SUPREME COURT OF NOVA SCOTIA

Citation: *Davies v. CBI Cape Breton Island Developers Inc.*, 2013 NSSC 375

Date: 20130809
Docket: Hfx. No. 388960
Registry: Halifax

Between:

Penny Davies and Ian Davies

Applicants

v.

CBI Cape Breton Island Developers Inc.

Respondent

Judge:	The Honourable Justice A. David MacAdam
Heard:	August 6, 7, and 9, 2013, in Halifax, Nova Scotia
Written Release of Decision:	November 25, 2013 **(Orally - August 9, 2013)**
Counsel:	Christopher W. Madill and Tipper McEwan, for the Applicants Tim Hill, for the Respondent

By the Court:

[1] The applicants, Penny Davies and Ian Davies (individually "Penny" or "Ian" and collectively the "Davies"), became interested in purchasing a lot at the Louisbourg Golf Resort and Spa (the "Resort") being developed by the respondent ("CBI"). They learned about the development in an advertisement in the London Times placed by Pure International, ("Pure"), who were acting on behalf of CBI in marketing the Resort. The Davies, who are accountants, are British citizens who at the time were residing in Bermuda.

[2] The Davies were interested in the property as a second home, but also considered the possibility that they might at some point relocate to Canada and use it as a full-time private residence or as a retirement home. In February, 2008, Penny contacted Pure seeking information regarding the resort. She received an email that included a brochure entitled "Frequently Asked Questions". The brochure identified CBI as the developer of the resort. As they did not have the resources to purchase the property outright, they recognized that they would have to remortgage their residence in the United Kingdom to release equity for the initial payment and to finance the balance. At page 9, the brochure stated that

"CBI Developers are able to put you in touch with lenders who can provide 75% construction financing (of lot price and construction) subject to client preapproval." Contact information was provided for B.H. (Brian Degaust), P.F.P. Manager, personal banking.

[3] Penny deposed in her affidavit that "the availability of financing from lenders, including Scotiabank, was vital to our decision to buy a property at the resort." Henric Bauermeister, ("Bauermeister"), was the contact person at CBI throughout the negotiations that led to the Davies signing an agreement to purchase the lot at the resort. Penny's affidavit continues:

> 26. In the following months I discussed the importance of obtaining financing with PURE International and with Mr. Bauermeister. I made it clear from the outset and throughout the purchasing process that we would require 75% loan to value financing to complete the transaction.
>
> 27. I was also advised on many occasions by Henric Bauermeister and did verily believe that Scotia Bank was completely behind the Resort, was the Resort's main lender and had granted mortgages already to other purchasers of property at the Resort.

[4] Penny stated that on or about March 24, 2008 she spoke with Mr. Degaust, ("Degaust"), who advised that a 75% loan to value ratio ("LTV")mortgage, as was described in the brochure, could be obtained from Scotiabank. Mr. Degaust testified that he made no such statement. He agreed that in a meeting with the

Davies he became aware that they were looking for 75%. He said as non-residents the usual percentage was 50% and that, although it was possible to obtain more, 75% was unlikely. Penny deposed that as a result of Mr. Degaust indicating that a 75% LTV could be obtained from Scotiabank, on or about March 25 she spoke with Gemma Burns of Pure and reserved lot 47. Subsequently she forwarded the written reservation agreement for lot 47.

[5] On April 25 Penny wrote Degaust inquiring as to whether they would be able to obtain the 75% LTV. Meanwhile she continued to explore other aspects of the purchase, including issues of financing, furniture and HST implications. She also arranged a visit to Nova Scotia to view the property.

[6] The Davies visited the property between May 3 – 6, 2008. They met Bauermeister, who informed them that he was a lawyer. He reviewed with them the details of the development and reiterated the information from the brochure they had received from Pure. Penny deposed that they discussed financing, and Bauermeister indicated that he had good relations with various banks and that financing should not be a problem. The Davies visited the resort, where they saw

about six homes, as well as a few under construction. Penny learned that CBI had had difficulties with the local contractor and had taken over construction itself.

