IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dr. Anca Catona Inc. v. Elkerton*, 2010 BCSC 83

Date: 20100122
Docket: S095938
Registry: Vancouver

Between:

Dr. Anca Catona Inc. and Dr. Dan Catona Inc.

Petitioners

And

Janis Lynn Elkerton

Respondent

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for the Petitioner:	H.A. Mickelson, Q.C.
Counsel for the Respondent:	J.P. McStravick
Place and Date of Hearing:	Vancouver, B.C. November 9, 2009
Place and Date of Judgment:	Vancouver, B.C. January 22, 2010

[1] This petition is brought pursuant to Rules 10(1)(b) and 57 of the *Rules of Court.* Rule 10(1)(b) reads as follows:

> 10(1) An application, other than an interlocutory application or an application in the nature of an appeal, may be made by originating application where
>
> ...
>
> (b) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or written contract, or other document ...

[2] The petitioner seeks certain declarations of the meaning and effect of various provisions in a co-owner's agreement dated January 1, 2005 in respect of premises located at 2130 Austin Avenue in Coquitlam (the "Property") and as to the meaning and effect of two virtually identical option agreements, one dated July 31, 2006 and the other undated, respecting options granted in relation to ownership interests in the Property.

[3] The petition sets out the essential facts upon which the applications are based and which have given rise to a dispute between the petitioners and the respondent as to the meaning and effect of the provisions at issue. The petitioner's statement of facts, reads, in part, as follows:

> 1. The Austin Dental Group clinic is located at 2130 Austin Avenue, Coquitlam, B.C. (the "Property").
> 2. Prior to 2006, three dentists, Dr. Douglas Garnett, Dr. William Shiels, and Dr. Wayne Elkerton practiced dentistry together at that address under a cost sharing agreement.
> 3. The premises out of which Austin Dental Group operates was custom designed on an "open plan" concept. The three dentists share all common areas such as the waiting room.
> 4. The dentists, or their respective professional corporations, rented the Property from the Co-Owners, who were the wives of the three dentists, each wife holding a one-third interest as tenants in common in the Property. The Co-Owners entered into a Co-Ownership Agreement dated January 1, 2005.

5. The Co-Ownership Agreement provided that if any Owner wished to sell her interest in the Property to a third party, she was required to first offer that interest to her husband, and secondly to the other Co-Owners, who had rights of first refusal.

6. In or about 2006, Doctors Garnett and Shiels were looking to retire. They decided to sell their respective practices to other dentists who would be prepared to take their place and work with Dr. Elkerton in the open plan style premises located at the Property.

...

8. In 2006, Dr. Garnett sold his practice to Dr. Anca Catona. Also in 2006, Dr. Shiels sold his practice to Dr. Dan Catona.

9. In co-ordination with the purchase of the practices of Doctors Garnett and Shiels, the Petitioners entered into a Dental Office Lease with Ms. Elkerton and the other Co-Owners, Ms. Garnett and Ms. Shiels on July 31, 2006.

10. As consideration for the Petitioners purchasing the practices of Doctors Garnett and Shiels (with its corresponding benefits to Ms. Garnett and Ms. Shiels), agreeing to share the Property with Dr. Elkerton by, *inter alia* entering into the Dental Office Lease, and entering a cost sharing agreement with Dr. Elkerton, the Petitioners sought and obtained the Option Agreements whereby each of the Petitioners could purchase the respective interest of Ms. Garnett and Ms. Shiels in the Property. One of the Option Agreements was dated July 31, 2006; the other is undated but is in substantially the same terms.

11. As the Option Agreements engaged the right of first refusal provided for in the Co-Ownership Agreement, it was necessary and appropriate for all of the other Co-Owners, and the husband of the respective optionors, to consent to and become signatories of each of the Option Agreements, along with the optionor.

12. It was understood and agreed among the parties that by exercising the option under the Option Agreements, each of the Petitioners would become bound by the terms of the Co-Ownership Agreement "with such changes reasonably necessary to give effect to [their] inclusion ..." (clause 5.05(c)).

13. The Option Agreements set out a procedure for determining the Purchase Price (as that term is used in the Option Agreements). In particular, that procedure involved each party retaining an independent appraiser, and provided for binding arbitration in certain circumstances. This Purchase Price valuation procedure required significant expenditure by both the optionor and the optionee.

14. On May 25, 2009, each of the Petitioners exercised their options to purchase the interests in the Property provided for under the Option Agreements, thus ripening and converting the Option Agreements into enforceable agreements for the sale and purchase of land.

15. Ms. Elkerton has asserted that, notwithstanding her express consent to the Option Agreements, she retains a further right of first refusal under the Co-Ownership Agreement which she may exercise in response to the Petitioners exercising their respective options under the Option Agreements.

