COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Roeder v. Blues,***
2004 BCCA 649

Date: 20041217
Docket: CA31205

Between:

John Roeder, Larry Mashburn,
James Mashburn and William Gordon Buchanan

Appellants
(Plaintiffs)

And

Robin D.A. Blues, Morton & Company and
Robin D.A. Blues, Personal Law Corporation

Respondents
(Defendants)

And

Larry Mashburn, James Mashburn
and William Gordon Buchanan

Defendants
by Counterclaim

Before: The Honourable Chief Justice Finch
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Smith

J.H. Frank	Counsel for the Appellants
A.A. Macdonald	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia November 1, 2004
Place and Date of Judgment:	Vancouver, British Columbia December 17, 2004

Written Reasons by:
The Honourable Chief Justice Finch

Concurred in by:
The Honourable Madam Justice Huddart
The Honourable Mr. Justice Smith

Reasons for Judgment of the Honourable Chief Justice Finch:

I. INTRODUCTION

[1] The plaintiffs appeal from the dismissal of their action for damages for breach of a "Trustee Agreement" or negligence. The plaintiffs say they suffered loss as a result of the defendants' actions in relation to a share purchase transaction. They ask this court to reverse the judgment at trial, impose liability on the defendants on one of the grounds asserted, and assess damages. In the alternative, they seek an order apportioning fault between the plaintiffs and defendants, and in the further alternative, seek orders remitting the matter to the trial court for the apportionment of liability and the assessment of damages.

[2] This appeal was argued by both parties on the footing that the trial judge did not err in concluding, at para. 67 of the reasons for judgment, that the defendants were in breach of the Trustee Agreement. The main issues on this appeal are: (1) whether the learned trial judge erred in holding that the plaintiffs acquiesced in the defendants' breach of the Trustee Agreement, and whether such acquiescence was a complete defence to the claim; and (2) whether fault for any loss caused to the plaintiffs should be apportioned between the

parties due to contributory negligence on the part of the plaintiffs.

II. THE AGREEMENTS

[3] The “Trustee Agreement” sued upon was executed on 29 April 1993. The parties were Tim Pinchin (the purchaser), the plaintiffs (the vendors) and Morton & Company, a firm of barristers and solicitors referred to in the Agreement as “Morton & Co.” (the trustee).

[4] The Trustee Agreement refers to another agreement executed 29 April 1993 between Tim Pinchin as purchaser and the plaintiffs as vendors, described as the “Share Purchase Agreement” (“SPA”).

[5] The relevant parts of the Trustee Agreement provide:

> WHEREAS:
>
> A. By agreement dated the 29th day of April, 1993 (the “Agreement”), the Purchaser agreed to an option to purchase from the Vendors common shares of Keywest Resources Ltd. (the “Company”).
>
> B. Pursuant to clause 2 of the Agreement, the Vendors are to deliver 701,150 free trading shares of the company (the “Free Trading Shares”) and other documents (including stock powers of attorney, directors and officers resignations, etc.) (collectively the “Shares and Documents”) to a trustee to facilitate the sale and transfer of the Shares and Documents.

> C. Each of the Purchaser and the Vendors have agreed to appoint Morton & Company as the Trustee to deal with the Shares and Documents.
>
> NOW THEREFORE WITNESSETH that in consideration of the sum of $1.00 of the lawful money of Canada now paid by each of the Purchaser and the Vendors to Morton & Company, the receipt of which is hereby acknowledged, and the premises and the covenants herein contained, the parties hereby agree as follows:
>
> 1. Morton & Company, Barristers and Solicitors, are hereby appointed as Trustee and Morton & Company hereby agree to act as Trustee and not solicitors for either the Purchaser or the Vendors in respect of the receipt and delivery of the Shares and Documents.
>
> 2. The Shares and Documents will be held by the Trustee and dealt with in accordance with Clauses 4, 5, 6 and 13 of the Agreement, a copy of same is attached hereto as Schedule “A” and which clauses are to be read as part of this Agreement.

[6] The relevant parts of the Share Purchase Agreement are clauses 4, 5, 6, 10 and 13. They provide:

> 4. The Trustee will follow the terms of the trust arrangement agreed upon between the Vendors and the Purchaser in respect of the delivery to the Purchaser of all or a part of the shares and the documents referred to in Clause 2. The trust arrangements will require that the Purchaser make arrangements for payment of the Purchase Price in instalments. The instalments will be paid against delivery of a portion of the Free-Trading Shares, which for the purposes of this Agreement, will be referred to as the “Working Shares”.

