what he calls the "Operation of the Arbitration Clause in 1999". In the result, he rejected Bell's interpretation of the arbitration clause as providing for arbitration administered by the Institute and commenced by filing a notice to arbitrate with the Institute. This rejection — or, at least, his conclusion [at para. 28] that the last sentence of the arbitration clause "is at best equivocal with respect to the agreement of the parties" — rests, as he saw it, on the failure of the parties to make reference to three things in that sentence, namely:

(i) the failure to specify filing with the Institute in accordance with art. 4.1 of the 1999 Rules and to identify the "notice of arbitration" as the notice of arbitration provided for in art. 4 of those Rules;

(ii) the failure to insert the words "with the Institute" after the words "failure to file a notice of arbitration" (leaving open The Plan Group's suggested interpretation equating "filing" with "delivery" to the other party, he concludes); and

(iii) the failure to clarify, for limitation purposes, which of the filing requirements under art. 4.2 or art. 4.4 — one requires the filing of a single notice; the other of three copies — applied.

[73] There are a number of reasons why this rationale for the rejection of Bell's position is not sustainable under the language of the arbitration clause, even as interpreted through the lens of the 1999 Rules.

[74] In the first place, the language of the arbitration clause makes it clear that the arbitration is to be conducted, not in accordance with the 1999 Rules (unless the arbitration happens to be commenced when they are in force), but in accordance with the Rules of the Institute in place from time to time — the "then-current rules". Consequently, there was no reason for the parties to refer specifically to any particular provisions in the 1999 Rules. Indeed, to have done so might well have created problems of interpretation in the future because references to specific rules might set up a conflict with different rules in effect at a later time.

[75] Secondly, the notion that "filing" may be equated with "delivery" — or with "service", or with "giving notice" — in the context of a legal-related proceeding is seriously flawed. "Filing" is a well-understood concept in the dispute resolution milieu. It means placing or depositing a document with the institutional overseer of the proceeding. It does not mean delivering the document to, or leaving it with, or serving it upon the other party.

[76] A cursory review of any number of dictionary resources confirms the distinction between these concepts. For example, *The Shorter Oxford English Dictionary*, 3rd ed., defines the verb "file" to mean "to place in due manner among the records of a court or public office" and the verb "deliver" to mean "to hand over to another's possession or keeping".[10] Service involves the formal delivery of a document to someone: *Black's Law Dictionary*, 8th ed., *s.v.* "service".

[77] Both the 1999 Rules and the Current Rules of the Institute use the terms "file", "deliver" and "serve" in distinct contexts. "Filing" is used in the context of depositing a document with the Institute — for example, a notice of arbitration or a pleading. Often, filing is what triggers the requirement for an administrative fee payment. Article 4.4 of the 1999 Rules requires the claimant to "*file at the office of the Institute* three copies of the Notice of Arbitration together with the administrative fee". Articles 4.6-4.8 provide that the pleadings are to be *served* on the opposite party *and filed* with the Institute. Rule 13 of the Current Rules deems the arbitration to have been commenced "when a Notice of Request to Arbitrate . . . *has been filed with the Institute* and the initial filing fee has been paid". Under the Current Rules, pleadings are "delivered" to the parties and to the Institute, but they are not "filed" with the other party.

[78] Finally, it was not necessary for the parties to the arbitration clause to have added the words "with the Institute" after the words "failure to file a notice of arbitration" in the final sentence of the arbitration clause. The fact that the notice was to be filed with the Institute is self-evident from a reading of the arbitration clause as a whole. The arbitration was to be conducted in accordance with the Rules of the Institute.

[79] The application judge's treatment of the waiver provision in the last sentence of the arbitration clause had several unfortunate consequences. It caused him to lose sight of the simple, straightforward meaning of that stipulation in the arbitration

---

10 See, also, *The Canadian Oxford Dictionary*, 2nd ed., *s.v.* "file" and "deliver"; *Black's Law Dictionary*, 8th ed., *s.v.* "file" and "deliver".

clause: a notice of arbitration must be filed with the Institute within 12 months of the occurrence upon which the claim is based; otherwise the claim is irrevocably waived. Of equal importance, however, it skewed his interpretation of the balance of the arbitration clause. Instead of leading him to conclude — as it should have done — that the parties had agreed to an arbitration procedure to be administered by the Institute, his erroneous interpretation served to bolster his conclusion that [the] type of arbitration agreed to was not one that was to be administered by the Institute and that the clause was to be interpreted largely in light of the application of the 1999 Rules.

The dissent

[80] I have had the opportunity to review the dissenting reasons of my colleague, Justice Gillese. Respectfully, I do no share her view of the proper disposition of the appeal for the reasons I have given.

[81] In completion, I should address an issue she has raised as a preliminary matter, namely, the question whether the matters in the application should have been referred to the arbitrator for determination, based on the principles set out in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34. The parties to this appeal are sophisticated commercial parties represented by sophisticated commercial counsel. They did not argue or ask us to deal with this issue, presumably for their own practical reasons. I would be reluctant to determine the appeal on that basis.

[82] In any event, I do not see the application (and the appeal) as raising a question regarding the jurisdiction of the arbitrator, but rather a question of whether there *is* an arbitration within which the arbitrator may or may not exercise a jurisdiction.

IV. *Disposition*

[83] Accordingly, for the foregoing reasons, I would allow the appeal, set aside the order of the application judge and in its place direct that arbitration under the Alliance Agreement must be commenced by filing a notice of request to arbitrate with the Institute.

[84] Bell is entitled to its costs of the appeal and of the application. Counsel have agreed on amounts. In accordance with that agreement, the costs of the appeal are fixed at $20,000 and the costs of the application at $30,000. Both amounts are inclusive of fees, disbursements and GST.

[85] GILLESE J.A. (dissenting): — I have read the draft reasons of my colleague, Blair J.A. With respect, I do not agree that the application judge's interpretation of the arbitration clause is to be reviewed on a standard of correctness. In any event, however, in my view, the application judge's interpretation is not only reasonable, it is correct. Accordingly, I would dismiss the appeal.

[86] As will become apparent, the factual context plays a significant role in the disposition of this appeal. Thus, I begin there.

Background[11]

The Alliance Agreement

[87] Going into the 1990s, Bell Gateways (a division of the appellant, Bell Canada ("Bell")) was dominant in the structured cabling market. Its competitors were principally small, unsophisticated cabling installation contractors. This changed in the early 1990s when electrical contractors entered the structured cabling market and larger contractors began providing the same value-added services as Bell. Electrical contractors brought sophisticated project-management skills to the cabling market and developed relationships with general contractors, project managers, electrical engineers and Bell's clients. Over time, customers gave their electrical and cabling work to electrical contractors.

[88] These developments posed a problem for Bell Gateways because it found it difficult to penetrate the long-standing relationships that electrical contractors had with project managers and general contractors. Bell Gateways increasingly lost market share to electrical contractors, including the Plan Group, a premier structured cabling contractor.

[89] In early 1998, Bell and The Plan Group joined forces and began to jointly pursue cabling projects. Success in those projects led Bell and the respondents ("Plan") to enter into an agreement dated February 1, 1999 (the "Alliance Agreement").

[90] The Alliance Agreement contemplated that Plan would perform electrical and cabling services contracted in Bell's name and Bell would provide marketing, bonding and project financing services for Plan. It reflected the parties' expectation that a number of projects would be started during the term of the agreement. The initial term of the Alliance Agreement was for five years, ending on January 31, 2004.

11 The facts are taken largely from the Notice Demanding Arbitration prepared by Plan.

[91] Article 22 of the Alliance Agreement establishes a two-step process for resolving disputes that might arise between the parties. The first step in the process is set out in art. 22.1. It requires the party that considers a dispute to exist to provide written notice to the other. The parties must then make good faith efforts to resolve the dispute through a structured discussion process.

[92] If the good faith efforts fail to resolve the dispute, the parties move to the second step of the dispute resolution process. The second step, contained in art. 22.2 (the "Arbitration Clause"), requires the dispute to be settled by arbitration. The last sentence in the Arbitration Clause provides that a failure to file a notice of arbitration within 12 months of the occurrences supporting a claim constitutes an irrevocable waiver of that claim (the "Waiver").

[93] The full text of art. 22 is set out below.[12] The critical portions of the Arbitration Clause read as follows:

> 22.2 Bell and [Plan] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 22.1 hereof. A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc. . . . Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.

The dispute

[94] The parties contracted to provide the Greater Toronto Airport Authority ("GTAA") with electrical systems in its new airport terminal. Plan continued to work on the GTAA project after January 31, 2004, the end date of the initial five-year term of the Alliance Agreement.

[95] By October 2004, Bell had not paid Plan for invoices it had rendered in relation to the GTAA project. The invoices claimed for amounts in excess of $40 million. Without collecting a significant amount of the invoiced amounts, Plan would have gone bankrupt.

[96] On December 16, 2004, Plan accepted $23 million as settlement for the invoiced amounts (the "Settlement"). Plan says that it was compelled to accept the significantly reduced amount because it was in a vulnerable financial state. It further alleges that its compromised financial state was brought about by Bell's capital investment demands of Plan that were made as part of the Alliance Agreement, coupled with Bell's subsequent breach of cash flow obligations.

---

12 It can be found at para. 107, below.

[97] Plan wished to dispute the Settlement in accordance with art. 22.

[98] On August 26, 2005, Plan took the first step in the dispute resolution process to which the parties are bound by virtue of art. 22 of the Alliance Agreement. It delivered written notice to Bell that a dispute existed between the parties. In addition, Plan alerted Bell to the possibility that the dispute might proceed to arbitration by attaching to the notice of dispute a 20-page draft "Notice Demanding Arbitration" (the "Draft Notice"), which set out particulars of its claim. Among other things, the Draft Notice asserted Plan's claim to compensation in respect of the Settlement.

[99] What happened thereafter is most easily understood by means of a timeline.

A chronology of the events that followed

September 8, 2005	—	Bell responds to Plan's notice of dispute and Draft Notice. It asserts that Plan's claim was waived, pursuant to art. 22.2, as it was in respect of occurrences that took place over 12 months previously. It says nothing about the need to file a notice of arbitration with the Arbitration and Mediation Institute of Ontario Inc. (the "Institute") or in accordance with the Institute's rules. Bell also agrees to meet with Plan pursuant to art. 22.1.
Fall and winter 2005	—	Bell asks for extensive particulars of Plan's claim. Plan provides them.
December 12, 2005	—	Although discussions between the parties continue, Plan delivers a final notice demanding arbitration (the "Notice") to counsel for Bell. In the cover letter that accompanies the Notice, Plan states that it wishes to preserve its rights under the Alliance Agreement,

	reiterates its willingness to continue with settlement discussions and asks counsel for Bell to confirm that it can accept service of the Notice. The Notice complies with the requirements for commencement of arbitration in s. 23(1)3 of the *Arbitration Act, 1991*, S.O. 1991, c. 17.
January 17, 2006	— As Plan has received no response to the Notice, it contacts Bell by e-mail, asking when it might hear back.
January 20, 2006	— Bell responds by e-mail, saying that it is continuing to review Plan's claim and asks for further particulars. It raises no issue about the adequacy of the Notice or the need for it to be filed with the Institute. It says that it has not ruled out the possibility of further meetings and discussions.
March 2, 2006	— Plan provides Bell with further particulars.
April 11, 2006	— Plan concludes that Bell is not making good-faith efforts to settle the dispute. It sends Bell a letter to that effect and advises that it will proceed in accordance with the Arbitration Clause. It asks Bell to contact it by April 18 to discuss the selection of a suitable arbitrator.
April 19, 2006	— Bell responds saying it will make an application to the court to seek relief consistent with its position that Plan's claims are not arbitrable because they have been waived and, in some cases,

		released. It says it will serve a notice of application shortly. Counsel for Bell asks counsel for Plan not to commence arbitration proceedings until it serves its notice of application.
Spring and summer 2006	—	Plan makes a number of inquiries of Bell about the status of the notice of application and is assured repeatedly that the notice will be sent.
August 11, 2006	—	Bell serves Plan with the notice of application. The relief sought includes a declaration that Plan had waived its claim and that Plan is barred from commencing arbitration by virtue of its failure to file a notice of arbitration in accordance with the Arbitration Clause.
September 20, 2006	—	Bell serves Plan with the supporting affidavit material.
December 7, 2006	—	Plan brings a motion seeking to stay Bell's application and refer the dispute to arbitration on the basis that Bell's application required the determination of arbitrable issues.
Spring or summer of 2007	—	Settlement discussions take place in respect of Bell's application and Plan's motion. The parties agree to withdraw their respective court proceedings (*i.e.*, the application and stay motion), without prejudice to their ability to advance their positions at arbitration.

September or fall of 2007	—	Plan and Bell agree on the Honourable Coulter Osborne as arbitrator of the dispute.
September 2007	—	The application and stay motion are withdrawn.
Fall 2007	—	Bell refuses to appoint the Honourable Coulter Osborne or schedule a hearing of the arbitration until Plan files a notice of request to arbitrate in accordance with s. 11 of the Institute's rules.

The proceedings below

[100] Plan found itself in a "catch 22" position. It could not get the matter before the arbitrator because Bell refused to accept that Plan had commenced arbitration and would not appear before the arbitrator unless Plan filed a notice of request to arbitrate with the Institute. If Plan took that step, however, it was concerned that it would jeopardize its position in respect of the Waiver.

[101] On November 8, 2007, in an attempt to get the court's help to break the deadlock, Plan brought a notice of application to the Superior Court of Justice. The relief sought was an order appointing the Honourable Coulter Osborne as arbitrator of the dispute, pursuant to art. 22.2 of the Alliance Agreement.

[102] On January 23, 2008, the parties agreed that they would advise the application judge that the only issue for determination was whether commencement of arbitration under the Alliance Agreement required a party to file a written request to arbitrate with the Institute. They also agreed not to rely on disputed evidence.

[103] Plan maintains that it asked the court, alternatively, to resolve the impasse by appointing an arbitrator to interpret the Arbitration Clause regarding commencement of arbitration. It says that the agreement between counsel concerning the scope of the application pertained only to the relevance of disputed evidence and the suitability for summary determination by way of application. It says it did not abandon its alternative position that if the court declined to determine the matter summarily in accordance with the principles in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, [2007] S.C.J. No. 34, then the matter should be decided by an arbitrator appointed by the court, without prejudice to either party's position concerning the proper procedure for commencing arbitration.

[104] On February 28, 2008, Wilton-Siegel J. heard the application.

[105] By order dated April 29, 2008 (the "Order"), the court declared that as of December 14, 2005, the Arbitration Clause did not require a party commencing arbitration under the Alliance Agreement to file a notice of request to arbitrate with the Institute.

[106] Bell appeals.

Article 22 of the Alliance Agreement

[107] For ease of reference, art. 22 is set out in full, below:

> 22. DISPUTE RESOLUTION
>
> 22.1 The Parties seek to avoid disputes whenever possible. In the event of a dispute between the Parties concerning any matter arising from or connected with this Agreement, the Parties shall use their commercially reasonable efforts to settle the dispute in accordance with the following procedures:
>
> (a) A Party which considers that a dispute exists shall provide written notice (in this paragraph 22.1(a), a "Notice of Dispute") to the other Party to the attention of the other Party's representative. For this purpose the nominated representative of Bell shall be its Assistant Vice-President Internetworking and the nominated representative for [Plan] shall be either of Bill Kurtin or Marshel Cohen. (Either Party may change its representative(s) on written notice to the other Party.) Following the provision of a Notice of Dispute to a Party's representative, the representatives of the Parties will forthwith make commercially reasonable efforts to, in good faith, resolve all disputes which are the subject of such notice in no more than 10 days from the date of the notice.
>
> (b) Should the dispute between the Parties not be resolved pursuant to the settlement process set out in Paragraph 22.1(a) hereof during the 10 day period referred to therein, the dispute shall be referred for resolution to Bell's Vice-President Gateways and to either of Bill Kurtin or Marshel Cohen. Following such referral, such persons will forthwith make commercially reasonable efforts, in good faith, to resolve all disputes which are the subject of such referral within 10 days from the date of such referral.
>
> 22.2 *Bell and [Plan] will settle by arbitration any dispute arising out of or related to this Agreement or any Sub-contract that is not finally resolved pursuant to Section 22.1 hereof. A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [Plan] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered in any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.*

(Emphasis added)

The Reasons of the Application Judge

[108] The application judge understood the application to have raised a single issue: did the Arbitration Clause require a party to file a "Notice of Request to Arbitrate" with the Institute in order to commence arbitration? He noted that the parties had very different conceptions of how the Arbitration Clause operated and that the issue turned on which conceptual approach applied. At paras. 16 and 17 of the reasons, the application judge set out the parties' conceptual approaches:

> Plan says that the parties did not agree that the Institute would administer any arbitration under the Agreement. It submits that the parties agreed only to be bound by the procedural rules of the Institute (whether the 1999 Rules or the Current Rules) that apply in the conduct of an arbitration after the appointment of an arbitrator, and only to the extent that the arbitrator chooses to apply them. Accordingly, Plan submits that the rules of the Institute do not apply to determine the method of initiating arbitration. It also argues that the Arbitration Clause permits an arbitration to be commenced by any means recognized under law, including delivery of a notice demanding arbitration, using the language of paragraph 23(1)3 of the Act.
>
> Bell argues that the parties agreed that (1) the Institute is to administer any arbitration under the Agreement; and (2) any such arbitration must be commenced by filing a Notice to Arbitrate with the Institute. Bell relies on the reference in the second sentence of the Arbitration Clause to the "then-current rules" of the Institute, and the substitution of the Current Rules for the 1999 Rules including, in particular, section 5 of the Current Rules. Bell says that, collectively, these provisions have the result that the parties are bound by the Current Rules of the Institute in their entirety including, in particular, the provisions respecting commencement of an arbitration.

[109] The application judge summarized the two relevant sets of Institute rules at paras. 5-14 of the reasons:

> *The 1999 Rules*
>
> The Rules of the Institute that applied at the time of execution of the Agreement (the "1999 Rules") were divided into four parts under the following headings: "General", "Commencing the Arbitration", "The Arbitrators" and "Conduct of the Arbitration". The following provisions have relevance to the issue herein.
>
> First, in Part I, section 2.1 provided that the provisions of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "Act") would govern in the event of any conflict between the Act and the 1999 Rules.
>
> Second, in Part II (entitled "Commencing the Arbitration"), section 4.1 required that written notice of a proposed arbitration be given by a party initiating arbitration to the Institute and all other necessary parties. Section 4.2 provided that the arbitration would be deemed to commence on the date on which the Institute received a Notice of Arbitration from the claimant (presumably, but not expressly, the written notice contemplated by section 4.1).

> Third, in Part IV (entitled "Conduct of the Arbitration"), section 10.1 provided that the arbitration was to be conducted in accordance with the Act, the 1999 Rules and any applicable agreement between the parties including the arbitration agreement.
>
> *The Current Rules*
>
> Since at least 2003, the Institute has applied the ADR Institute of Canada, Inc. National Arbitration Rules (the "Current Rules"). The Current Rules are not divided into discrete sections in the manner of the 1999 Rules.
>
> Section 3 of the Current Rules provides that the Current Rules, rather than the Act, govern in the event of any conflict, except to the extent that the parties may not lawfully contract out of the provisions in the Act.
>
> The first sentence of section 5, upon which Bell places considerable reliance, provides that "[b]y agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute".
>
> Section 11 of the Current Rules requires the delivery of a "Notice of Request to Arbitrate" to the respondent and to the Institute to commence an arbitration. Section 11 also specifies in detail the required content of a Notice of Request to Arbitrate.
>
> Section 13 provides that an arbitration is deemed to have commenced when a Notice of Request to Arbitrate has been filed with the Institute and the initial filing fee has been paid.
>
> More generally, in addition to the matters addressed by the 1999 Rules, the Current Rules address a number of procedural and substantive issues that are also addressed in the Act. The Current Rules essentially constitute a complete code for the commencement and conduct of an arbitration.

[110] The application judge considered the operation of the Arbitration Clause at the time the Alliance Agreement was executed in 1999 and then considered whether the legal result was different under the Current Rules. He found that the Arbitration Clause did not mandate delivery and filing of a notice of arbitration in compliance with ss. 4.1 and 4.3 of the 1999 Rules in order to initiate arbitration.