16. As at the present date, due to disagreements among the optionor-vendors and optionee-purchasers as to compliance with the valuation process under the Option Agreements, the Purchase Price of the one-third interests of Ms. Garnett and Ms. Shiels have not yet been determined.

[4] The relevant provisions of the option agreements, which were between the petitioner, Dr. Dan Catona Inc., Kirsten Shiels, Sharon Lynn Garnett, Janis Lynn Elkerton (the respondent) and Dr. William Shiels in relation to the July 31, 2006 agreement and between Sharon Lynn Garnett, the petitioner, Dr. Anca Catona Inc., Kirsten Shiels, the respondent, Lynn Elkerton, and Dr. Doug Garnett in relation to the undated agreement read as follows:

> A. The Owner is the owner of an undivided one-third (1/3) interest as tenant-in-common in and to the Land (the “Interest”);
>
> B. The Owner has agreed to grant to the Optionee an option to purchase in respect of the Interest on the terms and conditions set out in this Agreement; and
>
> C. Sharon and Janis, who each hold an undivided one-third (1/3) interest as tenants-in-common in and to the Land, and who each hold certain rights under the Co-ownership Agreement including, without limitation,

rights in connection with any proposed or deemed or actual purchase and sale of the Interest as contemplated under Articles 5 and 6 of the Co-ownership Agreement and Dr. Shiels who holds certain rights under the Co-ownership Agreement including, without limitation, rights in connection with any proposed or deemed or actual purchase and sale of the Interest as contemplated in Articles 5 and 6 of the Co-ownership Agreement, have been included as parties to this Agreement to acknowledge and confirm the option to purchase granted by the Owner on the terms and conditions set out in this Agreement.

...

1.1

...

(c) "Co-ownership Agreement" means the co-ownership agreement made as of January 1, 2005 among the Owner, Sharon, Janis, Dr. Shiels, Dr. Douglas Garnett and Dr. Wayne Elkerton governing the ownership of the Land and granting certain rights to the parties thereto;

(d) "Exercise Date" means the date on which notice of the exercise of the Option is delivered by the Optionee to the Owner under section 2.3;

...

(k) "Option Expiry Date" means the earlier of August 1, 2011 and that date upon which any of Sharon, Janis or Dr. Shiels acquire the Interest in accordance with the Co-ownership Agreement.

...

2.1 Option. Subject to any and all rights which Sharon, Janis and/or Dr. Shiels may have under the Co-ownership Agreement including, without limitation, any and all rights in connection with any proposed or deemed or actual purchase and sale of the Interest as contemplated under the Co-ownership Agreement, the Owner hereby grants to the Optionee the sole and exclusive option, irrevocable within the time herein limited, for exercise by the Optionee to purchase the Interest.

...

2.3 Exercise of Option. The Optionee may exercise the Option at any time until 12:00 p.m. (noon) on the Option Expiry Date by delivering to the Owner written notice of the exercise of the Option. If the Option is exercised as set forth in this section 2.3, this Agreement shall become a binding agreement for the

purchase and sale of the Interest which shall be completed upon the terms and conditions contained in this Agreement on the Closing Date.

2.4 Non-exercise of Option. If the Option is not exercised within the time and in the manner set forth in section 2.3, the Option and this Agreement shall be null and void and no longer binding upon the parties.

2.5 Effect of Acknowledgement and Confirmation of Option. The acknowledgement and confirmation of the grant of the Option set out in Recital C to this Agreement is restricted to the grant of the Option and will not be deemed to be a consent to or waiver of the requirement for the Owner to comply with, and will not prejudice any of the rights of Sharon, Janis or Dr. Shiels, under Articles 5 and 6 of the Co-ownership Agreement. Any and all rights of Sharon, Janis and Dr. Shiels under Articles 5 and 6 of the Co-ownership Agreement shall take precedence over, and be paramount to, the Option granted herein.

...

6.1

...

(d) other than the Optionee and Sharon, Janis and Dr. Shiels under the Co-ownership Agreement, no Person has any agreement, or option or right to, or capable of becoming an agreement, option or right to, acquire any interest in the Interest;

...

10.5 Entire Agreement. This Agreement and the agreements, instruments and other documents entered into under this Agreement set forth the entire agreement and understanding of the parties with respect to the subject matter of this Agreement and supersede all prior agreements and understandings among the parties with respect to the matters herein and there are no oral or written agreements, promises, warranties, terms, conditions, representations or collateral agreements, express or implied, other than those contained in this Agreement.

[5] The relevant provisions of the co-owner's agreement which is incorporated by reference in the option agreements, read as follows:

5.02 Except as expressly provided for in this Agreement, no Co-owner shall sell, transfer, assign,

convey, grant an option to purchase, grant a right to purchase or otherwise dispose of its Interest or any portion thereof in any manner whatsoever unless it first offers for sale such Interest or portion thereof to the other Co-owners in accordance with the provisions of this Article 5.