Payment Date	**No. of Free-Trading Shares**	**Payment**	
Commencement Date (May 5, 1993)	50,000	$100,000	(First Instalment)
May 30, 1993	200,000	$400,000	(Second Instalment)
August 31, 1993	175,000	$350,000	(Third Instalment)
TOTAL:	425,000	$850,000	

The date that the Third Instalment is to be paid will be referred to as the "Closing Date".

5. Subject to Clause 7, at such time as the Trustee has received each of the instalments described in Clause 4 above, the Trustee will cause the number of Working Shares for which payment is received to be delivered to the direction of the Purchaser (together with Stock Powers of Attorney, if required). The Purchaser may make an instalment payment in an amount greater than the minimum payment indicated, and he may accelerate the payment dates, in which case appropriate adjustments will be made as to the number of Working Shares to be delivered, on the basis of $2.00 for each Working Share paid for. Upon delivery of any of the Working Shares to the Purchaser, the Trustee shall release that portion of the Purchase Price for which such Shares are delivered, to the direction of the Vendors.

6. On the Closing Date, and provided the Purchase Price has been paid in full, the Trustee will deliver to the direction of the Purchaser, the remaining Free-Trading Shares they then hold (being 276,150 shares), and all of the remaining documents referred to in Clause 2 (stock powers of attorney and documents to effect transfer of the Escrow shares, etc.).

. . .

10. The Purchaser's obligations to complete the transaction hereby contemplated shall be subject to the following conditions precedent:

(a) that the Company receive shareholder approval if required to the change of control;

(b) that the Company receive shareholder approval if required, to the disposition of all or substantially all of the Company's assets;

(c) that the Company receive shareholder approval if required, to the reallocation of funds raised by the Company pursuant to its Prospectus Offering;

(d) that this Agreement and the transactions described in Paragraph 10(a), (b), and (c) receive the approval of regulatory authorities of the Company including but not limited to the Vancouver Stock Exchange which approval shall be approved not later than August 30, 1993; …

The conditions set forth in this Clause **except** those that may require shareholder and regulatory authorities approval are for the exclusive benefit of the Purchaser and the Purchaser may waive any of the said conditions at any time.

. . .

13. Notwithstanding any other provision of this Agreement, this Agreement will terminate:

(a) in the event any of the conditions precedent described herein in Clause 10 have not been satisfied and provided the Purchaser has not waived any of the said conditions that may be waived;

(b) in the event the Purchaser does not pay the Third Instalment to the Trustee on the required date provided the Closing Date is not extended;

(c) in the event that the Purchaser does not complete the First and Second Instalments on the dates set out hereinbefore, then in such event, the Vendor shall have the option to terminate the Agreement;

(d) in the event shareholder approval, if required, and regulatory authorities [sic] approval that

> the transaction herein contemplated is not obtained by the Closing Date, provided the Closing Date is not extended; …
>
> In the event of a termination of this Agreement, all of the shares and documents then held by the Trustee and not otherwise released to the Purchaser shall be returned to the Vendors and any of the Purchase Price instalments which may then be held by the Trustee and not yet paid to the Vendors shall be returned to the Purchaser, neither the Vendors or the Purchaser shall have any claim against the other in respect of any matter arising from and during the term of Agreement.
>
> [emphasis added throughout]

III. DECISION OF THE COURT BELOW

[7] The trial judge's finding that the plaintiffs acquiesced in the defendants breach of the Trustee Agreement turned on conflicting evidence of the parties relating to events that occurred in June 1993. At that time, the purchaser Pinchin sought to accelerate the delivery of shares and payment for them, in advance of the schedule contemplated by the SPA. The trustee, represented by the defendant Robin Blues, spoke to the vendors' solicitor, Andrew Chamberlain, concerning the request to accelerate. The learned trial judge summarized the evidence, and made critical findings of fact as follows:

> [43] Blues testified that he returned to his office from a legal education seminar at noon on June 15th. He was told by his assistant that Pinchin had called to say that $130,000 had been deposited as required, he wanted to bring in the remaining sum of $3,880 to which I have earlier referred and he wanted to pick up the remainder of the shares held by the Firm.

