

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Sunshine Valley Developments Ltd. v. Hendrichs,***
2006 BCSC 319

Date: 20060227
Docket: S14763
Registry: Chilliwack

Between:

**Sunshine Valley Developments Ltd.,
Sunshine Community Co-operative Club, also known as
Sunshine Community Co-operative Club Association,
Sunshine Valley Utilities Ltd.,
and Donald Walter Low**

Plaintiffs

And

Bernd Karl Hendrichs, Marilyn Ernestine Hendrichs, Donald James MacDonald, Dawn Irene MacDonald, Donald William Bender, Sharon Gail Bender, Anthony Henri Jongedijk, Joyce Frances Jongedijk, Roger Alexander Michael Nardi, Barbara Ann Nardi, Gordon Earl Zucht, Oldrich Korabek, Beata Korabek, Ruben Benbaruj, Estrella Benbaruj, Adrianus Hermanus Peters, Cecile Anna Peters, Riaz Kassam, Nusserin Kassam, Marc Hanford Porter, Barbara Mary Lebeau, James Samuel Benbaruj, Ashok Ghate, Ursula Ghate, Charlene Kay Cowling, Norman Cowling, Hazel Irene Boyd, Peter Zazulak, Kathy Bonney and George Bonney

Defendants

Before: The Honourable Mr. Justice Joyce

Reasons for Judgment

Counsel for the plaintiffs

D. Stander and L. Smith

Barbara Lebeau appearing on her own behalf
and as agent for all other defendants, except
Henri Jongedijk, Joyce Frances Jongedijk,
Peter Zazulak and Hazel Irene Boyd

Date and Place of Trial:

August 29-31, September 1, October
11-12, 2005
Chilliwack, B.C.

I. INTRODUCTION

[1] A few kilometres to the east of Hope, British Columbia, along the Hope-Princeton Highway is a community known as Sunshine Valley. It was conceived by two brothers, Messrs. Donald and Ray Low and brought to life through the Lows' company, Sunshine Valley Developments Ltd. ("SVD"), starting in or about 1972. Originally, Sunshine Valley was largely a recreational community but today approximately 125 of the 400 property owners in Sunshine Valley are full-time residents.

[2] There are a number of different types of tenure at Sunshine Valley: the residents of Cedar Village own individual fee simple lots; the residents of Parkhill Village and Meadow Village are members of strata corporations; the residents of Alpine Village own shares in a company, Alpine Park Estates Ltd., which entitle them to exclusive occupation of their lots on land that is owned by the company. Finally, some persons lease individual campsites and mobile home lots in Huckleberry Village and Sumallo Village. The defendants in this action are residents of Sunshine Valley who live in Cedar, Parkhill, Meadow or Alpine Village.

[3] There is one feature that was common to the whole of Sunshine Valley. The Lows decided that there should be a community club to which all residents of

Sunshine Valley would belong. The club was to provide recreational and other facilities to its members, including a clubhouse and pool. The club would finance its operations by way of monthly recreational dues paid by the members of the club. To this end, Sunshine Community Co-operative Club (“SCCC”) was incorporated on March 20, 1979 under the predecessor to the ***Cooperative Association Act***, SBC 1999, c. 28 (the “***Act***”).

[4] In fact, in addition to providing recreation facilities for the residents, SCCC became the *de facto* policy making body for the community of Sunshine Valley. That is because Sunshine Valley is in an unorganized territory not subject to any local government.

[5] The Lows incorporated a separate company, Sunshine Valley Utilities Ltd. (“SVUL”), which, for a fee, provided certain utility services, including water and propane, to the residents of Sunshine Valley.

[6] For a number of years all residents in Sunshine Valley were members of the SCCC and paid monthly recreation dues which were billed in advance in January and July of each year for six months at a time. Prior to 2002 the recreation facilities were actually owned by SVD and used by SCCC for a fee paid to SVD. During this period SVUL invoiced the members of SCCC for the recreation dues, collected the dues, paid a portion to SCCC and gave the majority of the dues to SVD to cover the costs of providing the facilities. In 2002, SVD transferred the recreation buildings, facilities and lands on which they were situated to SCCC and SCCC took over invoicing the residents for the monthly recreation dues.

[7] Beginning in 1999 a number of residents became disenchanted with the SCCC, decided to resign from the Club and ceased paying monthly recreation dues. For some time SCCC took the position that residents of Sunshine Valley could not voluntarily resign from the Club. Those members who withdrew their memberships filed a petition on December 17, 2003 (Chilliwack Registry No. S14284) to determine whether their withdrawal from the Club was effective. Ultimately, SCCC conceded that the members had the right to withdraw and that proceeding has been determined by a decision filed concurrently with this one (*Hendrichs v. Sunshine Community Co-operative Club* 2006 BCSC 320).