5.03 If any Co-owner (the "Offeror") receives a *bona fide* written offer (the "Trigger Offer"), solicited or otherwise, to purchase its Interest or any portion thereof (the "Offered Interest") on terms and conditions upon which the Offeror would, except for the existence of this right of first refusal, be willing to accept and by such acceptance constitute and enter a legally binding contract of purchase and sale, the Offeror shall by notice in writing offer to sell the Offered Interest to Doug, Bill, Wayne and/or the other Co-owners (the "Offerees") as follows:

(a) the offer (the "Husband Sale Offer") shall be made first:

(i) to Doug, if the selling Co-Owner is Sharon;

(ii) to Bill, if the selling Co-owner is Kirsten; or

(iii) to Wayne, if the selling Co-owner is Janis

Which Husband Sale Offer shall comply with the following provisions:

(iv) the Husband Sale Offer shall specify that it is being made pursuant to the provisions of this Agreement;

(v) the Husband Sale Offer shall enclose a copy of the Trigger Offer and shall specify the details of the Offered Interest and the terms and conditions of sale including, without limitation, the price, expressed in the lawful money of Canada, and the terms of payment, which terms and conditions shall be identical to those in the Trigger Offer;

(vi) the date that the Husband Sale Offer shall become effective (the "Husband Effective Date"); and

(vii) the Husband Sale Offer shall limit the time in which the Husband Sale Offer, if not accepted, shall be deemed to be declined by the Offeree, but the time for acceptance shall not be less than ten Business Days from the Husband Effective Date; and

(b) if none of Doug, Bill or Wayne accepts the Husband Sale Offer in (a), above, the offer (the "Remaining Co-owners Sale Offer") shall be made second to the Remaining Co-owners, which Remaining Co-owner Sale Offer shall comply with the following provisions:

(i) the Remaining Co-owner Sale Offer shall specify that it is being made pursuant to the provisions of this Agreement;

(ii) the Remaining Co-owner Sale Offer shall enclose a copy of the Trigger Offer and shall specify the details of the Offered Interest and the terms and conditions of sale including, without limitation, the price, expressed in the lawful money of Canada, and the terms of payment, which terms and conditions shall be identical to those in the Trigger Offer;

(iii) the date that the Remaining Co-owner Sale Offer shall become effective (the "Remaining Co-owners Effective Date"); and

(iv) the Remaining Co-owners Sale Offer shall limit the time in which the Remaining Co-owners Sale Offer, if not accepted, shall be deemed to be declined by the Offeree, but the time for acceptance shall not be less than ten Business Days from the Remaining Co-owners Effective Date.

5.04 Any of Doug, Bill or Wayne, as the case may be, may accept his Husband Sale Offer in whole only. Any of the Offerees who are remaining Co-owners may accept the Remaining Co-owners Sale Offer and by such acceptance specify any additional portion of the Offered Interest which such Offeree who is a remaining Co-owner is prepared to purchase in the event that any of the other Offerees who are remaining Co-owners fails to accept the Remaining Co-owners Sale Offer. If any of the other Offerees who are remaining Co-owners fails to accept the Remaining Co-owners Sale Offer. If any of the other Offerees who are remaining Co-owners fails to accept the Remaining Co-owners Sale Offer, such Offeree who is a remaining Co-owner accepting the Remaining Co-owners Sale offer (*pro rata* with any other Offerees who are remaining Co-owners and who have also specified that they will accept additional portions of the Offered Interest based on their respective Proportionate Interests in the Property. If the Offerees who are remaining Co-owners accept or are prepared to purchase in total all, but not less than

all, of the Offered Interest, then a binding contract of purchase and sale shall come into effect upon notice of such acceptance being delivered to the Offeror. Notwithstanding the foregoing, it is agreed that:

(a) no acceptance shall be effective unless it is accompanied by a copy of a commitment letter whereby a financial institution, or other lender acceptable to the Offeror, has irrevocably and unconditionally committed to provide to the Offerees financing sufficient to permit him or her to complete the purchase and sale of the Offered Interest; and

(b) if the Trigger Offer and, therefore, the Husband Sale Offer or the Remaining Co-Owners Sale Offer, as the case may be, contains a provision for vendor financing, the Offerees may accept on a full cash price the basis, which cash price may be financed by the Offeror.