[111] Instead, the application judge interpreted the Arbitration Clause as providing that after commencement of arbitration and the appointment of the arbitrator, the arbitrator would apply the Institute rules to the conduct of the arbitration. He reached this conclusion because, on its face, he found the Arbitration Clause favoured Plan's interpretation. He gave several reasons for this conclusion, the most significant of which may be summarized as follows:

1. *The wording and order of the second and third sentences in the Arbitration Clause*. The Arbitration Clause does not say that any dispute or arbitration under the Alliance Agreement is to be resolved in accordance with the Institute rules. Instead, it refers specifically to the "conduct" of the arbitration being

subject to the Act and the then-current Institute rules. Thus, "on a plain reading", the Arbitration Clause limits the reach of the 1999 Rules to the conduct of the arbitration rather than compliance with all of the Institute rules. Part IV of the 1999 Rules is entitled "Conduct of the Arbitration". It is separate and distinct from Part II of the 1999 Rules, which is entitled "Commencing the Arbitration".

2. *The Arbitration Clause contemplates a procedure for appointment of an arbitrator outside the Rules*. Had the parties intended the reference in the second sentence of the Arbitration Clause to constitute an agreement to comply with all of the 1999 Rules, the third sentence should have carved the appointment process out of the rules. The fact that it doesn't suggests the parties did not intend all of the Institute rules to apply.

3. *Plan's interpretation is more consistent with the context in which the Arbitration Clause was negotiated*. The application judge gave a detailed explanation for this view, based on the 1999 Rules and the wording of the Arbitration Clause. For example, Bell's interpretation was based on its position that the Institute would administer the arbitration. However, this position was based on s. 5 of the Current Rules, for which there was no counterpart in the 1999 Rules. Moreover, there is nothing in the Arbitration Clause to say that the Institute would administer the arbitration. Further, Plan's interpretation is consistent with the 1999 Rules, which are divided into parts, making it feasible that only the parts governing conduct of the arbitration would apply.

[112] After concluding that the Arbitration Clause did not mandate compliance with the 1999 Rules for commencement of arbitration, the application judge considered whether the Current Rules had that effect. This question arose because the Arbitration Clause provides that the arbitration will be conducted in accordance with the "then-current" Institute rules. Bell argued that if the Arbitration Clause did not mandate filing of a Notice to Arbitrate under the 1999 Rules, the result is different because of ss. 3 and 5 of the Current Rules. The effect of those sections, read together with the Arbitration Clause, Bell argued, was that any arbitration must be commenced in accordance with the Current Rules, *i.e.*, by filing a notice of request to arbitrate with the Institute under s. 11.

[113] After outlining Plan's response to this argument, the application judge explained that the difference between the parties turned on fundamentally different views of the nature of

the agreement between the parties in 1999 with respect to (1) the scope of the rules to which the parties agreed to be bound and (2) the involvement of the Institute in the administration of an arbitration. He concluded that the parties agreed that the arbitrator was to apply the procedural rules of the Institute in effect from time to time in the conduct of the arbitration. He did not agree that either (1) the remaining rules of the Institute were also to be applied in respect of any arbitration under the Agreement or (2) the Institute was to administer any such arbitration.

[114] Thus, the issue was whether, by the reference to the then-current rules of the Institute in the second sentence of the Arbitration Clause, the parties agreed to accept the possibility that their agreement could be overridden by a substitution of the Current Rules for the 1999 Rules by the Institute.

[115] He gave two reasons for rejecting the notion that by referring to the "then-current" Institute rules, the parties intended that they would be bound by anything more than changes to procedural rules. First, he found it unlikely that the parties turned their minds to the possibility that by virtue of a change to the Institute rules, the fundamental approach to arbitration embodied in the Arbitration Clause could be changed without their involvement. There was nothing in the limited scope of the 1999 Rules or the Act to suggest the possibility of such a fundamental change. He saw it as far more likely that the parties envisaged that possible changes to the Institute rules would relate to the conduct of arbitration.

[116] The second reason, given at paras. 55-58 of the reasons, is a contextual consideration:

> Most important, the Agreement was the product of a negotiation between two sophisticated commercial parties represented by legal counsel. In the absence of wording suggesting otherwise, the Court should proceed on the basis that the conceptual approach to arbitration set out in the Arbitration Clause was meaningful to the parties. In the absence of express wording suggesting otherwise, I do not think the Court should interpret the acknowledgment in the Arbitration Clause of possible revisions to the 1999 Rules to constitute an agreement to be bound by rules that change the fundamental conceptual approach in the Arbitration Clause without the consent of the parties.
>
> Moreover, even if they had agreed to the possibility of a change of some nature to the fundamental conceptual approach in the Arbitration Clause by means of a revision of the 1999 Rules, there is no basis for concluding that the parties agreed to the involvement of the Institute in the administration of any arbitration under the Agreement, which is implied by Bell's position.
>
> If the parties were agreeable to Institute administration of any such arbitration, they could have selected this approach from the outset. Despite the more limited set of provisions in the 1999 Rules, they could have agreed that the arbitration was to be governed in all respects by the 1999 Rules.

> Alternatively, they could have addressed the possibility of future Institute involvement in the Arbitration Clause. They did neither. The failure to do either reinforces the conclusion that the parties did not agree to accept Institute administration of any arbitration.
>
> In addition, the position of Bell implies that the parties agreed to accept all revised rules of the Institute, sight unseen and without any opportunity to consider the consequences thereof for any arbitration under the Agreement. While I think it is reasonable to contemplate an agreement of this nature extending to revisions of procedural rules designed to facilitate the conduct of an arbitration, it is unreasonable to expect that the parties in this proceeding would have agreed to be bound by a revision that broadened the scope of the operation of the rules of the Institute. For example, I do not think it is reasonable to conclude that the parties agreed to comply with any revision to the rules that imposed additional costs of arbitration upon the parties without their consent by imposing Institute involvement in respect of any arbitration.

[117] Accordingly, the application judge could not find that the parties agreed to be bound by any revisions to, or replacement of, the 1999 Rules beyond changes to procedural rules in the absence of either wording to that effect in the Arbitration Clause or other contextual evidence.

[118] In the result, he concluded that as of December 14, 2005, the Arbitration Clause did not require that in order to commence arbitration, a party had to file a "Notice of Request to Arbitrate" with the Institute.

The Issue

[119] The Order declared that as of December 14, 2005, the Arbitration Clause did not require a party commencing arbitration under the Alliance Agreement to file a notice of request to arbitrate with the Institute. Thus, the issue on appeal is whether the application judge erred in making that declaration.

[120] The application judge was required to interpret the Arbitration Clause in order to reach the conclusion that such notice was not required. Accordingly, the first step in the analysis is to determine what standard of review applies to the application judge's interpretation of art. 22.2.

[121] Before turning to the standard of review, however, a preliminary matter needs to be addressed.

A Preliminary Matter

[122] In *Dell*, at paras. 84-86, the Supreme Court laid down "a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator". The court should "depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law" or a

question of mixed law and fact where "the questions of fact require only superficial consideration of the documentary evidence in the record". Further, "[b]efore departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding". Thus, "even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process".

[123] This court has endorsed a similarly deferential approach that mandates referral to arbitration where it is arguable that a dispute falls within the scope of an arbitration clause: see *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737, [2003] O.J. No. 2094 (C.A.); *Greenfield Ethanol Inc. v. Suncor Energy Products Inc.*, [2007] O.J. No. 4660, 2007 ONCA 823, (C.A.), affg [2007] O.J. No. 3104, 159 A.C.W.S. (3d) 474 (S.C.J.); *Dancap Productions Inc. v. Key Brand Entertainment, Inc.*, [2009] O.J. No. 572, 246 O.A.C. 226 (C.A.). Moreover, although the court has concurrent jurisdiction to decide the arbitrability of a dispute under the *Arbitration Act, 1991*, it will construe broadly drafted arbitration clauses generously, "consistent with the legislative policy . . . which favours arbitration over litigation where the parties so provide by agreement": see *Woolcock v. Bushert*, [2004] O.J. No. 4498, 246 D.L.R. (4th) 139 (C.A.), at paras. 23, 25; *Greenfield*, at para. 11.

[124] In my view, it may well have been preferable had the application judge been asked to refer the whole matter to arbitration, including the dispute regarding the validity of commencement. Such an approach would have been consistent with the parties' agreement in art. 22.2 to have all disputes "arising out of or related to" the Alliance Agreement resolved by arbitration. Further, Bell's stance appears to be a delaying tactic, and, as the decision of my colleague may permanently prevent the arbitration from taking place, it cannot be said that the court proceedings have been "best for the arbitration process". However, the application judge did not refer the issue of commencement to the arbitrator and neither party asked this court to approach the appeal on this basis.

[125] Having said that, it is significant that the Order is consonant with the *Dell* principles, set out above, and the jurisprudence of this court. The Order does not state that Plan has commenced arbitration. It simply says that as of the relevant date, it was not necessary to file a notice with the Institute to commence arbitration pursuant to art. 22.2 of the Alliance Agreement. That is, the Order leaves the question of whether

Plan commenced arbitration with the arbitrator, just as the jurisprudence urges.

[126] I do not see the form of the Order as some kind of happenstance. The Order takes its form from the conscious decision of counsel for both parties to ask the application judge to perform a single task and decide a single question: interpret the Arbitration Clause and determine whether, on December 14, 2005, a party had to file a notice with the Institute to commence arbitration. The parties did not ask the application judge to decide if Plan had commenced the arbitration, nor did he decide that question. Consequently, it is open to Bell to raise that matter as an issue once the parties are before the arbitrator.

[127] I raise this preliminary matter for a single purpose — it provides an additional reason for dismissing the appeal. If the Order stands, the parties can appear before the arbitrator and have him decide whether Plan commenced the arbitration. That is, the arbitration will be conducted in a way that conforms with the guidance of this court and that of the Supreme Court.

The Standard of Review in Contractual Interpretation

[128] I agree with much of what my colleague has said generally in respect of appellate review on matters of contractual interpretation. However, I disagree with the view that the question of contractual interpretation in this appeal attracts a standard of review of correctness. To explain my position, I must recap some of the discussion on the guiding legal principles.

The guiding legal principles

[129] As my colleague noted, historically, interpretation of a contract was treated as a question of law, reviewable on a standard of correctness. However, *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, [2002] S.C.J. No. 31 dictates that a more nuanced approach be taken by reviewing courts. The standard of review in contractual interpretation — as in other types of civil proceedings — depends on the nature of the question that the trial judge decided: was it one of law, fact, or mixed law and fact? Questions of law are reviewable on a standard of correctness. Questions of fact are reviewable on a standard of palpable and overriding error, or the "functional equivalents" of "clearly wrong", "unreasonable" or "not reasonably supported by the evidence": *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, [2005] S.C.J. No. 24, at para. 110. Questions of mixed law and fact, however, lie along a spectrum, with some questions being more akin to questions of law and others being more akin to questions of fact.

[130] At para. 36, *Housen* explains the approach that appellate courts are to take when determining the standard of review to apply to a question of mixed law and fact. Such matters

> . . . lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard. The general rule . . . is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

[131] While *Housen* is a negligence case, this court recognized in *MacDougall v. MacDougall*, [2005] O.J. No. 5171, 262 D.L.R. (4th) 120 (C.A.), that the *Housen* principles inform the standard of review to be applied by appellate courts when reviewing decisions based on the interpretation of contracts.

[132] Writing for the court, Lang J.A. explained in *MacDougall*, at para. 30, that the trial judge must apply the proper principles of contract interpretation and that a failure to follow such principles is an error of law attracting review on a correctness standard. At para. 31, Lang J.A. states that when the task of interpretation includes consideration of extrinsic evidence or a determination of the factual matrix, the trial judge is making findings of fact or drawing factual inferences. Such findings are not to be overturned except in the case of palpable and overriding error. At para. 32, she states that where the trial judge applies legal principles to the language of the contract in the context of the relevant facts and inferences, he or she is applying law to fact, which is a question of mixed law and fact. Similarly, if the question is an "inextricable intertwining" of law and fact, it is a question of mixed law and fact. Questions of mixed law and fact are to be reviewed in accordance with the principles from *Housen*, quoted above: *MacDougall*, at para. 33.

[133] Based on *Housen* and in accordance with *MacDougall*, I understand that an appellate court should determine the standard of review in matters of contractual interpretation in the following way. Begin by identifying the nature of the question that the trial judge decided. This first step is extremely important as a mischaracterization of the question can obscure the true issues and alter the applicable standard of review.

[134] If the question is either one of law or fact, the standard of review is straightforward — the former is to be reviewed on a standard of correctness, the latter on a standard of palpable and overriding error or its "functional equivalents".

[135] If, however, the question is one of mixed law and fact, the standard of review may be either correctness or palpable and overriding error. To decide which of those standards applies, the appellate court must determine whether the trial judge made an "extricable" error in legal principle in arriving at his or her interpretation. In the area of contractual interpretation, errors in principle include the failure to apply proper principles of contractual interpretation,[13] the application of an incorrect standard[14] or the failure to consider a required element of a legal test.[15] Such errors constitute errors of law.

[136] If an error of law can be identified (*i.e.*, extricated), the trial judge's interpretation is subject to review on a standard of correctness. Where, however, the alleged error cannot be extricated from the factual findings, the trial judge's interpretation is to be subjected to a more deferential standard of review. In such cases, appellate courts should review the decision on a standard of palpable and overriding error or its "functional equivalents".

Determining the standard of review in matters of contractual interpretation

[137] Before determining the standard of review in accordance with these principles, it is useful to recognize that three matters complicate the application of the *Housen* principles to matters of contractual interpretation.

[138] First, it can be difficult to determine the nature of the question. For example, in the present case, Bell asserts that the contractual interpretation question decided by the application judge is one of law whereas Plan says it is a question of mixed law and fact.

[139] Second, if the question is one of mixed law and fact, it is difficult to establish where it lies on the spectrum. A spectrum is not an "either-or" proposition. I do not think it is possible to place a question at a precise point on the spectrum. At most, it

---

13 *MacDougall*, at para. 30.

14 *Housen*, at para. 36. Although stated to be an example of an extricable error in the negligence context, I see no reason that it ought not to apply equally to contractual interpretation.

15 *Ibid.*

appears to me that a question of mixed law and fact can be seen to lie more closely toward one end of the spectrum, rather than the other.

[140] In my view, however, *Housen* resolves this second difficulty as it provides that if the trial judge has not made an extricable error of law, the question is to be reviewed on the standard of palpable and overriding error.

[141] The third challenge arises from the nature of the task that the trial judge performs when interpreting a contract. When interpreting contracts, trial judges are engaged in the application of settled legal principles — which are designed to give effect to the mutual intentions of the parties — to the contractual provisions. However, the "proper" interpretation often depends, to a greater or lesser extent, on a consideration of the factual matrix and the weighing of evidence. Thus, the very nature of the task performed by the trial judge can make it difficult to determine whether an "extricable" error in law has been committed.

A deferential standard of review is owed in the present case

[142] In my view, the application judge's interpretation of art. 22.2 of the Alliance Agreement is reviewable on a standard of palpable and overriding error or its functional equivalents of clearly wrong, unreasonable or not reasonably supported by the evidence.

[143] I reach this conclusion for three reasons. First, the question in this case is one of mixed law and fact. Second, the application judge committed no extricable error of law. Third, there are sound policy reasons for a deferential standard of review in this case.

1. *The question is one of mixed law and fact*

[144] As I have mentioned, the first step in determining the standard of review is to identify the nature of the question that the application judge decided. My colleague treats the question as one of law or, if mixed law and fact, as falling at the correctness end of the spectrum. I do not agree.

[145] The reasons of the application judge make it clear that his interpretation of the Arbitration Clause depends on the application of legal principles to the language used by the parties with due consideration for the factual matrix, particularly the facts as he found them to be in 1999 when the Alliance Agreement was entered into. As I explain more fully below, it is not possible to interpret the Arbitration Clause without regard to such factual determinations. Accordingly, the application judge was deciding a question of mixed law and fact.

[146] My colleague gives three reasons for viewing the question as one of law or strongly akin to a question of law. The first is that the application judge heard the matter in writing, without oral evidence, and the same written materials are available to this court. However, the law is clear that a first instance judge's findings are to be accorded deference by an appellate court, even when he or she heard no oral evidence: *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, [1997] O.J. No. 3921 (C.A.), at pp. 334-35 O.R. There are numerous reasons for giving deference to factual findings of trial judges apart from those that arise when the trial judge has heard testimony first-hand and observed witnesses: *Housen*, at para. 24.

[147] The second reason given by my colleague for holding that a correctness standard applies is that there are no underlying evidentiary or factual issues of a contested nature. This, however, does not necessarily make the question one of law alone. To reiterate, a question of mixed law and fact is one in which the trial judge "applies the legal principles to the language of the contract in the context of the relevant facts and inferences": *MacDougall*, at para. 32.

[148] In the recent decision of *Dumbrell v. Regional Group of Companies Inc.* (2007), 85 O.R. (3d) 616, [2007] O.J. No. 298 (C.A.), at para. 52, Doherty J.A. explained that contractual interpretation involves the interplay between the words of a contract and the context in which those words were chosen:

> No doubt, the dictionary and grammatical meaning of the words (sometimes called the "plain meaning") used by the parties will be important and often decisive in determining the meaning of the document. However, the former cannot be equated with the latter. The meaning of a document is derived not just from the words used, but from the context or the circumstances in which the words were used. Professor John Swan puts it well in *Canadian Contract Law* (Markham, Ont.: Butterworths, 2006) at 493:
>
>> There are a number of inherent features of language that need to be noted. Few, if any words, can be understood apart from their context and no contractual language can be understood without some knowledge of its context and the purpose of the contract. Words, taken individually, have an inherent vagueness that will often require courts to determine their meaning by looking at their context and the expectations that the parties may have had.

[149] In the present case, the application judge was called on to interpret the Arbitration Clause within the Alliance Agreement as a whole and in the context of these parties, in the particular circumstances at the time the Alliance Agreement was created, with regard to the expectations the parties had at that time. That is, the application judge was called on to decide a question of mixed law and fact, not one of law alone.

[150] The third reason given by my colleague for a correctness standard of review is that the interpretation of a contract is "very much a legal exercise". I agree that interpreting the language of a contract is a legal exercise. That, however, does not change the fact that the application judge was required to interpret art. 22.2 within its unique factual matrix. The application judge did not decide a question of wide or general application nor did he answer a broad jurisdictional question. In fact, he answered a very narrow, discrete question — as of December 2005, did art. 22.2 of the Alliance Agreement require a party to commence arbitration by means of filing a notice with the Institute? Identifying the precise question that the application judge was called on to decide reinforces my view that the true nature of the question is one of mixed law and fact. The question builds into it the factual context, namely, the situation of the parties and their expectations at the time the agreement was entered into.

2. *The application judge committed no extricable error of law*

[151] In interpreting a particular clause of an agreement, the trial judge is engaged in drawing a legal inference as to what the parties intended from the objective standpoint of the law of contract. Such an inference, although a conclusion of law, may be dependent on findings of fact regarding the words of the document and the surrounding circumstances. In such situations, the meaning of the words in the contract cannot be divorced from their context and the factual circumstances in which the agreement was made. That is, it may be inherently difficult to "extricate the legal questions from the factual" in matters of contractual interpretation, just as in negligence: *Housen*, at para. 36.

[152] This is just such a case. The application judge held that the Arbitration Clause did not require the delivery and filing of a notice of arbitration with the Institute in order to commence the arbitration. In his view, the Arbitration Clause contemplated that after the commencement of arbitration and the appointment of the arbitrator, the arbitrator would apply the Institute's procedural rules, as amended from time to time. The application judge held that the subsequent replacement of the 1999 Rules with the Current Rules could not retroactively change the intention of the parties as of 1999 when the Alliance Agreement was executed.

[153] In drawing a legal conclusion as to what the parties mutually intended from the words of the contract and the surrounding circumstances, the application judge was involved in a context-driven inquiry that depended on the weighing of documentary and other evidence, findings of fact and factual inferences. The end

result is a legal conclusion that cannot be neatly or easily separated from its factual underpinnings.

[154] Although the application judge did not recite the principles of contractual interpretation when interpreting the Arbitration Clause, he carefully and thoughtfully applied them. He thoroughly dealt with the arguments of both parties and gave cogent reasons for choosing the interpretation advanced by Plan. In so doing, he indicated the principles of contractual interpretation that guided him.

[155] On my reading of his reasons, the application judge interpreted art. 22.2 in the context of the whole agreement and the factual matrix. Unlike my colleague, as I explain below, I view the application judge as having given meaning and effect to the requirement in the second sentence of art. 22.2 that the arbitration be conducted under the then-current Institute rules and to the meaning of "file" in the Waiver. In my view, his reasons demonstrate no extricable error of law.