[8] SCCC continues to take the position that the former members of SCCC remain liable to pay monthly recreation dues notwithstanding their withdrawal from membership in SCCC. In this action, which was commenced May 25, 2004, the SVD and SCCC claimed damages against the following defendants for breach of contract in failing to pay recreation dues:

Donald James MacDonald

Bernd Karl Hendrichs

Kathy Bonney

Ruben Benbaruj

Ashok Ghate and Ursula Ghate

Oldrich Korabek and Beata Korabek

Cecile Anna Peters

Hazel Irene Boyd

Donald William Bender

Anthony Henri Jongedijk

Gordon Earl Zucht

Barbara Ann Nardi

Riaz Kassam and Nusserin Kassam

Marc Hanford Porter

Barbara Mary Lebeau

[9] SCCC, SVD and SVUL also advanced claims against the defendants to recover unpaid recreation dues or compensation in respect thereto on the grounds of unjust enrichment.

[10] There are other claims advanced by the plaintiffs in this action, including claims for damages for intimidation, abuse of process, tortious interference with contractual relations, defamation, misrepresentation, trespass and mental and economic distress. The defendants Hazel Boyd, Anthony Jongedijk, Joyce Jongedijk and Peter Zazulak filed a counterclaim alleging conspiracy to injure, malicious prosecution and various other wrongs for which they seek damages. Only the claim relating to unpaid recreation dues is currently before the court for disposition under Rule 18A.

[11] The petition in proceeding No. S14284 was heard at the same time as this Rule 18A application. While the two proceedings arise out of the same factual background they involve different, albeit related issues, and though I have delivered separate reasons for judgment in the two proceedings, they should be read in conjunction with one another.

[12] Prior to the hearing of the applications the plaintiffs settled their claims arising from the statement of claim against the defendants Hazel Boyd, Peter Zazulak, Anthony Jongedijk and Joyce Jongedijk. The counterclaim remains outstanding.

II. APPROPRIATENESS OF THE MATTER UNDER RULE 18A

[13] Despite my unease with an application under Rule 18A that will deal with some, but not all, of the matters raised in the statement of claim and will not deal at all with the counterclaim, I have been persuaded, at the urging of all parties, to hear and determine the issue relating to unpaid recreation dues. I doubt that this decision will bring “peace in the valley” that is so desperately sought but the parties have already spent far too much time and money fighting amongst themselves. It is my hope that the optimism expressed by the parties that this decision will go a long way to enabling them to finally resolve this lawsuit may prove justified.

III. ISSUES

[14] It is useful at this stage to set out the basis of the plaintiffs’ claims and to identify the issues that have to be decided.

[15] It appears from the evidence that for a long time the plaintiffs believed that property owners in Sunshine Valley were obligated to pay recreation dues based on the fact of ownership, i.e. a covenant running with the land. I dealt with the issue of the covenant registered against the lands in an earlier decision, ***Lebeau v. Low*** 2002 BCSC 687, and the plaintiffs now concede, quite correctly, that there is no

such obligation attached to ownership of the lands, though it is clear that Donald Low wishes this were otherwise.

[16] The plaintiffs now assert their claim on two different bases: contract and unjust enrichment. While counsel for the plaintiffs submitted that the defendants, having paid recreation dues for a number of years, were estopped from ceasing to pay, no such claim is advanced in the amended statement of claim. In any event, I am of the view that no cause of action for the payment of recreation dues following withdrawal of membership from SCCC can be founded on the principle of estoppel. The issues to be determined with respect to each defendant are therefore:

- (a) Is there an enforceable contract between the plaintiffs or any of them and the defendants that obliges the defendants to pay recreation dues to SCCC even though the defendants have ceased to be members of SCCC?
- (b) Are the plaintiffs or any of them entitled to compensation from the defendants on the grounds of unjust enrichment?

IV. CONTRACTUAL CLAIM

1. Facts

[17] The plaintiffs rely upon various documents executed by the defendants at the time they acquired their properties as constituting enforceable contracts binding the defendants to pay recreation dues for as long as they own the property, regardless of whether they remain members of SCCC. The plaintiffs take the position that the

defendants are contractually obligated to pay recreation dues for the benefit of SCCC whether or not SCCC was a party to the contract.

[18] Because the circumstances surrounding the acquisition of the defendants' property interests and the documents relied on by the plaintiffs as constituting the contract to pay recreation dues varies from defendant to defendant, I propose to set out the facts in relation to the contractual issue as they relate to each defendant.

(a) Bernd Hendrichs

[19] The Hendrichs own two properties in Sunshine Valley, both of them located in Parkhill Village. They purchased the first property in 1993 (Lot P11) from the former owner, a person by the name of Woodworth, and the second in 1995 (Lot P10) from the former owner, whose name I do not know.

[20] The Hendrichs paid recreation dues to SVUL until April 2000 when they withdrew their membership in SCCC (see ***Hendrichs v. Sunshine Community Co-operative Club*** 2006 BCSC 320). The plaintiffs claim the sum of \$2,379.35 in respect of unpaid recreation dues and interest for Lot P11 and \$2,821.30 in respect of unpaid recreation dues and interest for Lot P10.

[21] With regard to Lot P11, the plaintiffs rely on the contract of purchase and sale dated July 1, 1993 as creating the contractual obligation to pay recreation dues. It states that it is made between Sunshine Valley Developments Ltd. and/or Woodworth as vendors and Bernd Hendrichs and Marilyn Hendrichs as purchasers.