5.05 If the Husband Sale Offer and/or the Remaining Co-owners Sale Offer is not accepted, then the Offeror may sell, transfer, assign or otherwise dispose of the Offered Interest to the Person making the Trigger Offer (the "Third Party") provided however that:

(a) the Offered Interest shall not be sold, transferred, assigned or otherwise disposed to the Third Party upon terms other than the terms contained in the Trigger Offer and the Husband Sale Offer and/or the Remaining Co-owners Sale offer;

(b) if the Offered Interest is not sold, transferred, assigned or otherwise disposed of to the Third Party in accordance with the Trigger Offer, the Offeror shall not be entitled to sell, transfer, assign or otherwise dispose of any of the Offered Interest and the provisions of this Article 5 shall again become applicable to the sale, transfer, assignment or other disposition of the Offered Interest;

(c) the Offered Interest shall not be sold, transferred, assigned or otherwise disposed to the Third Party unless the Third Party signs and delivers an amended and restated co-owner's agreement agreeing to be bound by all of the provisions hereof (with such changes reasonably necessary to give effect to the inclusion of the Third Party);

(d) the Offered Interest shall not be sold, transferred, assigned or otherwise disposed to the Third Party unless the Offeror pays to the remaining Co-owners all sums of money due and owing from the Offeror to the remaining Co-owners pursuant to the terms and conditions of this Agreement.

[6] In an affidavit sworn September 11, 2009, the respondent attested to her understanding of the option agreement, and the basis for it at para. 11:

> Prior to signing the Option to Purchase Agreement at Schedule B of the Petition, I specifically asked the solicitor involved in the transaction, David Saito, to confirm that my rights of first refusal in the Co-Ownership Agreement were preserved and were not in any way, shape or form negatively affected by the Option to Purchase Agreement. Mr. Saito assured me that my rights of first refusal in the Co-Ownership Agreement were preserved and were not negatively affected by the Option to Purchase Agreement. He specifically referred me to those portions of the Option to Purchase Agreement set out in paragraph 10 of my Affidavit which I read. Based on the foregoing, I signed the Option to Purchase.

[7] In an affidavit sworn August 13, 2009, Dr. Dan Catona, the principle of Dr. Dan Catona Inc., attested that he and his wife, Dr. Anca Catona, the principal of Dr. Anca Catona Inc., bought the practices of Dr. Garnett and Dr. Shiels respectively; paid more for the practices than they felt they were worth; and, paid an "above market rent" for the office space, in part because they understood that "after exercising the option and purchasing the interests under the option agreement" they had the ability to become co-owners of the Property. He attested to their understanding, in effect, that the other co-owners and respective optioners' husbands entered the option agreements because it was necessary for them to consent to the grant of the option, because of their rights of first refusal.

[8] By share purchase agreements entered in March 2006 (before execution of the option agreements), the petitioners

purchased the shares in the respective dental practices which they were purchasing. Dr. Anca Catona Inc. purchased the shares of Dr. D.S. Garnett Inc. for $290,000 and Dr. Dan Catona Inc. purchased the shares of Dr. William R. Shiels' dental practice for the sum of $250,000. The share purchase agreements each contain the following conditions precedent at para. 6.1:

> (g) on or before the Closing Date, the Purchaser or its nominee shall have negotiated the option rights to purchase at least a one-third (1/3) interest in the building in which the Dental Practice is located, for a purchase price equal to the fair market value of such interest, provided however, that such option to acquire an interest in such building shall only be exercisable if the other co-owners of such building do not exercise their right of first refusal in respect of the purchase of such one-third interest in such building;

[9] In addition to the share purchase agreements and option agreements, the petitioners also entered into cost sharing agreements and dental office lease agreements in furtherance of the purchase of the practices of Drs. Garnett and Shiels.

[10] It is the central thrust of the petitioner's submission that the provisions of the option agreement incorporating and preserving the portions of the co-owners agreement respecting the option husbands' and other co-owners' rights of first refusal are subordinate to the legal character of the grant of an option. The petitioners say the grant of option is "an irrevocable offer by the optionor to convey the property upon the exercise of the option", that having received the grant, the optionee has the unilateral right to compel the conveyance, and that once the option is exercised, there is a binding and enforceable bilateral agreement.

[11] The petitioners contend that in light of the legal nature of the grant of an option – it being a divestiture of an interest in land – the legal effect of the co-owners' agreement provision which was incorporated into the option agreement cannot

be to derogate from or limit that divestiture from the optionor to the optionee, otherwise it does not constitute an option. Thus, say the petitioners, the effect of the co-owners' provision respecting the right of first refusal, must be interpreted in a way that preserves the legal character of the option as an option and not in a way that changes its legal nature or status. The petitioners further contend that the references to the co-owners agreement and the option agreements are present for the mutual benefit of all the parties and represent an acknowledgement that the respective option husbands and/or co-owners, were already given a "first opportunity" to purchase before the grant was made to each petitioner.

[12] The petitioners say the reference to the co-owners agreement benefits the co-owners and the option husbands by preserving the other (unexpended) rights under the co-owners agreement, including a requirement that the petitioners, upon exercising their options, become parties to the co-ownership agreement and subjecting them to the co-owners' right of first refusal, and as well, maintaining the option husbands and co-owners' future right of first refusal in the event that the petitioners fail to exercise their options before expiry.