[7] On May 5 the Davies met with Degaust at the Scotiabank office in Sydney, Nova Scotia. Bauermeister was present, but left after advising that the Davies were looking for terms on a loan. Degaust said that based on the Davies' income he saw no problem with their obtaining a 75% LTV mortgage, and said he would put it forward to the bank's underwriters. On testifying, he agreed that their incomes could support a 75% mortgage. He appeared confused, however, with respect to whether his initial request for approval was for 65% or 75%.

[8] Following their meeting with Degaust, Bauermeister took them to the law offices of Sampson McDougall and introduced them to Gary Corsano and Elsbeth Cassidy, both of the Sampson McDougall law firm. Corsano was the lawyer for CBI. Penny deposed that Bauermeister advised that to ensure independence, she and Ian would be assigned a lawyer at the firm who was not working for CBI.

[9] On the final day of their visit the Davies reiterated to Bauermeister their requirements for 75% loan to value financing. Later that evening, they indicated to

him that they would be going forward with the purchase of Lot 47. Bauermeister reiterated that, as the water lots were selling quickly, they would need to move quickly.

[10] According to Penny, after they returned home Bauermeister called on a weekly basis to inquire as to when they were sending over the partial payment for the lot. She indicated that she told him they "were working on the financing and it was dependent on concerns we had in the UK that the money was not readily available, and the money would be forthcoming once we finalized arrangements in the UK." At the time they were working to remortgage their UK residence in order to obtain the money for the initial payment. She deposed:

> 90. Between our visit to the resort and July 2008, Mr. Bauermeister repeatedly advised me and I did verily believe, that obtaining 75% loan to value financing should not be a problem and that his relationship with Scotia Bank meant we would get the funding. He also advised there were other Canadian banks he could put us in touch with if Scotia did not work out and he anticipated no problem as there were many lenders his other purchasers had used.
> ...
>
> 101. On or about June 3, 2008, Ian and I received mortgage application was processed on the basis of a 65% LTV. I believed that Scotiabank had made an error based on our discussions on May 8th 2008 and the email exchange between April 28th and April 30th 2008. No one discussed 65% LTV financing with us prior to our receipt of this email. I called Mr. Degaust and asked him why application was processed for only 65% LTV when we had asked for 75% LTV.
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> 102. I was advised by Mr. Degaust and do verily believe that he applied for the 65% LTV ratio because he was advised in the interim by CBI that Ian and I wanted 65% LTV. The discussion between CBI and Mr. Degaust was not known to us until we

> received this email from Mr. Degaust. He also advised me and I did verily believe that he, Mr. Degaust had made a mistake in applying for the 65%, it was his error and now that the Underwriter approved the 65%, he could not now reapply to the Underwriter for consideration of the 75% until three months had passed, which is normal banking practice. He advised and I do verily believe that the decision was no reflection on us...

[11] Degaust testified that he could not recall if he applied for 75% financing, but only received approval for 65%, or applied for 65% with the intention of asking for an additional 10% upon approval. In view of his apparent confusion, and lack of recall, I prefer Penny's evidence that the application was for 65%, even though the Davies had never indicated an interest in seeking anything less than 75% LTV, which they had repeatedly said they required for the purchase of the lot and construction of the home.

[12] Around June 9, 2008, Penny received an email from Degaust advising that 65% loan to value financing was available, on a special basis for the Davies. He wrote that the usual financing available to non-Canadians was 50%, and that any special program consideration for the Resort, as had been requested by CBI, had not been authorized. Penny stated in her affidavit that the availability of only 50% loan to value financing had never previously been communicated to them during discussions with either Bauermeister or Degaust. She also deposed that

Bauermeister had advised at various times, and that she believed, that if they could not borrow from Scotiabank, "there were other Canadian banks he could put us in contact with who could loan us 75% LTV. Mr. Bauermeister also told Ian and I not to concern ourselves too much as if we paid the deposit he could put us in touch with these other lenders. These statements reassured us, as the Brochure also advised CBI could put us in contact with various 'lenders'."