3. *Policy reasons favour a deferential approach in this case*

[156] Since the nature of the question is one of mixed law and fact, in the absence of an extricable error of law, this court should accord deference to the trial judge's interpretation. This conclusion flows from *Housen* and is based on sound judicial policy.

[157] Although it may be difficult to identify the nature of the question and the standard of review — particularly where questions of mixed law and fact are involved — *Housen* provides guidance in two ways. First, it grounds the issue of the standard of review in the different roles that trial and appellate courts play. The "primary role of trial courts is to resolve individual disputes based on the facts before them and settled law". The primary role of appellate courts, by contrast, "is to delineate and refine legal rules and ensure their universal application": *Housen*, at para. 9.

[158] Because of the different roles of trial and appellate courts, the precedential value of the question can be of some relevance in determining its nature and the standard of review. If the question is "apt to be of much interest to judges and lawyers in the future", or if the dispute is over a "general proposition that might qualify as a principle of law", it is more likely to be a question of law reviewable for correctness: *Housen*, at para. 28, citing *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116, at para. 37. Conversely, where "the matrices of facts at issue . . . are so particular, indeed so unique" that the decision would not have precedential value, it "draws nigh to being an unqualified

question of mixed law and fact" that is generally subject to a more stringent standard, unless the error is traceable to an error in principle that would engage the law-making function of an appellate court: *Housen*, at paras. 28, 36-37; *Southam*, at para. 37.

[159] In the present case, the interpretation of the Arbitration Clause is of little or no precedential value. The dispute regarding art. 22.2 depends on a unique matrix of facts that is particular to two parties to a specific negotiated agreement. Further, there is no identifiable error in legal principle at issue that would engage the law-making function of the appellate court.

[160] The second way in which *Housen* provides guidance is that it directs appellate courts to be cautious in finding that a trial judge erred in law in his or her determination of negligence because it is "often difficult to extricate the legal questions from the factual": *Housen*, at para. 36. In my view, and for the same reason, this court should be reluctant to find the application judge's interpretation to be attributable to an error of law. As I have explained, the application judge was engaged in the application of settled legal principles to the evidence and the facts of the case. His legal conclusion regarding the parties' intentions is an "inextricable intertwining of both fact and law": *MacDougall*, at para. 33.

[161] Furthermore, a deferential approach reflects sound judicial policy. In *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723, [1999] O.J. No. 69 (C.A.), Laskin J.A. deferred to a trial judge's interpretation of a contractual provision that was reasonable (and therefore not "unreasonable"), noting that the appellant had not alleged any error in the application of the relevant legal principles. In my view, this approach is consistent with *Housen*. As discussed above, where the question is one of mixed law and fact and no extricable error in principle has been made, deference should be paid to the trial judge's interpretation of a contractual provision in the absence of palpable and overriding error or an interpretation that is clearly wrong, unreasonable or not reasonably supported by the evidence.

[162] In *Bradscot*, Laskin J.A. referred to his earlier decision in *Gottardo Properties (Dome) Inc. v. Toronto (City)*, [1998] O.J. No. 3048, 162 D.L.R. (4th) 574 (C.A.). In *Gottardo*, he stated, at para. 48:

> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence

> of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

[163] This passage was quoted with approval by the majority in *Housen*, at para. 12, in relation to findings of fact and the drawing of factual inferences. In relation to questions of mixed law and fact, the majority held that "in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with": *Housen*, at para. 31. As the majority explained, at para. 32, since both legal and factual inferences

> . . . are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

[164] In contractual interpretation, as in negligence, it can be inherently difficult to extricate the legal questions from the factual. Owing to the fact-sensitive nature of the inquiry — ascertaining the parties mutual and objective intentions — courts frequently make conclusions regarding the "proper interpretation" of a contractual provision without directly applying the interpretive principles or canons of construction. Conclusions as to the "proper interpretation" of a contractual clause summarily express conclusions of law as to what the parties are objectively taken to have intended based on a set of facts. In these situations, as I have said, the interpretation of a contract is a question of mixed law and fact.

[165] While courts express opinions on the "proper interpretation" of a contract, there may be more than one reasonable interpretation. It is not uncommon, for instance, for various guidelines or canons of construction to point in different directions on a set of facts and for different courts to reach different conclusions regarding the interpretation of a particular clause.

[166] Accordingly, a deferential approach to the application judge's interpretation of a contract, given the absence of an identifiable error of law, is grounded in sound judicial policy and consistent with the guidelines laid down by the Supreme Court in *Housen*.

Interpreting the Arbitration Clause

[167] The application judge's interpretation of the Arbitration Clause underlies the Order. If his interpretation is reviewed on a palpable and overriding error standard, I see no basis on which to interfere with it. He made no extricable error in legal principle and his interpretation is not "plainly unreasonable". While one might reasonably interpret the Arbitration Clause other than as the

application judge did, that is a function of its wording and does not make the application judge's interpretation unreasonable.

[168] In any event, however, as I have said, in my view, the application judge was correct in finding that a party did not have to file a notice with the Institute in order to commence arbitration. I reach that conclusion based on the following chain of reasoning:

(1) The Arbitration Clause does not specify how arbitration is to be commenced;

(2) the Arbitration Clause does specify that the arbitration will be conducted in accordance with the *Arbitration Act, 1991* and the then-current Institute rules;

(3) article 24.6 of the Alliance Agreement says that Ontario law governs;

(4) in 1999, when the Alliance Agreement was executed and at the time of the dispute in 2005, the *Arbitration Act, 1991* was the Ontario law that applied to the Alliance Agreement;

(5) section 23(1) of the *Arbitration Act, 1991* reads as follows:

> 23(1) An arbitration may be commenced in any way recognized by law, including the following:
>
> 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.
>
> 2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.
>
> 3. *A party serves on the other parties a notice demanding arbitration under the agreement.*

(Emphasis added)

(6) Thus, as the application judge held, in 2005, the Arbitration Clause did not require a party commencing arbitration in respect of a dispute under the Alliance Agreement to file a notice of request to arbitrate with the Institute. It appears from s. 23 of the Act that filing such a notice would have been an acceptable way of commencing arbitration, just as was the method chosen by Plan (*i.e.*, service on Bell of a notice demanding arbitration under the agreement);

(7) the Waiver does not detract from this reasoning; [and]

(8) this reasoning promotes a result that is reasonable, fair and sensible.

[169] Below, I explain how I arrive at the foregoing reasoning. Before doing so, I make the following observations about the principles that guide the courts when interpreting contracts.

The principles that guide contractual interpretation

[170] The primary goal when interpreting a contract is to give effect to the intention of the parties. There is no need to repeat the general principles of contractual interpretation which assist in achieving that goal as they are well set out in the reasons of the majority. However, the following quotation from *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, [1979] S.C.J. No. 133, at p. 901 S.C.R., provides useful guidance:

> *[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract.* Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. *Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties.* Similarly, an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

(Emphasis added)

[171] What, then, was the true intent of the parties in February 1999 when they entered into the Alliance Agreement? Did they intend that if a dispute arose between them that could not be resolved through good faith discussions, the party with the claim could commence arbitration in only one way, namely, by complying with the Institute's rules for commencement of arbitration? I turn now to the analysis which leads me to conclude that the answer to that question is "no".

Article 22

[172] The Arbitration Clause does not stand alone — it is but one part of art. 22. Article 22 establishes a two-step process for dispute resolution. Given that art. 22.2 governs the second step in a two-step dispute-resolution process, the first of which is contained in art. 22.1, both logic and the guiding principles of contractual interpretation dictate that art. 22 be considered as a whole.

[173] Article 22 reflects the parties' shared intention to resolve disputes quickly, co-operatively and without recourse to the courts. The first step in the dispute resolution process is laid out in art. 22.1. Pursuant to art. 22.1(a), a party who considers a dispute to exist must provide a designated representative of the other party with written notice to that effect. Within ten days of the date of the notice, designated representatives of both parties must make commercially reasonable efforts, in good faith, to resolve the dispute. If the dispute is not resolved within ten days, pursuant to art. 22.1(b) the dispute "shall" be referred to other designated persons in the two organizations (the "second tier"). Within a further ten days, the second tier must again make commercially reasonable efforts, in good faith, to resolve the dispute.

[174] It is worthy of note that while art. 22.1(a) makes it clear how the dispute resolution process is to be commenced (*i.e.*, by written notice delivered by the party alleging the dispute to a designated representative of the other party), art. 22.1(b) does not indicate how the dispute is to be referred to the second-tier should the initial good faith discussions fail to resolve the dispute. That is, it says nothing about how to commence the second tier discussions.

[175] If the dispute is unresolved through the good faith efforts required by art. 22.1, the parties move to the second step of the dispute resolution process. Article 22.2 governs the second step; it states that the parties "will settle by arbitration" any disputes unresolved through the first step. It goes on to stipulate that a single arbitrator, selected by the parties from a panel of persons knowledgeable in business information and the construction industry, will conduct the arbitration in Toronto in accordance with the *Arbitration Act, 1991* and the then-current rules of the Institute. Failure to file a notice of arbitration within 12 months "after the occurrences supporting a claim" constitutes an irrevocable waiver of that claim.

[176] Three things are immediately apparent on reading art. 22.2. First, it says nothing expressly about how arbitration is to be commenced. In that regard, it stands in sharp contrast with art. 22.1(a), which, as has been noted, spells out the requirements for commencing the dispute resolution process.

[177] Second, while art. 22.2 is silent on how the arbitration is to be commenced, as already indicated, a number of other aspects of the arbitration process are specified.

[178] Third, the Waiver is in the last sentence of art. 22.2 and it says nothing expressly about commencement of arbitration. That makes sense. The Waiver, on which more is said below, is an important provision which affects substantive rights. How a party commences arbitration is a procedural matter.

How is arbitration to be commenced under art. 22.2?

[179] I return to the question which lies at the heart of this appeal. In February 1999, when the parties entered into the Alliance Agreement, did they intend that arbitration could be commenced by only one method, namely, in accordance with the then-current Institute rules?

[180] Article 22.2 does not say that and, with respect, there is no basis on which to imply such an intention. What is clear is this: the parties intended that if the good faith efforts called for by art. 22.1 failed to resolve the dispute, the matter would go to arbitration. How was the arbitration to be commenced? In the absence of any specified manner, I see no reason why the Arbitration Clause must be interpreted so as to permit a party to commence arbitration by one method only, namely, compliance with the Institute rules. The parties to the Alliance Agreement are sophisticated, experienced businesses. Legal counsel assisted in the drafting of the agreement. Had they intended to stipulate a single method by which to commence the arbitration process, that matter would have been specified, just as the method for commencement of the first step in the process in art. 22.1 is specified and just as so many other aspects of the arbitration process are specified.

[181] Moreover, art. 24.6 of the Alliance Agreement provides that it is to be governed and construed in accordance with Ontario law.[16] Accordingly, in 1999, when the parties entered into the Alliance Agreement, the *Arbitration Act, 1991* applied to the agreement. Section 2(1) of the *Arbitration Act, 1991* provides that, subject to exceptions that do not apply in this case, the Act applies to arbitrations conducted under an arbitration agreement. "[A]rbitration agreement" is defined as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them". Clearly, art. 22.2 is such an agreement. Thus, as I have said, the *Arbitration Act, 1991* applied to art. 22.2.

[182] Consequently, I see the true intention of the parties — as expressed in the Arbitration Clause — to be that arbitration could be commenced "in any way recognized by [Ontario] law".

16 Article 24.6 provides:

> *Governing Law.* This Agreement shall be governed and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The Parties hereby attorn to the non-exclusive jurisdiction of the Courts of Ontario.

Thereafter, the parties would select an arbitrator with the specified background who would conduct the arbitration in accordance with the Act and the Institute rules, as amended.

[183] This interpretation is consistent with the flow and structure of art. 22. As has been noted, the method for commencing the dispute resolution process itself is [spelled] out in art. 22.1(a) but, thereafter, nothing is specified in terms of how notice should be given to move the dispute resolution forward. Art. 22.1(b) says nothing as to how the dispute is to be placed before the second tier should the initial good faith discussions fail. Similarly, art. 22.2 says nothing as to how to commence arbitration should both tiers of the good faith discussions fail. This suggests that the parties' intention was that once the dispute resolution process was commenced, they would co-operate in seeing it through to settlement.

[184] It is also consistent with the Alliance Agreement as a whole. Under the terms of the Alliance Agreement, Bell and Plan agreed to work collaboratively and co-operatively. The Alliance Agreement is not a standard form contract, nor is it a contract in which one party provides goods or services and the other pays for them. It is not a detailed agreement. Rather, it sets out the parties respective rights and obligations in broad terms to create a unique arrangement in which the parties agree to work together to deliver expensive, complicated, technical electrical-cabling projects.

[185] The parties' agreement to extensive levels of co-operation in all aspects of the joint venture is evident throughout the Alliance Agreement, beginning with the preambles in which the parties recognize that each has unique capabilities and express the desire to co-operate in providing their services on cabling projects. In art. 2, the parties agree to coordinate their marketing efforts in respect of existing and new customers and to collaborate in pursuing business opportunities. In art. 3, Plan agrees to refer to Bell all of its cabling project customers in the region and Bell agrees to use Plan to provide customer services to all of its customers in the region. In arts. 8 and 9, the parties agree to provide one another with all training necessary to support customer inquiries in respect of deliverables. The parties also agree to forego any other similar types of alliance agreements in the region and to work together on all new cabling projects.

[186] In short, within the structure created by the Alliance Agreement, co-operation between the parties is the hallmark. Similarly, the interpretation I offer for how arbitration is to be commenced relies on the parties' co-operation, within the agreed-on structure provided by art. 22.

[187] Furthermore, the factual matrix supports this interpretation. The parties had been working together in a co-operative fashion. As has been mentioned, they were sophisticated, experienced business people working with legal counsel. Their whole approach — both from a legal and a business perspective — was to set out, in broad strokes, that which they wished to accomplish and then co-operate in seeing the matter through to fruition.

[188] The interpretation given by my colleague is restrictive and technical — arbitration can be commenced in only one way, by filing a notice with the Institute. In my view, for the reasons already given, such an interpretation is not consistent with the flow and structure of the overall dispute resolution process in art. 22, with the Alliance Agreement as a whole or the factual matrix.

[189] Furthermore, the interpretation adopted by my colleague relies heavily on the statement in art. 22.2 that the arbitration is to be conducted under the Institute's rules. There are two responses to this. First, recall that the sole reference to the Institute in art. 22.2 is in the second sentence, which provides that the arbitrator "will conduct the arbitration under the *Arbitration Act, 1991* (Ontario) and the then-current rules of the. . . Institute". One cannot conduct an arbitration unless it has been commenced. Thus, on a plain reading, art. 22.2 says that the Institute rules are to apply to the conduct of the arbitration, not to its commencement.

[190] Second, and in any event, even if "conduct" of the arbitration is taken to include its commencement, I see no reason to constrain it to include commencement only by compliance with the Institute rules. That is not what art. 22.2 says. Article 22.2 says that the arbitrator is to conduct the arbitration under both the *Arbitration Act, 1991* and the Institute rules. Both contain rules for the commencement of arbitration. There is nothing in the wording of art. 22.2 to suggest that the Institute's rules are to govern commencement. Indeed, there is force to the argument that as art. 22.2 refers to the *Arbitration Act, 1991* before the Institute rules, the parties' evinced an intention that the rules set out in the *Arbitration Act, 1991* are to govern commencement of arbitration.

[191] Nor do I see *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (S.C.J.) as supportive of the interpretation advanced by my colleague. The wording of the clause in *Spectra* is materially different than the Arbitration Clause. The clause in *Spectra* [at para. 3] provided that the arbitration tribunal should determine the matter "*acting in accordance with the Rules [of the ICC]*" (emphasis added). However, the Arbitration Clause

stipulates that the arbitrator "will *conduct* the arbitration *under the Arbitration Act, 1991* (Ontario) and the then-current [Institute rules]" (emphasis added).

[192] Moreover, as the application judge noted, at para. 41 of his reasons:

> While the arbitration clause in *Spectra* also addresses the appointment of the arbitrator by the parties (in this case, an arbitration board), it does not refer to compliance with the applicable rules in the context of the conduct of the arbitration by the arbitrator so appointed. This difference points to a specific intention in the Arbitration Clause that the arbitrator, once appointed, would be required to apply the procedural rules in the Act and in the rules of the Institute, as in effect from time to time, rather than to a more general intention that the Institute was to administer all aspects of the arbitration, as was held to be the case in *Spectra*. Accordingly, rather than supporting the interpretation of the Arbitration Agreement proposed by Bell, I think that the decision in *Spectra* actually supports the interpretation of Plan by identifying the unique feature of the Arbitration Clause that distinguishes it from clauses that would contemplate the administrative involvement of the Institute.

[193] Further, in *Spectra*, the court relied on the factual matrix in interpreting the clause. After observing that the applicant was based in Singapore, the respondent was based in Ontario and the agreement concerned the supply of product in India, the court in *Spectra* concluded, at para. 17:

> The I.C.C. court which was founded in Paris in 1923, has a long-standing reputation as one of the leading institutions for arbitration of international commercial disputes. *In this context*, it would be altogether logical that the parties would want to resolve any dispute by setting up an arbitration board acting in accordance with the Rules of conciliation and arbitration of the I.C.C.

(Emphasis added)

[194] No such inter-jurisdictional commercial considerations operate in the case at bar, in which all aspects of the business arrangement take place in Ontario and the parties have expressly chosen to have their agreement governed by Ontario law.

[195] Finally, the Waiver is an exclusionary provision which warrants strict interpretation as its operation affects substantive rights. In contrast, the clause in *Spectra* dealt with matters of mere procedure.

The Waiver

[196] The Waiver is the mechanism chosen by the parties to ensure that claims under the Alliance Agreement are dealt with in a timely fashion — file a notice of arbitration within 12 months of the occurrences which support a claim or the claim is to be treated as irrevocably waived.

[197] Bell contends that the Waiver dictates that arbitration could have been commenced in only one way — by filing a notice with the Institute. It says that the word "file" in the Waiver must mean to file with the Institute and, as the Notice was not filed and issued through the Institute, Plan's claim is extinguished. In large measure, my colleague accepts that contention by interpreting the word "file" in the Waiver as a crucial indicator of the parties' intention that the Institute rules were to govern the commencement of arbitration.

[198] With respect, I see the Waiver to be of little significance in determining whether the arbitration has been commenced.

[199] "Waiver" of a claim and "commencement" of arbitration are not synonymous. The Waiver may be a defence to be raised in the arbitration but it does not dictate whether and how the arbitration is to be commenced.

[200] Similarly, I see no reason to adopt an unnecessarily restrictive meaning of "file". "File" is not a defined term in the Alliance Agreement. As the parties intended that disputes would be resolved without recourse to the courts, it does not make sense to ascribe to that word a narrow, strictly legal meaning. Where the parties wanted to closely circumscribe some aspect of the dispute resolution process, they did so — good faith discussions were to be conducted within ten days of the date of the notice of dispute, the arbitration was to be in Toronto, the arbitrator was to be selected from a panel of persons with a particular background and so on.

[201] Further, the broader dictionary meaning of "file" includes delivery and receipt and to do that which is necessary to commence a legal proceeding. The common meaning of "file" includes "actual delivery" to the recipient (as opposed to simply mailing) or to initiate proceedings by proper formal procedure. For example, *The Canadian Dictionary of Law*, 3rd ed. defines "file" as follows:

> *File.* v. 1. To leave with the appropriate office for keeping. 2. Register. 3. Requires actual delivery. A mailed document is not filed until received by the other party.

[202] These broad meanings of "file" are consistent with the commencement of arbitration under s. 23 of the *Arbitration Act, 1991*.

[203] To the extent that there is ambiguity in the Waiver, as it is an exclusionary provision, it ought to be construed strictly against the forfeiture of legal rights. This principle of interpretation is particularly apt in the present case where Plan sought to commence arbitration in a manner which complied with a plain reading of the Arbitration Clause and with the express purpose of protecting its rights and Bell raised no objection to the form of

the purported commencement of arbitration until many months later. The broader interpretation advanced here recognizes commencement of arbitration by any means allowable in law and would not work an injustice by causing the loss of rights.

[204] I do not intend to suggest that the Waiver is irrelevant or unimportant. To the contrary. On its own, the Waiver is important as it is the mechanism that the parties chose to ensure that claims would be raised in a timely fashion. Furthermore, if this matter were permitted to proceed to arbitration, as I have mentioned, it raises a significant issue for the arbitrator to decide.