> Blues called Pinchin who confirmed the message Blues had received from his assistant. Blues testified that Pinchin asked him to call Chamberlain to say he would have the final purchase price that day and to investigate an early closing of the transaction. Blues testified that he called Chamberlain, told him he would have the final purchase price that day, advised that Pinchin wanted an earlier closing, and asked if Chamberlain had any objection. Blues testified that Chamberlain asked if he, Blues, would have all the funds that day, Blues said yes, and Chamberlain said he had no objection.
>
> [44] Blues' testimony suggests that the conversation with Chamberlain occurred before Blues took any steps to assemble documents for release. I find that was not the case. The firm's telephone records tendered as evidence record a call of 30 seconds duration to Chamberlain at 1229 hours on June 15th. That call reflects a minimum charge and I find that Blues and Chamberlain did not converse at that time.
>
> [45] Blues testified that he gathered the documents in the firm's possession, drafted and signed a letter to Pinchin, left an envelope at reception for pick-up by Pinchin, and left to return to the education seminar shortly after 1300 hours. I find as a fact he had prepared and packaged in an envelope the control documents comprised of a certificate or certificates representing 276,150 free trading shares, executed stock powers of attorney in respect of those shares and 1,088,850 escrow shares, and undated directors' resignations before he had a conversation with Chamberlain of 1 minute 35 seconds duration at 1314 hours on June 15th. I also accept Blues' testimony and find as a fact that he did not review the terms of the SPA or the trustee agreement before deciding to release, or actually releasing, the documents to Pinchin.

[8] The learned trial judge concluded that neither Chamberlain, acting on behalf of the plaintiffs (see paras. 52 and 62), nor Blues as trustee (para. 45) read or reviewed the

terms of the SPA or the Trustee Agreement before releasing the shares and control documents to Pinchin on 15 June 1993. Apparently neither Chamberlain nor Blues recalled that the conditions precedent for shareholder and regulatory approval could not be waived.

[9] Transfer of control of the company was never approved by the shareholders, or by the regulatory authorities at any time. On 30 June 1993 the B.C. Securities Commission stopped trading in the company's shares at the request of Pinchin's solicitor "pending an announcement." After enquiry by the Securities Commission and the Vancouver Stock Exchange, the Commission ordered trading to cease on 19 July 1993.

[10] In concluding that the defendants were in breach of the Trustee Agreement, the learned trial judge said this:

> [66] The trustee agreement employed in this case is noteworthy in that, unlike a commonplace deposit or escrow agreement that directs a custodian to deal with documents or property in accordance with written instructions received from those who are parties to a transaction, this agreement directed the trustee to act in a specified manner, on specified dates, when certain events described in the SPA [Share Purchase Agreement] had occurred. The agreement did not provide or contemplate that the trustee would act in response to written directions from the beneficiaries. The trustee cannot say he discharged his obligations under the trustee agreement because he acted on instructions from the parties. The defence would only be available if the agreement had been amended to direct the trustee to act pursuant to instructions from the parties.

> [67] Neither the SPA nor the trustee agreement was amended after execution. In that regard and contrary to the submissions of counsel for the defendants, I find, both in fact and in law, that the SPA was not amended to alter its closing and approval requirements when Roeder agreed to lend Pinchin US $150,000 to complete the Comm-Tech transaction. The SPA and trustee agreement stipulated that control documents were not to be released without the antecedent shareholder and regulatory approvals. The trustee wrongfully released the control documents in the absence of such approvals and, in doing so, breached the trustee agreement.
>
> [emphasis added]

[11] The learned trial judge then addressed the question of whether the plaintiffs' claim was defeated by their acquiescence in the defendants' conduct. He concluded as follows:

> [71] In my opinion, Chamberlain's concurrence on behalf of Roeder with the proposed course of action in his June 15th telephone conversation with Blues, Chamberlain's acceptance of the advice contained in the Blues letter of June 22nd, the failure of Chamberlain and Roeder to assert any wrongdoing by Blues or to assert any claim to the property or documents on June 30, 1993 when they learned that Pinchin had halted trading in the shares of Keywest, the omission to allege any wrongdoing until August 1993, and the omission to take any legal proceedings against Pinchin to recover property to which he was not entitled until the eve of the expiry of the limitation period six years after the events in question, amount to concurrence in, or acquiescence to, Blues' course of conduct. In my opinion, that concurrence or acquiescence was not vitiated by virtue of the fact that Chamberlain omitted to review, consider, or focus on the specific terms of the SPA or trustee agreement on June 15 or 22, 1993. Blues made no misrepresentation to Chamberlain who