[13] The petitioners submit that it would be a legally absurd result to construe the co-ownership provisions so as to change the legal character of a grant of option and as well, it would be a commercially absurd result. The petitioners say that the prospect of an optionee exercising his/her option and going through the burden and expense of the valuation process only to have an option husband (for example) "buy" his wife's interest out from under the optionee to thwart a sale at a price the optionor considers unfavourable, is not commercially efficacious. The petitioners submit that even the prospect of a co-owner shouldering aside the optionee to take advantage of a favourable sale price would reduce the value of the option to the optionee and not provide much motive for the optionee to exercise his/her

option. Again, the petitioners say that would not be a commercially reasonable result as it would leave the optionor without a lever for the sale of her interest in the property.

[14] The petitioners say that in light of the dictates of commercial good sense and the clear legal nature of an option as a divestiture of a property interest to the optionee, the words of the contract favour the construction which they advance: that the option agreement represents a waiver, or an acknowledgement that the option husbands or other co-owners have declined to purchase that which has been granted to the petitioners.

[15] In advancing their position that the legal character of an option conditions the meaning and effect of the contract, the petitioners rely on *Mitsui and Co. (Canada) Ltd. v. Royal Bank of Canada,* [1995] 2 S.C.R. 187, 123 D.L.R. (4th) 449.

[16] In that case, at issue was a lease agreement for two helicopters which provided the lessee, Pegasus, an option to purchase the helicopters from the lessor manufacturer (Mitsui) on giving at least 120 days notice in writing, that it wished to exercise the option where upon it would have 30 days to agree to the reasonable fair market value as established by the lessor. When Pegasus defaulted on bank loans from the respondent RBC, the bank appointed a receiver for Pegasus' property under fixed and floating charges. Mitsui had not registered the leases under the *Conditional Sales Act*, R.S.N.S. 1989, C. 84,which defined a conditional sale as "any contract for the hiring of goods by which it is agreed that the hirer shall become or have the option of becoming the owner of the goods upon full compliance with the terms of the contract".

[17] Mitsui sought a declaration that the leases were not conditional sales contracts requiring registration, so that it could claim priority over the bank's security and obtain possession of the helicopters.

[18] The chambers judge held the leases were conditional sales contracts requiring registration and dismissed Mitsui's application. The court of appeal reversed the chamber judge's decision. The Supreme Court of Canada reversed the Appeal Court and restored the judgment of the chambers judge. In doing so, the court reviewed the nature of an option. The relevant clause in the lease at issue was clause 32, which reads as follows:

> PURCHASE OPTION
>
> Lessee, if in compliance with all of its Lease obligations as to any helicopter, shall have the option to purchase said helicopter in its then condition, on the expiration of the term or any renewal under this lease agreement. Exercise of this option shall be by notification to Lessor in writing at least one hundred and twenty (120) days prior to the lease (or lease extension) expiration or this option shall cease. If this option is exercised, the purchase price shall be the reasonable fair market value of the helicopter as established by Lessor. In the event Lessee does not agree to such established price in writing within thirty (30) days of such notification, this option shall cease and neither party shall have any further obligation under this Section.

[19] The issue in *Mitsui* was explained by the court at para. 9 as follows:

> If the leases are conditional sales agreements under the definition in the *Act*, then the respondent loses its priority because of its failure to register. Conversely, if the leases are leases only, then the respondent is entitled to possession and priority. Two questions arise: does a lease with an option to purchase at fair market value fall within the ambit of s. 2(1)(b)(ii) in the *Act*; and is clause 32 a true option?

[20] In considering the nature of an option, at para. 23, the court considered the definition provided in *Canadian Long Island Petroleums Ltd. v. Irving Industries (Irving Wire Products Division) Ltd.*, [1975] 2 S.C.R. 715 at 731-32, 50 D.L.R. (3d) 265:

> An option gives to the optionee, at the time it is granted, a right, which he may exercise in the future, to compel the optionor to convey to him the offered property.
>
> ...
>
> In other words, the essence of an option to purchase is that forthwith upon the granting of the option, the optionee, upon the occurrence of certain events, solely within his control can compel a conveyance of the property to him.

[21] In the balance of para. 23 and para. 24, the court went on to hold as follows:

> 23. ...In that case, it was held that the agreement in question created a right of pre-emption and not an option to purchase. The difference between an option and a right of pre-emption is that an option gives the optionee the unilateral right to exercise the option and thereby require the optionor to sell the subject-matter of the option upon pre-arranged terms. A right of pre-emption, or right of first refusal, does not give the grantee the unilateral power to compel the grantor to sell the property in question. Instead, the grantor has the sole power to decide whether to make an offer. It is only at that point that the grantee (or lessee) is given the opportunity of purchasing the property. A right of first refusal is a commitment by the grantor to give the grantee the first chance to purchase should the grantor decide to sell.
>
> 24. Clause 32 is not a right of first refusal, or right of pre-emption. The respondent did not have the right to decide whether or not it was going to give Pegasus the first chance to purchase the helicopters. The choice was with Pegasus, by virtue of the leases, to decide whether it wished to purchase the helicopters. It alone had the ability to compel the sale of the helicopters. As stated by the Chambers judge, the terms of clause 32 gave the lessee on signing the leases the unilateral right to compel the lessor to sell. I respectfully cannot agree with the Court of Appeal's conclusion that clause 32 was merely a right of pre-emption.