The result is reasonable, fair and commercially sensible

[205] In the quotation from *Consolidated-Bathurst* set out above, the Supreme Court states that where a provision admits of more than one construction, the court should choose the one which produces a result that is more reasonable, fair and commercially sensible.

[206] The result, on the interpretation advanced above, is that Plan may assert that it commenced arbitration on December 12, 2005, when it delivered to Bell the Notice pursuant to s. 23 of the *Arbitration Act, 1991*, if not earlier. That matter, however, remains to be determined by the arbitrator. I say that because, as I have already explained, the Order does not declare that Plan has commenced arbitration and, if so, on what date. By answering the question in the manner in which the parties had framed it (*i.e.*, in the negative), the application judge left the question of when Plan commenced arbitration, if at all, to be determined by the arbitrator.

[207] In my view, this result is reasonable, fair and commercially sensible.

[208] When parties have agreed that disputes are to be settled by arbitration and that the *Arbitration Act, 1991* applies, it is reasonable for the parties to follow the provisions of that legislation regarding commencement of arbitration.

[209] Moreover, this interpretation promotes a fair result as it would permit the arbitration to proceed while leaving it to the parties to pursue the issues of both commencement and operation of the Waiver before the arbitrator.

[210] There is no commercial necessity that would augur in favour of excluding the operation of s. 23 of the *Arbitration Act, 1991*.

[211] No commercial injustice arises from this interpretation. Bell was given ample notice of Plan's intention to take its claim to arbitration. It took advantage of that notice by demanding extensive particulars in respect of the claim. Moreover, Bell was

manifestly aware of all the elements of a notice of request to arbitrate under the Institute's then-current rules.

[212] There is no evidence that Bell would suffer any prejudice from this interpretation of the Arbitration Clause. Instead, the evidence suggests opportunism on the part of Bell. It seeks — very late in the day — to invoke the Waiver on grounds that are entirely formalistic in nature. Plan delivered the Draft Notice to Bell on August 26, 2005, when it initiated the good faith discussions required by art. 22.1(a). Bell raised no objection then to the fact that the Draft Notice was made under the *Arbitration Act, 1991* instead of the Institute rules. Nor did it suggest that such a notice would not be adequate to preserve Plan's rights with respect to the Waiver. It raised the Waiver, but only to suggest that Plan's claim was out of time as the occurrences on which it was based had taken place over 12 months previously.

[213] In the context of good faith discussions, Bell should have raised this objection at that time, if it were genuine. At the very least, if no objection were raised when the Draft Notice was delivered, Bell should have raised its concerns when the Notice was delivered on December 12, 2005. Instead, Bell remained silent on this issue, demanded further particulars and suggested that the good faith discussions might continue.

[214] In summary, interpreting the Arbitration Clause to allow commencement of arbitration in any manner recognized by s. 23 of the *Arbitration Act, 1991* — which would include the Institute rules as well as delivery of a notice demanding arbitration — meets the reasonable expectations of the parties, reflects their intention as expressed in the Alliance Agreement in 1999 when they executed the agreement, and produces a result that is reasonable, fair and commercially sensible.

Disposition

[215] Accordingly, I would dismiss the appeal, with costs to the respondents fixed at $20,000, inclusive of disbursements and GST.

Appeal allowed.

TAB # 5.

HANBURY & MARTIN

MODERN EQUITY

SIXTEENTH EDITION

BY

JILL E. MARTIN, LL.D. (Lond.)

Professor of Law, Kings College, London

Barrister, Lincoln's Inn

London
Sweet & Maxwell Ltd
2001

not normally specifically enforceable.[69] Similarly, in *Napier and Ettrick (Lord) v. Hunter*[70] it was considered that the duty of an insured person to hand over any damages from the wrongdoer to the insurer was specifically enforceable, so that the insurer had immediate proprietary rights in the form of a lien over the money.

ix. Equity is equality. Where two or more persons are entitled to an interest in the same property, then the principle of equity is equal division, if there is no good reason for any other basis for division.[71] Equity, therefore, dislikes the joint tenancy where, by the doctrine of survivorship, the last survivor takes all. This may be contrasted with the tenancy in common, where the interest of each party devolves upon his personal representative on his death. In the absence of an express declaration to the effect that the equitable interest is held jointly, equity presumes a tenancy in common in certain cases where at law the parties are joint tenants: for example, where the purchase money has been provided in unequal shares, equity presumes a tenancy in common in shares proportionate to the contributions. Even where the equitable interest is held jointly, equity leans in favour of severance, meaning that equity is ready to regard an act or dealing as an act of severance, whereby the equitable interest is converted to a tenancy in common, thus excluding the possibility of survivorship.[72]

x. Equity looks to the intent rather than the form. This principle does not mean that formalities may be ignored in equity, but rather that equity looks at the substance rather than the form. Thus equity will regard a transaction as a mortgage even though it is not so described, if in substance it appears that the property was transferred by way of security. Similarly a trust may be created although the word "trust" has not been used.[73] A covenant will be regarded as a restrictive covenant if negative in substance even if it is worded in a positive form.[74] Although a party to a covenant can enforce the contract at law even though no consideration has been given, equity regards such a party as a volunteer and will not order specific performance in his favour.[75]

[69] [1994] 2 R.L.R. 57 (D. Crilley); (1994) 53 C.L.J. 31 (A. Oakley); (1994) 110 L.Q.R. 178 (P. Watts); All E.R.Rev. 1994 pp. 252 (P. Clarke) and 365 (W. Swadling); (1995) 54 C.L.J. 60 (S. Gardner); (1995) 58 M.L.R. 87 (T. Allen).
[70] [1993] A.C. 713.
[71] For a recent example, see *Rowe v. Prance* [1999] 2 F.L.R. 787 (yacht).
[72] See *Burgess v. Rawnsley* [1975] Ch. 429.
[73] *post*, p. 95.
[74] *Tulk v. Moxhay* (1848) 18 L.J.Ch. 83 (covenant "to keep uncovered by buildings" held negative).
[75] *Cannon v. Hartley* [1949] Ch. 213.

TAB # 6.

EQUITY AND THE LAW OF TRUSTS

Eleventh Edition

PHILIP H PETTIT MA

of the Middle Temple, Barrister

Emeritus Professor of Equity, Universities of Bristol and Buckingham

OXFORD
UNIVERSITY PRESS

property, then, in the absence of any provision or agreement applying to the situation, equity treats them as equally entitled. This is at the basis for equity's preference for a tenancy in common over a joint tenancy: in a joint tenancy, the rule of survivorship operates arbitrarily in favour of longevity. The maxim is also applied to an implied trust in default of appointment.[143]

(I) 'EQUITY LOOKS TO THE INTENT RATHER THAN THE FORM'

Equity concentrates on the substance of a transaction, rather than its form. Thus, it may hold that a trust has been created even though the word 'trust' has not been used,[144] that a covenant, although positive in wording, is in substance negative and enforceable as a restrictive covenant,[145] and it will refuse to grant an injunction that would, in substance, amount to a decree of specific performance where such an order would not be granted directly.[146] It will not grant specific performance of a voluntary contract even though contained in a deed.[147]

(J) 'EQUITY LOOKS ON THAT AS DONE WHICH OUGHT TO BE DONE'

Equity commonly treats a contract to do a thing as if that thing were already done. A well-known example is the doctrine of *Walsh v Lonsdale*,[148] under which a person who, for valuable consideration, has entered into an agreement for a lease is treated as if he were an actual lessee, and a vendor under a contract for the sale of land is treated as a constructive trustee for the purchaser, although in a modified sense.[149] It is the basis of the equitable doctrine of conversion,[150] and the rule in *Howe v Earl Dartmouth*.[151]

(K) 'EQUITY IMPUTES AN INTENTION TO FULFIL AN OBLIGATION'

This is usually listed as one of equity's maxims, although it is of limited application. It puts a favourable construction on what a person has done, and is one of the bases of the equitable doctrines of satisfaction, ademption, and performance.[152]

(L) 'EQUITY ACTS *IN PERSONAM*'

As we have seen,[153] equity enforced its decrees by a personal order against the defendant: breach of the order would be a contempt of court, for which he was liable to imprisonment. Provided that the defendant is within the jurisdiction of the court, it does not

143 See p 37, *infra*.
144 See the discussion of precatory trusts, p 47 *et seq*, *infra*.
145 *Tulk v Moxhay* (1848) 2 Ph 774.
146 See, eg, *Page One Records Ltd v Britton* [1967] 3 All ER 822.
147 See p 653, *infra*.
148 (1882) 21 Ch D 9, CA.
149 See p 164, *infra*.
150 See the Online Resource Centre.
151 (1802) 7 Ves 137 and p 429 *et seq*, *infra*.
152 See the Online Resource Centre.
153 See p 4, *supra*.

TAB # 7.

Pacific National Investments Ltd. *Appellant*

v.

Corporation of the City of Victoria *Respondent*

Indexed as: Pacific National Investments Ltd. v. Victoria (City)

Neutral citation: 2004 SCC 75.

File No.: 29759.

2004: June 15; 2004: November 19.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Municipal law — Zoning — Land development — Unjust enrichment — Developer suing municipality for unjust enrichment following "down-zoning" of lots — Whether municipality entitled to retain improvements made by developer on these lots without paying.

Unjust enrichment — Land development — Municipalities — Developer suing municipality for unjust enrichment following "down-zoning" of lots — Whether municipality entitled to retain improvements made by developer on these lots without paying — Whether conditions for unjust enrichment met.

In the 1980s, the provincial government and the respondent City agreed on the desirability of redeveloping, for residential and commercial uses, approximately 200 acres of provincial Crown land on the City's inner harbour. With respect to Phase II of the project, once the rights and obligations of the provincial Crown agency that owned the land had been assigned to the appellant real estate developer, the City and the developer entered into an agreement which provided, amongst other things, that the developer would build roads, parkland, walkways and a new seawall. These works and improvements were completed at a cost of about $1.08 million. It was a condition precedent to the developer's obligations that the City would re-zone the 22 acres from the existing industrial designation to permit residential and

Pacific National Investments Ltd. *Appelante*

c.

Corporation de la ville de Victoria *Intimée*

Répertorié : Pacific National Investments Ltd. c. Victoria (Ville)

Référence neutre : 2004 CSC 75.

N° du greffe : 29759.

2004 : 15 juin; 2004 : 19 novembre.

Présents : La juge en chef McLachlin et les juges Major, Bastarache, Binnie, LeBel, Deschamps et Fish.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit municipal — Zonage — Aménagement foncier — Enrichissement sans cause — Poursuite du promoteur immobilier contre la municipalité pour enrichissement sans cause à la suite d'une modification du zonage des lots — La municipalité peut-elle conserver sans en payer le prix les améliorations que le promoteur a apportées à ces lots?

Enrichissement sans cause — Aménagement foncier — Municipalités — Poursuite du promoteur immobilier contre la municipalité pour enrichissement sans cause à la suite d'une modification du zonage des lots — La municipalité peut-elle conserver sans en payer le prix les améliorations que le promoteur a apportées à ces lots? — Les conditions de l'enrichissement sans cause sont-elles réunies?

Dans les années 80, le gouvernement provincial et la Ville intimée ont convenu de l'opportunité du réaménagement, à des fins résidentielles et commerciales, d'environ 200 acres d'un bien-fonds de la Couronne provinciale situé dans le port intérieur de la municipalité. Relativement à la phase II du projet, après que la société d'État provinciale propriétaire des terrains eut cédé ses droits et ses obligations au promoteur immobilier appelant, la Ville et le promoteur ont conclu un accord prévoyant notamment que ce dernier construirait des routes et une nouvelle digue et aménagerait des espaces verts et des sentiers. Ces travaux et améliorations ont été menés à terme et leur coût est estimé à 1,08 million de dollars. La prise en charge des obligations de la société d'État par le promoteur était subordonnée à ce que la Ville modifie commercial uses appropriate to carrying out the agreed upon project. However, when the developer applied for building permits to develop its two water lots, the City Council down-zoned these lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums. The developer sued the City for breach of contract and, in the alternative, for unjust enrichment. Ultimately, this Court rejected the contractual claim on the basis that, under the provincial law governing municipalities at the relevant time, the City lacked the statutory authority to make and be bound by an implied term to keep the zoning in place for a reasonable time to allow for completion of the project, and that its breach therefore could not give rise to an action for damages. The matter was remitted to the trial court to deal with the alternative claim. The trial judge, on that basis, for unjust enrichment, awarded $1.08 million to the developer. The Court of Appeal set aside the trial judge's decision.

Held: The appeal should be allowed and the trial judgment restored. The City had no right in equity to retain the benefit of the extra works and improvements carried out by the developer without paying for them.

The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. In this case, the City obtained $1.08 million worth of roads, parkland and walkways and a new seawall, wholly at the developer's expense. These works and improvements were in excess of what the City could lawfully demand under the *Municipal Act*. The developer, having lost its earlier claim against the City for breach of contract, no longer attacks the validity of the down-zoning. It no longer seeks damages for breach of contract that included loss of profits on a project it was unable to build. The Court is now dealing simply with the cost of extra works and improvements. The focus is not on the developer's loss but on the City's enrichment. The power to down-zone in the public interest does not immunize the City against claims for unjust enrichment.

The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of

au préalable le zonage industriel des 22 acres pour permettre l'aménagement résidentiel et commercial projeté. Cependant, lorsque l'appelante a demandé les permis de construction nécessaires à l'aménagement de ses deux plans d'eau, le conseil municipal a modifié le zonage de ceux-ci afin que seuls des immeubles commerciaux d'un étage puissent y être construits, éliminant ainsi les deux étages supérieurs destinés aux condominiums résidentiels. Le promoteur a poursuivi la Ville en responsabilité contractuelle et, subsidiairement, pour enrichissement sans cause. Finalement, notre Cour a rejeté l'action contractuelle au motif que, sous le régime du droit provincial régissant les municipalités à l'époque considérée, la Ville n'avait pas le pouvoir de s'engager tacitement à maintenir le zonage pendant une période raisonnable afin que le projet puisse être mené à terme, et que l'inexécution ne pouvait donc fonder une action en dommages-intérêts. L'affaire a été renvoyée en première instance pour qu'il soit statué sur l'argument subsidiaire. Le juge de première instance a accueilli l'action fondée sur l'enrichissement sans cause et ordonné à la Ville de payer 1,08 million de dollars au promoteur. La Cour d'appel a infirmé cette décision.

Arrêt : Le pourvoi est accueilli et le jugement de première instance est rétabli. La Ville ne pouvait, suivant l'equity, bénéficier des travaux et des améliorations supplémentaires réalisés par le promoteur sans en payer le prix.

L'enrichissement sans cause est une cause d'action en equity qui offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience. En l'espèce, la Ville a obtenu, entièrement aux frais du promoteur, des routes, des espaces verts, des sentiers et une nouvelle digue d'une valeur de 1,08 million de dollars. Ces travaux et améliorations allaient au-delà de ce que la Ville pouvait légalement exiger en application de la *Municipal Act*. Le promoteur, qui a été débouté dans sa poursuite pour rupture de contrat, ne conteste plus la validité de la modification du zonage. Il ne demande plus de dommages-intérêts pour inexécution de contrat, notamment pour le manque à gagner afférent au projet qu'il n'a pu mener à terme. Seul le coût des travaux et des améliorations supplémentaires est en cause. L'accent est mis non pas sur la perte du promoteur, mais bien sur l'enrichissement de la Ville. Le pouvoir de modifier le zonage dans l'intérêt public ne met pas la Ville à l'abri d'une action fondée sur l'enrichissement sans cause.

Pour qu'il y ait enrichissement sans cause, trois conditions doivent être réunies : (1) l'enrichissement du défendeur; (2) l'appauvrissement corrélatif juristic reasons for the enrichment. There are two stages to the juristic reason inquiry. At the first stage, a claimant must show that there is no juristic reason within the established categories that would deny it recovery. At this time, the established categories are the existence of a contract, disposition of law, donative intent and "other valid common law, equitable or statutory obligatio[n]". At the second stage, the focus shifts to the defendant, who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. Here, the developer has a valid claim for unjust enrichment: the City obtained, on the basis of its *ultra vires* demand, additional roads, parkland and walkways and a new seawall, wholly at the developer's expense; the developer suffered a corresponding deprivation of $1.08 million; and there was no juristic reason for the enrichment.

du demandeur; (3) l'absence de tout motif juridique justifiant l'enrichissement. L'examen relatif au motif juridique comporte deux étapes. Dans un premier temps, le demandeur doit démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie le refus de l'indemniser. Pour l'heure, les catégories établies sont le contrat, la disposition légale, l'intention libérale et « les autres obligations valides imposées par la common law, l'equity ou la loi ». Dans un deuxième temps, il appartient au défendeur de réfuter la preuve *prima facie* en avançant un autre motif valable de refuser l'indemnisation. En l'espèce, le promoteur allègue à juste titre l'enrichissement sans cause. En raison de ses exigences *ultra vires*, la Ville a obtenu aux frais du promoteur des routes, des espaces verts et des sentiers supplémentaires, ainsi qu'une nouvelle digue, le promoteur s'est appauvri corrélativement de 1,08 million de dollars et aucun motif juridique ne justifiait l'enrichissement.

The trial judge found the extra works and undertakings given in exchange for the *ultra vires* zoning commitment to be clearly separate and identifiable. The cost was $1.08 million. There is no difficulty on the facts in distinguishing between the City's lawful entitlement and the *ultra vires* extras. It is not necessary for the developer in this action to try and set aside the entirety of its contractual arrangements with the City. It need only isolate the provisions related to the *ultra vires* demand, and show why the City ought not to be allowed to rely on them as a defence to a claim in unjust enrichment. Moreover, the trial judge found that the *ultra vires* arrangements rested on a common mistake. Both the City and the developer assumed the City had the legal authority to make zoning commitments the City did not possess. The finding of common mistake is important to the developer's claim to recover the cost of the extra works and improvements. If there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.

Le juge de première instance a conclu que les travaux et les améliorations supplémentaires en contrepartie desquels avait été pris l'engagement *ultra vires* relatif au zonage étaient clairement distincts et identifiables. Leur coût s'élevait à 1,08 million de dollars. Il n'est pas difficile de distinguer entre ce à quoi la Ville avait légitimement droit et ce qui était *ultra vires*. Le promoteur n'a pas à écarter toutes les conventions conclues avec la Ville. Il lui suffit d'isoler les dispositions liées à la demande *ultra vires* et de montrer pourquoi la Ville ne devrait pas être admise à les invoquer pour réfuter l'enrichissement sans cause. De plus, le juge de première instance a conclu que les accords *ultra vires* reposaient sur une erreur commune aux deux parties. Tout comme le promoteur, la Ville a supposé qu'elle était légalement habilitée à prendre un engagement en matière de zonage, ce qui n'était pas le cas. L'erreur commune est importante pour ce qui est du recouvrement du coût des travaux et des améliorations supplémentaires par le promoteur. La situation aurait été différente si nous avions été uniquement en présence d'une opération *ultra vires*, sans que ne s'y ajoute l'erreur commune, et l'issue n'aurait pas nécessairement été la même.

Equity looks to substance rather than to form. A characteristic of the doctrine of unjust enrichment is the flexibility of remedies. Here the substance of the problem to be remedied is clearly identified. The City is sitting on $1.08 million worth of improvements which have been found to be the fruits of an *ultra vires* demand. The remedy sought is simply to reverse the wrongful transfer of wealth by ordering reimbursement of that amount to the developer.

L'equity s'intéresse au fond et non à la forme. L'une des caractéristiques de la doctrine de l'enrichissement sans cause est la souplesse dans les réparations susceptibles d'être accordées. En l'espèce, les données du problème qui appelle réparation sont clairement établies. La Ville bénéficie d'améliorations d'une valeur de 1,08 million de dollars, et il a été statué qu'elles résultaient d'exigences *ultra vires*. La réparation demandée consiste simplement à annuler le transfert de richesse injustifié en ordonnant le paiement du prix des améliorations au promoteur.

Section 914 of the *Local Government Act* and s. 215(3) of the *Land Title Act* do not authorize the City's retention without payment of the extra works and improvements. The claim here is not based on "the adoption of an official community plan or [zoning] bylaw". While the earlier appeal alleged that the down-zoning of the water lots breached an implied term of the contract, that claim was rejected, and the developer's losses flowing from the down-zoning are no longer in issue. The developer's cause of action for unjust enrichment was complete when it put in place the extra works and improvements on the basis of a mutual mistake that its contract with the City in respect thereto was enforceable.