> was fully aware of the requirements relating to the share purchase transaction and fully aware of the course Blues intended to follow.
>
> [72] It follows that I reject Roeder's claim that Chamberlain did not appreciate or understand that which Blues planned to do on June 15th. I am satisfied Blues spoke to Chamberlain of a closing and release of the control documents. Earlier transactions that had resulted in the accelerated payment for, and delivery of, free-trading shares had not been referred to as "closings" in any discussions between Blues and Chamberlain. Chamberlain testified that he was not concerned about the release of the escrow shares or the directors' resignations. It is unreasonable to conclude that he would not have been concerned about those releases, but concerned about the release of the 276,150 free-trading shares without expressing that concern to Blues. As between Roeder and the defendants, any oversight by Chamberlain to which Roeder might point cannot be visited upon Blues.
>
> [73] In the result, the defendants are not liable to the plaintiffs and the action is dismissed.

IV. ISSUES ON APPEAL

[12] On the hearing of this appeal, the plaintiffs abandoned a claim that the "trustee" was in breach of a fiduciary duty. They also abandoned submissions that they or their solicitor Chamberlain were not fully informed of all rights and material facts, and that they took no positive steps to indicate their approval or acquiescence in Blues' release of the shares and control documents.

[13] The arguments advanced by the plaintiffs on the appeal are as follows:

1. First, the finding of acquiescence was in error because the evidence shows that Blues as trustee had already decided to deliver the shares and control documents before he had any conversation with Chamberlain in which the latter expressed agreement on the plaintiffs' behalf in the proposed course of action.

2. Second, acquiescence is not a defence to a claim in law (breach of contract or negligence) as opposed to a claim in equity (breach of trust or fiduciary duty) unless the defendants prove that they relied to their detriment on the plaintiffs' acquiescence in the breach of duty. Delay alone will not suffice to constitute detriment.

These two arguments amount to the assertion that the trial judge erred in finding that Chamberlain authorized the release of the shares and control documents, and that even if Chamberlain did, Blues did not rely on Chamberlain's authorization.

3. Third, the plaintiffs say their claim against the trustee is based on the trustee's breach of the Trustee Agreement. They say that the release of the shares and

control documents on 15 June 1993 may not have amounted to a breach of the SPA if the parties had made a valid parole agreement to vary that contract. However, the Trustee Agreement was never varied, and the trustee, acting through Mr. Blues, had a duty to see that the conditions precedent in the unmodified SPA, expressly incorporated into the Trustee Agreement by paragraph 2, were fulfilled.

4. Fourth, and in the alternative, the plaintiffs say that if Chamberlain acting on their behalf was at fault in agreeing to the release of the shares and control documents, then fault on the part of Blues as trustee contributed to the plaintiffs' loss, and the defendants should be held partially liable for the loss suffered. Counsel invites this Court to apportion fault and assess damages.

V. ANALYSIS AND DISPOSITION

A. ACQUIESCENCE

[14] The learned trial judge relied on ***Brighouse v. Morton***, [1929] S.C.R. 512 as a legal foundation for his finding of acquiescence. That case dealt with acquiescence in the breach of a trust. The appellants argued in their written submissions that no trust relationship had been constituted

between the parties. As I see it, nothing turns on whether the breach of the trust agreement was a breach of trust or a breach of contract. Given the common mistake as to the terms of the trustee agreement, the acquiescence or "equitable estoppel" defence is available in either case (see: I.C.F. Spry, ***The Principles of Equitable Remedies*** (Agincourt: Carswell Co., 2001) at 180-185).

[15] Whether the plaintiffs in this case actually acquiesced in the breach of the Trustee Agreement is a question of mixed fact and law. Insofar as it is a question of fact, the key issue is whether Chamberlain, on the plaintiffs' behalf, agreed to and authorized the early closing and release of the shares and control documents.

[16] The plaintiffs' counsel argued that the trial judge made a palpable and overriding error in finding acquiescence, and he took us through a careful analysis of the evidence concerning the events of 15 June 1993. With respect, it was open to the trial judge to interpret the evidence concerning the events of 15 June 1993 as he did. His view of that evidence, together with the other circumstances supporting a finding of acquiescence, as summarized by him in paras. 71 and 72 of the reasons for judgment quoted above, amply support his finding that Blues released the shares and control documents

only after Chamberlain had expressly agreed to that course of action. I see no palpable or overriding error in the trial judge's finding that Chamberlain acquiesced.

[17] I would not give effect to this ground of appeal.

B. NO RELIANCE OR DETRIMENT

[18] In my view, this argument is also met by the trial judge's conclusions with respect to what occurred on 15 June 1993. He found that Chamberlain concurred on the plaintiffs' behalf "… with the proposed course of action in his June 15th conversation with Blues" (para.71), and he rejected the plaintiffs' evidence that Chamberlain did not appreciate or understand "… that which Blues planned to do on June 15th." These findings support the reasonable inferences, implicit in the trial judge's conclusions, that Blues did in fact rely on Chamberlain's agreement before he released the remaining working shares, the control shares, and the control documents; and that he did act to his potential detriment (by breaching the Trustee Agreement) as a result of that reliance by delivering the shares and control documents to Pinchin, and thereby putting those documents out of his control. Thus, the elements of reliance and detriment were adequately made out for the defence of acquiescence to succeed.

[19] I would not give effect to this ground of appeal.

C. TRUSTEE AGREEMENT NOT VARIED

[20] I do not think this argument advances the plaintiffs' position. As noted at para. 2 above, the finding that Blues was in breach of the Trustee Agreement is not in issue on this appeal.

D. CONTRIBUTORY NEGLIGENCE

[21] Since the trial judge treated the plaintiffs' acquiescence as a complete defence, he did not make any findings as to damages suffered by the plaintiffs, and did not address the issues of contributory negligence and apportionment of fault. However, on his findings there are at least two contributory sources for any such loss: the defendants' breach of the Trustee Agreement; and the conduct of the plaintiffs' solicitor, Chamberlain, in failing to ensure compliance with that agreement.

[22] Paragraph 2 of the Trustee Agreement incorporates clause 13 of the SPA. The defendants therefore owed a duty to the plaintiffs to return to the plaintiffs all shares and documents held by the trustee upon termination of the SPA. As noted above, Clause 13 of the SPA states that the SPA terminates,

> (a) in the event that any of the conditions precedent described herein in Clause 10 have not been satisfied;
>
> … [or]
>
> (d) in the event that shareholder approval, if required, and regulatory authorities [sic] approval that the transaction herein contemplated is not obtained by the Closing Date, provided the Closing Date is not extended.

[23] Clause 4 of the SPA defined the "closing date" as "the date that the Third Instalment is to be paid." Under the accelerated purchase plan, the Third Instalment was to be paid on June 15th, making that date the "closing date." Since shareholder and regulatory approvals had not been obtained by the closing date, the SPA terminated on June 15th. The defendants were then obliged under the Trustee Agreement to abide by s.13 of the SPA and, specifically, to return the shares and documents to the plaintiffs and not to release them to Pinchin. In failing to do what was required of them under the Trustee Agreement, the defendants' conduct may be said to have caused or contributed to the plaintiffs' loss.

[24] With respect to the plaintiffs' solicitors' conduct, the trial judge found as fact that Chamberlain "omitted to review, consider, or focus on the specific terms of the SPA or trustee agreement" (paras. 71 and 64). It is important to recall that

Chamberlain is not a party to these proceedings, and there were no findings of negligence made concerning his conduct.

[25] The trial judge said at para. 72 that “any oversight by Chamberlain to which Roeder might point cannot be visited on Blues.” That is no doubt correct. But that statement overlooks the fact that as the plaintiffs’ solicitor, Chamberlain was their agent with apparent authority to agree, or disagree, to the course of action proposed by the purchaser. Indeed, the trial judge found at para. 62 “that Chamberlain was acting on Roeder’s behalf when he spoke to Blues on June 15th.”

[26] In their submission on appeal, counsel for the plaintiffs acknowledge that Chamberlain “may not have met the standard of a reasonably prudent solicitor”. It is neither possible nor necessary in these proceedings to decide whether Chamberlain’s conduct amounted to negligence in respect of his clients, the plaintiffs. We do not know the nature or scope of his instructions or retainer, there is no *lis* in these proceedings between the plaintiffs and Chamberlain, and Chamberlain’s interests were not represented either in this court or the court below.

[27] However, as between the plaintiffs and the defendants, Chamberlain’s conduct is the conduct of those on whose behalf

he acted. The plaintiffs' conduct in failing to see that the conditions precedent in para. 10 of the SPA were satisfied contributed along with Blues' conduct to any loss the plaintiffs may have suffered. It does not matter whether the plaintiffs relied on Chamberlain to attend to those requirements on their behalf, or whether they proposed to see that those conditions were satisfied in some other way, or whether they simply overlooked those conditions. On the trial judge's findings, which are supportable on the evidence, Blues would not have acted without the plaintiffs' assent.

[28] There are two possible ways to view the plaintiffs' acquiescence in these circumstances. The first is that the plaintiffs' acquiescence by their agent Chamberlain contributed with the defendants' conduct to any loss the plaintiffs have suffered. The second is the trial judge's conclusion that the plaintiffs' acquiescence absolved the defendants from any liability.

[29] With regard to contributory negligence, the provisions of the ***Negligence Act*** R.S.B.C. 1996, c.333, were pleaded in the defendants' amended statement of defence. Counsel advised that contributory negligence was argued as an alternative defence at trial. The learned trial judge, however, did not address this issue in his reasons.

[30] On appeal, we were asked in the alternative to apportion fault as between the plaintiffs and defendants and to assess damages. There is some logic to a contributory negligence analysis in this case. Blues' conduct caused potential loss to the plaintiffs through his release of the remaining working shares, the control shares, and the control documents. The plaintiff's conduct, through their agreement with Blues' course of action, was a factor that contributed to the loss.

[31] The underlying question, however, is whether it would be fair to apportion some fault to Blues, when his conduct was induced by the plaintiffs' own conduct.

[32] Acquiescence, or equitable estoppel, is a defence to a party's unconscionable reliance upon legal rights. This equitable defence is designed to provide fairness in all the circumstances of the case.

[33] In my view, it would be "unfair or unjust" (words this Court found preferable to "unconscionable" in ***Litwin Construction (1973) Ltd. v. Kiss*** (1988), 29 B.C.L.R. (2d) 88 (C.A.) at para. 28), to permit a party to a stakeholding contract who has assented to its breach prior to it being carried out, and accepted benefits from that breach, to claim any compensation from the stakeholder for that breach. It

must be recalled that when the plaintiffs agreed to Blue's release of the shares and control documents to the purchaser, the plaintiffs would receive the third and final payment under the SPA.

[34] In Re Eaves, [1940] Ch. 109, [1939] 4 All E.R. 260 (C.A.), at 117-8, (cited with approval by Oliver J. in Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.; Old & Campbell Ltd. v. Liverpool Victoria Trustees Co. Ltd., [1981] 1 All E.R. 897 (Q.B.)), Lord Justice Clauson said:

> It is well settled that, if a party has so acted that the fair inference to be drawn from his conduct is that he consents to a transaction to which he might quite properly have objected, he cannot be heard to question the legality of the transaction as against persons who, on the faith of his conduct, have acted on the view that the transaction was legal: Cairncross v. Lorimer (1860), 3 L.T. 130; 21 Digest 328, 1227. The principle applies even if the party whose conduct is in question was himself acting without full knowledge or in error: Sarat Chunder Dey v. Gopal Chunder Laha (1892), I.L.R. 20 Calc. 296; L.R. 19 Ind. App. 203; 21 Digest 300, case 1982 iv. In the circumstances of the present case, the defendant was left by the plaintiff to act, and did in fact act, on the view that the winding up of the trust was a completely legal transaction, leaving the fund in his hands as his own for him to spend, and it appears to me to be contrary to all principles that the plaintiff should now be heard to question the legality of the transaction.

[35] I am therefore persuaded that it would be "unfair or unjust" to permit recovery by the plaintiffs against Blues in these circumstances. I respectfully agree with the trial

judge’s conclusion that the plaintiffs’ acquiescence is a complete defence for Blues, and that the action was properly dismissed.

[36] I would dismiss the appeal.

“The Honourable Chief Justice Finch”

I Agree:

“The Honourable Madam Justice Huddart”

I Agree:

“The Honourable Mr. Justice Smith”