It was signed by Donald Low on behalf of SVD. SCCC is not named as a party to that agreement. The document contains the following clauses:

5. The purchaser agrees to pay assessments from time to time as outlined in the Guidelines and/or Prospectus and/or Building Code and Land Restrictions, before delinquency.
6. Appurtenant to each purchase is an automatic family membership in Sunshine Community Co-operative Club, a community club which will own and operate recreational facilities, including trails, community beaches, playgrounds, reserved areas and roads, etc. and will regulate the use of the same by its members. Purchaser hereby agrees to be a member of said Club, and pay dues as determined by the Club and live up to the rules for the use of property in the development; and to pay his share of maintenance of club property.

[22] Marilyn Hendrichs also signed a document entitled “Release, Waiver and Indemnity – Sunshine Community Co-operative Club” by which she released and indemnified SCCC and a number of other named entities for injury, loss or damage suffered while using recreation facilities. It does not refer to dues.

[23] The plaintiffs did not put forward any contractual documents in connection with the purchase of Lot P10 in their affidavit in support of the application. However, attached to the affidavit of Bernd Hendrichs is a largely illegible copy of an offer to purchase Lot P10 dated March 30, 1995, which is not signed by the vendor. Mr. Hendrichs also refers to three other documents in relation to Lot P10. The first is a document signed by his wife on April 7, 1995, headed “Important Notice to New Property Owners”. It reads in part:

The rules for membership [in SCCC], as established by the Act, and modified by Extraordinary Resolution at the Annual General Meeting, state: “Any person over the age of sixteen years may be a member.

Membership is automatic to any such person who acquires an interest in any property in Sunshine Valley or to an alternate person, as named by such owner, provided that no more than one membership shall be issued per property”.

[24] The second document is the same form of waiver described in paragraph 21 above.

[25] The third document is addressed to “Secretary, Sunshine Community Co-operative Club” and is signed by Bernd and Marilyn Hendrichs. It reads:

I acknowledge having received information by way of the “Notice to New Property Owners” and by receipt of the Sunshine Community Co-operative Club Association Guideline, for use of Sunshine Valley Recreation Facilities, and I understand that recreation dues are payable when billed, and I promise to faithfully adhere to the rules for use of the facilities and to pay dues to the Club or to Sunshine Valley Developments Ltd., or to their agent, from time to time.

(b) Donald MacDonald

[26] The MacDonalds purchased their property in Cedar Village in or about May 1985. They paid recreation dues until February 2000 when they withdrew their membership in SCCC (see *Hendrichs v. Sunshine Community Co-operative Club*, 2006 BCSC 320). The plaintiffs claim the sum of \$1,760.21 for unpaid recreation dues and interest up to December 31, 2001 against Mr. MacDonald only. There is no claim for dues after December 31, 2001 because, in September 2002, SCCC cancelled the dues claimed after January 1, 2002 and purported to transfer to SVUL the right to collect unpaid dues for the period up to that date.

[27] The plaintiffs rely on the contract of purchase and sale dated May 30, 1985 as creating the contractual obligation to pay recreation dues. It states that it is made between Sunshine Valley Developments Ltd. and/or Mr. and Mrs. Troutman as vendors and Donald and Dawn MacDonald as purchasers and was executed by SVD. SCCC is not named as a party to that agreement. The document contains the same clauses 5 and 6 as set out in paragraph 21 above.

(c) Donald Bender

[28] The Benders own two properties in Cedar Village. They acquired the first in April 1985 (Lot C7) and the second (Lot C8) in May 1995. They paid recreation dues until February 1999 when they withdrew their membership in SCCC (see ***Hendrichs v. Sunshine Community Co-operative Club*** 2006 BCSC 320). The plaintiffs claim the sum of \$2,964.90 for unpaid recreation dues and interest in respect of Lot C7 up to December 31, 2001 and \$1,691.18 for unpaid recreation dues and interest in respect of Lot C8 up to December 31, 2001. There is no claim for dues thereafter because, in September 2002, SCCC cancelled the dues claimed after January 1, 2002 and purported to transfer to SVUL the right to collect unpaid dues for the period up to that date. The claim is advanced as against Mr. Bender only.

[29] The plaintiffs rely on the contract of purchase and sale dated April 7, 1985 as creating the contractual obligation in respect of Lot C7. It states that it is made between Michael Ciavarella as vendor and Donald and Sharon Bender as purchasers. The name "Sunshine Valley Developments Ltd." that was printed on the

contract was crossed out before Mr. Ciavarella and the Benders signed the document, although Donald Low purported to execute the document on behalf of SVD sometime thereafter. I find, as a fact, that neither SVD nor SCCC were parties to the agreement. The document contains the same clauses 5 and 6 as set out in paragraph 21 above.

[30] The interim agreement dated May 25, 1995 relating to Lot C8 is made between the Benders as purchasers and Ernest and Margaret Brown as vendors. It contains no reference to recreation dues.

