

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Westbank Holdings Ltd. v. Westgate
Shopping Centre Ltd.*,
2009 BCSC 1460

Date: 20091028
Docket: S061736
Registry: Vancouver

Between:

Westbank Holdings Ltd.

Respondent/Plaintiff

And:

**Westgate Shopping Centre Ltd. and
Elliott Glassman**

Applicant/Defendants

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiff:

H.C. Ritchie Clark

Counsel for the Defendant,
Glassman:

D. Barry Kirkham, Q.C.
& Ramneek S. Padda

Place and Date of Trial:

Vancouver, B.C.
September 1 and 2, 2009

Place and Date of Judgment:

Vancouver, B.C.
October 28, 2009

INTRODUCTION

[1] The personal defendant, Glassman, (“the Applicant”) applies for the following:

1. Judgment under Rule 18A dismissing all claims against him personally as set out in the amended statement of claim.
2. Special costs.

[2] The plaintiff’s/respondent’s allegations against the Applicant include the following:

1. secretly and fraudulently encouraging another party (“Jam’s”) to sue the plaintiff;
2. fraudulently failing to disclose to the plaintiff that Jam’s was contemplating suing the plaintiff; and
3. doing the foregoing so that the corporate defendant could avoid paying certain contract money which it owed to the plaintiff.

[3] In this application, the Applicant makes two main arguments:

1. The plaintiff’s pleadings disclose no cause of action against the Applicant.
2. Even if they do disclose a cause of the action, the evidence demonstrates that Jam’s threats of litigation were fully disclosed by the Applicant to the plaintiff.

[4] On this application, the plaintiff argues as follows:

1. This is not a suitable matter for determination under Rule 18A or, in the alternative;
2. The 18A application should be dismissed on its merits and the matter determined pursuant to a traditional trial or, in the alternative;
3. If the matter is determined under Rule 18A, judgment should be granted to the plaintiff.

[5] Because of the potential for confusion between the names of the parties, I will refer to them as follows:

1. The personal defendant, Glassman, as “the Applicant”;

2. The defendant, Westgate Shopping Centre Ltd. as the “corporate defendant”; and
3. The plaintiff/respondent, Westbank Holdings Ltd. as the “plaintiff”.

[6] In addition to the parties to this litigation, I will refer to other relevant persons and companies as follows:

1. Jam’s International Ventures Inc. as “Jam’s”. I have used this diminutive form because the parties did so. There are several locations in this judgment where a strict application of rules of punctuation and grammar would require a second apostrophe to show possession. I have chosen clarity over strict grammar rules and have not used the second apostrophe in those situations;
2. Ian Gillespie, the principal of the plaintiff company as “Gillespie”;
3. Brent Sawchyn, the principal leasing agent of the plaintiff as “Sawchyn”;
4. Joseph McHugh, the principal of Jam’s, as “McHugh”; and
5. Arlene McHugh, the wife of McHugh as “Arlene McHugh”.

[7] The Applicant was at all relevant times the principal of the corporate defendant.

[8] I find that all of the parties, and the witnesses previously referred to, were at all material times experienced and knowledgeable in business affairs.

SUITABILITY OF RULE 18A

[9] The plaintiff argues that this matter is not suitable for disposition under Rule 18A. It argues as follows:

1. The affidavits relied upon by the Applicant are inadmissible. They purport to provide more evidence than the affiants would be permitted to give in evidence at trial, including unsourced hearsay, arguments, summaries, personal feelings, and opinions.
2. The affidavit of the Applicant reads more like counsel's argument than the Applicant’s own words and evidence. The plaintiff points directly to a number of specific paragraphs which

it objects to. If the foregoing portions of the objectionable affidavits are admitted as evidence, then this application would have to be based upon seriously flawed material.

3. There are credibility issues to be determined. A comparison on the affidavits of the parties and of various witnesses reveals many areas of conflict, some involving crucial particulars. They should be tested by cross-examination before the finder of fact, particularly in cases of alleged misrepresentation, such as this one.
4. Allegations of fraud are central to the issues in this case. Fraud has a subjective element that is not easily determined or resolved on the basis of affidavit evidence alone, even where there are cross-examination transcripts available.
5. This application will not dispose of the trial even if the Applicant is successful. This is because the corporate defendant has not joined the Applicant in this application. The amended statement of claim pleads fraud against both the Applicant and the corporate defendant independent of each other. Therefore, even if the Applicant is successful on this application, the same issues on this application will remain to be litigated between the plaintiff and the corporate defendant.
6. If this application is determined under Rule 18A, and the matter against the corporate defendant proceeds to trial, there is the potential for different findings of fact by, and consequent potential embarrassment for, two different judges.

[10] I reject the arguments of the plaintiff in this regard and am satisfied that this matter is suitable for determination under Rule 18A. While there are conflicts on the evidence, I am satisfied that the totality of the evidence in this case enables me to make the necessary credibility findings and findings of fact. My reasons are as follows:

1. While there are some aspects of the affidavits relied on by both sides which are based on unsourced hearsay, opinion, or are simply argument, I am satisfied that the matter can be determined without reference to those particular aspects of the affidavits. Where there are other matters in the affidavits which depend upon determinations of weight, I am satisfied that the totality of the evidence in this case permits me to make those determinations.
2. In *Strathloch Holdings Ltd. v. Christensen Bros. Foods Ltd.* (1997), 29 B.C.L.R. (3d) 341 (C.A.), the Court concluded that a

misrepresentation claim may, in certain circumstances be amenable to a summary trial. I am satisfied this is one of those circumstances. In that case, the Court said the following at para. 12:

It is of course well established that the existence of "conflicts in the evidence" is not fatal to an application for summary trial under R. 18A, and that when such an application is made, the respondent is expected to take every reasonable step he can to place all relevant evidence before the court, even though he may object to the procedure.

3. In *Dahl v. Royal Bank*, 2005 BCSC 1263, 46 B.C.L.R. (4th) 342, aff'd 2006 BCCA 369, Gerow J. of this court listed and analyzed the types of factors to be considered in determining suitability for trial under Rule 18A. These may include the amount involved, the complexity of the matter, the cost of the conventional trial in relation to the amount involved, and the course of the proceedings, including other factors that may be relevant in specific cases.
4. In applying relevant factors to this case, I conclude the following:
 - (a) The trial is set for seven weeks, tentatively scheduled to begin in October of 2010. This application, which again involves only the Applicant, took less than two days.
 - (b) The amount claimed against the personal defendant is approximately \$103,000, which I am able to determine from a letter from the plaintiff's lawyer providing "particulars of damages".
 - (c) The claim for damages against the corporate defendant may be more than those which are the subject of this application, which involves only the Applicant.
 - (d) Complexity: There is admittedly a good deal of documentation setting out the history of this matter. Nevertheless, I am satisfied that, as against the Applicant, it can be determined as easily on this application as on a trial.
 - (e) While there are credibility issues at stake on this application, I am satisfied that I am in a better position to determine this than are most judges deciding an 18A application. This is because my determinations are not wholly dependent upon conflicting affidavits. While there have not been examinations for discovery, there have been cross-examinations of all of the important parties and witnesses on their affidavits. This includes the

Applicant, Sawchyn, Gillespie, McHugh, and Arlene McHugh. I am satisfied that both parties to this application have had an opportunity to cross-examine the relevant parties and witnesses. These cross-examinations have helped to flush out the information in the various affidavits, and have contributed to a greater understanding of the evidence of each of these persons than would be possible with the affidavits alone. They have assisted me in making credibility findings and ultimately making findings of fact.

- (f) With respect to the argument that a decision on this application in favour of the Applicant will still leave the dispute between the plaintiff and the corporate defendant to be determined by trial, I make no finding and offer no comment. The parties disagree on whether this will be the case. I am satisfied that, whether or not it is the case, it is not a sufficient reason, in the circumstances of this case, to deny the Applicant a hearing under Rule 18A which is otherwise appropriate.

FACTS

[11] This lawsuit arises out of the development of a shopping centre in Maple Ridge, British Columbia commenced by the plaintiff and later invested in by the corporate defendant. A dispute arose with Jam’s, one of the tenants, which involved litigation. In this lawsuit, the plaintiff claims that the Applicant and the corporate defendant fraudulently had dealings with Jam’s to the financial disadvantage of the plaintiff.

[12] What follows is a chronology of important dates and events:

Brief Description

1996	The plaintiff commenced development of a shopping centre in Maple Ridge, British Columbia, known as the Westgate Shopping Centre (the “shopping centre”). The plaintiff assembled the land, let construction contracts, and negotiated offers to lease with various prospective tenants.
1996/early 1997	Sawchyn, on behalf of the plaintiff, discussed with Jam’s the possibility of becoming a tenant.

- Prior to April 17, 1997 Jam's signed an offer to lease with the plaintiff to operate a restaurant. The offer contained an "exclusive use clause" protecting Jam's from the danger of the landlord leasing premises to a competing restaurant in the shopping centre. Sawchyn acted as the principal leasing agent on behalf of the plaintiff.
- April 17, 1997 The plaintiff entered into a Leasing and Project Management Agreement ("LPMA") with the corporate defendant which essentially acquired the shopping centre. The plaintiff was engaged to act as an independent contractor on behalf of the corporate defendant to assist in finding tenants, and to provide project management services, including the supervision of construction and leasing to tenants.
- December, 1997 The plaintiff and the corporate defendant advised Jam's that they were proposing to enter into a lease with "Cheesecake", a potential competitor of Jam's. Jam's immediately objected that this would constitute a breach of the "exclusive use clause".
- January, 1998 Jam's threatened to apply for injunctive relief, but no action was in fact started at that time. At this point, the corporate defendant had not signed a lease with Jam's, and was not prepared to sign one unless the dispute was resolved. The plaintiff and the corporate defendant turned the matter over to the plaintiff's lawyer.
- March 17, 1998 Jam's executed a settlement letter.
- April 15, 1998 Jam's executed a release drafted by the plaintiff's lawyer in favour of the plaintiff and the corporate defendant in respect of the previously mentioned potential competitor of Jam's. At this point, both the plaintiff and the corporate defendant believed the Jam's dispute had been resolved. The corporate defendant entered into a lease with Jam's containing a substantially similar "exclusive use clause" to the one in the original offer.
- April, 1998 The Jam's restaurant opened.
- Fall, 1998 The plaintiff and the corporate defendant conducted negotiations leading to a settlement agreement ("the Settlement Agreement") between themselves resolving all issues under the LPMA.

August, 1998	The potential competing restaurant, "Cheesecake" opened.
October 14, 1998	Jam's wrote to the Applicant that "Cheesecake" was having a severe financial impact on Jam's business. While the letter does not expressly threaten litigation, it is clearly the letter of a very unhappy tenant and I am satisfied that any landlord receiving it would realize that, if the tenant's concerns were not alleviated, at least the possibility of litigation was in the air. The Applicant sent the letter to Gillespie and Sawchyn.
October and November 1998	The Applicant had discussions with McHugh concerning Jam's claim. In the discussions that the Applicant had with McHugh in October and November of 1998, McHugh complained bitterly about misrepresentations allegedly made by Sawchyn back at the time the offer to lease was negotiated. When McHugh threatened to sue based on those misrepresentations, the Applicant indicated that if Sawchyn had misled McHugh, McHugh should take the matter up with Sawchyn or the plaintiff, and that the corporate defendant was not involved at the time of the misrepresentations. There is a difference in the evidence with respect to how many times the Applicant met with McHugh and discussed matters that concerned the plaintiff during this time period. The Applicant deposes that they only met twice during this time period and refers to documentation to support his belief. The other parties cannot point to specific dates of other meetings during this time period, but suggest that the totality of the evidence should lead me to the conclusion that they must have met and/or discussed the matter many more times than that.
October and November 1998	Sawchyn, Gillespie, and the plaintiff maintain that the Applicant did not tell them, during this time period, that Jam's was contemplating litigation. The Applicant maintains that he did tell them, and that they knew about it in any event.
November 23, 1998	The Settlement Agreement between the plaintiff and the corporate defendant was signed and accepted by the plaintiff. Part of the Settlement

Agreement is an indemnity (the “indemnity clause”) granted by the plaintiff in Clause 10(j) which provides that the amount owed by the corporate defendant to the plaintiff would be reduced with respect to:

All costs, charges, fees, expenses, losses, damages and legal fees or disbursements paid or incurred by the Owner in relation to the dispute with and **threatened litigation by Jam’s** International Holdings Ltd., Joseph McHugh and Arlene McHugh. [Emphasis added.]

The Applicant was not a party to the Settlement Agreement although he did direct the participation of the corporate defendant.

- November 26, 1998 The Applicant wrote to the plaintiff and stated:
- I don’t like to say this but the owner of Jam’s has a point. Jam’s sales are some \$20K below break even. Cheesecake is at break even ... **Jam’s with his threat of legal action** may or may not have a legal argument. Unfortunately I think he may be correct on the issue that we put too many restaurants in the shopping centre and more than the market can absorb. Unfortunately given Jam’s reluctance to just walk away from his restaurant I don’t know what to do. [Emphasis added.]
- November 27, 1998 The plaintiff replied to the Applicant advising him not to be concerned with Jam’s threats.
- December 1, 1998 McHugh wrote to the Applicant complaining that when the offer to lease was negotiated with Sawchyn on behalf of the plaintiff, Sawchyn “assured me that he would only lease to complimentary and not competitive restaurants.” McHugh alleged that Sawchyn had represented that the alleged competitor was “a casual and not a family restaurant.” He demanded reduction of Jam’s rent as compensation. His letter concluded:
- Frankly Elliott [Glassman], at this time I can pay legal fees of \$25,000 per month and have a better chance to recapture my investment of \$1,450,000 against [the corporate defendant], its agents and employees, than earn a profit on

my investment. But, as a lawyer, I know that no matter how strong or weak Jam's case is, when **the jury goes out the odds go 50-50**. I prefer to make a business decision not a legal one.

[Emphasis added.]

- December 21, 1998 The plaintiff's lawyer provided a written opinion to his client about the Jam's situation. The plaintiff passed its lawyer's opinion on to the corporate defendant.
- January 4, 1999 The Applicant wrote a memo to the plaintiff concerning a meeting he had with McHugh on December 31, 1998 with respect to McHugh's threatened lawsuit. He pointed out that McHugh was now alleging that the release signed on April 15, 1998 was not valid and that McHugh "**has convinced himself that a lawsuit is the only way** he can recover part/all of his original investment."
[Emphasis added.]
- January 7, 1999 Jam's wrote a letter to the Applicant providing greater detail of his complaints and stating that if he did not receive a settlement by January 15, 1999, he would "**turn this claim over to my attorneys**". The Applicant sent the letter to the plaintiff who sent it to its lawyer.
[Emphasis added.]
- March 9, 1999 Jam's commenced its lawsuit against both the plaintiff, the corporate defendant, and Sawchyn. It later sought to join the Applicant personally as a defendant. The Applicant successfully opposed that application, on the basis that he could not have been personally responsible.
- 2004 The corporate defendant eventually settled its litigation with Jam's.
- March, 2006 The current action was commenced by the plaintiff against the corporate defendant. This is the fourth action commenced by the plaintiff against the corporate defendant and the second one against the Applicant personally.

[13] Additional relevant facts are as follows:

1. The Applicant has deposed that he did not encourage McHugh to sue Sawchyn or the plaintiff, but that he did make it clear that the corporate defendant was not responsible for any of the alleged misrepresentations made to Jam's.
2. McHugh made it clear from the outset that if he commenced an action, he would sue Westgate (the corporate defendant), Westbank (the plaintiff) and Sawchyn.
3. The Applicant acknowledges that the corporate defendant ultimately did cease making payments of what it may have owed to the plaintiff pursuant to the Settlement Agreement in part because of the Jam's situation, but also due to many other outstanding matters that had not been resolved between the parties.
4. Under the Settlement Agreement, the corporate defendant was entitled to set off a number of deductions against whatever amount may still have been owing to the plaintiff.

THE APPLICANT'S ARGUMENTS

[14] The Applicant argues as follows:

1. The plaintiff's pleadings disclose no cause of action against him.
2. Even if there is a cause of action, the evidence demonstrates that Jam's threats were fully disclosed to the plaintiff.

DO THE PLAINTIFF'S PLEADINGS DISCLOSE A CAUSE OF ACTION AGAINST THE APPLICANT?

[15] The Applicant argues as follows:

1. There is no allegation in the amended statement of claim that the Applicant made any representation to the plaintiff concerning Jam's. Rather, the plaintiff pleads that the Applicant was silent about Jam's threats of litigation while secretly persuading Jam's to commence litigation.
2. The foregoing pleaded facts do not disclose a cause of action. Silence cannot constitute fraud except in very discrete circumstances, none of which are present in this case.
3. In support of this proposition, the Applicant has provided me with a number of cases, only some of which I will now refer to.

4. The Applicant refers to the case of *S.(F.) v. H.(C.)* (1994), 120 D.L.R. (4th) 432 (Ont. Gen. Div.), where three exceptions are set out. The court states the following at p. 439:

The former husband also argues that the contract is invalid because there was an obligation on the former wife to disclose material facts to him. The general rule is that mere silence is not misrepresentation. There are, however, three sets of circumstances in which silence or non-disclosure affords a ground for relief, namely:

 - (1) where silence distorts positive representation;
 - (2) where the contract requires *uberrima fides* such as contracts of insurance, for the purchase of shares, or agreements to do with family arrangements;
 - (3) where a fiduciary relationship exists between the contracting parties.
5. *S.(F.) v. H.(C.)* was upheld by the Ontario Court of Appeal, 133 D.L.R. (4th) 767.
6. The plaintiff does not plead that the parties were in a fiduciary relationship.
7. In *Radhakrishnan v. University of Calgary Faculty Association*, 2002 ABCA 182, 215 D.L.R. (4th) 624 the Court explicitly states that settlement agreements are not contracts that import an obligation of utmost good faith. At paras. 59-60, the Court notes the following:

Nor are contracts compromising disputes contracts of the utmost good faith, except possibly for certain types of family property settlement Early in the 20th century, there was a dispute on this topic, but it is now well-settled that non-family compromises are not such contracts, and there is no duty to disclose....

That is logical, because the essence of a compromise is to produce certainty out of uncertainty and incomplete knowledge
8. The plaintiff does not plead any positive misrepresentations on the part of the Applicant. The Applicant argues, therefore, that even if he did not disclose Jam's threats of litigation (which is not admitted), his silence does not amount to fraud and does not become fraud by virtue of any of the three exceptions to the general rule. Therefore, he argues, the plaintiff's case must fail even if everything that has been pled is proven, because no cause of action is disclosed by those pleadings.

[16] I reject this argument by the Applicant. I am satisfied that the facts pled, if proven, may result in this case being an exception to the general rule that silence

does not amount to fraud. Therefore, the pleadings do disclose a cause of action.

My reasons are as follows:

1. While the general rule is that mere silence does not constitute fraud, except in special exceptional circumstances, I am satisfied that a proper analysis of whether fraud is present requires a less rigid analysis of the circumstances than simply determining whether or not they fit into a pre-determined category.
2. I have been referred to a number of cases where a broader approach to the analysis required has been taken. Some of those cases are:
 - (a) In *Sinn v. Arena Developments Ltd.*, [1986] B.C.J. No. 2252, 1986 CarswellBC 1286 at para. 18 (S.C.), Paris J. said this:

The plaintiffs' argument that there was misrepresentation by silence or omission requires closer scrutiny. The law is that mere silence or failure to state a material fact is not normally *per se* a misrepresentation. However, circumstances may exist where information or statements conveyed may, if not explained or further elaborated upon, have a misleading effect and, in that sense, the silence or omission may constitute a misrepresentation, perhaps even a fraudulent one.
 - (b) In *Brownlie v. Campbell* (1880), 5 App. Cas. 925 (H.L.), the principle is noted, and still cited with approval that silence can constitute fraud when a statement is made, which while initially true, later becomes untrue.
 - (c) In *Alevizos v. Nirula*, 2003 MBCA 148, 234 D.L.R. (4th) 352 at para. 34, the court notes that:

... a contracting party who is entitled to remain silent once the decision is made to say anything at all during negotiations on a particular subject that is relevant "must say everything, that is, everything material to the topic in question; by breaking silence, he impliedly 'undertakes' a duty which otherwise the law would not have prescribed" ...
3. I agree with the plaintiff that a less rigid approach is more appropriate in the case at bar.
4. Parties to a contract are under an obligation of good faith to fulfill the agreement and the intention of the parties, and not to act in such a way as to nullify the contractual objectives or cause harm to the other party, contrary to the original purpose and expectations of the parties.
5. In this case, the Applicant was dealing with and negotiating with Jam's, all with an eye to the reasonable expectation of the

parties arising out of the Settlement Agreement. It is a term of the duty of good faith, whether created as a stand-alone duty or by an implied term, that the Applicant would fully disclose to the plaintiff the position of Jam's and certainly that he would not encourage the very litigation with respect to which he was to be negotiating. Such conduct could amount to fraud.

6. If the evidence reveals what the pleadings suggest, this could lead to a finding of fraud. The ordinary rule that mere silence cannot be fraud is not applicable. The pleadings do disclose a cause of action.

[17] This argument made on behalf of the Applicant fails.

DID THE APPLICANT FULLY DISCLOSE JAM'S THREATS?

[18] The plaintiff argues as follows:

1. It is clear that Gillespie did not believe, at the time of the Settlement Agreement, that there was any serious threat of litigation. Otherwise, surely he would not have agreed to sign the indemnity clause.
2. The possibility of Jam's commencing an action was clear. It was relevant to the plaintiff in considering its options with respect to the indemnity clause.
3. Prior to entering the Settlement Agreement, no obligation of good faith was imposed on any of the parties. However, the circumstances were such that the Applicant was required to pass on to the plaintiff everything he was being told by Jam's. He was passing on some information to Sawchyn and Gillespie about McHugh and his position and intentions, but he was not passing on all of it. As Gillespie approached the execution date of the Settlement Agreement (November 23), he approached it believing that the release with Jam's had ended any serious threat of litigation. He was totally dependent (and the Applicant knew it) on the Applicant for any information about McHugh and his intentions in deciding on whether to agree to the indemnity clause in the Settlement Agreement.
4. While it is conceded that his belief was based in part on the release from April of 1998 it was also based in part upon the information provided by the Applicant. However, the Applicant had not been providing all of the necessary information.
5. There is conflict between McHugh and the Applicant as to when and how frequently and vocally McHugh began complaining and

threatening litigation. McHugh's evidence paints a picture of constant and persistent complaining and threatening.

6. The Applicant admits that he met with McHugh on November 19, a few days before the Settlement Agreement was signed. He also says that McHugh was adamant at that point that Jam's was going to sue. However, he did not pass that information on to Gillespie or Sawchyn. Instead, he waited until after the Settlement Agreement was signed as though he had learned it "in the last few days". That was not true. He knew it before the Settlement Agreement was signed.
7. In view of the foregoing, and in view of the fact that the Applicant elected to pass on some of the information, he is not entitled to the benefit of the general rule that silence cannot be fraud. His obligation was to make full disclosure. If he had done so, he would have advised Gillespie of the following:
 - (a) that Jam's had been complaining of and threatening litigation for some time;
 - (b) that McHugh's demands were becoming more and more insistent;
 - (c) that he had told McHugh that he should not sue the Applicant or the corporate defendant, but that it was the plaintiff's problem; and
 - (d) that the threats were serious; it was obvious he was going to sue.
8. If the Applicant had advised Gillespie accordingly, Gillespie would not have signed the Settlement Agreement with the indemnity clause.
9. Even after executing the Settlement Agreement, while it is true that the Applicant was passing on McHugh's correspondence, he was not conveying that he was actively and stridently pressing McHugh to commence litigation. This was clearly contrary to the reasonable expectations of the parties to the Settlement Agreement. The Applicant did it for two reasons:
 - (a) to involve the plaintiff directly in litigation and therefore spread costs, if not liability; and
 - (b) to delay the corporate defendant's payments to the plaintiff.
10. The corporate defendant still owed the plaintiff \$700,000 under the original contract regarding the shopping centre. The Settlement Agreement suspended the obligation to pay and provided that every dollar the corporate defendant spent

defending the Jam's litigation reduced the balance owing to the plaintiff.

[19] I reject the plaintiff's argument. The evidence satisfies me that the Applicant did make all disclosure required of him to the plaintiff. My reasons are as follows:

1. There is insufficient evidence to allow me to conclude that the Applicant received any information from Jam's at any time which he failed to disclose to the plaintiff. The evidence discloses that he passed on to the plaintiff each and every communication received from Jam's concerning Jam's intention to sue.
2. More than 10 years has passed since the occurrence of many of the events under consideration. All memories are necessarily diminished. The memory of the Applicant is also diminished; however, I am satisfied that he is more clear in his affidavits, his cross-examinations, and in his memory of relevant details than any of the other parties or witnesses. Further, and more importantly, given the amount of time that has passed, the documentation supports the evidence of the Applicant.
3. Among the documentary evidence, which supports the Applicant's position, are the following:
 - (a) the existence of the Settlement Agreement of November 23, 1998 which specifically refers to threatened litigation by Jam's;
 - (b) his letter of November 26, 1998, which specifically refers to Jam's threat of legal action;
 - (c) the fact that the plaintiff's own lawyer wrote an opinion on the subject on December 21, 1998; and
 - (d) a memo the Applicant wrote on January 4, 1999 to the plaintiff on the subject of a meeting he had with McHugh on December 31, 1998.
4. There was no reason for Clause 10(j) to be in the Settlement Agreement except for the fact that Jam's threats of litigation were known. The plaintiff argues that Gillespie would not have signed if he had known that the threat of litigation was a serious one. Surely, the reverse is more logical, that is, the Settlement Agreement would not have made express reference to it, if it was not serious. That Gillespie did not consider it as seriously as he should have is no fault of the Applicant's; rather, Gillespie was in a position to make his own assessment of just how seriously he should take the threat, and he assessed it as not being serious.

5. Gillespie's real complaint should not be that the Applicant did not tell him about Jam's threats of litigation but that Gillespie did not take them seriously because of the release which Jam's signed in April of 1998. The Applicant, Gillespie, the corporate defendant, and the plaintiff all thought that Jam's threat of litigation was likely to go nowhere because of that release.
6. The Applicant had little motive to encourage Jam's to sue. The fact is that McHugh had indicated that he would sue everybody, including the Applicant and the corporate defendant. He did in fact sue the corporate defendant as well as the plaintiff, and attempted, although unsuccessfully, to join the Applicant.
7. When cross-examined, McHugh indicated that he had made it clear that if he sued he was going to sue "everyone" including the corporate defendant.
8. The Applicant concedes that he told McHugh that neither he nor the corporate defendant were liable and that if McHugh intended to sue anybody it should be the plaintiff. Surely, that is not fraud, deceit, or improper in any way. McHugh had already indicated that the threat to sue was the result of misrepresentations made by Sawchyn, at a time when Sawchyn was connected to the plaintiff.
9. Sawchyn, in his evidence, said that he had no recollection of relevant details independent of the documents.
10. Gillespie testified during cross-examination on his affidavit as follows:
 - Q But when you signed the settlement agreement, you indemnified Westgate with respect to the threatened litigation of Jam's?
 - A Right.
 - Q So it was knowledge on your part at that time there was threatened litigation?
 - A Yeah, as I've said a dozen times, this guy was whining for a long time.
11. Gillespie testified that Jam's threat of litigation did not cause him any concern, despite the indemnity in the Settlement Agreement, because he was firmly of the view that the release of April 15 had put all issues to rest.
12. In respect of Jam's memo of January 4, 1999, where McHugh claims the release was not valid, and that he had convinced himself a lawsuit was the only way to recover his investment, Gillespie's response was:

There's nothing in this document that we wouldn't have all talked about There's nothing new in that document From way back, from when he first started complaining.

13. In one of McHugh's affidavits sworn June 28, 2004, he states the following:

The Westbank Defendants' assertion that we conspired with Westgate at the outset of this litigation is ridiculous, for the following reasons:

- (a) We did not know about the existence of the Settlement Agreement until after the commencement of the litigation;
- (b) We made it very clear that at all times we were going to sue the [corporate defendant], Brent Sawchyn and [the plaintiff], as we believed there were duties owed to us severally by those parties; and
- (c) Our legal fees since 1999 are in the hundreds of thousands of dollars, and a lot of them were expended in bitterly fought disputes with Westgate, our alleged co-conspirator. For example, we spent a great deal of time and effort and money in an ultimately unsuccessful attempt to add Mr. Glassman as [a] party in the Action.

14. McHugh swore a second affidavit which arguably was different than the first. However, in his cross-examination, McHugh clarified that what he was saying in his both affidavits was the same thing, namely, that if Jam's was going to sue, the suit should be against Westbank and Sawchyn. McHugh admitted that the Applicant did not want the suit to be commenced.

15. In cross-examination, McHugh said the following:

Q But he wasn't saying he wanted you to sue them he was simply saying, if you choose to sue, you should sue them, not him. Because they were at fault not him; fair?

A Yeah, I don't think -- yeah, I think that's fair, Counsel. He didn't want us to sue. He said, if you're going to do it -- yeah, that's right.

16. Arlene McHugh testified that when she received a phone call from the Applicant asking if the lawsuit had already been started, that phone call was in fact received after the lawsuit had been started.

[20] I am satisfied, on the totality of the evidence, of the following:

1. The Applicant was not involved in secret negotiations with, or any attempt to encourage, Jam's to sue the plaintiff.
2. The Applicant fully disclosed to the plaintiff what he knew about Jam's intention to sue.
3. The plaintiff suffered no harm or damages as a result of the Applicant informing, or not informing, the plaintiff of what he knew about Jam's intentions. Those intentions were already known to the plaintiff.

DECISION

[21] The application for judgment under Rule 18A is allowed. The plaintiff's suit against the Applicant is dismissed. Judgment is granted for the Applicant.

[22] These reasons and this judgment are not intended by me to have any bearing on the suit between the plaintiff and the corporate defendant, or on any judge who might be dealing with that matter.

SPECIAL COSTS

[23] The Applicant claims that special costs should be awarded because of unwarranted allegations of fraud made by the plaintiff in its suit. They are well aware that their allegations are contrary to the facts: *Genesee Enterprises Ltd. v. Rached*, 2001 BCSC 1172 at para. 11.

[24] At the very least, a *prima facie* case must exist to support such serious allegations, and if it does not, then special costs may be appropriate by way of "chastisement" as a reminder to the defendant to exercise better care in the future: *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at para. 9.

[25] On the other hand, the Supreme Court of Canada has stated that:

An unsuccessful attempt to prove fraud or dishonesty on a balance of probabilities does not lead inexorably to the conclusion that the unsuccessful party should be held liable for solicitor-and-client costs, since not all such attempts will be correctly considered to amount to "reprehensible, scandalous or outrageous conduct".

Hamilton v. Open Window Bakery Ltd., [2004] 1 S.C.R. 303 at para. 26.

[26] The quotation from *Hamilton v. Open Window Bakery* is apt in the circumstances of this case. I am not satisfied that this is a case where I should exercise my discretion to award special costs, and I decline to do so.

[27] The Applicant is entitled to his costs in the usual way at the scale for matters of ordinary difficulty.

“Silverman J.”

The Honourable Mr. Justice Silverman