[13] Penny deposed that Bauermeister asked her for a copy of Degaust's email of June 9, 2008, and indicated that he would "see what he could do." On June 10 she received a response from Degaust advising that the most the bank was prepared to approve was 65%. She asked him to keep this offer open until they were able to respond. She continued:

> 115. At this time, Mr. Bauermeister was reassuring us he could put us in touch with other lenders and continued to ask when our part payment would arrive. Mr. Bauermeister also continued to tell me in repeated phone calls, on a weekly or near weekly basis, that lots were selling quickly, that there were not many water lots left, and that we needed to complete the purchase as soon as possible. I trusted Mr. Bauermeister because he was extremely friendly and because he appeared to have our best interests at heart.
>
> 116. On June 10, 2008, I had an email exchange with Mr. Bauermeister regarding financing and the date of the purchase. I confirmed that we would release funds for the part payment once we received a 75% loan to value mortgage. Mr. Bauermeister responded:
>
> > *Your emails clearly confirm what you mentioned to me on the phone. I will try to solve the situation with Scotia and if not to get 75% financing in place with another lender. My apologies for the confusion at Scotia's end.*

[14] Between June 26 and July 1, 2008, draft agreements were exchanged in respect to the purchase of the lot, the construction of the home and the purchase of furniture for the home.

[15] Penny deposed that when she asked for the name of a solicitor to review the agreements, Bauermeister referred her to Chris MacInnes, also of Sampson McDougall. Bauermeister told her "he felt" there was not really a conflict of interest with Mr. Corsano acting for CBI. He told her that she could use another lawyer, but that using Sampson McDougall would "make it easier for us." She deposed that since he was a lawyer himself, she took his word. She also stated that Mr. MacInnes told her that this practice was perfectly ordinary and that, while Mr. Corsano was the lawyer for CBI, he would simply review the feasibility and fairness of the contract. In the event of a dispute, Sampson McDougall would not be able to represent either party and both parties would need to seek alternative lawyers. He also told them that their funds would be held in a separate bank account and he saw no problem with reviewing their documents himself and remaining independent as he was a lawyer and would give them his true and professional opinion. He advised that he believed the contract was fair.

[16] I will not comment on the involvement of the law firm of Sampson McDougall in this matter. The firm was not a party to this proceeding, and had no opportunity to address the issues of its lawyers acting on behalf of both sides of the transaction.

[17] On July 15, 2008 Penny wrote Bauermeister advising they had made the necessary arrangements to send a part payment in the amount of $221,500.00 CDN. This amount represented the agreed part payment, less travel expenses for the Davies' visit to Cape Breton to view the property, which CBI had agreed to reimburse (according to the brochure Penny received from Pure). This deduction amounted to $2000.00. Around this time Penny received an email from Degaust advising that the application for the 65% financing would expire after 120 days, at which point a new application would be required. She advised Bauermeister of this. In her affidavit, she stated that they were not satisfied with 65% and were still looking for 75% financing, and that she had "quite a few conversations with Mr. Bauermeister," who advised them, and she believed, that there were other banks that would support 75% financing, and there might still be the possibility of an

arrangement with Scotiabank. On July 21, 2008 the Davies transferred $221,500.00 to CBI.

[18] According to Penny, after they sent the funds in July 2008, “Mr. Bauermeister’s weekly calls came to an end.” She said she continued to press Bauermeister about obtaining 75% LTV financing through Scotiabank or another bank. They were not put in touch with any lenders by Bauermeister during this period. She also deposes that she asked him “when he believed construction on lot 47 would commence.” These inquiries continued into 2009.

[19] In July 2009 Penny advised Bauermeister that Ian had applied to the Canadian Imperial Bank of Commerce for a loan, but CIBC would not provide anything more than 50% loan to value financing. Again they received no bank referrals from Bauermeister. On July 25, 2009, she deposed, Bauermeister e-mailed that he would “do what I can to help” with financing. She added that Bauermeister did nothing to help, and all future work on financing was completed by Ian.

[20] On June 26, 2010 Penny advised Bauermeister that the she and Ian intended to visit the property that summer. She again inquired about financing, seeking Bauermeister's assistance, given that he had advised her that other clients were able to obtain the financing. She says at no point were they put in touch with any bank by CBI, other than Scotiabank and Degaust. Bauermeister did advise that if necessary they could borrow from CBI. She responded that they were not interested in this, because CBI was not a lending institution and would not be subject to third-party regulation. In addition, the rate of interest proposed was in excess of that charged by banks.

[21] The Davies visited the resort on or about August 14, 2010. Penny's affidavit outlined what they found:

> 194. We had been advised by Mr. Bauermeister and I did verily believe that twenty homes were to be built in that year at the Resort. I was also advised by Mr. Lionel Wadden, and by a news article, that these twenty homes would be built.
>
> 195. We were shocked when we saw the state of the resort.
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> 196. Only two or three houses had been built or completed since our last visit, and one or two of those houses were already half built when we visited in May 2008.
>
> 197. The roads were still full of scree, and loose small rocks and were not completed at all.
>
> 198. None of the houses had gardens.
>
> 199. The Resort was basically still in the same, rudimentary form as it was when we first saw it two years before.

> 200. We were given a house at the Resort to stay in.
>
> 201. After arriving, we drove to Sydney for some supper that night. As we were driving along I felt sick to my stomach and was almost physically sick in the car at the shock of how the resort did not appear to have progressed at all.
>
> 202. I was very upset.
>
> 203. I was so shocked and upset because every time I spoke with Henric he had advised that the resort was coming along nicely, albeit not with as many purchasers as he thought, and that building was taking place. I never once imagined that there would have been so little building as I saw that night.
>
> 204. The next day Carter Stevens, a Manager, took us up to Lot 47 and showed us that the road had been built to it and to about another twenty plots on that site. They were all labelled with the lot number and I took some photographs.
>
> 205. We went out for supper on our last evening with Mr. Bauermeister and he assured us he was getting other purchasers, he called them "investors". He also advised us he was thinking of setting up a hedge fund whereby he would get a lot of Investors to buy part of the large property portfolio and their return would be the rental income. Having worked for a hedge fund previously and a golf course, the latter of which was after we undertook the investment, we were both extremely sceptical.
>
> 206. I told Mr. Bauermeister on that evening that we were "rather shocked at the state of the resort" and that we "expected more building to have taken place" and what was being done about it. He assured us there would be significant house building in 2011. We saw no builders whilst we were there...

[22] Degaust testified that Bauermeister told him that he was primarily marketing the resort to non-residents but was looking for approval of up to 75% mortgage financing. He said he responded that 75% financing was unlikely, and denied giving CBI any assurance that 75% financing would be approved. He also testified that he knew from speaking to them that the Davies were looking for 75%

financing. He could not recall whether he wrote up the application for 65% or 75%. He said he had no credit concerns about the Davies, having reviewed their financial situation. He said he had no other applications for mortgage financing for the resort, other than by the Davies. He never obtained 75% financing for anyone.

[23] CBI filed no affidavit. Although counsel appeared on the respondent's behalf, apart from issues raised on cross-examination of Penny and Degaust, no evidence was presented to contradict Penny's description of the events or to clarify her allegations about her and Ian's dealings with Bauermeister and Degaust.

Issues

[24] The issues are as follows (based on applicants' counsel's framing):

> (a) The transaction having failed, are the Davies entitled to the return of their payment?
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> (b) In the alternative, was the availability of financing an implied condition of the Davies' agreement with CBI?
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> (c) In the alternative, was it an implied term of the Davies' agreements with CBI that the Resort be developed, and did CBI breach this term by failing to construct the Resort?
>
> (d) In the further alternative, are the Davies entitled to damages for fraudulent or negligent misrepresentation?

> (e) In the final alternative, was there an innocent misrepresentation entitling the Davies to rescind the contract?

[25] Damages do not appear to be an issue and would appear to be in the sum of $223,500 Canadian, plus costs and prejudgment interest.

Implied terms

[26] Notwithstanding the absence of a written condition that the agreements were subject to the Davies obtaining 75% loan to value financing, they assert that such a condition should be implied. The Davies cite *M.J.B. Enterprises Ltd. v. Defense Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at paras 27 and 29, where the court said, in discussing implied terms:

> 27 The second argument of the appellant is that there is an implied term in Contract A such that the lowest compliant bid must be accepted. The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711. Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p. 775)...
> ....
> 29 As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two

> separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the actual parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G. H. L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p. 476: In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[27] In *Halsbury's Laws of Canada*, "Construction", in respect to implied terms in building contracts, the authors state, at §HCU-28:

> HCU-28 When terms may be implied. Courts will not rewrite the parties' contract. Courts merely interpret and apply contracts to give them business efficacy. To do so, courts will imply terms in three situations: (1) based on custom or usage of the trade; (2) as legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term is necessary to give business efficacy to a contract. Extrinsic evidence of custom and usage of the trade is admissible as evidence to support an inference that the parties to the contract would have understood such a custom or usage to be applicable. Terms are implied in the same manner on the basis of a presumed intention. Terms implied as the legal incidents of a particular class or kind of contract do not depend on presumed intention. Such terms will only be implied if they are necessary. Reasonability is not enough. Terms implied as necessary to give business efficacy to a contract are implied on the basis of judicial determination after the fact of presumed intention at the time of the contract. Determination of the presumed intentions of the parties is subjective, not objective. It focuses on the intentions of the actual parties. Courts are careful not to impose after-the-fact intentions of objectively reasonable parties. Thus, terms will not be implied if there is evidence of a contrary intention by either party. In Québec, a general duty of good faith is implied into all contracts.
>
> Implied terms in construction contracts. Courts have implied terms into "Contact A", the tendering contract, and into "Contract B", the construction contract. It is an implied term of Contract A to accept only compliant tenders. It is an implied term of Contract A to be fair and consistent in the assessment of bids. The implied

> term of fairness and consistency is justified on the basis of the presumed intentions of the parties. It could also be implied as a matter of public policy, or as a legal incident of a certain type of contract. It is an implied term of Contract B that the owner will make the site sufficiently available to permit the contractor to perform its work in accordance with the contract. It is an implied term of Contract B that the contractor will complete the work within a reasonable period of time. It is an implied term of Contract B that the contractor will perform its duties diligently and in a workmanlike manner, or, expressed differently, that the work will be of "a reasonable, workmanlike quality". Where an owner has relied on the architect or engineer with respect to the suitability of the design, no warranty of fitness for use will be implied into Contract B. Where the skill of the contractor is expressly relied upon with regard to the construction, however, there will be an implied term of Contract B that the work be performed in a good and workmanlike manner and that the work, when done, will be fit for the intended purpose. There is an implied term that the contractor's work will comply with applicable codes and building regulations. A contract for the construction of a dwelling is subject to an implied term that it will be fit for human habitation. Courts imply terms into cost-plus contracts limiting the contractor to costs

[28] There is no suggestion that either of the first two situations apply here. It is not alleged that there is any custom or usage of the trade that would require such a condition, nor is it a legal incident of a particular class or kind of contract. The submission is that the term can be implied because it was the presumed intention of the parties and is necessary to give business efficacy to the contract.

[29] In her affidavit and her testimony, Penny stated that Bauermeister did not, before or after the contracts were signed, express any disagreement with the Davies' assertion that they were subject to their obtaining 75% loan to value financing. Both before and following execution of the contracts Bauermeister

reassured them that he could put them in touch with lenders who would provide the necessary financing, if Scotiabank was not prepared to do so. These reassurances continued, although with less frequency, following the initial payment and execution of the contracts. Penny testified that until receipt of an email in July 2009 in which Bauermeister said "I will do what I can to help," he had been consistently telling her that if not Scotiabank, there were other lenders he could put them in touch with that would provide the financing.

[30] Between 2008 and 2010 the Davies were consistent in communicating to Bauermeister the necessity for 75% financing. I am satisfied, on the evidence presented, that Bauermeister did not indicate that this was not part of his understanding of the circumstances under which the Davies executed the agreements and made the initial payment. CBI presented no evidence challenging Penny's evidence that the Davies' execution of the agreements was subject to this financing condition and their understanding that this was accepted by Bauermeister on behalf of CBI. Either Bauermeister accepted this as a condition of the Davies executing the contracts and making the initial payments, or he misled them into believing it was acceptable to CBI. In either case, I am satisfied that an

implied term of the contracts was the necessity for the Davies to obtain 75% loan to value financing. The third situation described in *Halsbury's* is present here.

Misrepresentations

[31] The misrepresentations alleged by the applicants relate to the brochure and the reference to 75% financing being available through Scotiabank, including the identification of Degaust as the contact party, as well as similar verbal representations by Bauermeister to the Davies, and other representations, both in the brochure and verbally by Bauermeister, that financing could be obtained through other banks.

[32] One of the elements of an action founded on misrepresentation, whether fraudulent, negligent or innocent, is that the representee must have relied, in a reasonable manner, on the representation. In *Da Silva v. Tobin Investments Ltd.* (1978), 34 N.S.R. (2d) 659, 1978 Carswell NS 185 (S.C.T.D.), at para. 28, the court discussed the elements of fraudulent misrepresentation as set out in Di Castri, *Law of Vendor and Purchaser*, 2d edn., at p. 161. The plaintiff must prove the following:

> 1. That the representations complained of were made to him by the Defendant;
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> 2. That they were false in fact;
>
> 3. That when made, they were known to be false or recklessly made, without knowing whether they were false or true;
>
> 4. That by reason of the complained representations the Plaintiff was induced to enter the contract;
>
> 5. That within a reasonable time after the discovery of the falsity of the representation the Plaintiff elected to avoid the contract and accordingly repudiated it.

[33] In *Barrett v. Reynolds* (1998), 170 N.S.R. (2d) 201, 1998 CarswellNS 333 (C.A.), Cromwell J.A., as he then was, set out the elements of negligent misrepresentation in his concurring judgment. He said, at para. 137:

> In *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at 110, lacobucci J. (writing for 5 of the 6 judges participating in the appeal) set out five general requirements for liability in negligent misrepresentation: 1. there must be a duty of care based on a "special relationship" between the representor and the representee; 2. the representation in question 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.

[34] See also *Desmond v. McKinlay* (2000), 188 N.S.R. (2d) 211, 2000 CarswellNS 178 (S.C.), at para. 52, affirmed at 2001 NSCA 24.

[35] As to "innocent misrepresentation," the following comments appear in Di Castri, *Law of Vendor and Purchaser*, 3d ed (Toronto: Carswell, 2011) at pp. 7/72-73:

> §252 Innocent Misrepresentation
> ...
> In the context of an innocent misrepresentation affecting a sale of land, a common law claim to damages is, in general, available only if the representee can show that the representation constitutes a term of the contract.
>
> However, the remedy of equitable rescission, with or without compensation, is available to the representee who cannot establish that the innocent misrepresentation, expressly or by necessary intendment, constitutes a term of the contract. He may also resist specific performance, but cannot claim specific performance with an abatement of the purchase price.
>
> An innocent misrepresentation operates to make an executory contract voidable, not void. On acquiring knowledge of the misrepresentation, the representee may elect to affirm or rescind the contract. The election to rescind must be made within a reasonable time after the discovery of the misrepresentation. The contract remains valid and binding until the representee elects to rescind. The election, once made, is final.
> ...
>
> To obtain rescission, then, a plaintiff must establish: (1) that the language relied upon imports or contains a representation of some existing or past material fact; and (2) that in entering into the contract he was induced to do so relying upon the representation. A false representation does not, by itself, amount to fraud in law unless it is made with a fraudulent intent. Where a misrepresentation becomes a term of the contract, damages may be sued for whether the misrepresentation is fraudulent, innocent or negligent. However, rescission would not be available, as a remedy based on a representation which induces a contract and a remedy based on the same representation which has become embodied in the contract as a term thereof cannot exist together.
>
> Rescission in the strict sense "is not a remedy available, for breach of contract. It is a remedy crafted by the courts of equity to provide redress in the absence of legal rights. The 'rescission' arising from a breach of contract is in truth a discharge of future obligations.
>
> A representee is justified in expecting infallibility as to representations of fact.

> An escape from the rule that innocent misrepresentation gives no right to damages is sometimes available to a pleader by alleging the misrepresentation was fraudulent, or alternatively, a collateral warranty.
>
> Of course, if a misrepresentation is written into the contract, damages are available to the plaintiff who can establish a breach of contract.

[36] In each instance it must be established that the applicants have been induced to act as a result of a representation of some existing or past material fact. In respect to the brochure, there was such a representation: namely, that Scotiabank would provide 75% financing to a purchaser of a lot at the Resort. However prior to forwarding any monies to the respondents the Davies learned that Scotiabank was not prepared to offer 75% financing. Therefore it cannot be said that they purchased Lot 47 having been induced by this representation, whether made in the brochure or as the result of discussions with Bauermeister.

[37] In respect to the other representations as to the availability of financing through other banks, these were not representations of present or past events, but of what could be provided in the event the necessary financing was not available through Scotiabank. These representations amounted to no more than statements that the Davies could be put in touch with other banks. No specific banks were identified, nor did Bauermeister indicate that he had contacted any other banks for

the purpose of obtaining financing for any purchasers, including the applicants. The claims founded on misrepresentation are therefore dismissed.

Breach of contract

[38] The Davies submit that the funds they advanced were a part payment (not a deposit) on a contract that was not completed by the respondents. As such, they argue, they are entitled to return of the funds. CBI takes the position that the Davies are not entitled to return of the payment because they repudiated the contract and did not complete it. CBI submits:

> In essence, the Davies have repudiated the contract and are not prepared to complete same. Nevertheless, they seek to have the monies paid returned on the basis that the funds were part payment and not a deposit, and if they were a deposit on the basis that in equity they should have relief from forfeiture.
>
> The court's attention is respectfully drawn to Di Castri, *Law of Vendor and Purchaser*, 3d, at p.16-59:
>
> > Where the contract is silent as to the designation of an initial payment made by a purchaser, the presumption is that, if the contract is performed, the payment is to taken into account, but if there is default by the purchaser the payment is to remain the property of the vendor; this presumption alerts a purchaser to the fact that forfeiture is the price of nonperformance.

[39] According to CBI, these contracts were silent, so the presumption is that where there is default by the purchaser the payment remains with the vendor.

[40] Under the agreement of purchase and sale the Davies agreed to pay $330,000.00 plus HST for Lot 47, with $82,500.00 payable on July 23, 2008 and the balance of $247,500.00 on the date of transfer of the legal title. CBI agreed that it would take all necessary action to transfer title to the Davies after completion of the transaction, but no later than July 31, 2009, if the full purchase price had been paid at that time.

[41] The construction contract recited the agreement for the purchase of Lot 47 and provided that CBI was to construct a residential dwelling on the property, and provide furnishings and home goods. The Davies agreed to pay $557,090.00, of which $415,000.00 plus HST was the purchase price of the home; $66,000.00 plus HST, would pay for the furniture; and $12,000.00 plus HST would pay for the home goods. In respect to the purchase of the home and furnishings, payment was to be made in two installments, with $103,750.00 payable on July 23, 2008, for construction, and $8500.00 payable on July 23, 2008, for furniture. The remaining balances were payable on “substantial completion”. The purchase price for the

home goods, plus HST, was payable on "substantial completion". Paragraph 5 of the construction agreement provided as follows:

> 5. The Developer shall take all necessary action to have the Residential Dwelling completed in accordance with the specifications of the "Invermere V" design as soon as possible, but in no event later than July 31st, 2009; subject, however, to any amendments to the specifications that may be agreed to in writing between the Owner and the Developer.

[42] Penny deposed that as time passed, and with no word from Bauermeister regarding financing, she became increasingly concerned they would not have financing in place for the July 2009 build date. She stated that she spoke to Bauermeister about this, and he responded that the contract dates did not matter because "we were in this together". She said he never got back to her in writing regarding modification to the build dates. She then stated:

> 164. I also called him a lot at this time and left messages for him to discuss the build dates with me. In one conversation, Mr. Bauermeister advised that CBI was not ready to build. In response, on June 8, 2009, I wrote to Mr. Bauermeister referencing his comment that the build dates might not be possible and inquiring whether the July 3, 2009 date for the commencement of construction was still feasible. ...
>
> 165. I did not receive a response from Mr. Bauermeister.
>
> 166. I followed up with Mr. Bauermeister's assistant, Ms. Marwinski on June 10, 2009. ...
>
> 167. I subsequently spoke with Mr. Bauermeister by phone. At this time Mr. Bauermeister had not put us in touch with other banks for financing, had made no demand for the balance of the funds.

> 168. Mr. Bauermeister advised me, and I did verily believe that CBI "was definitely not ready to build" on the contract date and repeatedly kept saying the date could be postponed until there were "better economic times" and that we were "in this together".
>
> 169. As a result of Mr. Bauermeister advising us that CBI was not ready to build, and because financing was not in place, I told Mr. Bauermeister that we were not in a rush to start building. However I wanted to agree to a date so that there was something for both of us to work towards...

[43] In her affidavit Penny stated that in July 2009 she tried, without success to contact Baumeister for information about financing options. She found his "disinterest quite alarming," and was concerned because the date for commencing construction was approaching. She stated that Ian had attempted to obtain financing through other Canadian banks but had been unsuccessful in obtaining 75% loan to value financing. He also applied to a mortgage broker in London, again without success. At no time, despite her request, did Bauermeister provide her with a date to replace the construction date set out the agreement.

[44] In the spring of 2010 the Davies considered another trip to Cape Breton. Penny contacted Bauermeister advising him of their intended visit for later in the summer and again followed up regarding financing.

[45] In respect to the date for construction CBI, through Baumeister, advised Penny that their home would not be built in accordance with the timetable set out in the construction agreement. The Davies acquiesced in this. However efforts by Penny to obtain a new date were unsuccessful and at no time did Bauermeister commit, on behalf of CBI, on a date for commencement of construction of their home. This failure amounted to a breach of contract on the part of CBI. The Davies had made a part payment for the construction of their home and had no commitment as to when that would be carried out. The fact they had not paid the balance of the purchase price is irrelevant. The breach occurred when Bauermeister failed to provide a new date, agreeable to the Davies, for the construction of their home.

[46] CBI argues that *Central London Property Trust Limited v. High trees House Limited*, [1947] K.B. 130, supports the position that it should have been granted a reasonable chance to commence construction of the home. However, in view of the long-standing failure of CBI to set a date, let alone commence construction, and in view of Penny's requests for Bauermeister to indicate a date, as well as the obvious lack of progress in developing the resort that the Davies observed on visiting the site, it was unnecessary for the Davies to prolong the inevitable. They

were entitled to treat the contract as having been breached by the CBI and to seek return of the funds they had advanced.

[47] Judgment accordingly.

MacAdam J