[31] The plaintiffs rely on a document addressed to SCCC and signed by the Benders on June 18, 1995 as creating the contractual obligation in respect of Lot C8. That document is in the same form as the document referred to in paragraph 25 above.

(d) Kathy Bonney

[32] Kathy Bonney purchased a share in Alpine Park Developments/Holdings Ltd. in 1980. She and George Bonney paid recreation dues until March 2001 when they withdrew their membership in SCCC (see *Hendrichs v. Sunshine Community Co-operative Club* 2006 BCSC 320). The plaintiffs claim the sum of \$2,279.48 for unpaid recreation dues and interest. The claim is advanced only against Kathy Bonney.

[33] The plaintiffs rely on the contract of purchase and sale dated November 1, 1980 as creating the contractual obligation to pay recreation dues. It states that it is

made between Sunshine Valley Developments Ltd. and/or [name left blank] as vendor and Kathy Bonney as purchaser. SCCC is not named as a party to that agreement. The document contains the same clauses 5 and 6 as set out in paragraph 21 above.

(e) Barbara Nardi

[34] Barbara Nardi purchased her property in Cedar Village from Mr. Ciavarella in April 1985. She and Roger Nardi paid recreation dues until February 22, 1999 when they withdrew as members of SCCC (see ***Hendrichs v. Sunshine Community Co-operative Club*** SCBC 2006 320). The plaintiffs claim the sum of \$2,964.90 for unpaid recreation dues and interest. The claim is advanced against only Barbara Nardi.

[35] The plaintiffs rely on the contract of purchase and sale dated April 7, 1985 as creating the contractual obligation to pay recreation dues. This document also contains the contract of purchase and sale between Mr. Ciavarella and the Benders. As I have already found, neither SVD nor SCCC were parties to that contract.

(f) Gordon Zucht

[36] Mr. Zucht purchased his property in Cedar Village in 1982. He paid recreation dues until May 2001 when he withdrew as a member of SCCC (see ***Hendrichs v. Sunshine Community Co-operative Club*** 2006 BCSC 320). The plaintiffs claim the sum of \$2,487.70 for unpaid recreation dues and interest.

[37] The plaintiffs rely on the contract of purchase and sale dated August 16, 1982 as creating the contractual obligation to pay recreation dues. It states that it is made between Sunshine Valley Developments Ltd. and/or D. Pare as vendors and Mr. Zucht as purchaser and was executed by SVD. It contains the same clauses 5 and 6 that are set out in paragraph 21 above.

(g) Ruben Benbaruj

[38] Mr. and Mrs. Benbaruj bought property in Cedar Village in 1982. They paid recreation dues until March 2001 when they withdrew their membership in SCCC (see ***Hendrichs v. Sunshine Community Co-operative Club*** 2006 BCSC 320). The plaintiffs claim the sum of \$1,979.68 for unpaid recreation dues and interest. The claim is advanced against only Ruben Benbaruj.

[39] The plaintiffs rely on the contract of purchase and sale dated August 13, 1982 as creating the contractual obligation to pay recreation dues. It states that it is made between Sunshine Valley Developments Ltd. as vendor and Ruben and Estrella Benbaruj as purchasers and contains the same clauses 5 and 6 that are set out in paragraph 21 above.

(h) Ashok Ghate and Ursula Ghate

[40] Ashok and Ursula Ghate purchased a property in Cedar Village in 1997 and sold it in April 2001. At the time of sale SVD took the position that there were unpaid recreation dues owing and SVUL refused to provide services to the new owner unless the account was paid. The Ghates placed the disputed amount in trust to

permit the conveyance to proceed and later sued for the return of the funds in Small Claims Court. They recovered judgment when SVUL failed to appear at the hearing.

[41] Clearly, the plaintiffs have no claim against the Ghates.

(i) Beata Korabek and Oldrich Korabek

[42] In the fall of 1980 the Korabeks acquired a leasehold interest in a lot in Meadow Village. In 1995 Meadow Village was converted into a strata corporation and the Korabeks purchased a lot in the strata development. They paid recreation dues until March 2001 when they withdrew their membership in SCCC (see ***Hendrichs v. Sunshine Community Co-operative Club*** 2006 BCSC 320). The plaintiffs claim the sum of \$2,148.43 for unpaid recreation dues and interest.

[43] The plaintiffs rely on the contract of purchase and sale dated August 20, 1995 as creating the contractual obligation to pay recreation dues. It states that it is made between Sunshine Valley Developments Ltd. as vendor and Oldrich and Beata Korabek as purchasers and contains the following clauses which are similar to those set out in paragraph 21 above:

5. The purchaser agrees to pay assessments from time to time as outlined in the Disclosure Statement and/or Building Code and Land Use Restrictions, before delinquency. ...
6. Appurtenant to each purchase is an automatic family membership in Sunshine Community Co-operative Club, which may now or in the future own and operate recreation facilities, including buildings, playgrounds, reserved area, etc., and will regulate the use of the same by its members. Purchasers agree to remain a member of the said Club, and pay dues as determined for or by the Club ...