[22] The court went on to hold that the exercise of an option results in a binding contract of purchase and sale, and that "the exercise of the option must mean the acceptance of the

offer. That acceptance must be unconditional and must only be made once, and must be made in accordance with the terms of the option."

[23] The court noted that in *Sudbrook Trading Estate Ltd. v. Eggleton,* [1983] 1 A.C. 444 at 477 (H.L.), Lord Diplock held that the giving of notice was all that was required to exercise an option:

> The giving of such notice ... converts the "if" contract into a synallagmatic or bilateral contract which creates mutual legal rights and obligations on the part of both lessors and lessees.

[24] The court in *Mitsui* held in the case before it that although the agreement called upon the lessee to give notice to the lessor on two occasions: once at least 120 days before the end of the lease; and, subsequently within 30 days of its notification by the lessor of the reasonable fair market value of the helicopters as established by the lessor, the lease was nevertheless an option. The court reasoned, at para. 30, that the first notice by the lessee and the valuation of the helicopter by the lessor were conditions precedent to the exercise of the option, "not conditions precedent to the option *per se*."

[25] The court went on to note as follows in para. 31:

> The parties had previously agreed that the option exercise price was to be the "reasonable fair market value" of the helicopters. That price is not uncertain. It is not subject to further negotiation; it is not an "agreement to agree". The price has been set to be the reasonable fair market value. As noted by the British Columbia Court of Appeal in *Re Nishi,* an option to purchase at "fair market value" is enforceable. This is not a situation where the price or some other material term of the option has yet to be agreed upon. The law recognizes that agreements to purchase property in the future at a "reasonable price" or at "fair market value" are valid and enforceable.

[26] The court concluded, at para. 34:

> As clause 32 gives the lessee the unilateral right to compel the lessor to sell the helicopters at their reasonable fair market value, it is an option. The fact that it is subject to conditions precedent does not alter its nature.

PRINCIPLES OF CONTRACTUAL INTERPRETATION

[27] In the case at bar, both the petitioners and the respondent tendered affidavit evidence which addressed events, negotiations and the subjective expectations of the parties leading up to and following the formation of the option agreement. Both the petitioners and the respondent to some extent relied on that evidence, which was in part contradictory, in advancing their respective positions. In that vein, it was the respondent's position that the fact the respondent signed the option agreement as a party could not reasonably be interpreted as a waiver of a right of first refusal, having regard for the language of the contract and the context of the correspondence between the parties leading up to its formation.

[28] The petitioner's position was that the language of the contract read as a whole, in light of the legal character of an option and the evidence of the expectations of the parties which reflect a commercially efficacious bargain lead to the interpretation that they advance.

[29] In the context of the parties' reliance on evidence extrinsic to the language of the option agreement, several authorities are of assistance.

[30] In *Gilchrist v. Western Star Trucks Inc.* 2000 BCCA 70, 73 B.C.L.R. (3d) 102, the principles of contractual interpretation were stated at para. 17, as follows:

> The goal in interpreting an agreement is to discover, objectively, the parties' intention at the time the contract was made. The most significant tool is the language of the agreement itself. This language must be read in the context of the surrounding circumstances prevalent at the time of contracting. Only when the words viewed objectively, bear two or

> more reasonable interpretations, may the court consider other matters such as the post-contracting conduct of the parties ...

The Court went on to say at para. 18:

> The first inquiry, then, is to determine whether there is only one reasonable meaning to the words in the contract, or more than one. In this search, one must look to the surrounding circumstances and the whole of the contract. The words of the contract must be looked at in their ordinary and natural sense and cannot be distorted beyond their actual meaning ...

[31] In *B.G. Checo International Ltd. v. B.C. Hydro and Power Authority,* [1993] 1 S.C.R. 12, 99 D.L.R. (4th) 577, Laforest J. and McLachlin J. (as she then was) in giving the majority judgment wrote as follows at pages 23-24:

> It is a cardinal rule of the construction of contracts that various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole ... Where there are apparent inconsistencies between different terms of the contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective.

[32] Contextual facts assume significance in this case, given both parties' contention that the extrinsic facts can illuminate the language of the contract or its meaning as a whole. In *Glaswegian Enterprises Ltd. v. B.C. Tel Mobility Cellular Inc.* (1997), 49 B.C.L.R. (3d) 317 (C.A.) [*Glaswegian*], the court described the proper role of contextual facts, or the "factual matrix", in the interpretation of a contract, noting at para. 18 that:

> The factual matrix is the background of relevant facts that the parties must clearly have been taken to have known and to have had in mind when they composed the written text of the agreement. It can throw light on what the parties must have meant by the words they chose to express their intention.

