SUPREME COURT OF NOVA SCOTIA

Citation: *Jauch v. Kuratli*, 2022 NSSC 228

Date: 20220809
Docket: Bridgewater No. 455191
Registry: Bridgewater

Between:

Eugen Jauch and Beatrice Jauch

Plaintiffs

v.

Bruno Kuratli and Brigitte Kuratli

Defendants

Judge:	The Honourable Justice Darlene Jamieson
Heard:	May 3 and 4, 2022 in Bridgewater, Nova Scotia
Further Written Submissions:	May 10, 2022 and May 27, 2022
Counsel:	Ms. Kathryn M. Dumke, Q.C. for the Plaintiffs Mr. Jonathan Cuming, for the Defendants

By the Court:

Background

[1] The Plaintiffs, the Jauchs, and the Defendants, the Kuratlis, are citizens of Switzerland. In 2011, the Jauchs wished to immigrate to Canada and were interested in purchasing a business known as Best View Cabins from the Defendants. The Kuratlis, at all relevant times, resided in Clementsport, Nova Scotia which is where the business is located.

[2] In 2011, the Kuratlis advertised the business for sale in Tierwelt, a Swiss magazine. The property was listed for sale at $450,000. On February 27, 2011, the Jauchs contacted the Kuratlis and indicated their interest in possibly purchasing Best View Cabins. The ensuing discussions between the Kuratlis and the Jauchs took place in Swiss German and continued from 2011 to 2016 when an Agreement of Purchase and Sale was terminated and the parties executed a Termination and Mutual Release of Agreement of Purchase and Sale. This case concerns the Jauchs' failed attempts to purchase the property and their claim for return of 50,000 Swiss Francs ("SFR").

[3] The Kuratlis did not attend the trial nor give evidence. The only witnesses at trial were the Jauchs and Ms. Lorene Prescesky, a real estate agent. The Jauchs gave their evidence through the assistance of a translator, Dr. Julia Poertner.

Preliminary issue

[4] During oral submissions, after the evidence was complete and all exhibits tendered, the Jauchs sought to amend their Statement of Claim to add a claim of rectification. The proposed amendments to the Statement of Claim are as follows:

> 26. …The Jauchs seek rectification of the written "Receipt" to reflect the oral agreement previously made.
>
> 32 (g) Rectification of the document labelled "Receipt" to remove reference to a "non-refundable" deposit.

[5] As this issue arose in submissions, the parties were given an opportunity to file written briefs concerning the request for an amendment after the conclusion of the trial. The Plaintiffs filed a notice of motion, written submission and draft order on May 10, 2022. The Defendants filed their written submission on May 27, 2022.

[6] The Jauchs argue their Statement of Claim makes direct reference to their allegation that the written contract signed by them did not reflect the terms of the oral agreement that it was meant to record. They say the material facts supporting a finding of rectification were pleaded in paragraphs 15-23 and paragraph 26 of their Statement of Claim and relied upon at trial. They say that the summary at paragraph 28 of the Plaintiffs' Statement of Claim, indicates the Kuratlis fraudulently misrepresented the written document drafted by them in English as accurately reflecting the terms of that agreement. They say the terms of the proposed rectification are clear - the contract should not suggest that the "deposit" was non-refundable. They conclude that although rectification of the written agreement to reflect the terms of the oral agreement was not explicitly requested in the Statement of Claim, it is clear from the pleadings that this outcome is and has always been desired by the Plaintiffs.

[7] The Kuratlis say the material facts pleaded in the Statement of Claim do not support the proposed amendment. They say the Plaintiffs' characterization of the terms of the alleged oral agreement are set out at paragraph 18 of the Statement of Claim and that the Plaintiffs assert that the oral agreement, which led to the SFR 50,000 being wired to the Defendants, would be accounted for in an anticipated agreement of purchase and sale of Best View Cabins. They say there is no reference to what would happen if the sale of the property could not be concluded. They further say that while the Plaintiffs testified that they were unaware that the receipt document contained the words "non-refundable deposit," that assertion was not referenced anywhere in the Plaintiffs' pleadings.

[8] The Kuratlis acknowledge that the amendment seeks alternative relief arising from the same facts previously pleaded and that no new facts are relied upon. However, they say the fact that no new facts have been pleaded raises the question as to whether the claim for rectification is sustainable.

[9] With respect to prejudice, the Kuratlis say that re-opening the matter will result in prejudice that would not be properly addressed by an award of costs. They say if the amendment is permitted, to ensure that the Defendants are not denied their right to discover the Plaintiffs on matters relevant to the pleadings, it would be necessary to re-open the discovery process.

[10] They further say that absent the court re-opening the hearing, and incurring the additional expense and delay associated with the same, the

Defendants would be denied the opportunity to challenge the Plaintiffs in relation to the elements which must be proven to substantiate a claim for rectification. They say rather than simply questioning the Plaintiffs as to why they would execute a document that they now allege they could not understand and investigating whether they are relieved of their legal obligations by reason of their claimed lack of understanding, the Defendants would also inquire as to the alleged differences between the "oral agreement" and the receipt document. They say they would want to inquire about the terms of the alleged loan agreement with an eye to determining whether the terms were sufficiently clear as to constitute a binding agreement. They say it may very well be that, based on that *viva voce* evidence, it would become clear there was no meeting of the minds and, therefore, no contract. In the event that such were found, the Jauchs would be left to attempt to recover against the recipient of the funds on the basis of unjust enrichment.

[11] Finally the Kuratlis say a claim of rectification is not sustainable. They say there is nothing in the pleadings which suggests a common intention to treat the 50,000 SFR as a loan, in the event the transaction failed to close. Simply put, the terms of the "loan agreement" are not definite and ascertainable. The Defendants, therefore, submit that the claim for rectification is not sustainable.

[12] Civil Procedure Rule 83.11 states:

> (1) A judge may give permission to amend a court document at any time.
>
> (2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35- Parties, including Rule 35.08(5) about the expiry of a limitation period.
>
> (3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

[13] Rule 83.11(3) applies where the amendment would not deprive the Defendants of a limitations defence because all the material facts have already been pleaded and the amendment "merely identifies, or better describes, the cause." As the Rule states, an amendment can be granted at any time, including during trial.

[14] The agreement in question dates to 2012 so there is no question this is an amendment sought after the expiry of the limitation period. The question for determination is whether the material facts have been pleaded and whether the amendment merely better describes the cause or represents an entirely new claim or cause of action.

[15] As Justice Farrar said in *Automattic Inc. v. Trout Point Lodge Ltd.,* 2017 NSCA 52:

> 28 Rule 83.11(3) is not complicated. A motions judge may allow amendments to the pleadings to allow additional causes of action after the expiry of a limitation period if the judge is satisfied that the facts material to the new cause of action are pleaded and the amendment merely identifies or better describes the cause.

[16] In upholding the motions judge in *Automattic*, supra, the Court of Appeal agreed that the new causes of action were already outlined in the earlier pleadings, but had not been properly named. Justice Farrar said at para. 31 and 32:

> Two of the causes of action that the respondents sought to add, promissory estoppel and fraudulent misrepresentation are actually referred to in Automattic's defence. Clearly they were of the view that the pleadings were sufficient to raise these two causes of action. Similarly, I am satisfied, as was the motions judge, that the pleadings, including the Response for Demands for Particulars which were filed, are broad enough to include the claims of copyright infringement and breach of honesty in contractual dealings.
>
> As a result, it did not matter what law governed the causes of action or if the limitation period had expired. The motions judge was satisfied that the material facts for the causes of action were already pleaded and the sought after amendments merely better described the causes of action. Therefore, she exercised her discretion in allowing the amendment. In doing so she correctly interpreted the *Civil Procedure Rules*.
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> [Emphasis added]

[17] It is helpful to outline the material facts necessary to support a claim for rectification and to examine the Plaintiffs' original Statement of Claim to determine whether the material facts have been pleaded. In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* [2002] 1 S.C.R. 678 the Supreme Court of Canada described the equitable remedy of rectification and set out the requirements:

> **31** Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available for unilateral mistake (as here), provided certain demanding preconditions

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

...

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

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

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

> rectification may be available: Hart, supra, at p. 630; Ship M. F. Whalen, supra, at pp. 126-27.
>
> **39** What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question. In *First City Capital Ltd. v. British Columbia Building Corp. (1989), 43 B.L.R. 29* (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context 'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud... . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained" (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken"…
>
> **40** The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention (Hart, supra, per Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not.
> The court's equitable jurisdiction is limited to putting into words that -- and only that -- which the parties had already orally agreed to.
>
> **41** The fourth hurdle is that all of the foregoing must be established by proof which this Court has variously described as "beyond reasonable doubt" (Ship M. F. Whalen, supra, at p. 127), or "evidence which leaves no 'fair and reasonable doubt'" (Hart, supra, at p. 630), or "convincing proof" or "more than sufficient evidence" (*Augdome Corp. v. Gray,* [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression "convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more probable than not" standard.
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> [Emphasis added]

[18] The questions under CPR 83.11(3), after determining whether a limitation period has expired, are as follows: whether rectification is a new "claim" or "cause of action" that is supported by material facts from the original Notice, and whether the amendments "merely add further particulars" to the claims already set out in the Statement of Claim.

[19] The Jauchs have not added new facts to support their claim of rectification. They rely on the existing material facts. The factual matrix is the same.

[20] I am of the view that the pleading is broad enough to include rectification. It is not specifically named but the Statement of Claim asserts there was an oral

agreement to loan 50,000 SFR followed by a document written in English entitled "Receipt" being presented to the Jauchs who "understood from the representations by the Kuratlis was to evidence payment made by the Jauchs, and confirm that the funds paid would reduce the purchase price of Best View Cabins." The Statement of Claim further says "The Kuratlis requested that the Jauchs sign the document at a place indicated by the Kuratlis." It also states:

> Paragraph 26 - The Kuratlis breached the agreement between the parties that the loan would be accounted for in the agreement of purchase and sale of Best View and that the monies would be repaid if the agreement would not be concluded."
>
> Paragraph 28- The Jauchs state, that in making these representations the Kuratlis knew or ought to have known, that the statements were false, carelessly made as to the truth and knew that the plaintiffs would rely on them in their decision to make the loan as a result the plaintiffs have suffered damages.
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> Paragraph 29- The plaintiffs claim:
>
> a. General damages
>
> b. Damages for deceit and fraudulent misrepresentation

[21] From the Statement of Claim it is clear the Jauchs' position was that the 50,000 SFR was refundable and that the receipt document indicating it was non-refundable was not an accurate reflection of the oral agreement. The Jauchs also plead deceit and fraudulent misrepresentation, and while this is raised solely in relation to the stated damages claim in paragraph 29, with no material facts pleaded, it cannot be of surprise to the Defendants that the Plaintiffs' position was the Defendants' actions in relation to the 50,000 SFR were alleged to be fraudulent.

[22] That the Jauchs disputed the contents of the Receipt document that stated "Non-refundable Deposit" was known to the Kuratlis, as it is clearly stated in the Statement of Claim. In paragraphs 15 and 26 it states the agreement between the parties was for a loan of 50,000 to be either accounted for in the purchase price of Best View Cabins or to be repaid. The Defendants say in their defence the 50,000 SFR was non refundable. Clearly this has always been in dispute between the parties. The Defence states:

> Paragraph 7- … The Defendants state that by an oral agreement reached in the summer of 2012, which agreement was reduced to writing and signed by the Plaintiffs in October

> 2012, the Plaintiffs agreed to pay SFR 410,000 for Best View and to provide a SFR 50,000 "non refundable deposit"
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> Paragraph 8-With respect to paragraph 15 of the Statement of Claim, the Defendants state that the SFR 50,000 payment was the amount that the Plaintiffs had agreed, while visiting Best View in the summer of 2012, to pay as a non-refundable down payment, which deposit was forfeited by the Plaintiffs.

[23] In my view, the amendment sought by the Jauchs is not a new cause of action or "claim" for the purposes of the *Limitation of Actions Act*, but merely further particularizes what the Plaintiffs have labelled as negligent misrepresentation, fraudulent misrepresentation, deceit and breach of contract claims already pleaded. That said, the outcome of this motion to amend does not depend on whether the amendments add new causes of action or claims. Whether the amendments should be permitted will depend on whether they will result in prejudice that cannot be compensated in costs.

[24] There is a well-established test to be applied in motions to amend pleadings. In the case of *Consolidated Foods Corp. (*1986), 76 NSR (2d) 182, the Nova Scotia Court of Appeal stated at paragraph 5:

> A review of the case law leads us to conclude that the amendment should have been granted unless it was shown to the judge that the applicant was acting in bad faith or that by allowing the amendment the other party would suffer serious prejudice that could not be compensated by costs…
>
> [Emphasis added]

[25] This principle has been similarly stated in many other cases including *Global Petroleum Corp. v. Point Tupper Terminals Co.,* 1998 NSCA 174.

[26] The Defendants have the burden, subject to rebuttal, to demonstrate either prejudice that cannot be compensated by costs or bad faith. The evidentiary burden is high (*HRM Pension Committee case 2012 NSSC 64; M5 Marketing Communications Inc. v. Ross*, 2011 NSSC 32).

[27] In *Altschuler v. Bayswater Construction Limited,* 2019 NSSC 197, Justice Bodurtha canvassed the law of amendments generally and prejudice specifically stating:

> 14 Justice Rosinski in *Oldford v. Canadian Broadcasting Corp.*, 2011 NSSC 49 (N.S. S.C.), summarized the relevant law in relation to adding amendments:

> [4] Counsel agree on the proper legal test that the Court should use. The test is found in *Stacey v. Consolidated Fund Corp. or Canada Ltd.* (1986), 76 N.S.R. (2d) 182 (C.A.) per Clarke, C.J.N.S.:
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>> ...the amendment should have been granted unless it was shown to the Judge that the Applicant was acting in bad faith or that by allowing the amendment, the other party would suffer serious prejudice that could not be compensated by costs." [emphasis added]
>> . . . . .
>
> [8] The only reported cases which have considered this issue under the new Rules are *Canada Life Assurance v. Saywood et al* (2010), 288 N.S.R. (2d) 273 (NSSC) and *M5 Marketing Communications v. Ross*, 2011 NSCC 32, both decisions of McDougall, J.
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> [9] As Justice McDougall concluded, I also do not believe the new Rules intended to alter, and I accept that they therefore have not altered, the appropriate legal test regarding when leave will be granted to amend court documents.

15 In *Canada Life Assurance Co. v. Saywood*, 2010 NSSC 87 (N.S. S.C.), McDougall J. summarized the law as follows:

> [7] Apparently there are no written decisions regarding the new Rule 83.02. There are, however, a number of cases pertaining to the predecessor Rule 15 (1972 Rules). In the case of *Global Petroleum Corp v. Point Tupper Terminals Co*. (1998), 170 N.S.R. (2d) 367, Bateman, J.A., at para. 15, stated:
>
>> [15] The law regarding amendment of pleadings is not complicated: leave to amend will be granted unless the opponent to the application demonstrates that the applicant is acting in bad faith or that, should the amendment be allowed, the other party will suffer prejudice which cannot be compensated in costs. (*Baumhour et al. v. Williams et al.* (1977), 22 N.S.R. (2d) 564, 31 A.P.R. 564 (C.A.))
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> [8] This same statement of the law was cited by the Honourable Justice Arthur J. LeBlanc in the case of *Shea v. Whalen* (2008), 250 N.S.R. (2d) 65 at para. 6.
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> [9] In the case of *Garth v. Halifax (Regional Municipality)* (2006), 245 N.S.R. (2d) 108 Cromwell, J.A. (as he was then) stated the following at para 30:
>
>> [30] The discretion to amend must, of course, be exercised judicially in order to do justice between the parties. Generally, amendments should be granted if they do not occasion prejudice which cannot be compensated in costs:

> [10] While these cases were all decided prior to the implementation of the new rule they continue to offer guidance despite these recent changes.

16 In *Thornton v. RBC General Insurance Co. / Cie d'Assurance Generale RBC*, 2014 NSSC 215 at para. 33, Justice Wood (as he then was), described prejudice that cannot be compensated in costs:

> 33 ... That type of prejudice is typically evidentiary in nature, which requires a consideration of whether documents and witnesses have been lost due to the passage of time.

17 In *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42, [2017] O.J. No. 241 (Ont. C.A.), the Ontario Court of Appeal said the following about non-compensable prejudice at para. 25:

> • There must be a causal connection between the non-compensable prejudice and the amendment. In other words, the prejudice must flow from the amendments and not from some other source: *Iroquois*, at paras. 20-21, and *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.), at para. 65.
>
> • The non-compensable prejudice may be actual prejudice, i.e. evidence that the responding party has lost an opportunity in the litigation that cannot be compensated as a consequence of the amendment. Where such prejudice is alleged, specific details must be provided: *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.), at paras. 5-7, and *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1995), 25 O.R. (3d) 106 (Gen. Div.), at para. 9.
>
> • Non-compensable prejudice does not include prejudice resulting from the potential success of the plea or the fact that the amended plea may increase the length or complexity of the trial: *Hanlan v. Sernesky* (1996), 95 O.A.C. 297 (C.A.), at para. 2, and *Andersen Consulting*, at paras. 36-37.
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> • At some point the delay in seeking an amendment will be so lengthy and the justification so inadequate, that prejudice to the responding party will be presumed: *Family Delicatessen Ltd. v. London (City)*, 2006 CanLII 5135 (Ont. C.A.), at para. 6.
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> • The onus to prove actual prejudice lies with the responding party: *Haikola v. Arasenau* (1996), 27 O.R. (3d) 576 (C.A.), at paras. 3-4, and *Plante v. Industrial Alliance Life Insurance Co.* (2003), 66 O.R. (3d) 74 (Master), at para. 21.
>
> [Emphasis added]

[28] The Kuratlis submit they will suffer prejudice if the amendment is allowed. They say if the amendment is granted it would be necessary to reopen the discovery process and the trial. However, I am of the view that the Defendants have known all along that the Jauchs alleged that the receipt document did not accurately reflect the oral agreement for transfer of the 50,000 SFR. They say so in the Statement of Claim when they state the monies were refundable if an agreement of purchase and sale was not reached.

[29] I am of the view that the Defendants had ample opportunity to pursue at discovery and at trial with the Jauchs their position that the Receipt document did not reflect the oral agreement that had been reached. The requested amendment merely arises out of what has been the issue between these parties all along: Does the agreement provide that the 50,000 SFR is non-refundable if the Jauchs were unwilling or unable to complete the purchase of Best View Cabins? With an opportunity to address the rectification claim specifically in cross examination of the Jauchs, I am of the view there would be no prejudice to the Kuratlis that could not be addressed in costs. I certainly acknowledge that reopening the trial to allow for further questioning of the Jauchs would increase costs. However, as set out below, my conclusion on the trial evidence, without reference to the rectification amendment, renders a reopening of the trial unnecessary in the circumstances of my findings.

The Issues

[30] The issues are as follows:

1. Did the Kuratlis breach a term of the contract by refusing to return the 50,000 SFR monies to the Jauchs?
2. Does the evidence support rectification by removal of the words non-refundable contained in the receipt document?
3. Are the Kuratlis liable to the Juachs on the basis of a negligent or fraudulent misrepresentation?
4. Are the Jauchs estopped from seeking the return of the 50,000 SFR by reason of their execution of a release?

The Evidence

[31] The parties entered a Joint Exhibit Book as Exhibit #2. They agreed the relevance and materiality of the documents was accepted; it was not necessary to

authenticate the document; and that no exclusionary rule precluded the documents from being admitted and formally accepted as an exhibit at trial. The parties also agreed that a separate booklet marked Exhibit #3 represented accurate translations into English of certain German documents in the Joint Exhibit Book, although there was no authentication document presented with the volume. The parties met with the interpreter, Dr. Julia Poertner, who reviewed the booklet of translations with them. The parties accepted the translations and the interpreter confirmed to the Court they accurately represented translations of the contents of the German language documents.

[32] The Kuratlis did not attend the trial nor give evidence. The Jauchs testified as to various conversations they had with the Kuratlis, some of which formed the basis of the alleged agreements between the parties. While hearsay evidence is presumptively inadmissible, it is subject to the traditional exceptions and can be admitted on a principled basis if it meets the test of necessity and reliability. Not all such statements are hearsay, for example, if it is not proffered for the truth of its contents but for the fact the statement was made. In addition, a listener's state of mind can be relevant, for example to explain why they did something - a triggering event that caused the witness to do something. The inability to test the reliability of the hearsay evidence is the central concern underlying the rule. However, here the declarants, being the Defendants, have chosen not to testify. Therefore, I question whether this concern is even present here. Regardless of the above, the Defendants themselves say it would not be fair, in the circumstances of their non appearance, to object to the admissibility of the conversations. In addition, they say they are not objecting to this evidence because the Joint Exhibit Book contains all documents the Defendants wish to put before the court in response and that these documents indicate the areas of dispute between the parties. In light of the above, I will not examine the evidence to determine if any of the alleged statements of the Kuratlis meet any of the exceptions to the hearsay rule.

[33] Mr. Eugene Jauch and Mrs. Beatrice Jauch testified through a German translater (Dr. Julia Poertner) who was properly sworn and whose qualifications the parties and the court accepted. The following is a summary of the evidence of the Jauchs and the information contained in the Joint Exhibit Book.

[34] Best View Cabins was advertised for sale in Tierwelt magazine. The ad was seen by the Jauchs who contacted the Kuratlis in March of 2011. The parties entered into discussions about purchase of the property including meeting in Switzerland where the Kuratlis spent their winters.

[35] The Jauchs flew to Nova Scotia to view the property in July of 2011. They spoke to the Kuratlis about the immigration process and provincial nominee program. Mrs. Kurati put them in touch with an immigration lawyer. Ultimately they were referred by the first lawyer to another lawyer who could speak German. Mrs. Kuratli drafted emails in English on behalf of the Jauchs and attempted to meet with an immigration representative who advised she could not provide any information to Mrs. Kuratli as she did not have an authorization from the Jauchs. Mrs. Kuratli wrote to Mrs. Jauch saying she had drafted a letter to immigration advising they had known the Jauchs since 2009. The evidence indicates they did not actually meet until 2011 when Mrs. Jauch called about the property.

[36] The Jauchs travelled to Nova Scotia again in September of 2011. Prior to their arrival, Mrs Kuratli spoke to the Royal Bank and advised the Jauchs that the bank would finance 50% of the purchase price and they could discuss details with the bank when they arrived. The Jauchs did not proceed with the purchase in 2011 due to not having sold their property in Switzerland.

[37] The Jauchs began communication with the German-speaking immigration lawyer in June 2012. They had started taking English lessons. The Jauchs understood from their discussions with their immigration lawyer they would not be able to immigrate due to not speaking sufficient English.

[38] Mr. Jauch said they were told by the immigration lawyer that they would not be able to immigrate due to their language deficiencies. He gave evidence that the Kuratlis told them they would keep looking and trying regarding immigration. Ultimately the plan was that if they bought the property they could go to Nova Scotia for six month periods, as there was a worker who managed the property. If they did this then they could continue working on getting their immigration status. When asked what the Kuratlis said about the likelihood of success, he indicated they said if the Jauchs did this then it could be that they could gain immigration status. They understood they would be purchasing Best View Cabins as vacation property owners and would be visitors to Canada.

[39] In 2012, the Jauchs travelled to Nova Scotia in May and September. By 2012 they had decided to rent their home in Switzerland while they waited for it to sell. Nothing had changed on the immigration front but the Kuratlis were trying to assist. They again travelled to Canada in September and spoke to the Kuratlis about the possibility of closing a deal to buy the property.

[40] After returning to Switzerland in the fall of 2012, the Kurtalis called and asked the Jauchs to loan them 50,000 SFR. The money was for their son to build a house. They had also talked about this request while they were in Nova Scotia. Mrs. Jauch gave evidence that the agreement they reached was that the Kuratlis would either repay the amount or it would be part of the selling price of the Best View property.

[41] Mr. Jauch gave evidence that the agreement relating to the loan of 50,000 SFR was that if they bought the property the 50,000 SFR would be deducted. If it didn't come to that then they would get the loan money back. He confirmed that he understood the 50,000 SFR would be applied to the purchase price if an agreement was put in place. In October of 2012 they wired 50,000 SFR to the Kuratlis.

[42] They were invited by the Kuratlis for dinner shortly after this. At the dinner, the Kuratlis advised they would try to find someone who could perhaps assist with immigration. They discussed with the Kuratlis a plan where they would hire someone to manage the property and they would be the owners. They understood they could stay in Nova Scotia for 6 months and then return to Switzerland as the Kuratlis had done. After dinner Mrs. Kuratli presented a receipt for them to sign. At this point their English was not good enough to read the receipt other than to understand the numbers. They also discussed with the Kuratlis that if they could not sell their Swiss property then the Kuratlis would buy their garage / workshop.

[43] Mrs. Jauch gave evidence that she understood the document she signed to be a receipt. She said Mrs. Kuratli told them it was a receipt and told them to sign, which they did.

[44] Mr. Jauch gave evidence that when they were presented with the piece of paper in October 2012 - the receipt - their English was not good enough to understand it. He said they asked what the document said and they were told it was a receipt for the money they had given to the Kuratlis. He understood the numbers in the document to represent the agreed upon purchase price less the 50,000 SFR.

[45] The Receipt signed by the Jauchs and the Kuratlis states:

> **<u>Receipt</u>**
>
> For
>
> Beatrice & Eugen Jauch-Hoppler

> Non refundable Deposit (Purchase of Best View Cabins)
>
> SFR 50’000.—
>
> (received Oct. 18, 2012)
>
> Total sales Price for Best View Cabins 1348 Hwy 1, Clementsport Nova Scotia B0S 1E0
>
> SFR 410’000.—
>
> Deposit SFR 50’000.__
>
> Balance to be paid bevor signing the Contract in May of 2013
>
> SFR 360’000.—

[46] The Receipt lists all parties’ names at the bottom and is signed by the Kuratlis at the bottom and by the Jauchs just below the words “Non refundable Deposit.”

[47] On November 14, 2012, Mrs. Kuratli wrote to the Jauchs saying:

> … The lawyer requires the following details: your name, date of birth, address, purchase price and in which currency. I will do some research to find out what’s better for you, whether we should state that in Swiss francs or in Canadian dollars. As soon as I have this information from you, I will forward it on to Roy and will ask about the documentation for the clearing of the container.

[48] With regard to the Kuratlis potentially purchasing the garage property belonging to the Jauchs in Switzerland, on March 26, 2013, a representative of the Kuratlis advised that they were not prepared to purchase the property for the price the parties had discussed but indicated that they would pay 160,000 SFR. Mrs. Jauch gave evidence that an agreement was never completed for sale of the garage.

[49] The Jauchs understood a formal agreement of purchase and sale for purchase of the Best View property would be completed when they arrived in Nova Scotia. Their arrival date was April 23, 2013. Mrs. Jauch gave evidence that one week prior to this the Kuratlis advised the deal was off the table.

[50] Mr. Jauch gave evidence that he recalled picking up the phone and speaking to Mr. Kuratli who didn’t say much other than there was no deal. Mr. Jauch said the Jauchs had two containers on their way to Nova Scotia and had already booked

flights. Mr. Kuratli replied this was not his problem. He recalled asking about the 50,000 SFR and Mr. Kuratli replied that it was his. Mr. Jauch responded that the 50,000 SFR was his money as they had made an agreement.

[51] Mr. Jauch said his understanding was that when they arrived in Nova Scotia the papers would be ready for them to purchase the property. He said he has no clue why all of a sudden there was no deal.

[52] The Jauchs' containers had already been shipped to Canada at this point so they flew to Canada. The Jauchs say they were forced to purchase another property as their containers had arrived in Nova Scotia. They purchased a property in Annapolis Royal in 2013. Prior to this purchase they say they were forced to stay in a hotel for three months. They remain in Canada but still have only visitor status.

[53] Mr. Jauch gave evidence that they didn't apply for a loan when they bought the property in Annapolis Royal as they used money from their pension plan. He said he understood the Best View property was still for sale when they purchased in Annapolis Royal. He said because the Kuratlis had terminated the deal and they were forced to look after their containers of belongings, they had to buy another property.

[54] On May 20, 2013, the Kuratlis wrote to the Jauchs saying they were sending a copy of the contract which they signed in September 2012. I infer this is a reference to the receipt. They say that the reason for the deposit was that they could take the property off the market. The email says "and by the way, you can immediately purchase Best View Cabins, should you have the funds for it, at least until we have another purchaser." The advertisement for sale of the property in the Tierwelt magazine remained until June 2013.

[55] The Jauchs replied to the Kuratlis on May 31, 2013. They said:

> By the way: we do not want purchase Best View anymore. We would have paid too much for it anyway.
>
> We always said that 120,000-from our RRSP's and the rest after the sale of the house. You must know that a house sale does not happen overnight and instead of leaving it vacant, we wanted to rent it.

> We have always been honest with you. You also wanted to buy our shed, which also doesn't happen that fast, where we also tried everything to make this a reality, but it wasn't fast enough for you.
>
> All of a sudden, you pulled back, even though you knew, our container was already on its way.

[56] Lawyers became involved in Switzerland in relation to the 50,000 SFR with discussions occurring in 2013 and 2014. In April of 2014 the Kuratis, through lawyers, indicated they would accept the 50,000 SFR as a deposit towards the purchase of the property and as a result of a change in market conditions were willing to lower the total purchase price to 290,000 SFR, meaning the Jauchs could purchase the property for 240,000 SFR. In this correspondence the Kuratlis take the position that the Jauchs withdrew from the agreement by way of the May 30 (sic 31) letter, thereby entitling the Kuratlis to the deposit.

[57] Mr. Jauch acknowledged that in 2014 the Kuratlis proposed a purchase of 290,000 SFR with the 50,000 SFR deposit reducing the amount to 240,000 SFR.

[58] The Jauchs say they again tried to purchase the property in 2016 with a purchase price of $260,000 CDN. They also had their Annapolis Royal property at this time. A formal written offer was made by the Jauchs on March 11, 2016. The closing date is stated to be May 16, 2016. The Jauchs provided a deposit of $2500. The agreement was subject to financing on or before March 31, 2016. The Kuratlis provided a counteroffer. There was also an amendment to extend financing and insurance. Ultimately the parties reached an agreement of purchase and sale with financing extended to April 13, 2016.

[59] The 2016 property transaction did not close. A Termination and Mutual Release of Agreement of Purchase and Sale was executed by the parties which provided for return of the $2500 deposit. The reason stated for the termination is "the bank will no longer finance the purchase due to the buyer's change in employment status." The termination was signed by the Kuratlis on May 10, 2016, and by the Jauchs on June 9, 2016. The deposit was returned. The agreement contains the following statement:

> We, the Buyers and Sellers in the above Agreement hereby release each other and the Brokerages in this Agreement from, all liabilities, covenants, obligations, claims and sums of money arising out of the above Agreement of Purchase and Sale, together with any rights and causes of action that each party may have had against the other and/or the

> Brokerage(s) and we direct the brokerage to disburse the… deposit of $2500… To be returned to the buyer…

[60] Mr. Jauch gave evidence that they attempted to obtain a loan in Canada for the first time in 2011 and the second time in 2016. The first time the process went well. He explained to the bank that they were selling their house in Switzerland where he had a job and that he would have a job in Nova Scotia. The bank advised him that they would give him half of the amount required.

[61] Mr. Jauch gave evidence that he believed the bank would have given him the money if they had gone ahead with the purchase. He gave evidence that the bank gave them a paper saying they would get 50% of the purchase price. He said he did not recall whether there was a deadline associated with the financing. He said the difference with the banks' response in 2016 was because in 2011, although they had no immigration status, he had a job in Switzerland.

[62] In 2016 the purchase price set out in the Agreement of Purchase and Sale was $260,000 CDN. The Jauchs were represented by a real estate agent. Mr. Jauch gave evidence that they needed to finance all of the purchase price because he didn't receive anything from the bank. This was because he had no immigration status and no job.

[63] Mr. Jauch confirmed that they, he and Mrs. Jauch, determined the price set out in the 2016 Agreement of Purchase and Sale which was presented to the Kuratlis. He said they didn't have any contact with the Kuratlis leading up to the 2016 agreement. He said the $260,000 CDN purchase price did not reflect the 50,000 SFR. He said when the document was prepared they didn't talk about the 50,000 SFR and that he understood it could be added later. He said that he understood the parties could revise the Agreement of Purchase and Sale. He said they were waiting to see if they got the money from the bank and then they would talk about the 50,000 SFR. He confirmed on cross-examination that at the time of the termination of the 2016 Agreement of Purchase and Sale they still believed they were owed 50,000 SFR.

[64] Mr. Jauch said that his understanding of the Termination Agreement and Mutual Release was that it only referred to the $2500 deposit. He understood they had to sign it order to receive return of the $2500. He gave evidence that he believes he reviewed the agreement with his lawyer before signing.

[65] Ms. Prescesky, a real estate agent, gave evidence. She listed the property for sale for the Kuratlis in 2014. In March 2016, a colleague, Ms. Paula Leslie, brought her an offer to purchase the Kuratli property from the Jauchs. On May 9 they received verbal notification from Ms. Leslie that her clients were terminating due to a change in circumstances. Ms. Leslie prepared the Termination and Mutual Release of Agreement of Purchase and Sale and asked Ms. Prescesky to leave it in an envelope for the buyers to pick up. She said it was picked up on May 10 but they did not receive it back until June.

The parties' positions

The Jauchs

[66] The Jauchs say the Kuratlis refused to repay the 50,000 SFR and, thereby breached the agreement between the parties that the loan would be accounted for in an agreement of purchase and sale to buy Best View Cabins and that the monies would be repaid if an agreement could not be concluded. They say the Kuratlis used the Jauchs' lack of capacity in the English language to reshape, in a dishonest manner, an oral contractual agreement between the parties through subsequent written material that did not reflect the Jauchs' understanding of what had been agreed to.

[67] They further say the Kuratlis made the following negligent misrepresentations (1) the Jauchs' immigration would be without problem if they purchased Best View Cabins; and (2) leaving the Jauchs to believe in that an agreement of purchase and sale was imminent. They say that they were induced to provide a loan as a result and have suffered damages. They say that in making these representations the Kuratlis knew or ought to have known that the statements were false, carelessly made as to their truth, and knew the Plaintiffs would rely upon them in their decision to make the loan and as a result the Plaintiffs have suffered damages.

The Kuratlis

[68] The Kuratlis did not attend the trial nor give evidence virtually, which was an option for them. They say the key issues are how the receipt should be dealt with, whether there was a unilateral cancellation of the agreement and the applicability of the Release signed by the parties in 2016. They argue, based on the evidence placed before the court, that the 50,000 SFR was a deposit toward the

purchase price of Best View Cabins and that the agreement between the parties is clearly evidenced in a receipt dated October 18, 2012, which describes the deposit as non-refundable. In their pretrial brief they say that the receipt includes all fundamental terms of the real estate transaction and represents a binding contract. They say the word “deposit” should be given its normal meaning and they should be entitled to keep the deposit as there was a binding contract that the Jauchs failed to complete.

[69] The Kuratlis agree that if there is a finding by the court that they unilaterally cancelled the agreement then the 50,000 SFR would be returnable. However, they argue that the Jauchs failed to meet the condition of being able to raise the funds to purchase the property and rely on a letter of May 20, 2013.

[70] They further say that the language of the Termination and Mutual Release of Agreement of Purchase and Sale, executed in 2016, is clear that the parties will release each other from any cause of action that each party “may have had against the other” and includes the 50,000 SFR. They say the current action was commenced approximately five months after the release was executed and the 50,000 SFR must have been in the contemplation of the Plaintiffs at the time they executed the release. They further say that the Jauchs’ signatures were witnessed by their legal counsel.

Law and Analysis

[71] The first question is whether a contract was formed, either orally or in writing between the parties. The alleged contract regarding the 50,000 SFR is based solely on oral communications between the parties in 2012. Later a document titled ‘receipt’ was signed by the parties. The question arises as to what effect, if any, this would have on an oral agreement.

[72] In *Apotex Inc. v. Allergan*, 2016 FCA 155, Justice Stratas of the Federal Court of Appeal set out the four essential elements necessary in the formation of a contract. These are not controversial and are found throughout the case law.

> 21. First, the court must find on the evidence before it that, objectively viewed, the parties had a mutual intention to create legal relations.
>
> 22. The test is whether a reasonable bystander observing the parties would conclude that both parties, in making a settlement offer and in accepting it, intended to enter into legal relations…

> 25. Second, like all other agreements, a settlement agreement must satisfy the requirement that there be consideration flowing in return for a promise…
>
> 26. The court must also find, as an objective matter, that the terms of the agreement are sufficiently certain …Where the parties 'express themselves in such a fashion that their intentions cannot be defined by the court… the agreement will fall for lack of certainty of terms': John McCamus, *The Law of Contracts* (Toronto: IrwinLaw, 2005) at page 91. Another way of putting this is that the court must be satisfied that the parties were objectively *ad idem* or were objectively of a common mind…
>
> 30. An agreement does not rise until there is matching offer and acceptance on all terms essential to the agreement: *Olivieri,* above at para 32…

[73] The purely subjective intentions of the parties are not pertinent or relevant (Justice Fichaud, *Halifax Regional Municipality v. Canadian National Railway Co*., 2014 NSCA 104.)

[74] I am of the view that the terms agreed to between the parties were sufficiently clear to form an oral contract concerning the loan of 50,000 SFR to the Kuratlis. The evidence indicates that the 50,000 SFR was a loan to the Kuratlis who wished to provide the funds to their son to assist with the construction of a home. The evidence further confirms the Kuratlis requested the loan of 50,000 SFR and the Jauchs advanced the requested loan on October 16, 2012.

[75] The oral agreement between the parties had terms. If an Agreement of Purchase and Sale was executed, whereby the Jauchs bought the Best View Cabins, then the 50,000 SFR would be taken off the purchase price. However, if there was no agreement completed then the funds would be repaid as a loan. The parties, fully anticipating the Jauchs would purchase the property, did not work out a repayment schedule for the loan. Both Mr. and Mrs. Jauch gave evidence that this was the oral agreement relating to the loan of 50,000 SFR. The elements necessary for the formation of a contract are present here.

[76] The Jauchs relied on the oral agreement and advanced the funds on October 16, 2012. The parties' expectation was the 50,000 SFR would be applied to the purchase price of Best View Cabins when they entered an Agreement of Purchase and Sale on the arrival of the Jauchs in Nova Scotia in the spring of 2013. In short, the Jauchs provided a loan to the Kuratlis on the understanding that when they purchased the property the loan would be repaid by deducting this amount from the purchase price. If there was no Agreement of Purchase and Sale reached then the loan would be repaid. I am satisfied on the evidence of the Jauchs that this oral

agreement did not include a term whereby the deposit was non-refundable if the Jauchs chose not to purchase the property or were unable to do so.

[77] The dispute centers on whether the 50,000 SFR was to be non-refundable as set out in the receipt, if the Jauchs decided not to purchase the property, for example, because they could not raise sufficient funds to complete the purchase. The Jauchs say it was never a term of their agreement that the loan of 50,000 SFR would be non-refundable. As noted above, I find that the oral agreement did not include a term whereby the 50,000 would be a non-refundable deposit. The Kuratlis did not give evidence but rely on the receipt document and say it clearly states the 50,000 SFR is non-refundable. They further say the Jauchs were unable to purchase and advised them by letter of May 31, 20013 they would not be buying the property, thereby, entitling the Kuratlis to retain the 50,000 SFR.

[78] The Receipt concerns the 50,000 SFR that had been advanced and how it would be addressed in a future agreement of Purchase and Sale. It is not a written contract to purchase the property. It clearly indicates in English that it is a receipt for the Jauchs' deposit received October 18, 2012. The Jauchs understood the figures in the receipt to be the purchase price they had agreed upon. After the 50,000 SFR, the amount due would be 360,000 SFR. The Receipt clearly states that "the balance to be paid bevor (sic) the Contract in May 2013." On the face of the receipt it indicates a contract would follow in May of 2013. It would seem this is a reference to an agreement of purchase and sale which the Jauchs say was what was intended by the parties – an agreement of purchase and sale would be executed when the Jauchs arrived in Nova Scotia. However, nothing turns on this.

[79] It is understandable the Jauchs would be interested in receiving a receipt from the Kuratlis to whom they had just advanced 50,000 SFR.

[80] That the Receipt is not a contract for the sale of Best View Cabins is clear from the document itself. For example, and as indicated above, the evidence before the court indicates the parties all understood it to be a receipt for the 50,000 SFR provided by the Jauchs. Further, the document states on its face it is a receipt. It acknowledges receipt of the funds and indicates they are to be applied to the purchase price of 410,000 SFR and that a contract will be signed in May 2013. For this receipt to be a written agreement for the sale of Best View Cabins it would need to contain the essentials of an agreement to sell the land. It does not. There is no closing date and there is no real description of what is being sold as "Best View Cabins" as it does not specify the land or PID (s) in question. It does not indicate

whether it is a business sale or a property sale. It was simply a receipt acknowledging part payment toward the purchase price, once an agreement of purchase and sale was signed.

[81] The issue in relation to the 50,000 SFR is whether it was a non-refundable deposit if the Jauchs chose not to complete the purchase, for example, because they could not raise the funds. The receipt says it is non-refundable. The Jauchs say it was always intended to be refundable. However, I need not enter into an analysis as to whether the receipt document represented a further an amendment to the oral agreement by the parties, a unilateral change by the Kuratlis to the oral agreement between the parties or whether it was a written expression of the terms of the oral agreement. Nothing turns on how this document is interpreted because there is no dispute between the parties that if the Kuratlis unilaterally decided not to proceed with an agreement to sell their property then the deposit was to be returned. This is exactly what happened.

[82] The Kuratlis decided not to sell the property to the Jauchs, meaning it did not matter whether there was an agreement that the 50,000 SFR was a non-refundable deposit. The parties agree unilateral action by the Kuratlis to terminate the agreement would render the deposit returnable. There can be no other conclusion in the circumstances. Clearly, on the evidence, the parties did not intend a scenario where the Kuratlis received a loan of 50,000 SFR to be repaid either by way of part payment on the purchase price of a future agreement of purchase and sale or by repayment as a loan, and then be entitled to simply say we refuse to sell you the property but will keep the 50,000 SFR. The Kuratlis terminated the agreement and the 50,000 SFR must be returned to the Jauchs.

[83] If the evidence was clear that it was the Jauchs who decided to terminate or were unable to move forward with purchase of Best View Cabins then the question of whether the oral agreement was amended by adding a term that the 50,000 SFR was non-refundable, would be a necessary consideration. Those are not the facts and I need not address this question. The following facts illustrate my findings that the Kuratlis decided not to sell to the Jauchs.

[84] Approximately one week before the Jauchs were to arrive in Nova Scotia and after their belongings were shipped, the Kuratlis advised they would not be selling the property to the Jauchs.

[85] Mr. Jauch gave evidence that Mr. Kuratli terminated the contract. He said he received a call from Mr. Kuratli one week before they were scheduled to fly to

Nova Scotia. He said Mr. Kuratli didn't say much other than there was no deal. Mr. Jauch advised him they had 2 containers on the way. Mr. Kuratli responded this was not his problem. Mr. Jauch gave evidence that he asked about the 50,000 SFR and Mr. Kuratli responded "it is mine." Mr. Jauch then said to him no that is our money as we made the agreement.

[86] The Kuratlis say that the Jauchs were financially unable to purchase the property and therefore, they are entitled to retain the 50,000 SFR. However, there is insufficient evidence to support the Kuratlis' position that as of the date the Kuratlis unilaterally decided not to sell the property, the Jauchs were unable to follow through and ultimately purchase the property. The Jauchs had every intention to arrive in Nova Scotia and enter into an agreement of purchase and sale to buy the Best View property. Their evidence indicates they were ready, willing and able to complete an agreement to buy Best View Cabins when they arrived in Nova Scotia. While there is evidence that in March of 2013 the Kuratlis decided not to purchase the Jauchs' garage for the price they wanted (and offered an alternate price), this in and of itself does not prove the Jauchs could not enter an agreement of purchase and sale and complete the purchase. The Kuratlis did not allow them the opportunity to do so.

[87] The Jauchs gave no indication to the Kuratlis that they would not be in a position to purchase the property when they arrived in Nova Scotia. They had shipped their belongings to Nova Scotia. Mrs. Kuratli was aware of their belongings being shipped. They had a prior Bank commitment to fund half the purchase price and there is no evidence there was a deadline for this commitment. They had their pension funds and they had a home and business in Switzerland. In fact, when the Kuratlis unilaterally advised they would no longer be prepared to sell the property to the Jauchs, the Jauchs purchased another property in Annapolis Royal.

[88] The Kuratlis unilaterally decided not to sell Best View Cabins to the Jauchs. They cannot then retain the 50,000 SFR provided by the Jauchs. Whether the parties intended the 50,000 SFR to be non-refundable or not, the Kuratlis have no entitlement to retain the funds when they unilaterally rendered the purchase an impossibility.

[89] More than a month after the termination, the Kuratlis wrote to the Jauchs on May 20, 2013, saying:

> Enclosed with this letter, we are sending you a copy of the contract you signed in September 2012.
>
> The reason for the deposit was that we could take the property off the market, as you were going to purchase it. In the meantime, we had 3 interested purchasers, which we declined, with the reasoning that we already have purchaser.
>
> Your accusation that we cheated you is very disappointing….
>
> And by the way, you can immediately purchase Best View, should you have the funds for it, at least until we have another purchaser.
>
> We had asked you in February or March of this year (2013) whether you have the funds to purchase Best View even without the sale of your house and your answer was yes.
>
> Following the latest telephone conversation with you in Switzerland, where and it became apparent that you could not get sufficient funds together and you are renting your home, and would not be able to sell it in the near future, we knew that we would be spending another season in Canada and would have to find another purchaser…
>
> [Emphasis added]

[90] Recognizing this correspondence occurred after the unilateral termination, I note it does indicate immediately before the termination that the Jauchs maintained they were able to purchase the property, even without the sale of their home in Switzerland. This is consistent with the evidence of the Jauchs. It is obvious the Kuratlis made their own assumptions about the Jauchs' ability to purchase the property, for whatever reason (s). I have no explanation for such an assumption as the Kuratlis chose not to attend the trial to give evidence.

[91] Offering the property again more than a month later by saying "And by the way, you can immediately purchase Best View Cabins, should you have the funds for it, at least until we have another purchaser" is not an answer to their earlier unilateral decision not to sell to the Jauchs. The Kuratlis also say it was the Jauchs who advised by letter of May 31, 2013, they were no longer interested in purchasing Best View Cabins. This letter came well after the Kuratlis decided they no longer wished to sell the property to the Jauchs and almost 2 weeks after the Kuratlis' letter of May 20, 2013, offering again to sell the property. It was not the Jauchs' decision to walk away from purchasing Best View Cabins. In the circumstances it matters not whether the receipt document notes the deposit for the property purchase as non-refundable, because when the Kuratlis made their unilateral decision not to proceed with the sale to the Jauchs, the 50,000 SFR became immediately repayable. The Kuratlis cannot take the 50,000 SFR as part

payment or a deposit, then decide not to sell and keep the deposit. The Kuratlis themselves acknowledge they could not unilaterally decide not to sell and also keep the deposit. It is not in dispute between the parties that a unilateral termination by the Kuratlis would require return of the funds. I find the 50,000 SFR has been due and owing since April of 2013.

Rectification

[92] Given my findings as set out above, I see no reason to address the claim of rectification.

Did the 2016 Termination and Mutual Release of Agreement of Purchase and Sale include the 50,000 SFR?

[93] The Kuratlis say the wording of the Termination and Mutual Release of Agreement of Purchase and Sale ("Termination and Mutual Release Agreement") encompasses the 50,000 SFR and the Jauchs are, thereby, estopped from claiming its return.

[94] The surrounding circumstances existing at the relevant time of the execution of the Release are to be considered. Justice Brothers said in *Inglis v. Medway Pines Stables,* 2020 NSSC 97:

> 35 In assessing whether an exclusion clause applies, further guidance is contained in *Chamberlin v. Canadian Physiotherapy Assn.* [2015 BCSC 1260 (B.C. S.C.)]. The court acknowledged that an interpretation must be consistent with the expectations of the parties. Simply put, the surrounding circumstances existing at the relevant time of the execution of the Release must be considered by the court:
>
>> [56] In addressing this first line of inquiry, Finch C.J.B.C. in *Keefer Laundry v. Pellerin Milnor Corporation*, 2009 BCCA 273 at para. 59 adopted the following remarks of Geoff R. Hall in *Canadian Contractual Interpretation Law*, 2ed, (Markham, Ont.: LexisNexis, 2012), at para. 7.10:
>>
>>> A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases. However, there is also a special rule which is superadded onto the regular ones. This rule comes from *London and South Western Railway v. Blackmore*, an 1870 decision of the House of Lords. The rule in *London and South Western Railway* holds that <u>a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given</u>. The rule allows the court to consider a fairly

> broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contract interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible.
>
> [Emphasis in Chamberlin]

[95] As the Supreme Court of Canada said in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, while the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of the agreement:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]

[96] Therefore, in interpreting the words of release in the Termination and Mutual Release Agreement, as with any contract, I must look at the entire document in order to ascertain its meaning. Further, the surrounding circumstances (context or factual matrix) are important in interpreting the words as such evidence

will assist my understanding of the mutual and objective intentions of the parties as expressed in the words. However, the subjective intent of the parties is not a consideration.

[97] The agreement is titled "Termination and Mutual Release of Agreement of Purchase and Sale." In the first line it refers to the Agreement of Purchase and Sale between the parties dated March 19, 2016. It then sets out the reason for the termination of this Agreement of Purchase and Sale, being financing, and then states the agreement is terminated. After the above wording the words of release appear.

[98] The Agreement releases the parties from any claims arising out of or in relation to that agreement. It states:

> We, the Buyers and Sellers in the above Agreement hereby release each other and the Brokerages in this Agreement from, all liabilities, covenants, obligations, claims and sums of money arising out of the above Agreement of Purchase and Sale, together with any rights and causes of action that each party may have had against the other and/or the Brokerage(s) and we direct the brokerage to disburse the… deposit of $2500… To be returned to the buyer…
>
> [Emphasis added]

[99] The words "together with any rights and causes of action that each party may have had against the other" cannot, in the circumstances, be taken to cover the 50,000 SFR that was advanced in October 2012. The words must be construed according to the particular purpose for which the agreement was made. Here the purpose is to terminate the March 2016 Agreement of Purchase and Sale and return the deposit. The circumstances in which this agreement was drawn clearly suggest that the release was only to apply to claims relating to the specific subject matter of the March 2016 failed transaction. The Termination and Mutual Release Agreement is not a general release negotiated by the parties in relation to any and all matters in issue between them. It is a form specific to the terminated transaction set out in the Agreement of Purchase and Sale

[100] The 2016 Agreement of Purchase and Sale was entered into approximately three years after the oral agreement was reached concerning loaning the Kuratlis 50,000 SFR. The 2016 Agreement of Purchase and Sale was a separate and distinct agreement. It did not reference or acknowledge the 50,000 SFR. It had a separate and distinct deposit of $2500 and a different purchase price.

[101] In relation to the 2016 Agreement of Purchase and Sale, there were no discussions amongst the parties concerning the 50,000 SFR. The parties did not themselves have discussions but dealt through their real estate agents. Both parties had utilized lawyers regarding the 50,000 SFR dispute in Switzerland. To conclude it was the parties' intent in signing a standard form agreement to terminate the 2016 Agreement of Purchase and Sale, to also include the 50,000 SFR owing from 2013 would be contrary to the factual context and the written words in the Termination and Mutual Release agreement.

[102] I find that in the circumstances, the parties did not contemplate the inclusion of the claim for 50,000 SFR. I find that the terms of the Termination and Mutual Release of Agreement of Purchase and Sale do not include release of the Jauchs' claim for return of the 50,000 SFR.

The Jauchs' claim of negligent misrepresentation and fraudulent misrepresentation/ deceit

[103] The Jauchs say the negligent representations made by the Kuratlis were twofold: (1) the Jauchs' immigration would be without problem if they purchased Best View Cabins; and (2) leaving the Jauchs to believe that an agreement of purchase and sale was imminent. They say that they were induced to provide a loan as a result and have suffered damages.

[104] In relation to immigration to Canada, the evidence from the Jauchs is as follows. Mrs. Jauch gave evidence that after they learned from the lawyer they could not immigrate with their level of English, the Kuratlis said they would try to do something. They said it would work out somehow and they would find someone who may be able to do something. Mrs. Jauch understood they would be owners but would have to return to Switzerland after 6 months.

[105] Mr. Jauch gave similar evidence saying they were told by the immigration lawyer that they would not be able to immigrate due to their language deficiencies. He gave evidence that the Kuratlis said they would keep looking and trying. Ultimately the plan was that if they bought the property they could come to Nova Scotia for six months as there was a worker who could manage the property. If they did this then they could continue working on getting their immigration status. When asked about what the Kuratlis said about the likelihood of success, he indicated they said if the Jauchs did this then it 'could' be that they could gain status.

[106] The vague statements made by the Kuratlis fail to meet the requirements for negligent misrepresentation which are as follows:

> The required elements for a successful negligent misrepresentation action have been stated as follows: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation must be untrue, inaccurate or misleading; (3) the representor must have acted negligently in making the misrepresentation; (4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted. *(Queen v. Cognos Inc*. [1993] 1 S.C.R. 87 per Sopinka and Iacobucci JJ., Remedies in Tort, Carswell 2022)

[107] In addition, there is correspondence from Mrs. Kuratli in June of 2012 saying that she was advised "a lot has changed this year in terms of immigration…and you will be better off with a lawyer." The evidence further establishes that the Kuratlis assisted the Jauchs in finding a lawyer and later a lawyer who spoke German.

[108] With regard to the allegation of representing an agreement of purchase and sale was imminent, the evidence indicates both parties understood an agreement of purchase and sale would be signed after the Jauchs arrived in Nova Scotia in April of 2013. There was no negligent misrepresentation. The Kuratlis decided not to sell the property to the Jauchs, therefore, pursuant to the oral agreement, the Jauchs were entitled to return of the 50,000 SFR. In these circumstances, the failure to conclude an agreement of purchase and sale does not entitle the Jauchs to damages in addition to the return of the 50,000 SFR.

[109] The Jauchs also seek "some" damages for deceit and fraudulent misrepresentation. They have not indicated an amount claimed nor provided any caselaw in support of quantum. The Plaintiffs simply claim that the representations of the Kuratlis meet the elements for the tort of fraudulent misrepresentation, also known as the tort of deceit. However, the evidence given at trial does not support this claim.

[110] *Remedies in Tort*, *supra,* at sections 5:1 & 19:2, says the following regarding fraudulent misrepresentation and deceit:

> In the law of torts a fraudulent misrepresentation that causes loss to the recipient grounds an action in "deceit" or "civil fraud". In order to sustain an action of deceit, there must be proof of fraud. Fraud is proved when it is shown that a false representation has been made knowingly, without belief in its truth, or recklessly, careless whether it is true or false.

> …
>
> "Fraud is not mistake [or] error … fraud is something dishonest and morally wrong)": *Washburn v. Wright* (1914), 31 O.L.R. 138, 19 D.L.R. 412 (C.A.), per Riddell J.
>
> …
> To establish deceit, the plaintiff must prove that the defendant made a representation with the intention that the plaintiff act on it, that the plaintiff did act on it and suffered damage thereby, and that the representation was made with knowledge of its falsity. It is this last element which distinguishes the tort of deceit from negligent misstatement, where the speaker need only be negligent or careless as to the truth of his statement.

[111] The elements necessary for a finding of fraudulent misrepresentation were referenced in *Gallagher Holdings Limited v. Unison Resources Inc*., 2018 NSSC 251. At para. 393, Justice Moir quoted from the Court of Appeal decision in *Grant v. March,* (1995) 138 NSR(2d) 385 (NSCA), stating:

> 393 At para. 20 of *Grant*, Justice Saunders quotes from *Cheshire & Fifoot* (6th ed.) at p. 241, including: '... a fraudulent statement is a false statement which, when made, the representor did not honestly believe to be true.' Justice Saunders also provides at para. 21, DiCastri's (3rd ed) list of elements applicable in a case of repudiation for fraud, which are similar to those later framed in *Bodzan* and *Amertek* for fraudulent misrepresentation:
>
> (1) the defendant made a false representation to the plaintiff;
>
> (2) the defendant
>
> a. knew the representation was false;
>
> b. had no belief in the truth of the representation; or
>
> c. was reckless as to the truth of the representation;
>
> (3) the defendant intended that the plaintiff should act in reliance on the representation;
>
> (4) the defendant did act on the representation; and
>
> (5) the plaintiff suffered loss by doing so.

[112] The elements of the tort of fraudulent misrepresentation are also found in the Ontario Court of Appeal decision in *Amertek Inc. v. Canadian Commercial Corp*., (2005), 76 O.R. (3d) 241, at paragraph 63, where the Court set out the above list as well.

[113] There is no basis on the evidence to conclude that there was a fraudulent misrepresentation. As Justice Saunders said at para. 22 of *Grant, supra,:* “Fraud is a serious complaint to make, and the evidence must be clear and convincing in order to sustain such an allegation.” Here there is no clear and convincing evidence of fraudulent misrepresentation. There is no need for me to address any of the elements beyond the first element, being whether a false representation or statement was made by the Kuratlis to the Jauchs. I am of the view that the actions of the Kuratlis as set out above do not meet the test for fraudulent misrepresentation and deceit. The presentation of a receipt bearing the words “non-refundable” when the Jauchs spoke little English, without further evidence, is insufficient to establish fraudulent misrepresentation.

[114] The Jauchs also seek punitive damages for the conduct of the Kuratlis. They say that $5000 in punitive damages is an appropriate amount to express the Court’s disapproval of the Kuratlis’ conduct. As the Supreme Court said in *Performance Industries*, *supra*,:

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

[115] I am not convinced that the conduct of the Kuratlis represents an exceptional case warranting an award of punitive damages. On the evidence before me, I am unable to conclude that presenting the Jauchs with a receipt describing the 50,000 SFR as non-refundable, terminating the agreement and retaining the 50,000 SFR was misconduct sufficient to impose an award of punitive damages.

[116] The Jauchs also claim prejudgment interest in the amount of 2.5% since 2013. The Defendants did not address prejudgment interest in their brief or oral submissions. The amount of 2.5% is reasonable and regularly awarded. The Kuratlis commenced this action in 2016 for monies owing since 2013. There was no explanation given to the court as to why this matter has taken 6 years to come to trial given the amount involved. I recognize that there were delays resulting from the pandemic but I am not convinced prejudgment interest is justified for a period of 9 years. Prejudgment interest in the amount of 2.5% is awarded for a period of 4 years.

Conclusion

[117] The Defendants are to pay to the Jauchs the Canadian equivalent of the sum of 50,000 SFR at the rate of exchange in effect at the date of April 16, 2013, which is the date the Kuratlis advised they would not be selling the property and, therefore, when the funds should have been returned to the Jauchs. Prejudgment interest at the rate of 2.5% for 4 years is also payable to the Jauchs. I ask that counsel for the Plaintiffs prepare the order. If the parties are unable to agree on costs, I direct the Plaintiffs to submit their position on costs, both in relation to the amendment motion and the trial, to me within 20 days of receipt of this decision. The Defendants shall have 10 days to reply from the date of receipt of the Plaintiffs' submission on costs.

Jamieson, J.