(j) Cecile Peters

[44] Ms. Peters' son purchased a property in Parkhill Village in 1987 which he transferred to Ms. Peters and her husband in September 1988. They paid recreation dues until March 2001 when they withdrew their memberships in SCCC (see *Hendrichs v. Sunshine Community Co-operative Club* 2006 BCSC 320).

[45] The plaintiffs originally claimed the sum of \$2,445.48 as unpaid recreation dues pursuant to contract but during the course of the hearing their counsel advised that the contractual claim was abandoned because there is no contractual relationship between Ms. Peters and any of the plaintiffs that could give rise to an obligation to pay the recreation dues. The plaintiffs maintain their claim based on unjust enrichment.

(k) Riaz Kassam and Nusserin Kassam

[46] The Kassams purchased a property in Cedar Village from the Cowlings in 2002. At that time they became members of SCCC and continue to be members.

[47] In September 2003 the Kassams purchased another property in Sunshine Valley. They have not signed any documents that purport to require them to pay additional recreation dues to SCCC as a result of that purchase.

[48] The plaintiffs claim the sum of \$993.06 for unpaid recreation dues and interest in connection with the property they acquired in 2002 and \$596.64 in connection with the property they acquired in 2003.

(l) **Marc Porter**

[49] Mr. Porter bought property in Parkhill Village in October 1999. He paid recreation dues until March 2001 when he withdrew his membership in SCCC (see *Hendrichs v. Sunshine Community Co-operative Club* 2006 BCSC 320). The plaintiffs claim the sum of \$2,115.19 for unpaid recreation dues and interest.

[50] The plaintiffs rely on the contract of purchase and sale dated October 5, 1999 as creating the contractual obligation to pay recreation dues. That agreement is between Mr. Porter as purchaser and Jennifer and Brian Mazur as vendors. An addendum to the contract contains a provision that reads:

7. Appurtenant to each purchase is an automatic family membership in Sunshine Community Co-operative Club Association, or any other Association, as appointed by the Developer, who may operate or manage recreation or other facilities in Sunshine Valley. Buyer hereby agrees to be a member and enjoy voting rights of said Association. Buyer's (sic) agree to pay dues as determined for or by the Developer or Association, and abide by the rules for the use of the property in the community, and to pay a share of maintenance/dues on Association property. Sunshine Valley Developments Ltd. or its (sic) appointee or agent, is the recognized authority for collection of all dues, fees, fines, and assessments, until this function is transferred to the Association or another agency. Buyer's (sic) agree to sign a membership voting form, waiver form and utility forms.

(m) **Barbara Lebeau**

[51] Ms. Lebeau and Mr. Benbaruj acquired their property in Cedar Village in 1997. They paid recreation dues until February 2001 when they withdrew their membership in SCCC (see *Hendrichs v. Sunshine Community Co-operative Club* 2006 BCSC 320). The plaintiffs claim the sum of \$783.60 for unpaid recreation

dues and interest up to December 31, 2001. There is no claim for dues thereafter because, in September 2002, SCCC cancelled the dues claimed after January 1, 2002 and purported to transfer to SVUL the right to collect unpaid dues for the period up to that date. The claim is advanced only against Barbara Lebeau.

[52] The plaintiffs rely on the contract of purchase and sale dated June 13, 1997 as creating the contractual obligation to pay recreation dues. That agreement is between Born Sausage Ltd. as vendor and Ms. Lebeau as purchaser. Neither SVD nor SCCC are parties to the agreement. The agreement includes an addendum that contains the following clause:

5. Appurtenant to each purchase is an automatic family membership in Sunshine Community Co-operative Club. Buyer hereby agrees to be a member of said Club and pay dues as determined for or by the Club and abide by the rules for the use of the property in the community, and to pay a share of maintenance of club property. Buyers agree to sign a membership voting form and a waiver form.

[53] The plaintiffs also rely on an acknowledgement in the same form as that set out in paragraph 25 above which Ms. Lebeau signed on July 14, 1997.

2. Discussion

[54] The plaintiffs suggest that there are certain features concerning the defendants' acquisition of title that are common to a number of the defendants which make it convenient to deal with those groups of defendants together.

(a) Hendrichs, MacDonald, Nardi and Zucht

[55] These defendants were subsequent purchasers. They purchased their property from other former owners rather than directly from the developer, SVD. The plaintiffs submit that SVD was a party to the contracts of purchase, that the contracts contain provisions requiring the defendants to pay recreation dues for the benefit of SCCC whether or not they cease to be members of SCCC and that SVD is entitled to enforce the contractual obligation.

[56] The plaintiffs' claim in contract as against these defendants fails in a number of respects.

[57] First of all, with regard to the claim against Bernd Hendrichs relating to Lot P10 there is no executed contract of purchase of sale before the court to substantiate the claim. The plaintiffs have to rely on the acknowledgement provided to SCCC. There is nothing in that document to suggest any obligation to pay recreation dues other than in connection with membership in the SCCC. In my opinion, it does not constitute a contract between SCCC and Bernd Hendrichs to pay recreation dues to SCCC or to anyone else in the event they cease to be members of the Club.

[58] With regard to the claim relating to Lot P11, which is based upon the contract of purchase and sale, the plaintiffs submit that both SVD and SCCC can sue for damages for breach of contract. The plaintiffs submit that SVD, being a party to the contract, has a right to sue for damages for breach of it and that even though SCCC

is not a party to the contract it is entitled to maintain an action for damages for breach of contract as a third party beneficiary.

[59] To the extent that the claim is made by SVD, it is my view that it must fail against these defendants for two reasons. First, SVD has given no consideration for any promise by the defendants to pay recreation dues to SCCC since it is SCCC that is responsible to provide the benefits for which the dues are paid. Thus, even though SVD is named in the document it cannot enforce the defendants' promises. Secondly, even if SVD could prove there was a contract which was breached, it has failed to adduce evidence proving that it suffered any loss or damage as a result of the breach, and therefore at most, could only be awarded nominal damages. It is conceded by the plaintiffs that if recreation dues are payable, they are payable to SCCC for facilities and services provided by SCCC. That is so whether the facilities and services are provided directly by SCCC or whether SCCC has made an arrangement with another person, namely SVD, to provide the facilities for a fee. The defendants had no part in any such arrangement. SVD has not proven that the defendants' failure to pay recreation dues caused it loss or damage.

[60] Further, with regard to the claim against Barbara Ann Nardi founded upon the contract of purchase and sale, I have concluded that SVD was not a party to it and could not assert any rights under it in any event.

[61] With regard to SCCC's ability to maintain an action in damages, the plaintiffs rely on the principled exception to the doctrine of privity of contract in favour of third party beneficiaries that was established in *London Drugs Ltd. v. Kuehne & Nagel*

International Ltd., [1992] 3 S.C.R. 299 as explained and extended in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108. In *London Drugs* the court made it clear that it is necessary to engage in a functional inquiry in deciding whether the doctrine of privity of contract should be relaxed in the given circumstances. The inquiry involves two stages, which were described in *Fraser River Pile & Dredge* at paras. 28 and 29:

¶ 28 In order to distinguish mere strangers to a contract from those in the position of third-party beneficiaries, the Court first established a threshold requirement whereby the parties to the contract must have intended the relevant provision to confer a benefit on the third party. In other words, an employer and its customer may agree to extend, either expressly or by implication, the benefit of any limitation of liability clause to the employees. In the circumstances of *London Drugs*, the customer had full knowledge that the storage services contemplated by the contract would be provided not only by the employer, but by the employees as well. In the absence of any clear indication to the contrary, the Court held that the necessary intention to include coverage for the employees was implied in the terms of the agreement. The employees, therefore, as third-party beneficiaries, could seek to rely on the limitation clause to avoid liability for the loss to the customer's property.

¶ 29 The Court further held, however, that the intention to extend the benefit of a contractual provision to the actions of a third-party beneficiary was irrelevant unless the actions in question came within the scope of agreement between the initial parties. Accordingly, the second aspect of the functional inquiry was whether the employees were acting in the course of their employment when the loss occurred, and whether in so acting they were performing the very services specified in the contract between their employer and its customer. Based on uncontested findings of fact, it was clear that the damage to the customer's transformer occurred when the employees were acting in the course of their employment to provide the very storage services specified in the contract.

(emphasis added)

[62] In *Fraser River Pile & Dredge* the Court held that the principled exception to the doctrine of privity was not limited to situations involving only employer-employee relationships. However, the two essential factors described above must exist for the exception to apply. As Iacobucci J. stated at paragraph 32:

¶ 32 In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

(emphasis added)

[63] It is clear that the principled exception is not limited to any particular type of relationship. However, in my view, *London Drugs* and *Fraser River Pile & Dredge* were intended to represent incremental changes to the law, not wholesale change to the doctrine of privity of contract.

[64] In *London Drugs* a limitation of liability available to Kuehne & Nagel was “extended” to its employees and the activities carried out by the employees were those that Kuehne & Nagel had contracted to perform. In *Fraser River Pile & Dredge* a waiver of subrogation in favour of, inter alia “any charterer” contained in

an insurance policy was extended to Can-Dive and the activity carried out by Can-Dive was held to be the very activity anticipated in the policy.

[65] In the present case, the form of contract does not provide any benefit for SVD and does not require SVD to do anything. There is no “extension” of benefit to a third party beneficiary or activity by the third party beneficiary of the nature contemplated as between SVD and the defendant. In my view this is simply a case where (putting aside the issue of consideration) one party to a contract (SVD) extracts a promise from the other party (the defendant) to make a promise to a third party (SCCC) that is unrelated to any performance of the contract between SVD and SCCC.

[66] Further, in ***Kitimat (District) v. Alcan, Inc.*** [2005] B.C.J. No. 58 (S.C.), aff’d. 2006 BCCA 75, the court held that the principled exception to the doctrine of privity of contract can only be used by the third party beneficiary as a “shield” to defend an action and cannot be the basis for bringing one.

[67] I conclude the principled exception to the doctrine of privity of contract does not apply in this case and SCCC is not entitled to maintain an action for damages for breach of contract against the defendants.

[68] In any event, I am of the opinion that the clause in the contracts upon which the plaintiffs rely does not create an enforceable contractual obligation to pay recreation dues whether or not the purchaser ceases to be a member of SCCC. In my view, the words “purchaser hereby agrees to be a member of the said Club, and pay dues as determined by the Club” must be construed in a manner that conforms

with the requirements of the **Act** to which SCCC is subject. The **Act** permits members to withdraw and permits an association to terminate memberships in certain circumstances. Persons cannot be compelled to remain members.

[69] It appears to me that at the time these contracts were entered into SVD believed that the obligation to belong to SCCC and to pay recreation dues was a covenant “running with the land”. This is borne out by clause 12 of the contracts, which provided that “all terms and conditions hereof ... shall be deemed covenants running with the land.” For years, SVD took the position against those who wished to withdraw from membership in SCCC and cease paying recreation dues that they were obliged to pay by virtue of their ownership of the property, i.e. by virtue of a covenant running with the land. When the plaintiffs realized this position was not supportable they sought to find in the documents an enforceable promise to pay, which does not exist.

[70] In my opinion, it is membership in SCCC which gives rise to an obligation to pay recreation dues. The dues are imposed for the purpose of financing the operation of the Association in accordance with its lawful objects under the terms of its memorandum and rules and in compliance with the requirements of the **Act**. When persons cease to be members, whether by withdrawal or expulsion, they cease to have any right to use SCCC facilities and cease to be required to pay recreation dues.

(b) Benbaruj and Bonney

[71] Ruben Benbaruj and Kathy Bonney purchased their property directly from SVD. However, for the reasons I have already given the contractual provision relied on do not create an enforceable contract in favour of SVD to continue to pay recreation dues to SCCC regardless of whether they cease to be members of the Club. Even if there was an enforceable contract which was breached, SVD has not proven it suffered any loss or damage by reason of the breach, and so would only be entitled to nominal damages in any event. The claims advanced by SCCC in contract must fail on the ground of lack of privity of contract.

(c) Porter

[72] Neither SVD nor SCCC is a party to the contract upon which the plaintiffs rely to establish contractual liability on the part of Mr. Porter. SCCC cannot claim the benefit of the addendum to the contract under a principled exception to the doctrine of privity of contract.

(d) Benders

[73] Neither SCCC nor SVD are parties to the Bender contracts of purchase and sale. For reasons that I have expressed earlier, the “acknowledgement” provided to SCCC does not create a continuing obligation to pay recreation dues after the Benders ceased to be members.

(e) Korabek

[74] For the reasons already stated, the plaintiffs cannot recover damages against the Korabeks based on the contract of purchase and sale.

[75] The Korabeks may be obliged to pay recreation fees by reason of the rules of their Strata Corporation but, if that is so (and I make no finding one way or the other) it is my view that this is an obligation that must be enforced by the Strata Corporation. The bylaws cannot provide the foundation for an action in contract brought by these plaintiffs.

(f) Kassams

[76] In my view, the Kassams are liable to SCCC for unpaid recreation dues because they were, at least to the date of commencing the action, members of the SCCC who were entitled to the benefits offered by the Club. However, the proper amount of the claim is \$993.06 since they never agreed to pay a second set of recreation dues when they purchased the second lot. Payment of dues is dependent upon membership in the club, not ownership of property.

(g) Lebeau

[77] Neither SVD nor SCCC is a party to the contract of purchase and sale upon which the plaintiffs rely. SCCC cannot maintain an action under that contract under a principled exception to the doctrine of privity of contract. The acknowledgement signed by Ms. Lebeau does not create an obligation to pay recreation dues after she ceased to be a member.

V. UNJUST ENRICHMENT

[78] The plaintiffs allege the defendants have been enriched because they have received the benefits of club membership and property ownership in Sunshine Valley, that SCCC has suffered a corresponding detriment as a result of not receiving recreation dues from them and that there is no juristic reason for the enrichment. In particular, SCCC alleges that the defendants have enjoyed the following benefits:

- (a) fire department service;
- (b) efficient and less expensive building inspection and zoning services;
- (c) enhancement of property values;
- (d) road design and construction, including the placement of hydrants, standpipes, ditches and draining culverts;
- (e) snow removal services, including roads, driveways and hydrants;
- (f) post office facilities, including post office boxes and a mail-out facility;
- (g) coordination of school bus services;
- (h) lot identification services;
- (i) regulation of tree felling;
- (j) regulation of all-terrain vehicles;
- (k) access and use of over 1100 acres of land and numerous trails;
- (l) access and use of the Community Centre, recreation facilities, pools, games room, playground and other recreation facilities;
- (m) recreational activities;
- (n) rip-rapping of the Sumallo River; and
- (o) various other benefits of Club membership and property ownership.

[79] In support of this claim Donald Low has deposed that the foregoing benefits were created by SCCC and SVD acting together. He says that the fact the defendants have ceased paying recreation dues has resulted in a detriment to SVD and SCCC in the amount of the unpaid dues. Mr. Low deposed further that he and SVD have contributed substantial amounts to the upkeep of the facilities. However, the claim for unjust enrichment is advanced in the amended statement of claim by SCCC, the party to whom the plaintiffs say dues are payable. In order to prove this claim SCCC must prove that the defendants enjoyed a benefit, that SCCC suffered a corresponding detriment and that there is no juristic reason for the enrichment.

[80] The evidence fails to persuade me that SCCC has suffered a detriment corresponding to any benefits that the defendants may have enjoyed. In the first place, the evidence does not satisfy me that it was SCCC that provides most of the services set out above.

(a) *Fire Department and Services*

[81] The Fire Department has been a separate incorporated society for several years. The members of SCCC as well as the defendants contribute a sum of money each month to that society to help finance the operations of the Volunteer Fire Department for the benefit of all residents of Sunshine Valley. With respect to the capital cost of the hall and equipment, Mr. Low's evidence is that in the past SVD spent thousands of dollars upgrading the fire hall and equipment.

(b) *Building inspections and zoning services*

[82] Mr. Low's evidence is that since 1984 SVD and SCCC have been responsible for building inspection and zoning services. Mr. Low's evidence is that this function has been performed by SVD since 1993. Furthermore, these services are provided for a fee and there is no evidence the fees that are charged do not cover the cost of the services.

(c) *Enhanced property values*

[83] There is no evidence to prove that the actions of SCCC as opposed to general inflation of property values or any other circumstances have resulted in an increase in property values.

(d) *Road design and construction*

[84] This was work done by SVD. The cost of the initial work at the time of development was presumably recouped from the sale of lots. Subsequent work was undertaken by SVD for which it has also presumably recouped its costs in some fashion. No evidence has been put forward with respect to these costs.

(e) *Snow removal*

[85] The main roadways in Sunshine Valley are maintained by an independent contractor under contract to the Department of Highways or, in the case of the strata corporations, by those corporations. Mr. Low testified that the Fire Department clears snow from around the hydrants. Snow from the mailboxes is sometimes

cleared by SVD and sometimes by SCCC but there is no evidence that SCCC has suffered any loss or detriment in this regard.

(f) *Post office facilities*

[86] The evidence is that Canada Post provided the post boxes at Sunshine Valley.

(g) *Coordination of school bus services*

[87] None of the defendants have children who attend school and use school buses. In any event the cost of the school buses is not paid by SCCC or SVD. The residents' taxes indirectly contribute to the cost.

(h) *Lot identification*

[88] This refers to work done by Mr. Low and other individuals in the late 1970s or early 1980s to identify the lot numbers on the various properties. There is no evidence what cost, if any, was involved.

(i) *Regulation of tree felling;*

[89] Mr. Low's evidence is that SCCC regulates the removal of trees by charging a permit fee on an individual basis. There is no evidence that there is any cost that is not covered by the individual permit fees. BC Hydro clears trees that are a potential hazard to the power lines.

(j) *Regulation of all-terrain vehicles*

[90] Mr. Low testified that the club instituted rules for the use of all terrain vehicles at Sunshine Valley but there is no evidence of any cost involved with supervision or monitoring. In short, there is no evidence of any detriment to SCCC.

(k) *Access and use of over 1,100 acres of land and numerous trails*

[91] SCCC pays an annual fee to SVD for the use by its members of lands owned by SVD. Non-members, including the defendants, cannot enjoy this benefit.

(l) *Access and use of the Community Centre, recreation facilities, pools, games room, playground and other recreation facilities*

[92] These are facilities and services provided by SCCC to its members.

(m) *Recreational activities*

[93] These are facilities and services provided by SCCC to its members.

(n) *Rip-rapping of the Sumallo River*

[94] This work was done in 1980 or 1981 when a large run-off washed away the river banks. One-half or two-thirds of the cost was met by a Provincial grant and the other portion by contributions from the property owners in Sunshine Valley. SCCC may have been instrumental in organizing the funding but it did not pay the cost.

[95] The unjust enrichment claim must fail because the defendants have paid for any benefits they have received from SCCC. To the extent SCCC provided benefits in the nature of recreation facilities and services from which the defendants derived

a benefit, they contributed to their costs while they enjoyed them by paying recreation dues. Once the defendants withdrew their memberships and ceased to pay recreation dues they ceased to be able to enjoy any of the facilities or services provided by SCCC. The defendants are not receiving a benefit at the expense or to the detriment of SCCC.

[96] SCCC has failed to establish any equitable claim on the basis of unjust enrichment.

CONCLUSION

[97] The claims based on contract are dismissed as against all defendants except Riaz and Nusserin Kassam.

[98] SCCC is entitled to judgment against Riaz and Nusserin Kassam in the amount of \$936.06.

[99] The claim based on unjust enrichment is dismissed as against all defendants.

[100] The parties may make arrangements to speak to costs, if necessary.

“B.M. Joyce, J.”

B.M. Joyce, J.