[33] The court in *Glaswegian* adopted the words of Donald J.A. in *Black Swan Gold Mines Ltd. v. Gold Belt Resources Ltd.* (1996), 25 B.C.L.R. (3d) 285 (C.A.), where he wrote at para. 19:

> The words of the contract must not be overwhelmed by a contextual analysis, otherwise there is little point in writing things down. No certainty could be achieved in choosing words to express a bargain. Contract disputes would have to be resolved by lengthy enquiries into what was fair in light of what happened before, during and after the making of a contract.

[34] After adopting the words of Donald J.A. in *Black Swan* the court in *Glaswegian* went on to say at para. 20:

> The factual matrix is the background which may deepen an understanding of what the parties meant by the language they used, but the court cannot make a new agreement. ... That meaning is the meaning most consistent with commercial reality and most consistent with the other clauses of the whole agreement.

[35] Similarly, in *Group Eight Investments Ltd. v. Taddei*, 2005 BCCA 489, 47 B.C.L.R. (4th) 278 at para. 21 the court quoted Robins J.A. in *Scanlon v. Castlepoint Development Corp.* (1992), 99 D.L.R. (4th) 153 at p. 179 (Ont. C.A.), leave to appeal ref'd [1993] S.C.C.A. No. 62, as providing a clear summary of the principles of contract interpretation at play in the commercial context:

> The agreement with which we are concerned is a negotiated commercial document which should be construed in accordance with sound commercial principles and good business sense. To the extent that it is possible to do so, it should be construed as a whole and effect should be given to all of its provisions. The provisions should be read, not as standing alone, but in light of the agreement as a whole and the other provisions thereof.

DISCUSSION AND CONCLUSION

[36] In my view, there is some ambiguity in the terms of the option agreement which requires reference to the co-ownership

agreement and to provisions in the share purchase agreements, both of which form a part of the factual matrix which conditions an understanding of what the parties meant by the words used in the option agreement. I conclude, given the language of the option agreement and the co-owners agreement and having regard for clauses 6.1(g) of the Dr. Anca Catona/Dr. Douglas Garnette share purchase agreement, and clause 6.1(h) of the Dr. Dan Catona/Dr. William Sheils share purchase agreement respectively, there is no basis for the view that the option agreement operates as a waiver of the respondent's right of first refusal. I do not however, consider the evidence of the parties subjective intentions to be admissible as factual matrix evidence or otherwise, in construing the terms of this agreement.

[37] Under Article 1 "Interpretation", the definition of the option expiry date as "the earlier of April 1, 2011 and that date upon which any of Kirsten, Janice or Dr. Garnett acquire the interest in accordance with the co-ownership agreement" clearly contemplates that the exercise of the right of first refusal can operate prospectively, that is, after execution of the option agreement. If by signing the option agreement the parties intended that the co-owners were waiving their rights of first refusal, the option could not expire by one of the co-owners acquiring the interest by the co-ownership agreement.

[38] Similarly, Article 2.1 "makes the grant of the option subject to any and all rights which (the respondent) may have under the co-ownership agreement including ... any and all rights in connection with any proposed or deemed or actual purchase and sale of the interest as contemplated under the co-ownership agreement ..." (underlining added). There is nothing in Article 2.1 that is capable of being interpreted as derogating from or limiting the respondent's right of first refusal.

[39] In addition, clause 6.1 of the share purchase agreements clearly provides not that the grant of the option is subject to the right of first refusal provided for in the co-

owners' agreement, but that the option which the petitioners "shall have negotiated" is only exercisable "if the other co-owners of such building do not exercise their right of first refusal in respect of the purchase of the vendor's one-third interest in such building" (underlining added). That language strongly supports the interpretation that it is the exercise of the option, not its grant which is subject to the right of first refusal.

[40] Moreover, there is no language in the option agreements at issue which supports an interpretation that the co-owners waived their right of first refusal by signing the option agreement. If that was the intention of the parties, it would have been very easy to say so clearly and unambiguously. No such language appears in the option agreements.

[41] It is also apparent that all the relevant provisions of the option agreements are consistent with and support the interpretation that the rights of first refusal survive the grant of the options. Although there are some inconsistencies within the option agreement and between the option agreement and s. 6.1 of the respective share purchase agreements, those inconsistencies do not create any ambiguity as to the central issue in this case, which is whether the respondent co-owners' rights of first refusal survive the grant of the option and whether the petitioner's right to exercise the option is subject to that right of first refusal.