Neither the City nor the developer expected the extra works and improvements to be donated. The developer did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking it turned out the City was able to repudiate. The reasonable expectation was that the works and improvements would be paid for out of the profits from those parts of the Phase II project the developer was prevented by the City from building. The City now owns the works, and it is consistent with the parties' reasonable expectations that the appellant be reimbursed for their cost.

The grant of an equitable remedy in this case would not frustrate the legislature's purpose in making such zoning commitments unenforceable. In fact, the City did down-zone the lots in question and was held able to do so without having to pay damages for breach of contract. Whether or not it should pay the actual cost of benefits it actually demanded and received is a different question.

The City has not shown that it would be good public policy to allow municipalities to make development commitments, then not only to attack those commitments as illegal and beyond their own powers, but to scoop the resulting financial windfall at the expense of those who contracted with them in good faith.

Cases Cited

Applied: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peter v. Beblow*, [1993] 1 S.C.R. 980; **referred to:** *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64; *Burrow v. Scammell* (1881), 19 Ch. D. 175; *Air Canada v. British Columbia*,

L'article 914 de la *Local Government Act* et le par. 215(3) de la *Land Title Act* n'autorisent pas la Ville à conserver les travaux et les améliorations supplémentaires sans les payer. L'allégation considérée en l'espèce ne s'appuie pas sur « l'adoption d'un plan d'urbanisme ou d'un règlement [de zonage] ». Même si, dans le premier pourvoi, le promoteur a allégué que la modification du zonage des plans d'eau avait contrevenu à une clause implicite du contrat, cette prétention a été rejetée, et les pertes que lui a infligées cette modification ne sont désormais plus en cause. Les éléments constitutifs de l'enrichissement sans cause ont été réunis une fois que le promoteur a réalisé les travaux et les améliorations supplémentaires, les parties croyant à tort que le contrat conclu avec la Ville à cet égard était exécutoire.

En ce qui concerne les travaux et les améliorations supplémentaires, ni la Ville ni le promoteur ne s'attendaient à ce qu'il s'agisse d'un don. Le promoteur n'a pas offert de « rallonge » pour obtenir une chose qu'il avait déjà. Il l'a fait en contrepartie d'un engagement tacite que la Ville a pu en fin de compte répudier. Les parties s'attendaient raisonnablement à ce que le coût des travaux et des améliorations soit prélevé sur les profits tirés des volets du projet de la phase II que le promoteur n'a pu mener à terme à cause de la municipalité. La Ville est maintenant propriétaire des infrastructures, et il est compatible avec les attentes raisonnables des parties qu'elle en paie le coût au promoteur.

En l'espèce, une réparation fondée sur l'equity ne serait pas contraire à l'intention du législateur de rendre inexécutoire un engagement relatif au zonage. En effet, la Ville a modifié le zonage des lots en question et il a été décidé qu'elle pouvait le faire sans verser de dommages-intérêts pour rupture de contrat. C'est une autre question que de savoir si elle devrait supporter le coût des avantages qu'elle a demandés et qui lui ont été conférés.

La Ville n'a pas démontré qu'il serait dans l'intérêt public de permettre à une municipalité de prendre un engagement relatif à l'aménagement, puis non seulement de le contester au motif qu'il est illégal et outrepasse ses pouvoirs, mais de profiter d'un avantage financier aux dépens d'un cocontractant de bonne foi.

Jurisprudence

Arrêts appliqués : *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762; *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25; *Rathwell c. Rathwell*, [1978] 2 R.C.S. 436; *Pettkus c. Becker*, [1980] 2 R.C.S. 834; *Peter c. Beblow*, [1993] 1 R.C.S. 980; **arrêts mentionnés :** *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64; *Burrow c. Scammell* (1881), 19 Ch. D. 175; *Air*

[1989] 1 S.C.R. 1161; *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445.

Statutes and Regulations Cited

Land Title Act, R.S.B.C. 1979, c. 219, s. 215.
Local Government Act, R.S.B.C. 1996, c. 323, s. 914.
Municipal Act, R.S.B.C. 1979, c. 290, s. 989 [ad. 1985, c. 79, s. 8].

Authors Cited

American Law Institute. *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts, as Adopted and Promulgated by the American Law Institute, at Washington, D.C., May 8, 1936*. St. Paul, Minn.: American Law Institute Publishers, 1937.
Smith, Lionel. "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211.

APPEAL from a judgment of the British Columbia Court of Appeal (2003), 223 D.L.R. (4th) 617, 11 B.C.L.R. (4th) 234, 23 C.L.R. (3d) 181, 36 M.P.L.R. (3d) 222, 180 B.C.A.C. 104, 297 W.A.C. 104, [2003] B.C.J. No. 537 (QL), 2003 BCCA 162, reversing decisions of the British Columbia Supreme Court, [2002] B.C.J. No. 1379 (QL), 2002 BCSC 41, and (2002), 217 D.L.R. (4th) 248, 20 C.L.R. (3d) 251, 32 M.P.L.R. (3d) 235, [2002] B.C.J. No. 1847 (QL), 2002 BCSC 1185. Appeal allowed.

L. John Alexander, for the appellant.

Guy E. McDannold, for the respondent.

The judgment of the Court was delivered by

BINNIE J. — This case arrives in our Court for the second time. On the first occasion, the appellant real estate developer Pacific National Investments Ltd. ("PNI") sought to make the respondent municipality liable for breach of contract because it down-zoned in mid-project part of the appellant's 22-acre development on the Victoria waterfront. As a result of the down-zoning, a substantial amount of approved retail, residential and commercial space on the waterfront could not be built. The appellant sued the City on the basis that when PNI accepted an obligation to install $1.08 million in extra works

Canada c. Colombie-Britannique, [1989] 1 R.C.S. 1161; *Lignes aériennes Canadien Pacifique Ltée c. Colombie-Britannique*, [1989] 1 R.C.S. 1133; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445.

Lois et règlements cités

Land Title Act, R.S.B.C. 1979, ch. 219, art. 215.
Local Government Act, R.S.B.C. 1996, ch. 323, art. 914.
Municipal Act, R.S.B.C. 1979, ch. 290, art. 989 [aj. 1985, ch. 79, art. 8].

Doctrine citée

American Law Institute. *Restatement of the Law of Restitution : Quasi Contracts and Constructive Trusts, as Adopted and Promulgated by the American Law Institute, at Washington, D.C., May 8, 1936*. St. Paul, Minn. : American Law Institute Publishers, 1937.
Smith, Lionel. « The Mystery of "Juristic Reason" » (2000), 12 *S.C.L.R.* (2d) 211.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (2003), 223 D.L.R. (4th) 617, 11 B.C.L.R. (4th) 234, 23 C.L.R. (3d) 181, 36 M.P.L.R. (3d) 222, 180 B.C.A.C. 104, 297 W.A.C. 104, [2003] B.C.J. No. 537 (QL), 2003 BCCA 162, qui a infirmé des jugements de la Cour suprême de la Colombie-Britannique, [2002] B.C.J. No. 1379 (QL), 2002 BCSC 41, et (2002), 217 D.L.R. (4th) 248, 20 C.L.R. (3d) 251, 32 M.P.L.R. (3d) 235, [2002] B.C.J. No. 1847 (QL), 2002 BCSC 1185. Pourvoi accueilli.

L. John Alexander, pour l'appelante.

Guy E. McDannold, pour l'intimée.

Version française du jugement de la Cour rendu par

LE JUGE BINNIE — C'est la deuxième fois que 1
nous sommes saisis de cette affaire. La première fois, le promoteur immobilier appelant, Pacific National Investments Ltd. (« PNI »), recherchait la municipalité intimée en responsabilité contractuelle au motif que celle-ci avait rompu le contrat qui les liait en modifiant, à mi-parcours des travaux, le zonage d'une partie de son bien-fonds d'une superficie de 22 acres situé dans le secteur riverain de Victoria. Par suite de cette modification, un grand nombre d'immeubles résidentiels et de locaux commerciaux, y compris des commerces de détail,

and improvements, it had done so in exchange for an implied undertaking by the City to keep the zoning in place for a reasonable time to allow for completion of its project. By its down-zoning, the City had broken an implied term of the contract that went to the root of the arrangement between the parties. This Court, in a majority judgment, rejected the contractual claim on the basis that the municipality lacked the statutory authority to provide such an implied undertaking, which was *ultra vires*, and that its breach therefore could not give rise to an action for damages (see *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64). The matter was remitted to the trial court to deal with the appellant's alternative claim of unjust enrichment. This lesser claim required proof of a different set of facts and offered a much reduced level of compensation because it viewed the dispute from the perspective of the City's *gain* rather than (as in the contract claim) the appellant's *loss*. The claim for unjust enrichment was upheld by the second trial judge, Wilson J., but was reversed by the British Columbia Court of Appeal. I would allow the appeal, set aside the judgment of the Court of Appeal and restore the trial judgment. In my view, with respect, the municipality in these circumstances has no right in equity to retain the benefit of the extra works and improvements without paying for them.

dont l'aménagement dans le secteur riverain avait été autorisé, n'avaient pu être construits. Dans l'action qu'elle a intentée contre la Ville, l'appelante a soutenu qu'elle avait contracté l'obligation de réaliser des travaux et des améliorations supplémentaires d'une valeur de 1,08 million de dollars en contrepartie de l'engagement tacite de la Ville à maintenir le zonage pendant une période raisonnable afin que le projet puisse être mené à terme. Selon l'appelante, en modifiant le zonage, la Ville a contrevenu à une clause implicite du contrat qui était à la base même de l'accord intervenu entre elles. Les juges majoritaires de notre Cour ont rejeté l'action contractuelle au motif que la municipalité n'avait pas le pouvoir légal de prendre un tel engagement tacite, jugé *ultra vires*, et que l'inexécution ne pouvait donc fonder une action en dommages-intérêts (voir *Pacific National Investments Ltd. c. Victoria (Ville)*, [2000] 2 R.C.S. 919, 2000 CSC 64). L'affaire a été renvoyée en première instance pour qu'il soit statué sur l'argument subsidiaire fondé sur l'enrichissement sans cause. La preuve requise était différente, et l'appelante ne pouvait espérer toucher qu'une indemnité de beaucoup inférieure, le facteur déterminant étant le *gain* de la Ville, et non la *perte* de l'appelante (comme pour l'action contractuelle). Le juge du second procès, le juge Wilson, a accueilli l'action fondée sur l'enrichissement sans cause, mais sa décision a été infirmée par la Cour d'appel de la Colombie-Britannique. Je suis d'avis d'accueillir le pourvoi, d'annuler le jugement de la Cour d'appel et de rétablir la décision du juge de première instance. En toute déférence, j'estime que, en l'espèce, la municipalité ne peut, suivant l'equity, bénéficier des travaux et des améliorations supplémentaires sans en payer le prix.

I. Facts

2 In the 1980s, the provincial government and the City of Victoria agreed on the desirability of redeveloping, for residential and commercial uses, approximately 200 acres of provincial Crown land located on Victoria's inner harbour. The area was known as the Songhees lands (named after the First Nation displaced for the railway and industry). The first trial judge, Mackenzie J., found that "[t]he City had an intense interest in planning the redevelopment of such a large, strategically located site in the

I. Faits

Dans les années 80, le gouvernement provincial et la ville de Victoria ont convenu de l'opportunité du réaménagement, à des fins résidentielles et commerciales, d'environ 200 acres d'un bien-fonds de la Couronne provinciale situé dans le port intérieur de Victoria. Il s'agissait des terres Songhees, qui devaient leur nom à la Première nation déplacée pour la construction du chemin de fer et le développement industriel. Le juge du premier procès, le juge Mackenzie, a conclu que [TRADUCTION] « [l]a harbour area close to downtown" ([1996] B.C.J. No. 2523 (QL), at para. 3). Amongst other things, the City wanted to obtain additional parkland (closer to 30 percent of the project instead of the 5 percent ordinarily required), road improvements, walkways and a new seawall, which were not necessitated by the PNI project itself, but which would serve to make the whole area more efficient and attractive.

Ville avait grand intérêt à planifier le réaménagement d'un site aussi vaste, stratégiquement situé dans le secteur portuaire, près du centre-ville » ([1996] B.C.J. No. 2523 (QL), par. 3). La Ville désirait notamment obtenir une plus grande superficie d'espaces verts (près de 30 pour 100 au lieu des 5 pour 100 habituellement exigés), l'aménagement de routes et de sentiers et la construction d'une nouvelle digue. Ces éléments n'étaient pas nécessaires en soi au projet de PNI, mais ils devaient rendre le secteur plus fonctionnel et attrayant.

The province was sympathetic to the City's concerns, as was the appellant, who first became involved in the planning exercise in 1984 as a party interested in eventually undertaking Phase II of the project (22 acres) as a private development. It was the appellant's architect who contributed what became the conceptual plan for the waterfront development in 1985, long before any agreements had been signed between the City and the provincial Crown agency that owned the lands, British Columbia Enterprise Corporation ("BCEC"). The respondent argued that the appellant was a stranger to the negotiations between the City and BCEC, and that on a true interpretation of events, the Province had volunteered the extra amenities to the City and PNI had simply stepped into the shoes of BCEC. This theory was rejected by Mackenzie J., who concluded that the appellant was not a volunteer but a profit-oriented developer who had been a full participant in planning the project, including the efforts to accommodate the City's demand for extra amenities (at para. 23):

... I am satisfied that at all material times both the City and BCEC expected that BCEC would sell phase 2 to PNI, and that PNI would assume BCEC's rights and obligations with respect to phase 2 on the purchase.

La province a accueilli favorablement les demandes de la Ville, tout comme l'appelante, qui a pris part pour la première fois à l'exercice de planification en 1984 en tant que partie intéressée à entreprendre un jour l'aménagement privé de la phase II du projet (22 acres). C'est l'architecte de l'appelante qui a établi ce qui devint en 1985 le plan conceptuel de l'aménagement du secteur riverain, soit bien avant que n'intervienne un accord entre la Ville et la société d'État provinciale propriétaire des terrains, British Columbia Enterprise Corporation (« BCEC »). L'intimée fait valoir que l'appelante n'a pas été partie aux négociations entre la Ville et BCEC et que, suivant une juste interprétation des faits, la province a offert les infrastructures supplémentaires à la Ville, et PNI a simplement succédé à BCEC. Le juge Mackenzie a rejeté cette thèse. Selon lui, l'appelante n'était pas une partie désintéressée, mais un promoteur immobilier désireux de réaliser un profit et ayant participé pleinement à la planification de l'aménagement, y compris aux efforts visant à intégrer les infrastructures supplémentaires demandées par la Ville (par. 23) : 3

[TRADUCTION] ... je suis convaincu que, pendant toute la période considérée, la Ville et BCEC s'attendaient toutes deux à ce que BCEC vende la phase II à PNI et que, dès l'acquisition, PNI acquière les droits de BCEC et assume ses obligations relativement à la phase II.

The development of the Songhees lands proceeded in the following steps:

1. The City and BCEC entered into the Songhees Master Agreement dated August 28, 1987. BCEC itself proceeded with Phase I of the project.

Voici quelles ont été les mesures prises en vue de l'aménagement des terres Songhees : 4

1. La Ville et BCEC ont conclu le « Songhees Master Agreement » (« accord-cadre ») en date du 28 août 1987. BCEC a entrepris pour sa part l'aménagement de la phase I du projet.

2. A restrictive covenant was registered against title to the lands to prohibit building until appropriate servicing agreements had been entered into between the appellant and the City and subdivision plans had received City approval.

3. The appellant purchased the Phase II lands from BCEC conditional on zoning, park dedication, a service agreement between the appellant and the City, and formal subdivision approval.

4. The City enacted zoning bylaws to permit the appellant's plans for the whole of Phase II to be carried out, including the two water lots where three-storey structures were to be built resting on piles driven into the harbour bed, or possibly free floating, with retail and commercial use on the first floor, and residential condominiums on the upper two floors.

5. Once BCEC's rights and obligations had been assigned to the appellant, the appellant and the City entered into the Songhees Phase II Subdivision Servicing Agreement, dated January 29, 1988 which dealt with, amongst other things, the extra works and improvements which the parties have agreed cost about $1.08 million of the $2.5 million total service costs. It was a condition precedent to the appellant's obligations that the City would re-zone the 22 acres from the existing (industrial) designation to permit residential and commercial uses appropriate to carrying out the agreed upon project.

6. The City registered a statutory right-of-way for a public walkway around the perimeter of the structures to be built on the water lots.

5 After reviewing the evidence, Wilson J. concluded that the provision of the extra works and

2. Un engagement de ne pas faire a été enregistré contre le titre de propriété pour empêcher toute construction sur le bien-fonds jusqu'à la conclusion entre l'appelante et la Ville de contrats de viabilisation appropriés et l'approbation par la Ville des plans de lotissement.

3. L'appelante a acheté à BCEC le bien-fonds de la phase II, l'acquisition étant subordonnée à l'adoption et au maintien du zonage, à l'aménagement d'espaces verts, à la conclusion d'un contrat de viabilisation entre l'appelante et la Ville, ainsi qu'à l'approbation officielle du lotissement.

4. La Ville a adopté un règlement de zonage permettant la réalisation des travaux projetés par l'appelante pour l'ensemble de la phase II, y compris les deux plans d'eau sur lesquels devaient être construites des structures de trois étages reposant sur des pieux enfoncés dans le lit du port, ou peut-être sur une plate-forme flottante, le premier étage étant réservé aux commerces de détail et aux locaux commerciaux, et les deuxième et troisième étages, aux condominiums résidentiels.

5. Dès la cession à l'appelante des droits et des obligations de BCEC, l'appelante et la Ville ont conclu, le 29 janvier 1988, le « Songhees Phase II Subdivision Servicing Agreement » (« contrat de viabilisation des lots de la phase II ») prévoyant notamment les travaux et les améliorations supplémentaires dont les parties estiment le coût à 1,08 million de dollars sur les 2,5 millions de dollars prévus au total pour la viabilisation. La prise en charge des obligations de BCEC par l'appelante était subordonnée à ce que la Ville modifie au préalable le zonage (industriel) des 22 acres pour permettre l'aménagement résidentiel et commercial projeté.

6. La Ville a enregistré un droit de passage légal contre un sentier public longeant le périmètre des ouvrages devant être construits sur les plans d'eau.

Après examen de la preuve, le juge du second procès, le juge Wilson, a conclu que, pour les *trois* improvements, in the view of *all* three parties, was inextricably bound up with retention of the zoning to permit construction of the PNI project as planned:

... the provision that the plaintiff was to supply and install certain works, commensurate with the development contemplated, was inextricably bound up with the provision that the development anticipated construction of improvements pursuant to the defining by-laws. And in this case, that meant two, three-storey improvements on the water.

((2002), 217 D.L.R. (4th) 248, at para. 5)

By 1993, the condominium residences on dry land had been built, or were under development or at least in contemplation and the appellant had already earned a very substantial profit on its investment with still other lands left to sell. The new residents and others from the municipality were also pleased. They had started to enjoy their new parks, cleaned up vistas and walkways around the new seawall, which had all been put in at the appellant's expense. As Mackenzie J. observed (at para. 16):

The City had allowed the developer to come in and provide substantial tangible benefits to the City in terms of parks and other services at the developer's cost in the expectation that the development of the water lots as then contemplated by the City, BCEC and PNI would be allowed to proceed.

However, when the appellant applied for building permits to develop the two water lots, including a marina, restaurants, shops, other commercial uses, and two stories of residential condominiums on the harbour, the local community objected, and the matter became an issue in the pending municipal election. Following the election, the new City Council, with one dissent, voted to down-zone the two water lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums above. The appellant complained that the down-zoning rendered development of its water lots uneconomical.

parties, la réalisation des travaux et des améliorations supplémentaires était inextricablement liée au maintien du zonage permettant la construction projetée par PNI :

[TRADUCTION] ... la clause selon laquelle la demanderesse devait fournir et mettre en place certaines infrastructures, en rapport avec l'aménagement projeté, était inextricablement liée à celle prévoyant la construction d'améliorations suivant le règlement pertinent, soit, en l'occurrence, deux immeubles de trois étages sur les plans d'eau.

((2002), 217 D.L.R. (4th) 248, par. 5)

En 1993, les condominiums sur terre ferme avaient été construits, étaient en voie de l'être ou étaient à tout le moins projetés. L'appelante avait déjà réalisé un profit assez considérable et elle disposait encore de terrains à vendre. Les nouveaux résidants et les autres habitants de la municipalité y trouvaient également leur compte. Ils avaient commencé à profiter de leurs nouveaux parcs, des vues dégagées et des sentiers bordant la nouvelle digue, et ce, grâce aux dépenses engagées par l'appelante à cet égard. Comme l'a fait remarquer le juge Mackenzie (par. 16) : 6

[TRADUCTION] La Ville avait laissé le promoteur immobilier aller de l'avant, et ce dernier lui avait conféré des avantages tangibles importants — parcs et autres aménagements — à ses frais, s'attendant à ce que l'aménagement des plans d'eau alors projeté par la Ville, BCEC et lui-même puisse se concrétiser.

Cependant, lorsque l'appelante a demandé les permis de construction nécessaires à l'aménagement des deux plans d'eau — construction d'une marina, de restaurants, de boutiques, d'autres locaux commerciaux et de deux étages de condominiums résidentiels dans le port —, la collectivité locale s'est opposée à leur délivrance et le dossier est devenu un enjeu de la campagne électorale municipale alors en cours. Le nouveau conseil municipal élu a voté (sauf une voix dissidente) la modification du zonage des deux plans d'eau afin que seuls des immeubles commerciaux d'un étage puissent y être construits, éliminant ainsi les deux étages supérieurs destinés aux condominiums résidentiels. L'appelante a fait valoir que, dans ces circonstances, l'aménagement des plans d'eau n'était plus rentable. 7

8 In its Statement of Claim filed on October 8, 1993, the appellant alleged causes of action at common law (breach of contract) and equity (unjust enrichment). With respect to its contractual claim, the appellant alleged that the Songhees Master Agreement was subject to an implied term that the zoning permitting the contemplated development to proceed would be left in place for a reasonable period of time. The City's solicitor had expressed the view that the project would proceed "in several stages over a period of 10 to 12 years". The common law cause of action was allowed by Mackenzie J. He therefore found it unnecessary to address the claim for unjust enrichment. His judgment in the appellant's favour was reversed by the British Columbia Court of Appeal. The reversal was affirmed as correct by a majority judgment of this Court on December 14, 2000. Under the provincial law governing municipalities at the relevant time, the City did not have the capacity to make and be bound by an implied term to keep the zoning in place for a number of years or to pay damages if it modified it. Our Court then remitted the case "to trial on any unjust enrichment argument that may exist" (para. 75).

Dans la déclaration qu'elle a déposée le 8 octobre 1993, l'appelante a invoqué des causes d'action en common law (rupture de contrat) et en equity (enrichissement sans cause). En ce qui concerne l'action contractuelle, elle a plaidé que l'accord-cadre comportait une clause implicite selon laquelle le zonage autorisant l'aménagement projeté serait maintenu pendant une période raisonnable. L'avocat de la Ville avait opiné que la réalisation du projet [TRADUCTION] « se ferait en plusieurs étapes sur une période de 10 à 12 ans ». Le juge Mackenzie a fait droit à la cause d'action en common law et conclu de ce fait qu'il n'était pas nécessaire de statuer sur l'allégation d'enrichissement sans cause. Cette décision a été infirmée par la Cour d'appel de la Colombie-Britannique, puis par les juges majoritaires de notre Cour le 14 décembre 2000. Sous le régime du droit provincial régissant les municipalités à l'époque considérée, la Ville ne pouvait s'engager tacitement à maintenir le zonage pendant un certain nombre d'années et à payer des dommages-intérêts si elle le modifiait. Notre Cour a ensuite renvoyé l'affaire « en première instance pour [qu'elle soit] examinée relativement à tout argument éventuel d'enrichissement sans cause » (par. 75).

II. Relevant Statutory Provisions

9 *Local Government Act*, R.S.B.C. 1996, c. 323

914 (1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part.

(2) Subsection (1) does not apply where the bylaw under this Division restricts the use of land to a public use.

Land Title Act, R.S.B.C. 1979, c. 219

215. . . .

(3) Where an instrument contains a covenant registrable under this section, the covenantee is binding on

II. Dispositions législatives pertinentes

Local Government Act, R.S.B.C. 1996, ch. 323

[TRADUCTION]

914 (1) Nul n'a droit à une indemnité pour la diminution de la valeur d'un bien-fonds ou pour tout préjudice ou perte résultant de l'adoption d'un plan d'urbanisme ou d'un règlement en vertu de la présente section ou de la délivrance d'un permis en application de la section 9 de la présente partie.

(2) Le paragraphe (1) ne s'applique pas lorsque le règlement pris en vertu de la présente section prévoit qu'un bien-fonds ne peut être utilisé qu'à des fins publiques.

Land Title Act, R.S.B.C. 1979, ch. 219

[TRADUCTION]

215. . . .

(3) Lorsqu'un acte renferme un engagement susceptible d'enregistrement en application du présent article,

the covenantee and his successors in title, notwithstanding that the instrument or other disposition has not been signed by the covenantee.

III. <u>Judicial History</u>

A. *Supreme Court of British Columbia* ((2002), 217 D.L.R. (4th) 248)

Wilson J. adopted the findings of fact from the earlier trial. Then, having regard to the outcome of the appeal to this Court, he found that the parties had proceeded on a mistaken assumption that the zoning would not change in a manner that would substantially and adversely affect the development before the plaintiff developer had a reasonable opportunity to implement the whole of Phase II, and a parallel mistake of law, i.e., that the City had the capacity to make such a contractual commitment. The extra works and improvements carried out by the appellant were in excess of works which the respondent could lawfully have demanded. He accepted the evidence that the excess work the appellant did as a result of the mistake was worth $1.08 million.

Wilson J. found that the City had been enriched by the extra works and improvements which, but for the mistake, it would not have received. The appellant had suffered a corresponding deprivation. He then found there was no juristic reason for the City to retain the benefit without accounting to the appellant. He therefore gave judgment for the appellant for $1.08 million with interest at registrar's rates from time to time commencing October 1, 1993 to the date of his judgment, being May 7, 2002.

B. *Court of Appeal of British Columbia (Southin, Braidwood and Hall JJ.A.)* ((2003), 223 D.L.R. (4th) 617)

Southin J.A. for the court found the claim concerning unjust enrichment to be misconceived. She agreed that the criteria for a finding of unjust enrichment were the enrichment of the person claimed against, a corresponding deprivation of the claimant and the absence of any juristic reason for retaining the enrichment. Applying these criteria to the

celui-ci lie le bénéficiaire de l'engagement et ses successeurs même s'il n'a pas signé l'acte ni aucun autre acte d'aliénation.

III. <u>Historique des procédures judiciaires</u>

A. *Cour suprême de la Colombie-Britannique* ((2002), 217 D.L.R. (4th) 248)

Le juge Wilson a fait siennes les conclusions de 10
fait tirées lors du premier procès. Puis, compte tenu de l'issue du pourvoi interjeté devant notre Cour, il a estimé que les parties avaient agi en supposant à tort que le zonage ne serait pas modifié de façon à compromettre sensiblement le projet avant que l'appelante n'ait eu la possibilité raisonnable de mener à terme l'aménagement de la phase II en entier et, sur le plan du droit, que la Ville était légalement habilitée à prendre un engagement contractuel en ce sens. L'intimée n'aurait pu légalement exiger les travaux et les améliorations supplémentaires effectués par l'appelante. Le juge a ajouté foi à la preuve selon laquelle la valeur des travaux et des améliorations réalisés sur le fondement de l'hypothèse erronée s'élevait à 1,08 million de dollars.

Le juge Wilson a conclu que la Ville s'était 11
enrichie à proportion des travaux et des améliorations supplémentaires que, n'eût été l'erreur commise, elle n'aurait jamais obtenus, l'appelante s'étant appauvrie corrélativement. Il a ensuite estimé qu'aucun motif juridique ne justifiait la Ville de conserver l'avantage sans indemniser l'appelante. Il a donc accueilli la demande et ordonné le versement à l'appelante de 1,08 million de dollars, plus l'intérêt calculé aux taux établis périodiquement par le registraire, du 1er octobre 1993 à la date du jugement, soit le 7 mai 2002.

B. *Cour d'appel de la Colombie-Britannique (les juges Southin, Braidwood et Hall)* ((2003), 223 D.L.R. (4th) 617)

S'exprimant au nom de la Cour d'appel, la juge 12
Southin a conclu que l'allégation d'enrichissement sans cause n'était pas fondée. Elle a convenu que les critères applicables à l'enrichissement sans cause étaient l'enrichissement du défendeur, l'appauvrissement corrélatif du demandeur et l'absence de tout motif juridique de conserver l'avantage. Après les

facts, Southin J.A. concluded that there was no deprivation. The extra works were "part and parcel of the consideration [the appellant] gave for the benefit which it received under the agreements. There is no true correspondence between the asserted enrichment and the asserted deprivation, that is to say, the downzoning of the two water lots" (para. 25). Not only was there no deprivation, but even if there was, "the juristic reason for what the appellant did in 1993 is that the Legislature had conferred upon it the power to do the act of downzoning. The by-law is of the same force and effect as if it had been enacted by the Legislature itself and provides a complete answer to any and all claims arising out of it" (para. 26). Accordingly, the appeal was allowed and the action was dismissed.

avoir appliqués aux fait de l'espèce, la juge Southin a conclu à l'absence d'appauvrissement : les travaux supplémentaires [TRADUCTION] « faisaient partie intégrante de la contrepartie versée par l'appelante pour obtenir l'avantage que lui conféraient les accords. Il n'y avait pas de véritable corrélation entre l'enrichissement et l'appauvrissement allégués, soit, dans ce dernier cas, la modification du zonage des deux plans d'eau » (par. 25). Non seulement il n'y avait pas eu d'appauvrissement, mais même s'il y en avait eu un, [TRADUCTION] « le motif juridique pour lequel l'appelante avait agi comme elle l'avait fait en 1993 résidait dans le pouvoir de modifier le zonage que lui avait conféré le législateur. Le règlement était tout aussi exécutoire que s'il avait été pris par le législateur lui-même et il permettait de régler entièrement tout litige découlant de son application » (par. 26). En conséquence, l'appel a été accueilli, et l'action rejetée.

IV. Analysis

13 The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of "'palm tree' justice" (*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 802) that varies with the temperament of the sitting judges. On the contrary, as the Court recently reaffirmed in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25, a court is to follow an established approach to unjust enrichment predicated on clearly defined principles. However, their application should not be mechanical. Iacobucci J. observed that "this is an equitable remedy that will necessarily involve discretion and questions of fairness" (para. 44).

14 As accepted by the courts in British Columbia, the test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, at p. 455; *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848;

IV. Analyse

L'enrichissement sans cause est une cause d'action en equity qui offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience. Il ne s'agit pas pour autant d'une forme de « justice au cas par cas » (*Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 802) dépendante de l'humeur des juges appelés à se prononcer. Au contraire, comme notre Cour l'a rappelé récemment dans *Garland c. Consumers' Gas Co.*, [2004] 1 R.C.S. 629, 2004 CSC 25, en matière d'enrichissement sans cause, le tribunal doit suivre une méthode établie s'appuyant sur des principes clairs. Cependant, l'application de ces principes ne doit pas être machinale. Le juge Iacobucci a signalé qu'« il s'agit d'un recours en equity qui fait nécessairement intervenir un pouvoir discrétionnaire et des questions d'équité » (par. 44).

Les tribunaux de la Colombie-Britannique ont statué que pour qu'il y ait enrichissement sans cause, trois conditions doivent être réunies : (1) enrichissement du défendeur; (2) appauvrissement corrélatif du demandeur; (3) absence de tout motif juridique justifiant l'enrichissement (*Rathwell c. Rathwell*, [1978] 2 R.C.S. 436, p. 455; *Pettkus c. Becker*, *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 987; *Peel*, *supra*, at p. 784; *Garland*, *supra*, at para. 30).

[1980] 2 R.C.S. 834, p. 848; *Peter c. Beblow*, [1993] 1 R.C.S. 980, p. 987; *Peel*, précité, p. 784; *Garland*, précité, par. 30).

A. *Was There Enrichment of the City?*

A. *Y a-t-il eu enrichissement de la Ville?*

15 The existence of an enrichment to the defendant is governed by "a straightforward economic approach" (*Peter*, *supra*, at p. 990). An enrichment may "connot[e] a tangible benefit" (*Peel*, *supra*, at p. 790), or it can be relief from a "negative", such as saving the defendant from an expense he or she would otherwise have been *required* to make.

Une « analyse économique simple » s'applique pour déterminer s'il y a eu enrichissement du défendeur (*Peter*, précité, p. 990). L'enrichissement peut « connote[r] un avantage tangible » (*Peel*, précité, p. 790) ou être « négatif », par exemple en épargnant au défendeur une dépense à laquelle il aurait été *tenu*.

16 In this case, the City obtained $1.08 million worth of roads, parkland and walkways and a new seawall, wholly at the appellant's expense. These works and improvements were in excess of what the City could lawfully demand under s. 989 of the *Municipal Act*, R.S.B.C. 1979, c. 290. Mr. Clive Timms, the principal witness on behalf of the City, acknowledged that it was "beyond the authority of the approving officer to require [the extra works] under what we have characterized as a simple subdivision".

En l'espèce, la Ville a obtenu, entièrement aux frais de l'appelante, des routes, des espaces verts, des sentiers et une nouvelle digue d'une valeur de 1,08 million de dollars. Ces travaux et améliorations allaient au-delà de ce que la Ville pouvait légalement exiger en application de l'art. 989 de la *Municipal Act*, R.S.B.C. 1979, ch. 290. Principal témoin de la Ville, M. Clive Timms a reconnu que [TRADUCTION] « le responsable de l'autorisation ne pouvait exiger [les travaux supplémentaires] dans le cadre de ce que nous avons considéré comme un simple lotissement ».

17 The City now argues that these extra works and improvements are not really a benefit because they were built on what was then provincial Crown land, and their upkeep by the City costs about $40,000 per year. The City's portrayal of itself as a victim of the appellant's generosity is not credible. The trial judge at the original trial, Mackenzie J., found as a fact that the City had pushed hard to obtain the extra amenities whose cost of upkeep it now grumbles about. Mackenzie J. noted, at para. 20, that "[t]he City wanted planned development with services, parks and other amenities at no cost to the City taxpayers." The City insisted on a restrictive covenant that prevented any construction until the subdivision plans had been approved and servicing agreements entered into, and it was the City that required the appellant as successor in title to assume BCEC's commitments for services, works and improvements beyond those it could lawfully have demanded (para. 23, *per* Mackenzie J.). On this point the *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937), at p. 12,

La Ville prétend aujourd'hui que ces travaux et améliorations supplémentaires ne constituent pas véritablement un avantage puisqu'ils ont été réalisés sur des terres qui appartenaient alors à la Couronne provinciale et que l'entretien de ces infrastructures lui coûte chaque année environ 40 000 $. La Ville ne peut sérieusement prétendre être victime de la générosité de l'appelante. Le juge du premier procès, le juge Mackenzie, a tiré la conclusion de fait que la Ville avait beaucoup insisté pour obtenir les infrastructures supplémentaires dont elle déplore aujourd'hui le coût d'entretien. Au par. 20 de ses motifs, il a relevé que [TRADUCTION] « [l]a Ville voulait un aménagement planifié avec services, parcs et autres infrastructures dont bénéficieraient gratuitement les contribuables. » La Ville avait exigé un engagement de ne pas faire empêchant toute construction jusqu'à l'approbation des plans de lotissement et la conclusion de contrats de viabilisation. C'est elle qui a insisté pour que l'appelante, en succédant à BCEC, prenne à sa charge les obligations de celle-ci relatives à la viabilisation ainsi qu'aux makes the useful comment that "[a] person confers a benefit upon another if he . . . performs services beneficial to <u>or at the request of</u> the other" (emphasis added).

travaux et aux améliorations qui étaient en sus de ce qu'elle pouvait légalement exiger (le juge Mackenzie, par. 23). À cet égard, un commentaire pertinent figure à la p. 12 de l'ouvrage intitulé *Restatement of the Law of Restitution : Quasi Contracts and Constructive Trusts* (1937) : [TRADUCTION] « [u]ne personne confère un avantage à une autre lorsqu'elle [. . .] fournit des services qui sont utiles à l'autre personne <u>ou dont celle-ci a fait la demande</u> » (je souligne).

18 The City argues that while the extra works and improvements "may benefit either PNI as a developer or the neighbourhood and the community, it does not benefit the <u>Corporation</u> of the City of Victoria" (emphasis in original). However, it was the City that contracted with the appellant for ownership of "the Works", wherever built, under clause 11(c) of the Songhees Phase II Subdivision Servicing Agreement, dated January 29, 1988, which provides:

> Save and except those works installed for public utility companies, the Works <u>shall be and remain the absolute property of the City</u> when accepted in writing by the City Engineer. [Emphasis added.]

La Ville prétend que les travaux et les améliorations supplémentaires [TRADUCTION] « peuvent bénéficier à PNI à titre de promoteur immobilier ou à la collectivité, mais qu'ils ne bénéficient pas à la <u>Corporation</u> de la ville de Victoria » (souligné dans l'original). Or, c'est la Ville qui, dans l'accord conclu avec l'appelante, s'est attribué la propriété des « infrastructures » où qu'elles soient construites. L'alinéa 11c) du contrat de viabilisation des lots de la phase II en date du 29 janvier 1988 prévoit en effet :

> [TRADUCTION] À l'exception de celles qui sont destinées aux services publics, les infrastructures <u>sont et demeurent l'entière propriété de la Ville</u> dès leur acceptation écrite par l'ingénieur de la Ville. [Je souligne.]

19 The City's present argument that the extra works and improvements it demanded are not an enrichment but something of a burden should be rejected.

Il y a lieu de rejeter l'argument que formule aujourd'hui la Ville, savoir que les travaux et les améliorations supplémentaires qu'elle a exigés ne constituent pas un enrichissement, mais une sorte de fardeau.

B. *Did the Appellant Suffer a Corresponding Deprivation?*

B. *Y a-t-il eu appauvrissement corrélatif de l'appelante?*

20 Using the straightforward economic approach, the appellant suffered a corresponding deprivation of $1.08 million. The appellant was required to spend funds to provide the amenities and had to give up the extra parkland out of the lands they had purchased. No other person or entity contributed to the enrichment. In these circumstances, as Cory J. put it in *Peter, supra*, at p. 1012, "I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment."

L'analyse économique simple révèle que l'appelante s'est appauvrie corrélativement de 1,08 million de dollars. L'appelante a dû contribuer financièrement à la mise en place des infrastructures et fournir les espaces verts supplémentaires à même les terres qu'elle avait acquises. Aucune autre personne physique ou morale n'a contribué à l'enrichissement. Dans ces circonstances, comme l'a dit le juge Cory dans l'arrêt *Peter*, précité, p. 1012, « j'aurais cru qu'un enrichissement donnerait presque invariablement lieu à un appauvrissement correspondant de la personne qui a contribué à l'enrichissement. »

21 The City claims that the appellant had already turned a handsome profit on the project even without development of the two water lots. So it did, but that is beside the point. The question here is not whether the developer made a success of its project generally, but whether it suffered a detriment corresponding to the City's enrichment. The appellant is not required to subsidize city amenities from the profits earned elsewhere on the project in the absence of some legal requirement. The significance of the Servicing Agreement in this respect is an issue to be considered at the third stage.

La Ville fait valoir que l'appelante a réalisé un profit considérable sans même avoir aménagé les deux plans d'eau. Soit, mais ça n'a rien à voir. Il ne s'agit pas de savoir si, en général, le promoteur immobilier a vu son projet couronné de succès, mais bien s'il a subi un désavantage corrélatif à l'enrichissement de la Ville. Sauf obligation légale de le faire, l'appelante n'a pas à subventionner les infrastructures de la ville par prélèvement sur ses profits provenant d'autres parties du projet. La portée du contrat de viabilisation à cet égard doit être examinée à la troisième étape.

C. *Is There a Juristic Reason to Deny Recovery to the Appellant?*

C. *Existe-t-il un motif juridique justifiant le refus d'indemniser l'appelante?*

22 This branch of the test for unjust enrichment is pivotal, for as McLachlin J. observed in *Peter, supra*, at p. 990:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

Ce volet du critère de l'enrichissement sans cause est le plus important. Comme l'a fait observer la juge McLachlin dans l'arrêt *Peter*, précité, p. 990 :

> C'est à cette étape que le tribunal doit vérifier si l'enrichissement et le désavantage, moralement neutres en soi, sont « injustes ».

23 The use of the expression "juristic reason" in this connection emphasizes that "unjust" is to be addressed as a matter of law and legal reasoning rather than a free-floating conscience that may risk being overly subjective; see L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at p. 219. This third step has to some extent been redefined and reformulated in *Garland, supra*, at paras. 44-46. There are now two stages to the juristic reason inquiry. At the first stage, a claimant (here the appellant) must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donative intent, and "other valid common law, equitable or statutory obligatio[n]" (*Garland*, at para. 44). The categories may be added to over time (para. 46). On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff (here the appellant) will have made out a *prima facie* case of unjust enrichment. It will have demonstrated "a positive reason for reversing the defendant's enrichment" (Smith, *supra*, at p. 244).

Vu l'exigence d'un « motif juridique », « injustes » ou « sans cause » renvoie au droit et au raisonnement juridique, et non à une conscience morale à géométrie variable susceptible d'être trop subjective; voir L. Smith, « The Mystery of "Juristic Reason" » (2000), 12 *S.C.L.R.* (2d) 211, p. 219. Cette troisième étape a été, dans une certaine mesure, redéfinie et reformulée dans l'arrêt *Garland*, précité, par. 44 à 46. Elle se scinde désormais en deux. Dans un premier temps, le demandeur (en l'occurrence l'appelante) doit démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie le refus de l'indemniser. Les catégories établies sont le contrat, la disposition légale, l'intention libérale et « les autres obligations valides imposées par la common law, l'equity ou la loi » (*Garland*, par. 44). D'autres catégories peuvent s'ajouter au fil du temps (par. 46). S'il prouve qu'aucun motif appartenant à ces catégories bien circonscrites ne justifie le défendeur de refuser de l'indemniser, le demandeur (en l'occurrence l'appelante) aura alors établi l'enrichissement sans cause *prima facie*. Il aura prouvé l'existence [TRADUCTION] « d'un motif concret d'annuler l'enrichissement du défendeur » (Smith, *loc. cit.*, p. 244).

24 Although this formulation requires the plaintiff to prove a negative, the task is made manageable by the limited number of categories, and it is only fair to put on the claimant the onus of proving the essential elements of its cause of action.

25 At the second stage, the onus shifts to the defendant (here the respondent City), who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. In the absence of a convincing rebuttal, the transfer of wealth will be reversed. According to *Garland*, it is at this stage that the court should have regard to the reasonable expectation of the parties and public policy considerations. However, as Iacobucci J. added, at para. 46:

> The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

26 With respect to the absence of a valid juristic reason in this case, the second trial judge was emphatic (at para. 17):

> There is no juristic reason for the City to retain the benefits without accounting to the plaintiff. I think it would be against conscience to have that result obtain.

27 I turn then to whether the appellant has demonstrated that the established categories do not apply.

(1) Stage One: The Established Categories

(a) *Contract*

28 In the usual course, the existence of a contract, such as was made by the parties to this appeal, would be a complete answer to the claim for unjust enrichment. The City relies on four contracts, namely (i) the purchase agreement between the appellant and BCEC; (ii) the subdivision servicing agreement; (iii) the assumption agreement; and (iv) the Songhees Master Agreement. There is no doubt that the parties were entitled to enter into agreements respecting the development of the 22-acre site, and that the project would not have been allowed to proceed without the appellant contributing to the City appropriate works and improvements. The

Bien que cette formulation oblige le demandeur à prouver l'inexistence de quelque chose, sa tâche est rendue possible par le nombre limité des catégories, et ce n'est que justice qu'il lui incombe d'établir les éléments essentiels de sa cause d'action.

Dans un deuxième temps, il appartient au défendeur (en l'occurrence la Ville intimée) de réfuter la preuve *prima facie* en avançant un autre motif valable de refuser l'indemnisation. S'il ne le fait pas de manière convaincante, il y a lieu d'annuler le transfert de richesse. Suivant l'arrêt *Garland*, c'est à cette étape que le tribunal doit tenir compte des attentes raisonnables des parties et des considérations d'intérêt public. Le juge Iacobucci a toutefois ajouté au par. 46 :

> Il faut comprendre ici que ce domaine est en évolution et que d'autres précisions et innovations résulteront d'affaires ultérieures.

Le juge du second procès a été on ne peut plus clair en ce qui concerne l'absence de motif juridique valable en l'espèce (par. 17) :

> [TRADUCTION] Aucun motif juridique ne justifie la Ville de conserver les avantages sans indemniser la demanderesse. Je crois que la conscience morale le lui défend.

Je me penche à présent sur la question de savoir si l'appelante a démontré que les catégories établies ne s'appliquent pas.

(1) Première étape : les catégories établies

a) *Contrat*

Habituellement, l'existence d'un contrat comme celui qu'ont signé les parties au présent pourvoi suffit à elle seule à sceller l'issue d'une action fondée sur l'enrichissement sans cause. La Ville invoque l'existence de quatre contrats : (i) la convention d'achat entre l'appelante et BCEC; (ii) le contrat de viabilisation des lots; (iii) la convention de prise en charge; (iv) l'accord-cadre. Nul doute qu'il était loisible aux parties de contracter pour l'aménagement du bien-fonds de 22 acres et que le projet n'aurait pu voir le jour si l'appelante n'avait pas fourni à la Ville les travaux et les améliorations appropriés. Or, la ville a exigé davantage que ce que prévoyait problem is that the City insisted on receiving more than s. 989 of the *Municipal Act* permitted it to ask for, and in exchange, as found in the first trial, it offered an implied undertaking regarding zoning that it was not authorized to give. The development agreements therefore included a perfectly valid core, which has been carried out by all parties, but we are now required to address the *extra* works and improvements demanded by the City and given by the appellant in exchange for guaranteed zoning. The City successfully argued in the first appeal to this Court that the sale of zoning was *ultra vires* its powers, and therefore incapable of giving rise to a cause of action for breach of contract. The logical conundrum for the City at this stage is that it is the very elements of the contract the City demonstrated were *ultra vires* (extra services for guaranteed zoning) that it now argues are the juristic reason for its just retention of $1.08 million in improvements "at no cost to the City taxpayers" (Mackenzie J., at para. 20). In my opinion, it is not open to the City to rely on the contractual arrangements, which in their relevant parts flowed from the City's *ultra vires* demand, to defeat the appellant's claim on the particular facts of this case.

l'art. 989 de la *Municipal Act* et, en échange, comme l'a conclu le juge du premier procès, elle a pris un engagement implicite qu'elle n'avait pas le pouvoir de prendre relativement au zonage. Les conventions relatives à l'aménagement conféraient aux parties des obligations parfaitement valides dont elles se sont acquittées, mais nous devons maintenant nous pencher sur les travaux et les améliorations *supplémentaires* exigés par la Ville et fournis par l'appelante en contrepartie de l'assurance que le zonage serait maintenu. Dans le cadre du premier pourvoi, notre Cour a fait droit à l'argument de la Ville selon lequel cette assurance était *ultra vires* de ses pouvoirs et, partant, ne pouvait faire naître une cause d'action fondée sur l'inexécution de contrat. Pourtant, la Ville invoque aujourd'hui les éléments mêmes du contrat dont elle a établi le caractère *ultra vires* (infrastructures supplémentaires contre maintien du zonage) comme motif juridique justifiant la conservation d'améliorations d'une valeur de 1,08 millions de dollars [TRADUCTION] « sans qu'il en coûte un sou aux contribuables » (le juge Mackenzie, par. 20). Vu les faits de l'espèce, la Ville ne peut à mon sens opposer à l'allégation de l'appelante les conventions dont les éléments pertinents découlaient de ses exigences *ultra vires*.

29

The trial judge found the "extra" works and undertakings given in exchange for the *ultra vires* zoning commitment to be clearly separate and identifiable. The cost was $1.08 million. There is therefore no difficulty on the facts in distinguishing between the City's lawful entitlement and the *ultra vires* extras.

Le juge de première instance a conclu que les travaux et les améliorations « supplémentaires » en contrepartie desquels avait été pris l'engagement *ultra vires* relatif au zonage étaient clairement distincts et identifiables. Leur coût s'élevait à 1,08 million de dollars. Il n'est donc pas difficile de distinguer entre ce à quoi la Ville avait légitimement droit et ce qui était *ultra vires*.

30

The agreements have been carried into execution by the appellant, who no longer seeks to enforce the *ultra vires* provisions. The question is whether equity will take into account the *ultra vires* nature of the City's demand, which is the root of the legal difficulties that followed, in determining whether the contract of which it forms a central part is fatal to the appellant's claim in unjust enrichment.

L'appelante a exécuté les conventions et ne cherche plus à faire appliquer les dispositions *ultra vires*. La question est de savoir si, en equity, il faut tenir compte de la nature *ultra vires* de la demande de la Ville, qui est à l'origine des démêlés juridiques subséquents, pour déterminer si le contrat dont cette demande constitue un élément central fait échec à l'action de l'appelante fondée sur l'enrichissement sans cause.

31

The general rule, of course, is that it is not the function of the court to rewrite a contract for the

En règle générale, il n'appartient évidemment pas au tribunal de réécrire le contrat à la place des parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract. None of that arises in this case. The question here, more precisely, is whether the City can be permitted in the first appeal to argue that it is absolved by the doctrine of *ultra vires* from any contractual responsibility to carry out the zoning obligations (that the trial court found it had undertaken to the appellant on the basis of a common mistake) and then in this appeal, in the same litigation (albeit in relation to a different cause of action), permitted to succeed on the basis that the same contract constitutes a juristic reason to obtain the extra works and improvements without paying for them. In my view, the City's success in the 2000 appeal knocked out of contention the juristic reason (the contractual provisions) on which it primarily relies in this appeal. I say that for two reasons. First, as a matter of equity, it is not necessary for the appellant in this action to try and set aside the entirety of its contractual arrangements with the City. It need only isolate the provisions relating to the *ultra vires* demand, and show why the City ought not to be allowed to rely on them as a defence to a claim in unjust enrichment. Secondly, the trial judge found that the *ultra vires* arrangements rested on a common mistake. Both the City and the appellant assumed the City had the legal authority to make zoning commitments the City did not possess. The finding of common mistake is important to the appellant's claim to recover the cost of the extra works and improvements. If there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.

parties ni de soustraire l'une d'elles aux conséquences d'un engagement pris à la légère. Tel n'est pas l'objet du présent pourvoi. La question qui se pose plus précisément en l'espèce est de savoir si la Ville pouvait prétendre, dans le cadre du premier pourvoi, que la doctrine de l'*ultra vires* la soustrayait à toute obligation contractuelle relative au zonage (qu'elle avait contractée, selon le juge de première instance, sur le fondement d'une erreur commune), puis avoir gain de cause dans le présent pourvoi, toujours dans la même affaire (mais relativement à une autre cause d'action), en affirmant que le contrat en question constitue un motif juridique la justifiant de conserver les travaux et les améliorations supplémentaires sans en payer le prix. À mon avis, la victoire de la Ville en 2000 a fait tomber le motif juridique (les dispositions contractuelles) sur lequel elle s'appuie principalement aujourd'hui, et ce, pour deux raisons. Premièrement, en equity, l'appelante n'a pas à écarter toutes les conventions conclues avec la Ville. Il lui suffit d'isoler les dispositions liées à la demande *ultra vires* et de montrer pourquoi la Ville ne devrait pas être admise à les invoquer pour réfuter l'enrichissement sans cause. Deuxièmement, le juge de première instance a conclu que les accords *ultra vires* reposaient sur une erreur commune aux deux parties. Tout comme l'appelante, la Ville a supposé qu'elle était légalement habilitée à prendre un engagement en matière de zonage, ce qui n'était pas le cas. L'erreur commune est importante pour ce qui est du recouvrement du coût des travaux et des améliorations supplémentaires par l'appelante. La situation aurait été différente si nous avions été uniquement en présence d'une opération *ultra vires*, sans que ne s'y ajoute l'erreur commune, et l'issue n'aurait pas nécessairement été la même.

(i) The Fruit of the *Ultra Vires* Demand

32 In many cases, no doubt, municipalities make demands that are not strictly authorized and developers do what they are asked to do because in the end they get the zoning they want. There is no suggestion that in the ordinary case such arrangements should be unwound on the basis of the doctrine of unjust enrichment. This case is different.

(i) La conséquence de la demande *ultra vires*

Dans bien des cas, il ne fait aucun doute que les municipalités formulent des demandes qu'elles ne sont pas, à strictement parler, autorisées à faire et que les promoteurs s'y plient parce qu'ils obtiennent en fin de compte le zonage voulu. Nul ne prétend que ces accords devraient normalement être écartés sur le fondement de l'enrichissement sans cause. La

As Mackenzie J. observed after the first trial (at para. 17):

In short, everyone involved miscalculated. What are the legal consequences of this imbroglio?

To which Wilson J., presiding at the second trial, added, somewhat darkly (at para. 4):

The plaintiff failed to adhere to the admonition, "put not your faith in princes", and must now accept the consequences.

Recognizing, as the trial judge did, that the source of the problem in this case is the City's *ultra vires* demand for works and improvements to which it was not entitled, one approach is to sever from the contractual arrangements the exchange of promises that flowed from that initial *ultra vires* demand.

It is true that these commercial agreements are, as one would expect, complex, and do not readily lend themselves to "blue-pencil" deletions. We are dealing, however, with an equitable cause of action, and equity looks to substance rather than to form. As stated earlier, a characteristic of the doctrine of unjust enrichment is the flexibility of remedies. Here the substance of the problem to be remedied is clearly identified. The respondent is sitting on $1.08 million worth of improvements which have been found to be the fruits of an *ultra vires* demand. The remedy sought is simply to reverse the wrongful transfer of wealth by ordering reimbursement of that amount to the appellant.

The City seeks to enjoy an unjustified windfall at the appellant's expense. The equitable doctrine would be a feeble thing if it did not possess the remedial flexibility to reverse an enrichment that has been established to the satisfaction of an experienced trial judge to be manifestly unjust. I would not give effect to a defence based on the form as opposed to the substance of the contractual documents.

présente espèce est particulière. Comme l'a souligné le juge Mackenzie à l'issue du premier procès (par. 17) :

[TRADUCTION] Bref, toutes les parties se sont trompées. Quelles sont les conséquences juridiques de cet imbroglio?

Ce à quoi le juge Wilson, qui a présidé le second procès, a ajouté un peu sombrement (par. 4) :

[TRADUCTION] La demanderesse a fait fi de l'exhortation « ne mettez point votre foi dans les princes », et elle doit maintenant en subir les conséquences.

Si, à l'instar du juge de première instance, l'on reconnaît que le problème découle en l'espèce de la demande de travaux et d'améliorations auxquels la Ville n'avait pas droit, une solution possible serait de retrancher des conventions intervenues l'échange de promesses ayant fait suite à la demande *ultra vires* initiale. 33

Il est vrai — et nul ne s'en étonnera — que ces conventions commerciales sont complexes et ne se prêtent guère au remaniement par voie de suppression. Nous sommes cependant appelés à statuer sur une cause d'action en equity, et l'equity s'intéresse au fond et non à la forme. Rappelons que l'une des caractéristiques de la doctrine de l'enrichissement sans cause est la souplesse dans les réparations susceptibles d'être accordées. En l'espèce, les données du problème qui appelle réparation sont clairement établies. L'intimée bénéficie d'améliorations d'une valeur de 1,08 million de dollars, et il a été statué qu'elles résultaient d'exigences *ultra vires*. La réparation demandée consiste simplement à annuler le transfert de richesse injustifié en ordonnant à l'appelante de payer le prix des améliorations. 34

La Ville cherche à bénéficier d'un avantage injustifié aux dépens de l'appelante. La doctrine de l'enrichissement sans cause aurait bien peu d'utilité si elle n'était pas assez souple, en matière de réparations, pour permettre l'annulation d'un enrichissement qui, selon un juge de première instance expérimenté, est manifestement injuste. Je ne ferais pas droit à un moyen de défense fondé sur la forme plutôt que sur la teneur des documents contractuels. 35

(ii) Common Mistake

36 Wilson J. found as a fact that the City and the appellant had entered into their contractual arrangements on the basis of a common mistake as to the City's legal authority. He said (at para. 34):

I have already found that each of these parties believed in a set of circumstances which have now been found [in the earlier appeal] not to be true.

37 The "mistake" was the belief that the City had the authority to contract for the extra works and improvements in exchange for what was found to be an implied contractual obligation to maintain the zoning in place for a reasonable time, estimated at 10 to 12 years, to allow completion of the appellant's project. The mistake was not wholly unreasonable. The judges of this Court were divided 4 to 3 on that issue in the first PNI appeal.

38 The City now denies that it was under any such misapprehension, suggesting that it knew all along that it could not carry out what was found to be its side of the bargain, but that position was rejected on the facts by the trial judge as noted above.

39 The result, accordingly, is that the City and the appellant purported to contract with respect to the extra works and improvements under a common mistake of law as to the enforceability of their agreement. "It cannot be disputed", wrote Bacon V.C. in 1881, that "Courts of Equity have at all times relieved against honest mistakes in contracts . . . where not to correct the mistake would be to give an unconscionable advantage to either party": (*Burrow v. Scammell* (1881), 19 Ch. D. 175, at p. 182). Such a mistake undermines the juristic reason relied upon by the City, as La Forest J. pointed out in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at p. 1200:

From his analysis, Dickson J. [in *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347] concluded that the judicial development of the law of restitution or unjust (or as Dickson J. noted, "unjustified") enrichment renders otiose the distinction between mistakes of fact and mistakes of law. He would

(ii) L'erreur commune

Le juge Wilson a tiré la conclusion de fait que les conventions étaient intervenues entre la Ville et l'appelante en raison d'une erreur commune quant au pouvoir légal de la Ville. Voici ce qu'il a dit (par. 34) :

[TRADUCTION] J'ai déjà conclu que chacune des parties s'était appuyée sur des faits dont l'inexactitude a été établie [dans le pourvoi antérieur].

L'« erreur » résidait dans la croyance que la Ville avait le pouvoir d'exiger par contrat des travaux et des améliorations supplémentaires en contrepartie de ce qui a été assimilé à une obligation contractuelle implicite de maintenir le zonage pendant une période raisonnable, soit de 10 à 12 ans, pour permettre le parachèvement du projet de l'appelante. L'erreur n'était pas entièrement déraisonnable, car lors du premier pourvoi, notre Cour a rendu un jugement partagé (4 juges contre 3) à ce sujet.

La Ville nie aujourd'hui s'être méprise, faisant valoir qu'elle savait dès le début qu'elle ne pouvait respecter sa part du marché. Or, au vu des faits de l'espèce, le juge de première instance a rejeté cette thèse, comme je l'ai indiqué précédemment.

Il appert donc que la Ville et l'appelante ont toutes deux conclu une convention relative aux travaux et aux améliorations supplémentaires sur le fondement d'une erreur de droit quant à son caractère exécutoire. Comme l'a écrit le vice-chancelier Bacon en 1881, [TRADUCTION] « il est indéniable que les cours d'equity ont toujours accordé réparation contre l'erreur commise de bonne foi en matière contractuelle [. . .] lorsque l'omission de la corriger aurait conféré un avantage indu à l'une ou l'autre partie » (*Burrow c. Scammell* (1881), 19 Ch. D. 175, p. 182). Pareille erreur compromet l'existence du motif juridique sur lequel s'appuie la Ville. Le juge La Forest a d'ailleurs fait remarquer dans l'arrêt *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, p. 1200 :

Cette analyse a amené le juge Dickson [dans *Hydro Electric Commission of Nepean c. Ontario Hydro*, [1982] 1 R.C.S. 347] à conclure que, étant donné la façon dont le droit en matière de restitution ou d'enrichissement [sans cause] (ou, comme le soulignait le juge Dickson, « injustifié ») a évolué devant les tribunaux, la distinction abolish the distinction, and would allow recovery in any case of enrichment at the plaintiff's expense provided the enrichment was caused by the mistake and the payment was not made to compromise an honest claim, subject of course to any available defences or equitable reasons for denying recovery, such as change of position or estoppel. [Emphasis added.]

See also *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133, at p. 1157.

Southin J.A. in the Court of Appeal (at para. 24) accepted the existence of the Songhees Phase II Subdivision Servicing Agreement as a valid juristic reason to deny recovery because

there is nothing in any of this [evidence] from which one could conclude that the original transaction would have come to fruition had the [appellant] asserted it would do only what could lawfully be required of a landowner under s. 989 of the Act.

This is true, but the fact is that the City and the appellant *did* make a deal on a basis which this Court found to be *ultra vires*. The City might not have done the deal on any other basis and certainly it is clear the appellant would not have undertaken the extra works and improvements without the zoning assurances it thought it had contracted for. However, the deal was done on the basis of a common mistake of law, the extra works and improvements are in place, and the relevant question now is who is to pay for them.

Southin J.A. also accepted the City's argument that what the appellant "asserts to be the deprivation, that is to say, the extra works, was part and parcel of the consideration it gave for the benefit which it received under the agreements" (para. 25). On this view, "the benefit" was the acquisition of the 22 acres of land and approval of the subdivision plan. Such a view, with respect, is at odds with the findings of fact by the trial judge as to the "consideration" the City and the appellant had agreed upon, namely the maintenance of the zoning in place for a reasonable time to permit the completion of the

entre les erreurs de fait et les erreurs de droit ne servait plus à rien. Le juge Dickson était d'avis de l'abolir et de permettre le recouvrement dans tous les cas d'enrichissement aux dépens du demandeur, quand l'erreur avait occasionné l'enrichissement et quand le paiement n'avait pas été effectué en vue de compromettre une réclamation légitime, sous réserve évidemment des moyens de défense ou des raisons d'équité qui permettraient de refuser le recouvrement, dont par exemple un changement de situation ou une fin de non-recevoir. [Je souligne.]

Voir aussi *Lignes aériennes Canadien Pacifique Ltée c. Colombie-Britannique*, [1989] 1 R.C.S. 1133, p. 1157.

La juge Southin de la Cour d'appel a reconnu (au 40
par. 24) que l'existence du contrat de viabilisation des lots de la phase II constituait un motif juridique valable de refuser le recouvrement, car

[TRADUCTION] aucun élément de cette [preuve] ne permet de conclure que l'opération initiale se serait concrétisée si [l'appelante] avait affirmé qu'elle ne ferait que ce qui pouvait être légalement exigé d'un propriétaire foncier suivant l'art. 989 de la Loi.

Soit, mais il demeure que l'accord *conclu* par la 41
Ville et l'appelante avait un fondement que notre Cour a jugé *ultra vires*. La Ville n'aurait peut-être pas conclu d'accord sur un autre fondement, et l'appelante n'aurait assurément pas entrepris les travaux et les améliorations supplémentaires sans la garantie contractuelle qu'elle pensait avoir obtenue relativement au zonage. Or, l'accord est intervenu par suite d'une erreur de droit commune, les travaux et les améliorations supplémentaires ont été réalisés et il s'agit désormais de savoir qui doit en assumer le coût.

La juge Southin a également fait sienne la thèse 42
de la Ville selon laquelle [TRADUCTION] « l'appauvrissement allégué par l'appelante, c'est-à-dire les travaux supplémentaires, faisait partie intégrante de la contrepartie versée par elle pour obtenir l'avantage que lui conféraient les accords » (par. 25). Dans cette optique, « l'avantage » s'entendait de l'acquisition du bien-fonds de 22 acres et de l'approbation du plan de lotissement. En toute déférence, j'estime que cette interprétation va à l'encontre des conclusions de fait tirées par le juge de première instance quant à la « contrepartie » dont la Ville et

project. As noted earlier, the "extra" works and improvements were found to be distinct from what was lawfully required.

l'appelante avaient convenu, soit le maintien du zonage pendant une période raisonnable afin que le projet puisse être mené à terme. Comme je l'ai indiqué précédemment, les travaux et les améliorations « supplémentaires » ont été jugés distincts de ceux qu'exigeait la loi.

43 For these reasons, I conclude that the appellant has negatived the contractual provisions as a juristic reason permitting the City to retain the extra works and improvements without paying for them.

Pour ces motifs, je conclus que l'appelante a réfuté l'argument que les dispositions contractuelles constituent un motif juridique justifiant la Ville de conserver les travaux et les améliorations supplémentaires sans en payer le prix.

(b) *Disposition of Law*

b) *Disposition légale*

44 It is evident that the appellant's claim must fail if the City's retention without payment of the $1.08 million enrichment is authorized by statute (*Peter, supra*, p. 1018; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, at p. 476).

La demande de l'appelante doit de toute évidence être rejetée si la loi autorise la Ville à conserver, sans payer quoi que ce soit, l'enrichissement de 1,08 million de dollars (*Peter*, précité, p. 1018; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445, p. 476).

45 The City relies on s. 914 of the *Local Government Act* which provides that no compensation is payable to anyone for any "reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part". The City argues that the loss claimed by the appellant flows from the down-zoning, and is therefore unrecoverable by reason of the statute.

La Ville invoque l'art. 914 de la *Local Government Act*, qui prévoit que nul n'a droit à une indemnité pour la [TRADUCTION] « diminution de la valeur d'un bien-fonds ou pour tout préjudice ou perte résultant de l'adoption d'un plan d'urbanisme ou d'un règlement en vertu de la présente section ou de la délivrance d'un permis en application de la section 9 de la présente partie ». La Ville prétend que la perte alléguée par l'appelante découle de la modification du zonage et, partant, qu'elle est irrécouvrable du fait de la loi.

46 In my view, the claim here is not based on "the adoption of an official community plan or [zoning] bylaw". While the earlier appeal alleged that the down-zoning of the water lots breached an implied term of the contract, that claim was rejected, and the appellant's losses flowing from the down-zoning are no longer in issue. The appellant's cause of action for unjust enrichment was complete when it put in place the extra works and improvements in the mistaken belief that its contract with the City in respect thereto was enforceable. The mistake formed the basis of the City's successful appeal after the first trial.

À mon sens, l'allégation considérée en l'espèce ne s'appuie pas sur [TRADUCTION] « l'adoption d'un plan d'urbanisme ou d'un règlement [de zonage] ». Même si, dans le premier pourvoi, l'appelante a allégué que la modification du zonage des plans d'eau avait contrevenu à une clause implicite du contrat, cette prétention a été rejetée, et les pertes subies par l'appelante par suite de cette modification ne sont désormais plus en cause. Les éléments constitutifs de l'enrichissement sans cause ont été réunis une fois que l'appelante a réalisé les travaux et les améliorations supplémentaires, croyant à tort que le contrat conclu avec la Ville à cet égard était exécutoire. L'erreur a permis à la Ville d'avoir gain de cause en appel du premier procès.

The City also relies on s. 215(3) of the *Land Title Act* under which the restrictive covenant bound the appellant to do the works "notwithstanding that the instrument . . . has not been signed by the covenantee". The City's argument amounts to the proposition that registration allows the City to do indirectly what would be *ultra vires* if done directly, and thereby to subvert the legislative intent to limit a municipality's authority, even as the municipality itself escapes its side of the bargain by pleading the doctrine of *ultra vires*. I would not give effect to the City's s. 215 argument. The second trial judge, Wilson J., found, at para. 5, that the appellant's obligations were "inextricably bound up" with the other provisions of the agreements including the City's *ultra vires* promise to maintain in place the requisite zoning. The appellant does not deny its obligation under the restrictive covenant or the underlying agreements. Its position is that in the circumstances, the agreements, flawed as they are, cannot be relied upon by the City as a juristic reason to keep the works and improvements without paying for them. I agree with that position.

47 La Ville s'appuie en outre sur le par. 215(3) de la *Land Title Act*, selon lequel l'engagement de ne pas faire obligeait l'appelante à effectuer les travaux [TRADUCTION] « même [si le bénéficiaire de l'engagement n'avait] pas signé l'acte ». Cela revient à dire que l'enregistrement de l'engagement permettait à la Ville de faire indirectement ce qui, directement, aurait été *ultra vires*, et de dénaturer ainsi l'intention du législateur de limiter le pouvoir d'une municipalité, même lorsque celle-ci ne respecte pas sa part du marché en invoquant la doctrine de l'*ultra vires*. Je ne retiendrais pas l'argument de la Ville fondé sur l'art. 215. Le juge du deuxième procès, le juge Wilson, a statué au par. 5 de ses motifs que l'obligation de l'appelante était [TRADUCTION] « inextricablement liée » aux autres dispositions des accords, y compris la promesse *ultra vires* de la Ville de maintenir le zonage. L'appelante ne nie pas son obligation découlant de l'engagement de ne pas faire ou des accords sous-jacents. Elle maintient que, dans les circonstances, les accords étant entachés d'une erreur, ils ne peuvent être invoqués par la Ville comme motif juridique de conserver les travaux et les améliorations sans en payer le prix. Je suis de cet avis.

(c) *Donative Intent*

The City contends that it is common for developers to offer "sweeteners" in excess of what a municipality can demand for zoning and subdivision approvals. This is true. Each side gets what it wants and moves on. However, their deal is not based on a common mistake. And here the appellant did not get what the City undertook to give it. Mackenzie J., at the initial trial, whose findings were adopted by Wilson J. at the second trial, flatly rejected any suggestion that the appellant possessed a donative intent (at para. 29):

> The characterization of park dedications and service cost expenditures as voluntary belies the reality. PNI was pursuing a business venture. It negotiated terms of purchase with BCEC and a services agreement with the City with a precise expectation of the lots it would acquire, the zoning for each lot and the extent of development thereby permitted. It made commitments pursuant

c) *Intention libérale*

48 La Ville fait valoir qu'il est courant qu'un promoteur immobilier offre une « rallonge » à ce que la municipalité peut exiger en échange d'une autorisation relative au zonage et au lotissement. Cela est vrai. Chacun obtient ce qu'il veut et va de l'avant. Mais leur accord ne repose pas sur une erreur commune. Et, en l'espèce, l'appelante n'a pas obtenu ce que la Ville s'était engagée à lui donner. Au premier procès, le juge Mackenzie, dont les conclusions ont été reprises par le juge Wilson lors du second procès, a catégoriquement rejeté l'idée que l'appelante ait eu une intention libérale (par. 29) :

> [TRADUCTION] Qualifier de désintéressées les dépenses engagées pour l'aménagement d'espaces verts et la viabilisation fait totalement fi de la réalité. PNI exploitait une entreprise. Elle a négocié des conditions d'acquisition avec BCEC et un contrat de viabilisation avec la Ville en ayant des attentes précises quant aux lots qu'elle acquerrait, au zonage de chaque lot et à l'ampleur

to written agreements with mutual obligations that it considered enforceable. Its motives were commercial and not philanthropic.

de l'aménagement qui y serait autorisé. Elle a pris des engagements par écrit dans des accords synallagmatiques qu'elle jugeait exécutoires. Ses visées étaient commerciales, et non philanthropiques.

49 The appellant did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking it turned out the City was able to repudiate.

L'appelante n'a pas offert de « rallonge » pour obtenir une chose qu'elle avait déjà. Elle l'a fait en contrepartie d'un engagement tacite que la Ville a pu en fin de compte répudier.

(d) *Other Valid Common Law, Equitable or Statutory Obligation*

d) *Autres obligations valides imposées par la common law, l'equity ou la loi*

50 Southin J.A. stated, at para. 26:

> In any event, the juristic reason for what the appellant did in 1993 is that the Legislature had conferred upon it the power to do the act of downzoning. The by-law is of the same force and effect as if it had been enacted by the Legislature itself and provides a complete answer to any and all claims arising out of it.

La juge Southin a tenu les propos suivants (par. 26) :

> [TRADUCTION] Quoi qu'il en soit, le motif juridique pour lequel l'appelante a agi comme elle l'a fait en 1993 réside dans le pouvoir de modifier le zonage que lui avait conféré le législateur. Le règlement est tout aussi exécutoire que s'il avait été pris par le législateur lui-même et il permet de régler entièrement tout litige découlant de son application.

51 With respect, this argument presupposes that the claim for unjust enrichment "arose" out of the down-zoning. However, the claim for unjust enrichment does not depend on the down-zoning. It depends on the fact that the City has obtained $1.08 million worth of extra works and improvements at the appellant's expense to which, after securing a court order declaring that it had no power to do what it purported to undertake to do, the City has no legitimate entitlement.

En toute déférence, cet argument présuppose que l'allégation d'enrichissement sans cause « découle » de la modification de zonage. Or, tel n'est pas son fondement. Elle tire sa source de l'obtention par la Ville, aux frais de l'appelante, de travaux et d'améliorations supplémentaires d'une valeur de 1,08 million de dollars auxquels elle n'a pas légitimement droit vu le jugement déclarant qu'elle n'était aucunement habilitée à faire ce qu'elle s'était engagée à faire.

52 The City also argues that requiring it to pay for the extra works and improvements would constitute an "indirect fetter" on the exercise of its legislative power, but this is not so. The appellant has never attacked the validity of the down-zoning. The appellant no longer seeks damages for breach of contract that included loss of profits on a project it was unable to build. We are now dealing simply with the cost of extra works and improvements. The focus is not on the appellant's loss but on the City's enrichment. The power to down-zone in the public interest does not immunize the City against claims for unjust enrichment.

La Ville prétend en outre que la contraindre à payer les travaux et les améliorations supplémentaires « entraverait indirectement » l'exercice de son pouvoir législatif. Ce n'est pas le cas. L'appelante n'a jamais contesté la validité de la modification du zonage. Elle ne demande plus de dommages-intérêts pour rupture de contrat, notamment pour le manque à gagner afférent au projet qu'elle n'a pu mener à terme. Désormais, seul le coût des travaux et des améliorations supplémentaires est en cause. L'accent est mis non pas sur la perte de l'appelante, mais bien sur l'enrichissement de la Ville. Le pouvoir de modifier le zonage dans l'intérêt public ne met pas la Ville à l'abri d'une action fondée sur l'enrichissement sans cause.

(2) Stage Two: Reasonable Expectation of the Parties and Public Policy Considerations

Under stage two of the "juristic reason" inquiry, the onus falls on the City to show that to allow the claim of unjust enrichment in this case would frustrate the reasonable expectation of the parties. It has not discharged this onus. On the contrary, Wilson J. found that neither the City nor the appellant expected the extra works and improvements to be donated. The reasonable expectation was that the works and improvements would be paid for out of the profits from those parts of the Phase II project the appellant was prevented by the City from building. The City did not expect to get the extra works and improvements for nothing, but the agreed form of consideration (guaranteed zoning) turned out to be beyond its powers. The City now owns the works, and it is consistent with the parties' *reasonable* expectations that the appellant be reimbursed for their cost.

The City contends that the grant of an equitable remedy in this case would be bad public policy.

First, the grant of the equitable remedy would not frustrate the legislative purpose in making such zoning commitments unenforceable. In fact, the City *did* down-zone the lots in question and *was* held able to do so without having to pay damages for breach of contract. Whether or not it should pay the cost of benefits it actually demanded and received is a different question.

Second, it is not suggested that the City or the appellant made these agreements for an improper purpose. On the contrary, Mackenzie J. at the first trial considered the "interlocking agreements [to be] an innovative means of achieving the parties' differing objectives by hinging binding obligations on each piece going into place" (para. 26). He pointed out that the exchange of contractual promises ultimately found to be *ultra vires* was designed, as stated by the City's solicitor, "to facilitate an unusual rezoning of a large area of undeveloped and

(2) Deuxième étape : attentes raisonnables des parties et considérations d'intérêt public

53 À la deuxième étape de l'analyse relative à l'existence d'un « motif juridique », il incombe à la Ville de démontrer que faire droit à l'action fondée sur l'enrichissement sans cause irait à l'encontre des attentes raisonnables des parties. Elle ne l'a pas fait. Le juge Wilson a conclu au contraire que, en ce qui concerne les travaux et les améliorations supplémentaires, ni la Ville ni l'appelante ne s'attendaient à ce qu'il s'agisse d'un don. Toutes deux s'attendaient raisonnablement à ce que leur coût soit prélevé sur les profits tirés de la partie du projet de l'appelante qui n'a pu voir le jour à cause de la modification du zonage. La Ville ne s'attendait pas à ce que les travaux et les améliorations supplémentaires ne lui coûtent rien, mais il s'est avéré que la contrepartie convenue (l'assurance que le zonage serait maintenu) outrepassait ses pouvoirs. La Ville est maintenant propriétaire des infrastructures, et il est compatible avec les attentes *raisonnables* des parties qu'elle en paie le coût à l'appelante.

54 La Ville prétend que, en l'espèce, l'octroi d'une réparation fondée sur l'equity irait à l'encontre de l'intérêt public.

55 Premièrement, une telle réparation ne serait pas contraire à l'intention du législateur de rendre inexécutoire un engagement relatif au zonage. En effet, la Ville *a* modifié le zonage des lots en question et il *a été* décidé qu'elle pouvait le faire sans verser de dommages-intérêts pour rupture de contrat. C'est une autre question que de savoir si elle devrait supporter le coût des avantages qu'elle a demandés et qui lui ont été conférés.

56 Deuxièmement, personne ne prétend que la Ville ou l'appelante a conclu les conventions dans un dessein illégitime. Au contraire, lors du premier procès, le juge Mackenzie a estimé que les [TRADUCTION] « conventions interdépendantes offraient aux parties un moyen innovateur de réaliser leurs objectifs divergents en rattachant des obligations à chaque composante » (par. 26). Il a signalé que les engagements contractuels jugés en fin de compte *ultra vires* visaient, pour reprendre les termes employés par l'avocat de la Ville, [TRADUCTION] « à faciliter

unsubdivided land" (para. 26). No one disputes that the redevelopment, as planned, was thought to be in the overall best interest of the municipality.

57 Third, I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith. This is precisely the sort of unfairness that the doctrine of unjust enrichment is intended to address.

58 The City has not pointed to any other public policy that ought to preclude recovery on the facts of this case. The City insisted on the works and improvements it now owns on the Songhees lands. It should pay for the cost of their construction. Municipalities are subject to the law of unjust enrichment in the same way as other individuals and entities.

V. Disposition

59 I would therefore allow the appeal, set aside the decision of the British Columbia Court of Appeal, and restore the trial judgment requiring the respondent City to pay the appellant $1.08 million. Interest will accrue on that amount at registrar's rates from time to time commencing the 1st day of October 1993 to the date of this judgment. The appellant is entitled to its costs of the trial before Wilson J. and of the appeal from that judgment to the British Columbia Court of Appeal, and the costs of the present appeal in this Court.

Appeal allowed with costs.

Solicitors for the appellant: Cox, Taylor, Victoria.

Solicitors for the respondent: Staples McDannold Stewart, Victoria.

la modification inhabituelle du zonage d'un vaste secteur non aménagé et non loti » (par. 26). Nul ne conteste que le réaménagement projeté était censé servir au mieux l'intérêt général de la municipalité.

Troisièmement, je ne suis pas persuadé qu'il serait dans l'intérêt public qu'une municipalité prenne un engagement relatif à l'aménagement, puis non seulement s'y dérobe et le conteste au motif qu'il est illégal et outrepasse ses pouvoirs, mais profite d'un avantage financier aux dépens d'un cocontractant de bonne foi. C'est précisément à ce type d'injustice que vise à remédier la doctrine de l'enrichissement sans cause.

La Ville n'a pas invoqué d'autres considérations d'intérêt public faisant obstacle au recouvrement en l'espèce. Elle a insisté pour obtenir les travaux et les améliorations dont elle est désormais propriétaire sur les terres Songhees. Elle doit en payer le coût. L'enrichissement sans cause s'applique à une municipalité comme à toute personne physique ou morale.

V. Dispositif

Je suis donc d'avis d'accueillir le pourvoi, d'annuler la décision de la Cour d'appel de la Colombie-Britannique et de rétablir le jugement de première instance ordonnant à la ville intimée de verser 1,08 million de dollars à l'appelante. Cette somme portera intérêt aux taux établis périodiquement par le registraire à compter du 1er octobre 1993 jusqu'à la date du présent jugement. L'appelante a droit aux dépens en première instance (devant le juge Wilson) et en appel de ce jugement devant la Cour d'appel de la Colombie-Britannique, ainsi qu'aux dépens du présent pourvoi devant notre Cour.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Cox, Taylor, Victoria.

Procureurs de l'intimée : Staples McDannold Stewart, Victoria.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC. et al.

Court File No. C51296

COURT OF APPEAL FOR ONTARIO

BRIEF OF AUTHORITIES
OF THE APPELLANT

McCarthy Tétrault LLP
Suite 5300, Toronto Dominion Bank
Tower
Toronto ON M5K 1E6

Geoff R. Hall LSUC# 34701O
Tel. 416 601-7856
Fax: 416 868-0673

Lawyers for the Appellant,
The Toronto-Dominion Bank

#842361