[42] Recital C of the option agreements does no more than to identify and acknowledge the existence of the respondent's "rights in connection with any proposed or deemed or actual purchase and sale of the interest" in the property "as contemplated under Articles 5 and 6 of the co-ownership agreement" and to identify and acknowledge the option to purchase granted to the petitioners "on the terms and conditions set out in the agreement". There is nothing in recital C which could be construed as limiting, extinguishing or waiving any of the

respondent's acknowledged rights under Articles 5 and 6 of the co-ownership agreement.

[43] It is apparent, however, that there is some inconsistency between clauses 6.1(g) and 6.1(h) of the respective share purchase agreements and the option agreement. Sections 6.1(g) and (h) of the share agreements refer to the petitioners' options to acquire an interest in the property as being subject to only the co-owners' exercise of a right of first refusal. Those clauses do not refer to the option husbands' rights. The option agreement, by contrast, provides that the grant of the options is subject to the rights of first refusal of the option husbands as well as the co-owners.

[44] Additionally, clauses 6.1(g) and (h) of the respective share purchase agreements contemplate the petitioner's option rights are "exercisable" only if the "other co-owners do not exercise their right of first refusal" whereas the option agreement provides that "the optionee may exercise the option at any time until 12:00 p.m. noon on the option expiry date by delivering to the owner written notice of the exercise of the option" in which case the option "agreement shall become a binding agreement for the purchase and sale of the interest which shall be completed upon the terms and conditions contained in this agreement on the closing date".

[45] Although in clause 2.5 of the option agreement it is provided that the rights of the other co-owners and option husbands under the co-ownership Agreement "shall take precedence over and be paramount to" the option granted, there is no provision to determine how or when the rights of first refusal are to be exercised. While it is clear on the terms of the agreement and by its legal nature that an option becomes a binding agreement for purchase and sale of the property when exercised, even if the price is subject to subsequent valuation, the respondent's interpretation of the agreement appears to contemplate that she can wait to exercise her right of first

refusal, not only until after the petitioners have entered into a binding agreement with the owners, but also until after they have undertaken at some cost, the evaluation process provided for in the option agreement to determine the price they have agreed to pay.

[46] As the petitioners submit, that interpretation of the contract does not make good business sense because the petitioners have no incentive to exercise their options and go through the expense of a valuation procedure if they can be shouldered aside by a co-owner or even an option husband if the valuation is favourable to them. Nor is that interpretation congruent with the legal nature of an option which has been exercised and becomes a binding contract.

[47] I conclude in all the circumstances that the only interpretation that can be found to give reasonable consistency to the terms in question in the option agreement requires implying a term to implement the parties' intent and to give business efficacy to the agreement. The need to give effect to the rights of first refusal in the co-ownership agreement does violence to the provision in the option agreement that the parties enter into a binding contract for the sale and purchase of the property once the option is exercised if there is no provision establishing that the right of first refusal must be exercised or waived first.

[48] I conclude, therefore, that a term should be implied in the option agreement that before the option can be regarded as having been exercised by the petitioners on giving notice of their intention to exercise the option, and before a binding obligation to undertake the valuation procedure to determine the price is imposed, the vendors must, upon receipt of the optionee's notice, provide the other co-owners and option husband with an opportunity to exercise their rights of first refusal under clause 5.03(a) and (b) of the co-ownership agreement on the

same foundation, including the valuation procedure, provided for in the option agreement.

[49] In concluding that a term should be implied in the option agreement to give effect to the presumed intentions of the parties, I have relied on *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* [1999] 1 S.C.R. 619 at paras. 27 and 29 as follows:

> 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).
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> …
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> 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:
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> 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.

[50] The language in the co-ownership agreement under clause 5.03(a)(v) which provides for "a copy of the trigger offer (specifying) the details of the offeror's interest and the terms and conditions of sale including, without limitation, the price ..." (underlining added) is simply not applicable in connection with the Option Agreement which becomes binding on exercise of the option before any price is established, and therefore engages the provisions of clause 5.05(c) calling for "... such changes reasonable necessary to give effect to inclusion of the 3rd party."

[51] In the present case, the right of first refusal is the right to stand in place of the option holders before the options are formally exercised and before the price is determined. It is not a right to set aside a binding agreement after an option has been exercised in the event the valuation procedure produces a price favourable to the purchaser.

[52] In the result, therefore, while I decline to make the declaration sought by the petitioners, I will declare that unless the co-owners exercise their rights of first refusal to enter into a binding agreement on the same terms of the option agreements which the petitioners have given notice of their intention to exercise, and in the manner and on the terms established in clause 5.03 (a) and (b) of the co-ownership agreement (but without a determination of price) and as otherwise modified to suit the provisions of the option agreement and this declaration, then those rights of first refusal are extinguished, and the petitioner's options are exercised and result in a binding agreement of purchase and sale between the optionors and optionees.

[53] As there has been divided success on this petition, I would order each of the parties to bear their own costs.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen