

CITATION: York Region Vacant Land Condominium Corporation No. 1010 v. Marcello, 2025
 ONSC 4604
COURT FILE NO.: CV-20-00636171-00CL
DATE: 20250811

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
YORK REGION VACANT LAND	)	<i>Robert W. Staley, Jason M. Berall, Andrew</i>
CONDOMINIUM CORPORATION NO.	)	<i>N. Sahai and Dylan H. Yegendorf for the</i>
1010	)	<i>plaintiff (and defendant by counterclaim)</i>
	)	<i>York Region Vacant Land Condominium</i>
	)	<i>Corporation No. 1010 and for the defendants</i>
Plaintiff	)	<i>to the counterclaim Alan Benolo, Rick</i>
	)	<i>Mangat and Nino Campoli</i>
– and –)	
)	
ROCCO A. MARCELLO, TREASURE	)	<i>S. Wayne Morris for the defendants (and</i>
HILL DEVELOPMENTS INC.,	)	<i>plaintiffs by counterclaim) Rocco A.</i>
WINDSOR PRIVATE CAPITAL INC.,	)	<i>Marcello, Windsor Private Capital Inc.,</i>
WINDSOR PRIVATE CAPITAL L.P.,	)	<i>Windsor Private Capital L.P. and for the</i>
MANZIANA BUILDERS (BT) CORP.,	)	<i>defendant Michael Marcello</i>
PODERE CONSTRUCTION LTD.,)	
NICHOLAS FIDEI and MICHAEL	)	<i>Alexander B. Paul for the defendant Mike</i>
MARCELLO	)	<i>Rogers</i>
)	
Defendants	)	<i>Stephen Brunswick, Matthew Sokolsky, and</i>
	)	<i>Elizabeth Ayo for the defendants Podere</i>
AND BETWEEN:	)	<i>Construction Ltd., Nicholas Fidei, and for</i>
	)	<i>the defendants (and plaintiffs by</i>
ROCCO A. MARCELLO, TREASURE	)	<i>counterclaim) Treasure Hill Developments</i>
HILL DEVELOPMENTS INC.,	)	<i>Inc. and Manziana Builders (BT) Corp.</i>
WINDSOR PRIVATE CAPITAL INC.,)	
WINDSOR PRIVATE CAPITAL L.P.,)	
and MANZIANA BUILDERS (BT))	
CORP.)	
)	
Plaintiffs by Counterclaim)	
)	
– and –)	
)	
YORK REGION VACANT LAND)	
CONDOMINIUM CORPORATION NO.)	

1010, ALAN BENLOLO, RICK))
MANGAT and NINO CAMPOLI))
))
 Defendants by Counterclaim))
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)
) **HEARD:** October 7, 8, 9, 10, 11, 15, 16, 17,
) 18, 21, 22, 23, 24, 25, 28, 29, 30, 31, 2024
) and January 23 and 24, 2025

CAVANAGH J.

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff, York Region Vacant Land Condominium Corporation No. 1010 (“1010”) is a vacant land condominium corporation under the *Condominium Act, 1998*, S.O. 1998, c.19 (the “*Condominium Act*”).

[2] The property of 1010 is a gated community of 36 high-end architecturally controlled homes located in Aurora, Ontario known as “Adena Meadows”. The Adena Meadows community is located next to the Magna Golf Club and its facilities.

[3] Before 1010 was created as a condominium corporation, its land was owned by Adena Meadows Limited, a company that was part of a group of companies owned by Frank Stronach (the “Stronach Group”).

[4] The land of Adena Meadows Limited was located next to other undeveloped land on the south side of Wellington Street East in Aurora (“the “Adjacent Land”). The Adjacent Land is also next to the Magna Golf Club. At the time that 1010 was formed as a condominium corporation in February 2004, the Adjacent Land was owned by a separate company that was also a member of the Stronach Group. In 2011, Leslie-Wellington Developments Inc., a company in the Stronach Group, became the owner of the Adjacent Land.

[5] The Adjacent Land was burdened by registered easements for the benefit of 1010.

[6] In the fall of 2015, Leslie-Wellington made an agreement to sell the Adjacent Land to Manziana Builders Corp., a nominee of Treasure Hill Developments Inc., an established developer. The sale was conditional on release of the easements. The proposed development could not proceed unless the easements were released.

[7] The defendant Rocco Marcello is a former director of 1010 and was its President at the time of the relevant events. The defendant Mike Rogers was also a director. He was a senior

executive with the Stronach Group. The third director at the relevant time, David Coriat, is a former defendant.

[8] The directors of 1010 supported the Manziana sale and they agreed to cause 1010 to take steps to release the easements to facilitate completion of the Manziana sale. They received and followed legal advice that in order to release the easements, 1010 should pass a stand-alone by-law approving release of the easements. A meeting of unit owners was held on July 4, 2016 and a by-law approving release of the easements passed, although two unit owners objected and wanted the vote postponed.

[9] The sale of the Adjacent Land by Leslie-Wellington to Manziana was completed on December 19, 2016. The easements were released on that day. After release of the easements, the transaction closed and the purchase price was paid. The residential development of the Adjacent Land has been completed.

[10] 1010 commenced this action on January 29, 2018.

[11] In its pleading, 1010 claims against Mr. Marcello and Mr. Rogers for damages and, in the alternative, disgorgement of profits, for breach of their fiduciary duty to act in 1010's best interests and the statutory duty of honesty and good faith, and for breach of their common law and statutory duty of care. 1010 claims against all defendants for damages and, in the alternative, disgorgement of profits, for the tort of knowing assistance of a breach of a fiduciary duty.

[12] In its pleading, 1010 pleads that the easements were so burdensome that they made the Adjacent Land undevelopable absent 1010's consent. 1010 pleads that with the easements, the Adjacent Land was worth approximately \$12 million in 2016 and without the easements it was worth approximately \$43.5 million. 1010 pleads that, as a result, the easements had a value in 2016 of approximately \$31.5 million.

[13] 1010 pleads that Mr. Marcello and Mr. Rogers breached the duties they owed as directors to 1010 by causing 1010 to release the easements for no value to 1010. 1010 pleads that they did so by omitting to inform 1010 and its unit owners that the easements rendered the Adjacent Land undevelopable and by falsely representing that the reciprocal easements granted to the owner of the Adjacent Land represented a threat to the character of the Adena Meadows community.

[14] 1010 pleads that Mr. Marcello received undisclosed interests in real estate properties from both the seller and the purchaser of the Adjacent Land for his assistance in securing the release of the easements. 1010 seeks disgorgement of profits made by Mr. Marcello.

[15] In their statements of defence, the defendants plead that 1010's allegation that the easements made the Adjacent Land undevelopable is untrue because 1010 is subject to a contractual obligation to release the easements upon written request in the event that any of the easements are not necessary for the proper function and operation of the Adena Meadows condominium. The defendants plead that the easements were not necessary for the proper function of the condominium, and that 1010 was required to release them. Mr. Marcello denies that he received any undisclosed benefits as an inducement or reward for assisting with release of the easements.

[16] 1010 repeats in its reply pleading that the easements made the Adjacent Land undevelopable and that the defendants procured the release of the easements through their wrongful conduct as set out in the Statement of Claim.

[17] The trial proceeded on the basis of these pleadings.

[18] In its closing submissions, 1010 no longer contends that the easements made the Adjacent Land undevelopable without its consent. 1010 no longer argues that Mr. Marcello and Mr. Rogers breached their duties owed to 1010 by failing to disclose that the easements made the Adjacent Land undevelopable. 1010 no longer claims any damages from release of the easements.

[19] 1010 now argues that Mr. Marcello knew that the Manziana sale was conditional on release of the easements, and he knew that there would be significant value in securing the release of the easements where the parties were unaware of the release provisions. 1010 submits that Mr. Marcello, armed with this knowledge, intentionally concealed the easement release provisions from Frank Stronach, Treasure Hill, and others, so that he could secure secret benefits for himself. 1010 also submits that Mr. Rogers breached his fiduciary duties to 1010.

[20] 1010 still alleges that Mr. Marcello dishonestly obtained secret benefits for himself as an incentive or reward for his assistance in securing release of the easements, in breach of his fiduciary duties. 1010 seeks disgorgement of the profits wrongfully obtained by Mr. Marcello, and it seeks disgorgement of these amounts from other defendants on a joint and several basis who, it alleges, participated with or assisted Mr. Marcello to breach his fiduciary duties.

[21] For the following reasons, I conclude that 1010 has failed to prove that Mr. Marcello wrongfully received any secret benefits as an incentive or reward for his assistance in securing release of the easements. 1010 has failed to prove that Mr. Marcello or Mr. Rogers breached their fiduciary duties or other duties owed to 1010. 1010 has failed to prove that any of the defendants is liable for the tort of knowing assistance with a breach of a fiduciary duty.

FACTUAL BACKGROUND

[22] In addition to the background facts set out in the Introduction, I set out the following background facts, some of which are repeated and included for context.

[23] In November 2003, the then owner of the Adjacent Land conveyed to Adena Meadows Limited certain easements which burdened the Adjacent Land for the benefit of the Adena Meadows Limited land. At the same time, Adena Meadows Limited conveyed to the then owner of the Adjacent Land certain easements which burdened the Adena Meadows Limited land for the benefit of the Adjacent Land. In respect of these easements, the transferor and the transferee of the easements entered into easement agreements which were registered on title to the relevant properties.

[24] On February 17, 2004, Adena Meadows Limited, as Declarant and owner of the land that would become the Adena Meadows gated community, registered a Declaration pursuant to the *Condominium Act*. Under the *Condominium Act*, upon registration of the Declaration, the

Condominium Act governed the land and the interests appurtenant to the land, the land was divided into units and common elements, and 1010 was created as a vacant land condominium corporation.

[25] On or about July 4, 2011, Leslie-Wellington Developments Inc. (“Leslie-Wellington”) became the registered owner of the Adjacent Land. Leslie-Wellington is a company that is, and was at this time, a member of the Stronach Group.

[26] The defendants Rocco Marcello and Mike Rogers are former members of the Board of Directors of 1010. David Coriat, a former defendant in this action, is also a former member of 1010’s Board of Directors. In 2015 and 2016, Mr. Marcello, Mr. Rogers, and Mr. Coriat were the directors of 1010. Mr. Marcello was the President of 1010. Mr. Rogers, while he was a director of 1010, was a member of the Executive Board of the Stronach Group and the President of the Stronach Group’s racing and gaming division. The defendant Michael Marcello is Rocco Marcello’s son.

[27] Mr. Marcello was the purchaser of the first lot of 1010 and he and his wife lived in the Adena Meadows community. He became a director of 1010 on June 30, 2006.

[28] The prospect of development of the Adjacent Land and the nature of any development was a matter of concern for unit owners. Mr. Stronach had made a proposal for development of the Adjacent Land in 2012 which did not proceed. The main concerns of the unit owners were privacy and security.

[29] On September 17, 2015, Leslie-Wellington and Manziana Builders Corp. (“Manziana”) entered into an agreement of purchase and sale by which Manziana agreed to purchase the Adjacent Land from Leslie-Wellington for a purchase price of \$45,250,000. Manziana is a single purpose company which is owned and controlled by Treasure Hill Developments Inc. (“Treasure Hill”). Treasure Hill is in the business of developing residential real estate in the Greater Toronto Area. The defendant Nicholas Fidei is the principal of Treasure Hill. Mr. Fidei is also the principal of the defendant Podere Construction Ltd. (“Podere”).

[30] On October 14, 2015, a meeting was held at the offices of the Stronach Group that was attended by representatives of Treasure Hill (Mr. Fidei and Jordan Weiner), Mr. Marcello and Mr. Rogers. Mr. Marcello did not know Mr. Fidei before this meeting.

[31] The proposed development would have a separate entrance from Wellington Street without access to the Adena Meadows community. In this respect, it differed from the previous proposal made by Mr. Stronach. Mr. Fidei and Mr. Weiner asked for Mr. Marcello’s support, as President of 1010, for the proposed Treasure Hill development of the Adjacent Land.

[32] Mr. Marcello made inquiries of Mr. Rogers about density of the proposed development and he attended to visit the Adjacent Land. He sent an email to Mr. Fidei and Mr. Weiner on October 20, 2015 and stated his belief that the proposed development would be a satisfactory alternative to what had previously been proposed. He expressed in this email that the security of Adena Meadows was essential, as this was the highest priority of residents.

[33] The directors of 1010 sent a notice to unit owners on November 9, 2015 advising of the nature of the Treasure Hill proposed development including that it would have separate access off Wellington Ave. The notice states that it is contemplated that the board of directors will advise the Town of Aurora of their support.

[34] By letter dated December 4, 2015, 1010's board of directors advised the Town of Aurora that the board supported the Treasure Hill proposal.

[35] On February 11, 2016, external legal counsel for Leslie-Wellington met with the directors of 1010, Messrs. Marcello, Coriat, and Rogers, to discuss release of the easements registered on title to the Adjacent Land. At the meeting, the directors indicated that they were prepared to recommend the release of these easements. The directors resolved to retain external legal counsel to represent 1010 and they retained the Goodmans LLP firm.

[36] On March 31, 2016, Tom Macdonald, the lawyer from Goodmans who represented 1010 with respect to the release of the easements, advised the three board members that, to comply with the *Condominium Act*, 1010 should pass a stand-alone by-law approving release of the easements following the process for release of the easements outlined in a letter from external counsel for Leslie-Wellington. The three directors accepted Mr. Macdonald's recommendation and instructed him to proceed accordingly.

[37] On June 16, 2016, the directors of 1010 issued a Notice of Special Owners Meeting to be held on July 4, 2016. The Notice stated that the "sole purpose of the Meeting is to vote on the approval of the proposed By-law No. 4 of the Corporation, which By-law relates to the proposed release of certain easements that the Corporation has over adjoining lands ...". An Information Circular was sent to unit owners in connection with the July 4, 2016 special meeting.

[38] A meeting of the unit owners of 1010 was held on July 4, 2016. At the July 4, 2016 meeting, By-law No. 4 was approved providing that 1010 shall release the easements burdening the Adjacent Land (other than the easement for rights in relation to the storm water pipe (the "Storm Water Easement")). I refer to these easements as the "Easements".¹

[39] The evidence at trial established that the Manziana sale transaction was conditional on release of the Easements and, unless the Easements were released, no development could proceed. As a result, this transaction could not proceed to completion unless the Easements were removed from title.

[40] The sale of the Adjacent Land by Leslie-Wellington to Manziana was completed on December 19, 2016. The Easements were released on that day. After release of the Easements, the transaction closed and the purchase price was paid.

¹ By-law No. 4 states that the storm water pipe and the Storm Water Easement will be relocated at the sole cost and expense of the owner of the Adjacent Land at some point in the future and a new easement will be granted in favour of 1010 for storm drainage purposes. By-law No. 4 provides that upon granting of the new storm water easement in favour of 1010, 1010 will release the Storm Water Easement.

[41] This action was commenced by a statement of claim issued on January 29, 2018.

ANALYSIS

[42] I first set out in more detail the claims pleaded by 1010 against the defendants and the defendants' pleaded defences.

Amendments to 1010's pleading

[43] On October 7, 2024, on a motion made by 1010 at the opening of the trial, I granted leave to 1010 to amend its Amended Fresh as Amended Statement of Claim. The amendments included 1010's more particular pleading of the remedy of disgorgement as an alternative to damages. 1010's Amended Amended Fresh as Amended Statement of Claim was filed on October 10, 2024.

[44] Pursuant to the October 7, 2024 order granting 1010 leave to amend its pleading, the action was dismissed as against former defendants Adena Meadows Limited, Leslie-Wellington, Miller Thomson LLP and Patrick Greco (who was a Miller Thomson lawyer) following settlements with those parties. The Court had previously issued orders dismissing 1010's action against David Coriat and other former defendants.

[45] I refer to 1010's Amended Amended Fresh as Amended Statement of Claim, for ease of reference, as the Statement of Claim.

Pleaded claims and defences

[46] In the Statement of Claim, 1010 claims a declaration that Mr. Marcello and Mr. Rogers breached their common law and statutory (pursuant to the *Condominium Act*) duties as directors (i) to act honestly, in good faith, and in the best interests of 1010, and (ii) to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. 1010 claims damages in the sum of \$50,000,000 against Mr. Marcello and Mr. Rogers for losses suffered as a result of the breaches of their duties, and for negligence.

[47] 1010 claims damages in the sum of \$50,000,000 against Mr. Marcello, Mr. Rogers, Treasure Hill, Windsor Private Capital Inc. ("WPC"), Windsor Private Capital L.P. ("Windsor LP"), Manziana, Podere, Mr. Fidei and Michael Marcello (defined collectively as the "Conspiring Defendants") for conspiracy and knowing assistance of breach of fiduciary duty. The claim for conspiracy was not pursued at trial.

[48] In the Statement of Claim at paras. 21-26, 1010 pleads a summary of the conduct of the defendants upon which its claims are based:

21. In November 2003, the then owner of the Adjacent Land granted Adena Meadows Limited easements over all or a substantial portion of the Adjacent Land (the "Easements"). Adena Meadows Limited also granted the then owner of the Adjacent Land easements over the lands owned by Adena Meadows Limited, which are now the plaintiff's lands.

22. The Easements were so burdensome that they rendered the Adjacent Land undevelopable absent YRVLCC's consent. With the Easements in place, the Adjacent Land was worth approximately \$12 million in 2016. Without the Easements, the Adjacent Land was worth approximately \$43.5 million in 2016. As a result, the Easements had a value in 2016 of approximately \$31.5 million.

23. Once developed, which could occur only after the Easements were released, the Adjacent Land had a value to Treasure Hill and Manziana (who ultimately purchased and developed the Adjacent Land) substantially in excess of \$43.5 million.

24. As the plaintiff's lands were developed first, the Easements also served an important blocking function. The Easements enabled the plaintiff YRVLCC and its unit owners to prevent development on the Adjacent Land that was inconsistent with the character of the homes located on the plaintiff's lands.

25. However, as set out below, the Conspiring Defendants caused the plaintiff to release the Easements for no value to the plaintiff YRVLCC by, among other things, omitting to inform the plaintiff and its unit owners that the Easements rendered the Adjacent Land undevelopable, and by falsely representing that the Easements granted to the owner of the Adjacent Land represented a threat to the character of the plaintiff's housing community.

26. In addition, as set out below, Rocco received undisclosed interests in real estate properties from both the seller and the purchaser of the Adjacent Land for his assistance in securing the release of the Easements.

[49] 1010 pleads that Mr. Marcello breached the duties he owed to 1010 to act honestly, in good faith, and in the best interests of 1010 by:

- (a) misleading unit owners of 1010 by:
 - (i) failing to inform them that the Easements rendered the Adjacent Land undevelopable absent 1010's consent to their release (which it was entitled to withhold);
 - (ii) failing to inform them that the consideration to be provided by Leslie-Wellington for the release of the Easements was nominal compared to the value created by the release of the Easements;
 - (iii) falsely representing that the easements granted to the owner of the Adjacent Land represented a threat to the character of the Adena Meadows community (where there could be no development of the Adjacent Land unless 1010 released the Easements);
 - (iv) failing to disclose that as a result of the sale of the Adjacent Land to Manziana, the owner of the Adjacent Land would no longer

contribute to costs associated with any shared facilities and, accordingly, the common expenses payable by 1010's unit owners would increase; and

- (v) failing to disclose to unit owners that Mr. Marcello was to receive secret interests from the seller and purchaser of the Adjacent Land as an inducement and/or reward for his assistance in securing approval of By-Law No. 4 and release of the Easements;
- (b) presiding over the July 4, 2016 meeting and addressing unit owners notwithstanding his conflicts of interest and improperly insisting that the vote proceed notwithstanding requests from two unit owners that it be delayed;
- (c) accepting secret interests in return for his assistance in securing approval of By-Law No. 4 and release of the Easements.

[50] 1010 pleads that Mr. Rogers breached the duties he owed to act honestly, in good faith, and in the best interests of 1010 by:

- (a) misleading unit owners of 1010 by:
 - (i) failing to inform them that the Easements rendered the Adjacent Land undevelopable absent 1010's consent to their release (which it was entitled to withhold);
 - (ii) failing to inform them that the consideration to be provided by Leslie-Wellington for the release of the Easements was nominal compared to the value created by the release of the Easements;
 - (iii) falsely representing that the easements granted to the owner of the Adjacent Land represented a threat to the character of the Adena Meadows community (where there could be no development of the Adjacent Land unless 1010 released the Easements);
 - (iv) failing to disclose that as a result of the sale of the Adjacent Land to Manziana, the owner of the Adjacent Land would no longer contribute to costs associated with any shared facilities and, accordingly, the common expenses payable by 1010's unit owners would increase; and
 - (v) failing to disclose to unit owners that Mr. Marcello was to receive secret interests from Adena Meadows Limited and Leslie-Wellington (both members of the Stronach Group) as an inducement to and/or reward for Mr. Marcello's assistance in securing approval of By-Law No. 4 and release of the Easements, and he was thereby in a conflict of interest;

- (b) supporting Mr. Marcello's improper insistence that the vote proceed at the July 4, 2016 meeting where requests were made for a delay, by stating that it would be a huge risk to go back to Manzianna without voting in favour of By-Law No. 4 because of concerns about fencing;
- (c) as a representative of Adena Meadows Limited and Leslie-Wellington, permitting Mr. Marcello to obtain secret interests in Lots 30 and 37 of the Adena Meadows gated community, respectively, as an inducement to and/or reward for his assistance in securing approval of By-Law No. 4 and release of the Easements; and
- (d) preferring his own interests as a key member of the Stronach Group to ensure that the vote passed to release the Easements.

[51] 1010 pleads that the "Conspiring Defendants" (who were all of the defendants at the time of trial) had actual knowledge of, or were reckless or wilfully blind to, both the fiduciary relationship between Mr. Marcello and 1010 as well as Mr. Marcello's improper conduct in ensuring that the vote passed to release the Easements. 1010 pleads that these defendants participated in or assisted with Mr. Marcello's improper conduct including by providing him with secret interests in Lots 30 and 37 and the Keswick Project and/or by assisting with the provision to him of the secret interests.

[52] 1010 pleads that Adena Meadows Limited sold Unit 30 to Michael Marcello as an inducement to and/or reward for his father's assistance in securing approval of By-Law No. 4. 1010 pleads that Michael Marcello held his interest in Lot 30 on behalf of Mr. Marcello and/or Mr. Marcello secretly profited from the purchase and sale of Lot 30.

[53] 1010 pleads Leslie-Wellington conveyed Lot 37, or Mr. Marcello's interest in it, to Podere as an inducement to and/or reward for Mr. Marcello's assistance in securing approval of By-Law No. 4. 1010 pleads that Mr. Marcello stands to make a substantial profit from the eventual sale of Lot 37.

[54] 1010 pleads that Mr. Marcello was permitted to obtain concealed interests in Lots 30 and 37 in breach of his fiduciary duties to 1010.

[55] 1010 pleads that Mr. Marcello and Mr. Rogers breached their common law and statutory duties (pursuant to the *Condominium Act*) to 1010 to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances by engaging in the conduct pleaded in support of its claims for breach of fiduciary duty and by failing to ensure that 1010 had proper advice prior to releasing the easements.

[56] 1010 pleads that it suffered damages as a result of Mr. Marcello's and Mr. Rogers' breaches of their fiduciary duty and their duty of care. 1010 pleads that it suffered damages as a result of the defendants' knowing assistance of breach of fiduciary duty and conspiracy to injure. 1010 also pleads the remedy of disgorgement of profits against the defendants as an alternative to damages. In respect of the claim for disgorgement, 1010 seeks:

- (a) disgorgement of at least \$709,250 on a joint and several basis as against Mr. Marcello, Michael Marcello, and Mr. Rogers in relation to the sale of Unit 30;
- (b) disgorgement of at least \$3,660,000 on a joint and several basis as against Mr. Marcello, WPC, Windsor LP, Podere, and Mr. Fidei in relation to the sale of Unit 37;
- (c) disgorgement of at least \$6,437,514 on a joint and several basis as against Mr. Marcello, WPC, Windsor LP, and Mr. Fidei in relation to the Keswick Project; and
- (d) disgorgement of profits earned in connection with the development of the Adjacent Land on a joint and several basis as against Treasure Hill and Manziana.

[57] 1010 pleads that the actions of the defendants were malicious and high-handed and showed a reckless disregard for the rights and interests of 1010. 1010 claims that it is entitled to punitive and exemplary damages against all the defendants in the amount of \$1,000,000.

[58] Mr. Marcello pleads in his Amended Statement of Defence that in his capacity as director of 1010, he acted honestly and in good faith, and at all times exercised the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. Mr. Marcello pleads that there was no improper conduct relating to his participation in the purchase and sale of lots 30 and 37 and the transactions relating to these lots had nothing to do with the passage of By-Law No. 4. Mr. Marcello pleads that his participation in the Keswick Project was neither secret nor improper.

[59] Mr. Rogers pleads in his Amended Statement of Defence that he acted honestly, in good faith, and in accordance with the *Condominium Act*. He pleads that he exercised his powers, duties and functions as a director of 1010 with due care, diligence, prudence and skill. Mr. Rogers denies any claim for breach of duty. He denies being part of any form of conspiracy. He denies any wrongful act in relation to the meeting of unit owners about proposed By-Law No. 4.

[60] In their statements of defence, the other defendants deny any liability to 1010.

[61] In their pleadings, the defendants deny 1010's pleaded allegation that the Adjacent Land was undevelopable absent consent by 1010 to the release of the Easements. The defendants plead that 1010 was under a contractual obligation to release the Easements and to execute and deliver all documentation necessary to release the Easements (or any part thereof) forthwith upon written request in the event that the Easement (or any part thereof) is not necessary for the proper function and operation of 1010. The defendants plead that the Easements were not required for the proper function and operation of 1010 and, therefore, 1010 was required to release them upon written request, which was made.

[62] I refer to the contractual provisions upon which the defendants rely as the "easement release provisions". These are addressed below.

[63] The defendants ask that 1010's action be dismissed.

[64] Mr. Marcello, WPC, Windsor Inc., Treasure Hill, and Manziana counterclaim against 1010, Alan Benlolo, Rick Mangat and Nino Campoli. Manziana claims damages to the extent that the defendants by counterclaim interfere with the “Manziana Project”. Mr. Marcello, WPC, Windsor Inc., seek a declaration that the defendants by counterclaim shall indemnify the plaintiffs by counterclaim for all damages they suffer or amounts they may be required to pay and declaring that no plaintiff by counterclaim can be assessed any costs associated with this lawsuit.

Was the Adjacent Land undevelopable absent 1010’s consent to the release of the Easements?

[65] I address 1010’s pleaded allegation made in the Statement of Claim, and repeated in its Reply,² that the Easements were so burdensome that, without 1010’s consent to the release of the Easements, the Easements made the Adjacent Land undevelopable.

[66] 1010 pleads that it suffered substantial damages from loss of the Easements. In its closing submissions, 1010 elected the remedy of disgorgement of profits as an alternative to damages.

[67] 1010 tendered expert evidence at trial from Terry Rout, who was qualified to give expert evidence as a real estate appraiser.

[68] In his expert reports that he adopted in his evidence at trial, Mr. Rout concluded that the Easements were granted in perpetuity and they severely impacted the development of the Adjacent Land without 1010’s consent.

[69] In his first report, Mr. Rout did not address the easement release provisions. In his second report, Mr. Rout addressed the easement release provisions. Mr. Rout wrote that in his first report, he estimated the value of the Adjacent Land before and after the release of the Easements as of the effective date of the valuation. He had concluded in his first report that with the easements in place, the property value was lower due to the significant encumbrance created by the easements. Mr. Rout wrote in his second report that, accordingly, the easement release provisions (in respect of which he did not offer an opinion because he did not regard himself as qualified to interpret legal documents) do not impact the conclusions in his first report.

[70] Mr. Rout’s opinion is that the highest and best use of the Adjacent Land before the Easements were released was as open greenspace or parkland for the exclusive use of 1010, at best. Mr. Rout expressed his opinion that before the Easements were released, the market value of the Adjacent Land (as undevelopable open space or parkland) was \$12,000,000 and, after they were released, the market value of the Adjacent Land (for use as a typical residential development) was \$43,500,000.

[71] Mr. Rout agreed on cross-examination that if the Easements were in place on the Adjacent Land and there was a process in place to remove them, the market value for the Adjacent Land before the Easements were released would be the same as the market value after the Easements were released.

² Statement of Claim, paras. 22, 25, 35, 52(b), 52(c), 63, 68, 71, 72, 101, and 104; Reply, para. 27.

1010 does not pursue its pleaded claims for breach of duty of care and for damages.

[72] Counsel for 1010 advised the Court in his oral closing submissions that, although not formally abandoned through a pleading amendment, 1010 is not pursuing its pleaded claim that it suffered damages from release of the Easements or its pleaded claim for a remedy for breach of the statutory and common law duty of care owned by Mr. Marcello and Mr. Rogers to 1010.

[73] 1010 continues to seek the remedy of disgorgement of profits for alleged breaches by Mr. Marcello and Mr. Rogers of their fiduciary duties and duties to act honestly and in good faith under s. 37(1)(a) of the *Condominium Act*. They seek the remedy of disgorgement against all defendants, jointly and severally, for the tort of knowing assistance with breaches of fiduciary duties owed by Mr. Marcello and Mr. Rogers.

Easement release provisions

[74] I address the legal effect of the easement release provisions.

(a) Easement Agreements

[75] The two easements that were transferred by 390346 Ontario Inc. and 1207309 Ontario Inc. as the then owners of the servient tenement (the Adjacent Land) to Adena Meadows Limited as owner of the dominant tenement were registered against title to the Adjacent Land by instruments numbered YR391749 and YR392420.

[76] Each of the two Easement Agreements includes the following provision under the heading “Partial Release”:

The Transferee covenants and agrees to execute and deliver all documentation necessary to release this easement (or any part thereof) forthwith upon written request in the event that this easement (or any part thereof) is not necessary for the proper function and operation of the Dominant Tenement Lands.

(b) Shared Facilities and Services Agreement

[77] 1010 and MI Developments Inc. (“MI”) and MEC Holdings (Canada) Inc. (“MEC”) entered into a Shared Facilities and Services Agreement (“SFA”) as of March 12, 2004. At this time, MI was the owner of the Adjacent Land and MEC was to be the developer of the Adjacent Land. MI and MEC were members of the Stronach Group.

[78] The SFA was made between 1010 and MI and MEC as of March 12, 2004. The SFA provides that it shall be binding upon the parties and their respective successors, assigns and successors in title.

[79] Article 9 of the SFA is headed “Easements”. Section 9.2 of the SFA provides, in part:

9.2 Additional Easements

The Adena Meadows Condominium agrees to execute and deliver all documentation necessary to release any easement burdening the MEC Condominium Lands or MID Lands forthwith upon written request in the event that any such easement is not necessary for the proper function and operation of the Adena Meadows Condominium.

(c) Declaration

[80] The Declaration was made by Adena Meadows Limited as Declarant under the *Condominium Act*.

[81] In the Declaration, the term “Shared Facilities and Services Agreement” means:

the agreement to be entered into between the Vacant Land Condominium, MEC Holdings (Canada) Inc. and 1376073 Ontario Inc. with respect to the ownership, operation, maintenance, repair, replacement and administration of the Shared Facilities and Services, as well as the facilities and services located on lands beneficially owned by 1276073 Ontario Inc. which provide the water, sanitary, hydro, stormwater drainage and other services for the benefit of the Vacant Land Condominium and the MEC Condominium.

[82] In the Declaration the term “Vacant Land Condominium” means the condominium corporation created by registration of the Declaration pursuant to the *Condominium Act*. This condominium corporation is 1010.

[83] Section 9.1 of the Declaration includes the following provisions under the heading “Duties of the Vacant Land Condominium”.

9.1 Duties

In addition to any other duties set out elsewhere in this Declaration or specified in the By-laws or the Rules, the Vacant Land Condominium shall have the following duties:

to assume, enter into and comply with the Shared Facilities and Services Agreement;

to assume, enter into and comply with any agreement or agreements that demand, supplement or restate the Shared Facilities and Services Agreement, from time to time;

...

(g) to execute and deliver all documentation necessary to release (or partially release) any easement benefiting the Lands (or any part thereof) in the event that it is determined by the Declarant, in its sole and absolute discretion, to be unnecessary for the proper function and operation of the Vacant Land Condominium;

...

(j) to ensure that each owner takes all reasonable steps to comply with the Act, Declaration, Adena Meadows Code, By-Laws and Rules of the Vacant Land Condominium; and

(k) assume, enter into and comply with any agreement or agreements that amend, supplement or restate the agreements referenced in this Declaration, from time to time.

[84] The evidence at trial was that that in 2015 or 2016, the Easements were not necessary for the proper function or operation of 1010. All necessary functions and operations of 1010 (except the storm water drainage which was addressed separately) were fully self-contained within the Adena Meadows community.

[85] When the easement release provisions are read in the context of each relevant document as a whole, and when the words used are given their ordinary and grammatical meaning, 1010, upon request, was contractually required to execute and deliver all documents necessary to release the Easements in the event they were not necessary for the proper function and operation of 1010.

[86] I find that when the Manziana sale agreement was made, the Easements were not necessary for the proper functioning and operation of the Adena Meadows condominium. Accordingly, pursuant to the easement release provisions, 1010 was contractually required to release the Easements upon written request.

[87] A written request for release of the Easements was made by Michael Wren, legal counsel for Leslie-Wellington, by letter dated March 18, 2016 in which Mr. Wren set out a recommended legal process for release of the Easements which included a standalone by-law passed by unit owners. Mr. Wren testified that when he wrote this letter, he was unaware of the easement release provisions.

[88] Under the Declaration, 1010 had a duty to comply with the SFA. Pursuant to By-Law No. 1, the president of 1010 was required to “direct enforcement of the Act, the Declaration, the by-laws and the rules of the Corporation by all lawful means at the Board’s disposal”. Mr. Marcello was required to facilitate release of the Easements.

Knowledge of directors of 1010 concerning 1010’s obligation to release the Easements.

[89] Mr. Coriat gave evidence at trial as part of 1010’s case. Mr. Coriat testified that when he received notice in November 2015 of the proposed Treasure Hill development, he knew from his review of the SFA, to which 1010 was a party, that this agreement required that the Easements be released if they were not being used and that a developer of the Adjacent Property had the right to build whatever it chose to build subject to compliance with zoning requirements and that sort of thing. Mr. Coriat testified that the three directors accepted as a given that the Easements had to be released if they were not being used. Mr. Coriat testified that the Easements were not being used by 1010 and no one suggested otherwise to him.

[90] Mr. Marcello testified that he understood from the Declaration and the SFA that if 1010 was not using the Easements, it had to give them up. He testified that a developer of the Adjacent Land could do what it wants to develop this land.

[91] I accept this evidence given by Mr. Coriat and Mr. Marcello and find that when they were considering release of the Easements in relation to the proposed Manziana sale, the directors of 1010 knew that 1010 had an obligation under the SFA to release the Easements if they were not being used and they knew that the Easements were not being used.

[92] As I have noted, a fundamental allegation made by 1010 in the Statement of Claim is that the Easements were so burdensome that they rendered the Adjacent Land undevelopable absent 1010's consent.

[93] Based on my finding that 1010 was contractually required to release the Easements forthwith upon written request, I reject 1010's pleaded allegation that the Easements were so burdensome that they rendered the Adjacent Land undevelopable absent 1010's consent. I reject 1010's pleaded allegation that Mr. Marcello and Mr. Rogers breached their duties owed to 1010 and unit owners by failing to inform them that the Easements rendered the Adjacent Land undevelopable.

1010's submissions at trial concerning the easement release provisions

[94] 1010, in pleading the allegation that the Easements made the Adjacent Land undevelopable, and that Mr. Marcello and Mr. Rogers breached their duties to 1010 and unit owners by failing to so advise them, does not refer to the easement release provisions in its Statement of Claim. These were pleaded by the defendants in their statements of defence.

[95] 1010, in its Reply pleading, alleges that the defendants never sought to rely on, and did not rely on, the easement release provisions for the release of the Easements. It pleads that the defendants never determined that the Easements were no longer necessary for the proper function and operation of 1010, never informed it of any such determination, and never requested that 1010 release the Easements pursuant to any of those agreements. 1010 repeats its pleaded allegation that the defendants procured the release of the Easements through their wrongful conduct set out in the Statement of Claim. 1010 repeats its allegation that the Easements were so burdensome that they rendered the Adjacent Land undevelopable.

[96] 1010 refers in its written closing submissions to the easement release provisions which, it submits, address the circumstances where 1010 could be required to release the Easements. 1010 contends that these provisions were not brought to the attention of unit owners or Miller Thomson, the law firm representing Leslie-Wellington in respect of the Manziana sale transaction. 1010 notes that there is no evidence that Treasure Hill was aware of these easement release provisions. 1010 points out that there is no document or other evidence that discusses the easement release provisions or their impact on the easement transaction presented to 1010.

[97] 1010 argues that in these circumstances, where the parties were unaware of the easement release provisions, there would be significant value in securing the release of the Easements if they were thought to make the Adjacent Land undevelopable unless 1010 consented to their release.

1010 submits that in these circumstances, Mr. Marcello secured benefits to himself in return for securing approval to By-law No. 4 and the release of the Easement. 1010 submits that in so acting, Mr. Marcello breached his fiduciary duties owed to 1010.

[98] When Mr. Marcello was cross-examined, it was put to him that it would be clear to a reader of the SFA that the Stronach Group as owner of the Adjacent Land had the right to secure the release of the Easements. He agreed. It was then suggested to him that he did not want the Stronach Group to know of those easement release provisions because he wanted to be rewarded personally for getting the Manziana deal done, and if the Stronach Group knew that it could secure release of the Easements without Mr. Marcello's assistance, he would be unable to obtain a personal reward. It was put to Mr. Marcello that he concealed the SFA from the Stronach Group and from unit owners because it was in his personal interest to do so.

[99] Mr. Marcello responded that he found the proposition that he intentionally concealed the SFA from the Stronach Group so that he could personally benefit offensive. He responded that the SFA was a matter of public record which had been given to unit owners. Mr. Marcello denied that he buried the SFA, as suggested.

Are Mr. Marcello or Mr. Rogers liable to 1010 for breaches of the duties of care they owed to 1010?

[100] In the Statement of Claim, 1010 pleads that Mr. Marcello and Mr. Rogers breached their common law and statutory duties of care pursuant to the *Condominium Act* to exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances. 1010 claims damages of \$50,000,000 for breaches of these duties. It pleads the remedy of disgorgement as an alternative to damages. In its written closing submissions, 1010 elected the remedy of disgorgement for this claim as an alternative to damages.

[101] Section 37(1)(b) of the *Condominium Act* provides that every director and officer of a condominium corporation shall exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[102] To succeed in claim for breach of duty of care, a plaintiff must establish that a director acted (a) in breach of the duty of care; and (b) in a way that caused injury to the plaintiff. See *Peoples Department Stores Inc. (Trustee of) v. Wise*, [2004] 3 S.C.R. 461, 2004 SCC 68, at para. 66.

[103] As I have noted, in oral closing submissions, counsel for 1010 told the Court that 1010 is no longer pursuing its pleaded claim that it suffered damages caused by release of the Easements through breaches by Mr. Rogers and Mr. Marcello of their duties of care or any remedy, including disgorgement, for such alleged breaches.

[104] If 1010 had not withdrawn its claim for damages, I would have found that 1010 did not suffer damages from release of the Easements because 1010 was legally required to release them pursuant to the easement release provisions. Mr. Rout agreed under cross-examination that if 1010 was legally required to release the Easements upon request and a process was in place to remove

them, it could not be said that the value of the Adjacent Land, with and without the Easements in place, differed when the Manziana sale agreement was made.

[105] 1010 has failed to show that it sustained any injury or suffered any damages caused by the loss of the Easements when the Manziana sale transaction was completed and the Easements were released.

[106] Given 1010's decision not to pursue its pleaded claim for damages or any remedy for breach of the common law or statutory duty of care owed by Mr. Marcello and Mr. Rogers to 1010, it is not necessary for me to address the evidence in this regard. I make no finding that Mr. Marcello or Mr. Rogers breached their common law or statutory duty of care by failing to meet the required standard of care as a director of 1010.

Is Mr. Marcello liable to 1010 for breach of his duty under s. 37(1)(a) of the Condominium Act or his fiduciary duty to act in the best interests of 1010?

[107] Section 37(1)(a) of the *Condominium Act* provides that every director and every officer of a condominium corporation in exercising the powers and discharging the duties of office shall act honestly and in good faith.

[108] Directors of condominium corporations owe fiduciary duties to act in the best interest of the condominium corporation. See *Dewan v Burdet*, 2016 ONSC 4917, at para. 53; aff'd 2018 ONCA 195.

[109] In *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, Brown J., writing for the Court, at para. 32, acknowledged that disgorgement is available for some forms of wrongdoing without proof of damages, for example, breach of fiduciary duty.

[110] 1010 submits that given its election to claim disgorgement as a remedy, the question of whether 1010 suffered damages for breach of the fiduciary duties owed by Mr. Marcello and Mr. Rogers as directors of 1010 is irrelevant to the determination of whether they are liable for disgorgement and knowing assistance.

[111] 1010 submits that Mr. Marcello breached his fiduciary duty by securing secret benefits for himself in exchange for assisting to secure release of the Easements, failing to disclose actual and potential conflicts of interest, and prioritizing his own interests over the interests of 1010. 1010 submits that Mr. Marcello also failed to recuse himself from the transaction involving release of the Easements as he was required to do pursuant to his fiduciary duty and section 40 of the *Condominium Act*. 1010 submits that after failing to recuse himself, Mr. Marcello acted to ensure the vote in favour of By-law No. 4 passed out of self-interest, in breach of his fiduciary duty.

Did Mr. Marcello breach his s. 37(1)(a) duty and his fiduciary duty to 1010 by abusing his position as a director to receive secret benefits for himself?

[112] 1010 submits that Mr. Marcello, after he was first asked to support the Treasure Hill development, immediately began securing benefits for himself and WPC. 1010's submissions in this regard relate to (i) alleged benefits from the Stronach Group in respect of three lots, (ii) alleged

benefits from Treasure Hill, (iii) alleged benefits in respect of other land owned by the Stronach Group at Bayview and Wellington, and (iv) alleged benefits from Manziana in relation to the purchase of the Adjacent Land.

Alleged benefit from the Stronach Group in respect of Lot 27

[113] 1010 relies on evidence that within hours of first meeting with representatives of the Stronach Group and of Treasure Hill on October 14, 2015, Mr. Marcello emailed Mr. Rogers to request his assistance with acquiring Lot 27. On October 29, 2015, WPC entered into an agreement of purchase and sale to acquire Lot 27 from the Stronach Group. The sale of Lot 27 to WPC closed on January 27, 2016. WPC paid \$784,000 for Lot 27.

[114] 1010 submits that the fact that Mr. Marcello contacted Mr. Rogers to complete the acquisition of Lot 27 within hours of his meeting with the Treasure Hill representatives at which he was asked to support the proposed Treasure Hill development is not coincidental. 1010 submits that this contact was made because Mr. Marcello understood that as a director and President of 1010, his support would assist the Stronach Group and Treasure Hill with their plans for the Adjacent Land. 1010 submits that contrary to his duty of honesty and good faith and his fiduciary duties, Mr. Marcello used his position of influence to secure secret benefits for himself.

[115] In the Statement of Claim, 1010 does not plead that Mr. Marcello breached his duties to 1010 by receiving a secret benefit in connection with Lot 27. I address 1010's submissions in relation to Lot 27 because they are relevant to its claims that Mr. Marcello received secret benefits in respect of Lot 30 and Lot 37.

[116] Mr. Marcello testified about how he acquired a right to purchase Lot 27.

[117] Mr. Marcello testified that in 2012, he made an agreement with Frank Stronach and Frank Campoli (an Adena Meadows resident who operated a building company) to develop for sale three lots in the Adena Meadows community and share the profits equally. The lots were lots 26, 27, and 28. Under the agreement, which was a handshake agreement, Mr. Stronach would make the lots available, Mr. Marcello would buy the lots, and Mr. Campoli would build houses on the lots. Lot 26 was developed and, in 2016, the profits from the sale were divided equally.

[118] Mr. Marcello testified that he wanted to develop Lot 27 under the same terms but Mr. Stronach did not wish to do so. Mr. Marcello testified that he had an option to buy Lot 27 at the price agreed upon for this lot at the time of the agreement with Mr. Stronach and Mr. Campoli in 2012. 1010 read into evidence as part of its case questions and answers from the examination for discovery of Mr. Marcello in which he testified that Frank Stronach did not want to continue the joint venture with respect to Lots 27 and 28, and that Mr. Marcello still had options on these lots. Mr. Marcello also owned Lot 10.

[119] Mr. Marcello testified that, later, there was a falling out between him and Frank Campoli. According to the evidence of Nino Campoli, Frank Campoli's son, the relationship between the Campolis and Mr. Marcello "went south" and Mr. Marcello brought the deal for Lot 27 (and Lot 10) to Treasure Hill. I accept this evidence.

[120] By letter dated February 19, 2016, WPC agreed to enter into a joint venture with Treasure Hill, through a company to be incorporated (which became Sage Grouse Management Corp.), to develop Lot 27. The letter provided that: (a) WPC would vend Lot 27 into the joint venture at a value of \$1.1 million; (b) Sage Grouse would develop and construct the property; (c) the first \$1.1 million from the sale of the property would be paid to WPC as a priority; and (d) the parties would share the profits equally.

[121] A Joint Venture Agreement between Sage Grouse, WPC, and Pateks Construction Inc. was made on June 7, 2016. Under the Joint Venture Agreement, WPC, as owner of Lots 10 and 27, agreed to convey title to these lands to the joint venture for the purpose of the construction of buildings and other improvements on these lands for resale. Sage Grouse was incorporated for the purpose of acquiring and holding title to the joint venture lands as nominee for the members of the joint venture. Under the Joint Venture Agreement, Sage Grouse was prohibited from carrying on any other business.

[122] 1010 points out that although Mr. Marcello acquired Lots 10 and 27 from the Stronach group for a total of \$1,541,000, WPC agreed to contribute both properties into the Sage Grouse joint venture at a value of \$2.2 million and WPC was entitled to be repaid this amount as a priority distribution from the joint venture before remaining proceeds were split between the parties. 1010 submits that Mr. Marcello received a profit from his acquisition of Lot 27 through self-dealing in breach of his fiduciary duties.

[123] The price at which Mr. Marcello was entitled to acquire Lot 27 was agreed upon with Mr. Stronach in 2012. The fact that Mr. Marcello, through WPC, and Treasure Hill agreed on a higher value for the two lots to be contributed to the joint venture than their combined acquisition cost does not show that Mr. Marcello was receiving a secret profit in exchange for assisting with release of the Easements.

[124] The evidence shows that Mr. Marcello, through his agreement with Frank Stronach in 2012, had a right to purchase Lot 27 at the price agreed upon in 2012. Mr. Marcello wanted to develop Lot 27 and sell the house at a profit. Mr. Marcello had a falling out with the Campolis, and did not want to use their company to build on Lot 27. In 2016, when Treasure Hill, an established builder, was introduced to Mr. Marcello in respect of a proposed sale of the Adjacent land, he approached Treasure Hill to be the builder of a house on Lot 27 and Lot 10. Mr. Marcello, through WPC, made a Joint Venture Agreement with Treasure Hill, through Sage Grouse, to develop Lot 27 and Lot 10. In the circumstances, there is nothing unusual in these arrangements.

[125] I find that Mr. Marcello did not raise the purchase of Lot 27 with Mr. Rogers soon after his meeting with Treasure Hill because he was using his influence as a director and officer of 1010 to secure a secret benefit to himself. The evidence does not support this submission. There was nothing improper in Mr. Marcello enforcing his agreement to acquire Lot 27 at the agreed upon price when he did, and making an agreement with Treasure Hill, a reputable builder to which he had been introduced, to develop and sell Lot 27. I find that Mr. Marcello's dealings with Treasure Hill in relation to Lot 27 were unrelated to the release of the Easements or the sale of the Adjacent Land to Manziana.

Alleged benefit from the Stronach Group in respect of Lot 30

[126] 1010 relies on evidence that Mr. Marcello made an agreement with Frank Stronach on March 24, 2016 to acquire Lot 30 for a price of \$840,750 which, 1010 submits, was substantially less than the fair market value of this property. 1010 relies on evidence that Mr. Marcello had a longstanding personal and business relationship with Mr. Stronach going back more than 40 years. 1010 submits that in making this agreement, Mr. Marcello used his position of influence to secure a secret benefit for himself and WPC from the Stronach Group as an inducement or reward for his assistance in securing release of the Easements.

[127] 1010 read-in the following questions and answers from the examination for discovery of Mr. Marcello as part of its own case:

309 Q. So am I right, Mr. Marcello, that in March 2016, you came to an agreement with Mr. Stronach to purchase one of either Lot 30 or 31 17 as well as the new parcel that was to become Lot 37?

A. That's correct.

310 Q. And can you tell me how that agreement came to be?

A. I owned Lot No. 28, which was – which was part of the original Joint Venture Agreement between myself and Stronach. In any event, Nino Campoli wanted to buy 28, and his father and Nino visited Frank and asked Frank to sell them 28.

I have the option to purchase 28, which related and went back to the original agreement of Lot No. 26, 27, and 28. And I refused to sell it. In any event, he was quite insistent. He was trying to please Frank Campoli, the father, and in any event, I still refused.

My son was going to be building on that lot, or I was hoping that he would build on the lot. He had been looking at Adena Meadows for quite some time, and he was very close to making a decision. In any event, I said, no, I would not sell Frank – I would not sell Nino the lot.

And Frank then offered me Lot No. 30 if I would sell Lot No. 28 to the Campolis. Lot No. 30 was a superior lot, and I felt that that would even be more of an enticement for my son to want to build there.

In addition, I said that I wanted the orphan piece, which was now - or at least which is now number 37, which he agreed to sell at the same price as number 28. And that was – that was it. It was confirmed, and several days later or a week later, he changed his mind.

311. Q. Explain that to me.

- A. Explain why he changed or how he changed his mind?
- 312 Q. Well, I understand that you did buy Lot 30, so when he changed his mind, I don't know what you mean by that.
- A. On 30 – on the orphan piece.
- 313 Q. Okay. Explain that to me.
- A. He changed his mind.
- 314 Q. How so? How did that come about?
- A. He just said that he could not do it any longer.
- 315 Q. “He” being Frank Stronach?
- A. Frank Stronach said that he couldn't do it because he had a previous commitment, had sold it before, that it was part and parcel of some other deal, and he had forgotten about it and so on and so forth. And that was the end of it.

[128] 1010 also read in as part of its case the following questions and answers from the examination for discovery of Mr. Marcello:

- 335 Q. Okay. And when you came to this agreement, what were your intentions with Lot 30?
- A. Michael was going to build on it.
336. Q. Okay. And what was your intention with Lot 37?
- A. To build on it.
- 337 Q. Okay. And if Mr. Sahai just scrolls up a little bit, keep going. Stop.
- And if you look at this email, it's on page 2 of the PDF from you to Mike Rogers at March 24, 2016, 5:15 p.m. It talks about pricing, and says that:
- “He will sell Campoli Lot 28 for \$1 million plus HST.”
- Why were you getting such better prices than Campoli?
- Well, because the lot or at least – Lot No. 28 was all part and parcel of an agreement that we'd done in 2012.
- 338 Q. What do you mean by that? I don't know what that means.

A. There was a Joint Venture Agreement, which I mentioned to you earlier, with Frank Stronach and Frank Campoli and myself that went back to -- that went back to 2012. The pricing had determined that that time.

After we have built -- after we have built Lot 26, Frank Stronach wanted out of the joint venture as did -- well, I can't say as did Frank because once Stronach exited out of the joint venture, that was the end of it; however, I carried on with it. So the pricing goes back to 2012.

[129] Mr. Rogers testified that in early 2016, Nino Campoli, an Adena Meadows resident, wanted to buy Lot 28 in Adena Meadows. Mr. Marcello objected to the sale of Lot 28 to Nino. Nino's father, Frank Campoli, told Mr. Rogers that Mr. Marcello was treating Nino unfairly, and asked for a meeting with Mr. Stronach. Mr. Rogers arranged the meeting which he attended with the Campolis and Mr. Stronach at the Stronach Group Offices on March 24, 2016. At the meeting, the Campolis explained the issue involving Mr. Marcello. Mr. Stronach advised that he would speak to Mr. Marcello to resolve the matter.

[130] Mr. Rogers testified that he set up a call for Mr. Stronach and Mr. Marcello which took place while Mr. Rogers was in the room with Mr. Stronach. On the call, Mr. Stronach offered to sell Mr. Marcello Lot 30 or Lot 31 if he agreed that Nino could purchase Lot 28. According to Mr. Marcello's evidence, the price for Lot 30 was to be the same as the price determined in 2012 for Lot 28. Mr. Marcello testified at trial, as he had when he was examined for discovery, that he said that he also wanted the "orphan lot" (which became lot 37) at the same price as Lot 28 and Mr. Stronach agreed.

[131] Mr. Rogers testified that after the call, Mr. Marcello emailed Mr. Rogers to document the terms of his agreement with Mr. Stronach. The email refers to Mr. Stronach's agreement to sell lot 30 or lot 31 "for the same price as he was going to sell me lot 28 (approximately \$750,000) excluding HST". Mr. Rogers printed the email and brought it to Mr. Stronach to confirm its terms and asked him to sign it, which he did. Mr. Rogers then responded to Mr. Marcello by email, confirming that Mr. Stronach agreed to the terms.

[132] On March 28, 2016, Mr. Rogers emailed Mr. Marcello confirming the purchase price of \$840,750 for Lot 30 or 31 and for Lot 37. The price was stated to be the same as what Mr. Stronach would have sold lot 28 for in 2012. Mr. Marcello sent an email agreeing to the final price. Mr. Rogers replied that "we will move forward with having the orphan piece of land registered with Adena Meadows".

[133] According to Mr. Marcello's and Frank Stronach's evidence, several days or a week later, Mr. Stronach told Mr. Marcello that he could no longer sell Lot 37, the orphan lot, because he already sold it as part of another deal which he had forgotten about. According to Mr. Marcello, that was the end of it.

[134] The purchase of Lot 30 closed and title was put in the name of Michael Marcello In Trust. The purchase price was \$840,750, which was the purchase price established for Lot 28 in 2012.

[135] Mr. Marcello's evidence at trial was consistent with the evidence from his examination for discovery that was read-in by 1010 as part of its own case. This evidence shows that the agreement made with Frank Stronach on March 24, 2016 with respect to Lot 30 was, in substance, a trade of Mr. Marcello's option to purchase Lot 28 for a right to purchase Lot 30 at the price determined for Lot 28 when the joint venture agreement was made in 2012. The agreement was made because Nino Campoli wanted to buy Lot 28 and was not initiated by Mr. Marcello.

[136] 1010 accepts the evidence read-in from Mr. Marcello's examination for discovery with respect to Lot 30. 1010 submits that Mr. Marcello used his position of influence to secure Mr. Stronach's agreement to sell him Lot 30 at a low price, the previously agreed upon price in 2012, and he took advantage of this position of influence in breach of his fiduciary duties, because Mr. Stronach, who was unaware of the easement release provisions, believed he needed Mr. Marcello's assistance to secure release of the Easements.

[137] 1010 relies on evidence that at the same time that the deal for Lot 30 (and Lot 37) was papered, Mr. Macdonald, the lawyer retained by 1010 to provide advice in connection with the release of the Easements, was seeking instructions from the directors of 1010 and neither Mr. Marcello nor Mr. Rogers told him about Mr. Marcello's agreement to purchase Lot 30 or Lot 37, nor did they advise Mr. Coriat, the third director. I do not regard this to be unusual in the circumstances. The agreement made in respect of Lot 30 concerned an agreement made in 2012 for Lot 28. The agreement with respect to Lot 37 was made at the same time as the agreement for Lot 30. I address the agreement with respect to Lot 37 below.

[138] 1010 relies on evidence that shortly after Lot 30 was acquired, it was sold for \$1,550,000, significantly higher than the acquisition price, as a vacant and unimproved lot. I do not regard this evidence as supporting 1010's submission that Mr. Marcello received a secret and improper benefit through his acquisition of Lot 30. The acquisition price for Lot 30 was established in 2012, so it is not surprising that it was later sold for a higher price.

[139] When I consider Mr. Marcello's discovery evidence read in by 1010 and the evidence given at trial, there is nothing inherently improbable in the evidence of how Mr. Marcello became entitled to acquire Lot 30. He had an option to purchase Lot 28. Mr. Stronach approached him about giving up this option so the lot could be sold to Nino Campoli. There is no question that there was a discussion between Mr. Marcello and Mr. Stronach, confirmed in writing the same day, by which Mr. Marcello became entitled to acquire Lot 30, in substitution for Lot 28, and at the same price. I accept Mr. Marcello's evidence concerning his agreement made with Mr. Stronach for the purchase of Lot 30.

[140] I reject 1010's submission that in making the agreement to acquire Lot 30, Mr. Marcello took advantage of Mr. Stronach's lack of knowledge that the easement release provisions required 1010 to release the Easements upon written request. This agreement was prompted by Nino Campoli's desire to purchase Lot 28, and Mr. Stronach's wish to accommodate him. Mr. Stronach's knowledge or absence of knowledge of the effect of the easement release provisions had nothing to do with the agreement he made in respect of Lot 30.

[141] With respect to Lot 30, 1010 has failed to prove that it was sold to Michael Marcello In Trust as an inducement or reward to Mr. Marcello for his assistance in securing approval of By-Law No. 4 and release of the Easements. The evidence is to the contrary and shows that price for the sale of Lot 30 was determined in 2012 and that the discussion and agreement in 2016 was unrelated to the release of the Easements and approval of By-Law No. 4. I so find.

Alleged benefit from the Stronach Group in respect of Lot 37

[142] 1010 submits that Mr. Marcello breached his fiduciary duties his duties of honesty and good faith to 1010 by asking Mr. Stronach to sell him Lot 37 for the same price as he had agreed to sell Lot 30, in circumstances where Mr. Stronach did not know about the easement release provisions. 1010 submits that Mr. Marcello took advantage of Mr. Stronach who would have a reason to provide an inducement to Mr. Marcello for his assistance in obtaining release of the Easements. 1010 submits that Mr. Marcello received a secret benefit by purchasing Lot 37 for a low price that he realized on when it was later sold by Podere, acting through the Sage Grouse joint venture, for a higher price.

[143] The evidence of Mr. Marcello and Mr. Stronach was that the agreed upon price for the orphan lot (which became Lot 37) was the same price as the price agreed upon in 2012 for Lot 28.

[144] With respect to this price, 1010 cites evidence given by Mr. Marcello on cross-examination that Lot 37 was bigger than Lots 30 or 31 and that he understood at the time that at a price of \$750,000, he was purchasing Lot 37 at a price below the market value of this lot. 1010 cites the evidence of Mr. Rogers that, from his perspective, Mr. Marcello “cut himself a good deal” and that Mr. Marcello “took advantage of Frank in a weak moment”. 1010 relies on the expert evidence of Mr. Rout, which was not contradicted, that Lot 37 had a market value of \$2,640,000 as of June 29, 2017 (when the acquisition of Lot 37 ultimately closed).

[145] 1010 tendered into evidence at trial Mr. Marcello’s evidence from his examination for discovery that in his call with Mr. Stronach, he asked to purchase the orphan lot at the same price as the agreed upon price for Lot 30, and Mr. Stronach agreed. 1010 did not tender direct evidence that the agreed upon price was related to Mr. Marcello’s role in the release of the Easements. The discovery evidence given by Mr. Marcello and read-in at trial about his discussion with Mr. Stronach which resulted in an agreed upon price for the sale of Lot 37 was not contradicted when he was cross-examined. 1010 also read-in discovery evidence from Mr. Marcello that several days or a week later, Frank Stronach called him and said he could not do the deal on Lot 37 because he had a previous commitment and had sold it before, which he had forgotten about.

[146] Mr. Marcello submits that 1010, having read-in this discovery evidence, without contradicting it by other evidence or through cross-examination, is bound by this evidence.

[147] Rule 31.11(4) of the *Rules of Civil Procedure* provides that a party who reads into evidence as part of the party’s own case evidence given on an examination for discovery of an adverse party may rebut that evidence by introducing any other admissible evidence. Under this rule, a party is not prevented from attempting to contradict an adverse party’s discovery answers by cross-

examining the adverse party. See *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA), at para. 104.

[148] The discovery evidence from Mr. Marcello read into evidence at trial by 1010 must be considered in the context of other evidence at trial, and not in isolation. A trial judge is entitled to form his or her own opinion on the discovery evidence in light of all the evidence in the case. The evidence that is read in becomes part of the totality of the evidence available for the trial judge to consider. See *Reti v. Fox*, 1976 CarswellOnt 327, at para. 21; *Akhavan v. Taheri*, 2022 ONCA 483, at para. 11.

[149] Mr. Marcello testified at trial that after they agreed to substitute Lot 30 for Lot 28, he asked Mr. Stronach about purchasing the orphan lot at the same price and Mr. Stronach said yes. Mr. Rogers, who was present for the telephone call, testified that Mr. Marcello asked to buy the orphan piece and he heard Mr. Stronach say that he would sell this lot for the same price, and then he hung up. Mr. Rogers testified that Mr. Marcello then called him and explained the deal he had struck with Mr. Stronach. Mr. Rogers asked Mr. Marcello to send an email confirming the deal, and he did. Mr. Rogers testified that he took the email to Mr. Stronach who confirmed that this was the deal he had just negotiated. Mr. Stronach indicated this on the email.

[150] Mr. Stronach testified that in his conversation with Mr. Marcello, Mr. Marcello said he wanted to buy the orphan lot and he agreed.

[151] There is no direct evidence that the price agreed upon for lot 37 was related in any way to the release of Easements or the Manziana purchase of the Adjacent Land. There is no evidence that before their telephone conversation in March 2016, Mr. Marcello and Mr. Stronach had any discussions about the orphan lot in relation to the release of Easements, or otherwise. The discussion about the sale of the orphan lot took place in the context of Mr. Stronach's effort to arrange for a sale of Lot 28 to Nino Campoli. The discussion was a short one in which Mr. Stronach agreed to sell the orphan lot for the same price as Lot 28.

[152] 1010 disputes the truthfulness of the evidence from Mr. Marcello's examination for discovery that was read in as part of 1010's own case, and his evidence at trial, that Frank Stronach cancelled the agreement for Mr. Marcello to purchase Lot 37. 1010 submits that the deal was never cancelled and, instead, Lot 37 was acquired by Mr. Marcello through the Sage Grouse joint venture with Treasure Hill. 1010 submits that Mr. Marcello's evidence, and Mr. Stronach's evidence to the same effect, that Frank Stronach cancelled the deal with respect to Lot 37 lacks credibility and should be rejected.

[153] Mr. Marcello was cross-examined on his evidence that Mr. Stronach cancelled the deal involving Lot 37 and it was put to him that contrary to his evidence, the deal for Lot 37 was never cancelled. He stood by his evidence and responded that the assertion put to him was a lie.

[154] Frank Stronach testified that he agreed to sell the orphan piece that would become Lot 37 to Mr. Marcello but a few days later he was made aware that the lot was already sold. He testified that this was at the time when he lost control of a certain side of his businesses to his daughter,

Belinda. Mr. Stronach testified that he told Mr. Marcello that this lot was already sold and he “took it in stride”.

[155] When Mr. Stronach was cross-examined on this evidence, it was put to him that it is untrue that he was told that Lot 37 had been sold. Mr. Stronach stood by his evidence. He testified that he does not know anymore who told him that and he does not know who this lot was sold to, and he did not inquire at the time.

[156] 1010 submits that Mr. Marcello’s evidence that he accepted Mr. Stronach’s cancellation of the Lot 37 deal without insisting that Mr. Stronach be held to his word is inconsistent with his evidence that “people should live up to the business arrangements that they made” and the evidence regarding Mr. Marcello’s objections when other business arrangements were not honoured, namely, business arrangements regarding the Keswick project and those involving the lands at Bayview/Wellington (described below), as well as arrangements regarding Lot 28. 1010 notes that there is no written record of the cancellation of the deal for Lot 37.

[157] 1010 submits that Mr. Marcello initially testified that he did not recall whether he told Mr. Rogers about the cancellation and, when challenged on this evidence through his discovery evidence, he agreed that he told Mr. Rogers. Mr. Rogers testified that until the July 4 meeting of unitholders to approve By-Law #4, he had no understanding that the deal for Lot 37 was not effective, other than his knowledge that there were issues with it because another employee of the Stronach Group, Ari Huber, expressed frustration about this deal.

[158] 1010 submits that Mr. Marcello’s pleading in his statement of defence, which he reviewed and approved, that there was “no improper conduct relating to Marcello’s participation in the purchase and sale of Units 30 and 37” does not refer to the cancellation of the deal for the purchase of Lot 37.

[159] 1010 relies on evidence that Mr. Marcello followed up with Mr. Macdonald twice about the “new lot” which, it submits, demonstrates his continued interest in Lot 37 which is inconsistent with the deal being cancelled.

[160] 1010 submits that Mr. Stronach’s evidence was deeply flawed and should not be accepted. 1010 submits that Mr. Stronach’s evidence that he was “made aware” that the lot was already sold is inconsistent with Mr. Marcello’s evidence that Mr. Stronach told him that Mr. Stronach, personally, had agreed to sell lot 37 to someone else (“I committed the lot to someone else”), and Mr. Rogers testimony that only Mr. Stronach had the power to sell the Lot for Adena Meadows. 1010 submits that Mr. Stronach’s evidence that someone else committed the lot is inconsistent with emails and testimony from Mr. Fidei and Mr. Weiner that Mr. Stronach excluded the orphan lot from the Manziana sale for his grandchildren. 1010 submits that Mr. Stronach’s suggestion that the cancellation of the deal for Lot 37 was made when he had lost control of a side of his business to his daughter, Belinda, is contradicted by his 2018 statement of claim in litigation against his daughter where he pleaded that he exercised *de facto* control over the business during this time in the way he always had.

[161] The submission by 1010 that Mr. Stronach and Mr. Marcello should be disbelieved when they testified that Mr. Stronach called Mr. Marcello and cancelled the agreement for the sale of Lot 37 must be considered in light of the evidence of Mr. Fidei and Mr. Baldassarra with respect to Lot 37. This is because 1010's submission is that Mr. Marcello retained an interest in Lot 37 when it was acquired by Podere, and that he received or is entitled to receive a portion of the profits from the sale by Podere of Lot 37 as a reward for his role in securing release of the Easements.

[162] Mr. Fidei testified that they originally wanted to buy this lot as part of the whole property and then Mr. Stronach said he wanted to retain it for his grandchildren. Later, he received a call or email from Ari Huber of the Stronach Group who told him that they had decided to sell this lot and the price would be \$840,000. Mr. Fidei testified that he told Mr. Huber that he would buy it for that price, which he thought was a fair one. Mr. Fidei did not recall when he received the call or email from Mr. Huber and thought it would have been closer to March 2016 than May 2017.

[163] Mr. Fidei testified that he was buying the lot for himself and Mr. Baldassarra. He testified that the agreement of purchase and sale was made with Sage Grouse, a nominee, as purchaser. Mr. Fidei testified that Lot 37 was not part of the joint venture with WPC but Sage Grouse was used as a nominee for convenience. Mr. Fidei testified that no one else was involved with this purchase, and that Mr. Marcello never had an interest in the purchase of Lot 37. He testified that Mr. Marcello received nothing from the proceeds of sale of this lot and is not entitled to receive anything.

[164] I do not accept 1010's submission that Mr. Fidei's evidence with respect to Lot 37 should be rejected because of inconsistencies in his evidence about when he received an offer to sell Lot 37 to him or why Mr. Huber was willing to sell lot 37 for \$840,000 when, according to an email exchange (not admitted into evidence but marked as an exhibit for identification), he would have known that Mr. Fidei was willing to pay \$1 million. What Mr. Huber knew and why he offered to sell Lot 37 at the proposed price is not in evidence. It was open to 1010 to call him to testify if his evidence was necessary for 1010 to prove its claim.

[165] Sage Grouse is a company owned by Mr. Fidei and Mr. Baldassarra. I do not accept 1010's submission that Mr. Fidei chose to use Sage Grouse to make the purchase agreement instead of another Treasure Hill company because Sage Grouse was a party to a joint venture with Mr. Marcello. On closing, title was transferred to Podere. Mr. Marcello had no interest in Podere. I find that Mr. Fidei used Sage Grouse as a nominee purchaser for convenience.

[166] Mr. Baldassarra testified that only his company and Mr. Fidei's company were involved in the ownership of Lot 37 and, when it was sold, he received his share of the proceeds, 65%, and Mr. Fidei received the balance. He testified that no one else received a share of the proceeds of sale, although he agreed that he does not know what Mr. Fidei did with his share of the proceeds.

[167] 1010 submits that two persons who were employees of the Stronach Group, Alon Ossip and Ari Huber, would have relevant knowledge about the sale of Lot 37. 1010 submits that these witnesses should have been called to testify at trial by the defendants and that an adverse inference should be drawn against the defendants that the evidence of Mr. Huber and Mr. Ossip would hurt their case, because of their failure to call Mr. Ossip and Mr. Huber as witnesses.

[168] I disagree that an adverse inference should be drawn from the failure of Mr. Marcello or other defendants to call Alon Ossip or Ari Huber as a witness. There was no undertaking given by Mr. Marcello or other defendants to call either of them. In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada, Fourth Edition*, LexisNexis 2014, the authors write, at §6.541, that “[a]n adverse inference should be drawn only after a *prima facie* case has been established by the party bearing the burden of proof”. It was open to 1010 to call these persons as witnesses if their evidence was needed for it to prove its case.

[169] With respect to Lot 37, the discovery evidence read-in by 1010 that Mr. Marcello was told by Mr. Stronach that he was cancelling the deal for Lot 37 was not contradicted through cross-examination or by other evidence. The evidence from Mr. Stronach, Mr. Fidei, and Mr. Baldassarra is that Mr. Marcello had no interest in Lot 37. There is no direct evidence that Mr. Marcello received, or is entitled to receive, any part of the proceeds from the sale by Podere of Lot 37.

[170] I have considered the submissions of 1010 that, in the circumstances, I should disbelieve the evidence of Mr. Marcello, Mr. Stronach, and Mr. Fidei and find that (i) the deal for Mr. Marcello to acquire Lot 37 was not cancelled by Mr. Stronach, (ii) Mr. Marcello had an interest in Lot 37 through the Sage Grouse joint venture when it was acquired by Mr. Fidei through Sage Grouse, and (iii) Mr. Marcello received or is entitled to receive, directly or indirectly, a share of the proceeds of sale.

[171] The evidence that Mr. Marcello did not object to the cancellation when he objected to other changes to agreements does not show that he is being untruthful. Mr. Marcello may have made a good deal, as Mr. Rogers put it, when he asked to buy Lot 37 and Mr. Stronach agreed. He may have been satisfied with the deal as it related to Lot 30 and been willing to give up the deal for Lot 37 without objection. The simple fact that Mr. Marcello responded to the cancellation of the deal as he did does not show that he or Mr. Stronach are being untruthful in their evidence on this point.

[172] The evidence that Mr. Marcello corrected his evidence when shown that he had testified earlier on discovery that he had told Mr. Rogers about the cancellation of the deal does not show that Mr. Marcello was being untruthful in his evidence. He testified at trial many years after the events in question and some inconsistencies between his evidence on discovery and at trial would not be unexpected.

[173] Mr. Marcello’s Statement of Defence including a broad denial of improper conduct in relation to the sale of Lot 37 does not show that he was being untruthful in his evidence at trial.

[174] Mr. Marcello’s emails to Mr. Macdonald about the “new lot” do not show that Mr. Marcello had a personal interest in Lot 37 or that he was being untruthful in his evidence.

[175] With respect to Mr. Stronach’s evidence that he cancelled the deal for Lot 37, I do not find that there is a significant discrepancy between his evidence of what he told Mr. Marcello and Mr. Marcello’s evidence about what he was told. Mr. Stronach stood by his evidence when he was cross-examined and I find no basis to disbelieve him.

[176] I also accept the evidence of Mr. Fidei that Mr. Marcello had no interest in Lot 37 when he acquired it and that he received no share of the proceeds of sale, directly or indirectly, nor is he entitled to receive a share.

[177] I accept the evidence read in by 1010 from Mr. Marcello's examination for discovery that the deal for Lot 37 was cancelled soon after it was made. I find that Mr. Marcello did not secure a secret benefit to buy Lot 37 at a favourable price as part of his support for the Treasure Hill development or as an incentive or reward for his role in obtaining a release of the Easements or that he has received or is entitled to receive a portion of the proceeds of sale by Podere of lot 37.

Alleged benefit from Treasure Hill in relation to Keswick project

[178] In the Statement of Claim, 1010 pleads that Treasure Hill or an affiliated company is developing a project in Keswick, Ontario. 1010 pleads that in exchange for Mr. Marcello's assistance in securing approval of By-Law No. 4, Mr. Fidei facilitated Mr. Marcello receiving a 15% interest in the Keswick project. 1010 pleads that Mr. Marcello stands to make a significant profit from his investment in the Keswick project. 1010 pleads that Mr. Marcello was permitted to invest in the Keswick project in return for his role in securing approval for By-Law No. 4, in breach of his fiduciary duties.

[179] 1010 submits that the evidence shows that Mr. Fidei permitted Mr. Marcello (through WPC) to invest in the Keswick project in return for Mr. Marcello's support for the Treasure Hill development. 1010 relies on evidence that at the time that WPC invested in the Keswick project, Mr. Marcello was still the President of 1010 and the Treasure Hill transaction had not yet closed. 1010 relies on evidence that the Keswick investment was made during the period when Treasure Hill was looking to Mr. Marcello for assistance in completing the agreement for release of the Easements, and this agreement was signed by Mr. Marcello (on behalf of 1010) and by Mr. Fidei (on behalf of Manziana) shortly after WPC was permitted to participate in the Keswick project.

[180] Mr. Fidei testified that after they met, he and Mr. Marcello became close friends and Mr. Marcello was someone with whom he wanted to do further business. Mr. Fidei testified that Mr. Marcello had a fund that was mainly focused on real estate and he thought he and his team would be good partners for Treasure Hill moving forward. He testified that he offered Mr. Marcello a share of a new deal in Keswick, first at 20%, which he then reduced to 15% or 16% because he had other partners.

[181] Mr. Marcello testified that Mr. Fidei approached him and asked if he was interested in investing in the Keswick project, a residential real estate project. He testified that he thought there was a great opportunity so he sent his son, Michael, to do a site visit, and he also did several site visits. He testified that he turned the file over to WPC's President and CEO, John Cundari, to follow up on this investment. Mr. Marcello testified that there was no connection between WPC's investment in the Keswick project and the release of the Easements.

[182] On October 3, 2016, Mr. Marcello sent an email to his colleagues at WPC describing an opportunity to invest in the Keswick development with a 20% interest. On October 17, 2016, Mr. Fidei wrote to Mr. Marcello advising that he would have to cut the interest of WPC to 15%. Mr.

Marcello testified that he was upset at being cut back to 15% but agreed, knowing that there would be other joint ventures.

[183] 1010 relies on evidence given at trial by Rick Mangat, a director of 1010. Mr. Mangat testified that he discussed the Keswick project with Mr. Fidei at a lunch around November 2017. Mr. Mangat testified that Mr. Fidei told him about his background and how he got into the development business with Mr. Baldassarra. He testified that Mr. Fidei told him they had funds available to them for their developments and funding was not a problem. Mr. Mangat testified that he asked Mr. Fidei why he had borrowed money from Mr. Marcello's company for the Keswick project. He testified that Mr. Fidei responded that he had to thank Mr. Marcello for "getting this easement deal done" and he said that "it was payback for getting this done".

[184] Mr. Fidei was asked about his lunch with Mr. Mangat. He testified that Mr. Mangat asked why WPC had Treasure Hill's logo on its web site and he responded that they had done a deal together at Keswick. He testified that he told Mr. Mangat that he met Mr. Marcello, started a relationship with him, and learned how he and his partners could help Treasure Hill's growth moving forward. On cross-examination, Mr. Fidei denied that he included Mr. Marcello as an investor in the Keswick project to pay him back for getting the Manziana purchase of the Adjacent Land completed. He repeated that he wanted to have Mr. Marcello as a partner because he thought he would bring value, and that the involvement of WPC in the Keswick project had nothing to do with the purchase of the Adjacent Land. He denied making any deals with Mr. Marcello as payback for his assistance in getting the Manziana purchase completed.

[185] John Cundari, the President and CEO of WPC, testified at trial. He testified that WPC became an investor in the Keswick project and contributed about \$2.9 million which was 16 percent of the funds required from investors. He testified that there were over ten investors. He testified that WPC would receive 16 percent of the profits from this project. WPC signed a guarantee required by the senior lender for its proportionate share of \$175 million which was \$35 million, which constrained its ability to do other deals of this nature. He testified that the project did not perform to expectations. Mr. Cundari testified that if scheduled payments in 2025 are made, WPC will receive a return of 12.9% on its investment over the life of the project. Mr. Marcello testified that this return is significantly lower than WPC's target rate of return on investments.

[186] I accept the evidence of Mr. Cundari. There were other outside investors. Based on his evidence, the terms of the investment, which required WPC to provide a substantial guarantee to the senior lender, were not unusual.

[187] The circumstances do not justify a finding that the evidence given by Mr. Marcello and Mr. Fidei should be disbelieved and that, in fact, Mr. Marcello, through WPC, received a secret interest in the Keswick project as a reward for his assistance in securing a release of the Easements or for assisting with completion of the Manziana purchase. Both Mr. Marcello and Mr. Fidei deny that this was the reason for this investment. I accept their evidence in this respect.

[188] In making this finding, I take into account that Mr. Marcello knew that 1010 was required to release the Easements pursuant to the easement release provisions. I do not accept 1010's submission that Mr. Marcello intentionally withheld from other parties 1010's obligation to release

the Easements and took advantage of their lack of knowledge to secure secret benefits. Mr. Marcello had advised soon after his first meeting with Mr. Fidei that he intended to support the Treasure Hill proposal based on what he knew at the time. The directors wrote to the Town of Aurora on December 4, 2015 expressing support for the Treasure Hill proposal. This was before the Keswick opportunity was known to Mr. Marcello. I also note that WPC did not try to conceal this investment. WPC's connection to Treasure Hill was posted on its web site. I find that WPC's investment in the Keswick project was made because Mr. Marcello and other WPC team members considered it to be a good investment opportunity, and that this investment was unrelated to the release of the Easements.

[189] If Mr. Fidei said to Mr. Mangat that he invited Mr. Marcello to invest in the Keswick project as a reward for his support of the Manziana purchase transaction, I find that this was not known to Mr. Marcello. Mr. Mangat may have misunderstood what he was told by Mr. Fidei about the reason for including WPC as an investor in the Keswick project. Mr. Fidei may have been referring only to Mr. Marcello's support for the Manziana purchase. I accept Mr. Fidei's evidence that he included Mr. Marcello in the Keswick project because he thought he and WPC would bring value to the project, and that this was unrelated to the purchase of the Adjacent Land by Manziana.

[190] I find that Mr. Marcello approved the investment by WPC in the Keswick project for business reasons unrelated to the release of the Easements or the sale of the Adjacent Land.

Alleged benefit from Treasure Hill in relation to Manziana purchase of Adjacent Land

[191] 1010 submits that the evidence shows that Mr. Marcello was permitted to participate as an investor in Manziana and that this was given to him as an inducement or reward for his assistance in securing release of the Easements and completion of the sale transaction.

[192] 1010 relies on evidence given by Mr. Baldassarra. On his examination in chief, he was asked about Manziana and he testified that when Mr. Fidei purchases land he likes to purchase it through a separate company. Manziana was used for this purpose. Mr. Baldassarra testified that Manziana was owned by Mr. Fidei and him, and probably a few shares in someone else. He was asked who the few other shares were given to and he answered that he thinks they were given to Mr. Marcello. He then said he was sure. When he was cross examined, Mr. Baldassarra was asked about this evidence and testified that he thinks Mr. Marcello was given shares in Manziana in 2017 or 2018 and he agreed this was done in connection with the deal that Manziana was doing to buy the lands around the golf course.

[193] Later in his cross-examination, Mr. Baldassarra was asked how much of the profits from the purchase of the lands to the north of the golf club were paid to Mr. Marcello. Mr. Baldassarra responded that no profit was paid to Mr. Marcello. He testified that Mr. Marcello was not involved. Mr. Baldassarra was reminded of his evidence that Mr. Marcello was a shareholder of Manziana and he responded: "If he was a shareholder, I can't remember everything. Like I got maybe six, 700 hundred companies that I do business, like and I got everything labeled like in my office, but if he was involved, he was paid his share."

[194] Mr. Baldassarra gave conflicting evidence with respect to Mr. Marcello's interest in Manziana. His evidence that Mr. Marcello held shares in Manziana, the purchaser of the Adjacent Land, conflicts with his evidence that Mr. Marcello was not involved in this transaction and received none of the profits from the purchase of the lands to the north of the golf club. Other than from Mr. Baldassarra, there is no evidence that Mr. Marcello owned shares in Manziana.

[195] Mr. Fidei was asked about Mr. Baldassarra's testimony that Mr. Marcello had an interest in the Manziana project and he responded that Mr. Baldassarra was confused, and that Mr. Marcello has no interest at all in Manziana.

[196] It was evident that Mr. Baldassarra was confused about the evidence he gave with respect to the shares of Manziana. Mr. Marcello, through WPC, was an investor in the Keswick project. This may have caused Mr. Baldassarra's confusion. When I consider Mr. Baldassarra's confusion when he testified on this topic, I do not find his evidence about Mr. Marcello's share interest in Manziana to be reliable. I accept Mr. Fidei's evidence that Mr. Marcello had no interest in Manziana. I find that Mr. Baldassarra was mistaken when he testified that Mr. Marcello held shares in Manziana.

Alleged interest in Bayview/Wellington property

[197] 1010 relies on evidence that in or about May 2016, Mr. Marcello engaged in negotiations regarding the acquisition of a plot of land from the Stronach Group at Bayview and Wellington and that Mr. Marcello and Mr. Fidei agreed to acquire the land through a joint venture. Mr. Cundari testified that a Treasure Hill entity would purchase the Bayview Wellington property and that WPC and Treasure Hill would participate in it as a joint venture.

[198] 1010 relies on an email sent by Mr. Marcello to John Simonetti of the Stronach Group dated December 22, 2016 which reads:

TSG asked for help to get the Touch Gold deal done which I provided. Ari and Belinda asked for help to get the Acasta closed which I provided. Who do I ask to get this this closed? Merry Christmas.

[199] Mr. Cundari testified that this deal died in 2018 or 2019 because the lands were caught up in a legal dispute between parties in the Stronach Group.

[200] There is no evidence that Mr. Marcello received any benefit from this proposed transaction. Both Mr. Marcello and Mr. Fidei testified that they became friends and wanted to do business together. There is no evidence that this proposed deal had anything to do with release of the Easements or completion of the Manziana sale. I do not regard the language of Mr. Marcello's email to show that he received a secret benefit for his assistance in securing release of the Easements where Mr. Marcello knew that 1010 was contractually required to release the Easements.

[201] I find that the dealings between Mr. Marcello and Treasure hill in relation to the Bayview Wellington property were usual business dealings between persons who wanted to work together.

These business dealings were not entered into as an inducement or reward for Mr. Marcello's assistance in securing release of the Easements.

Did Mr. Marcello breach his fiduciary duty and his duty under s. 37(1)(a) by failing to disclose actual and potential conflicts of interest?

[202] Section 40(1) of the *Condominium Act* provides:

A director of a corporation who has, directly or indirectly, an interest in a contract or transaction to which the corporation is a party or a proposed contract or transaction to which the corporation will be a party, shall disclose in writing to the corporation the nature and extent of the interest.

[203] 1010 submits that as a result of the March 2016 agreement with Mr. Stronach regarding Lots 30 or 31 and Lot 37, Mr. Marcello had a material interest in the transaction involving release of the Easements, which he was required to disclose. 1010 submits that the creation of Lot 37 as a part of the Adena Meadows community was offered to 1010 as consideration for releasing the easements and, therefore, Mr. Marcello had an interest in securing the release of the Easements to ensure the creation of Lot 37, which he could then purchase at a significantly discounted price.

[204] 1010 submits that by failing to disclose the March 2016 agreement to Mr. Coriat, Goodmans (1010's lawyers), or unit owners, Mr. Marcello acted in contravention of his duty under s. 40 of the *Condominium Act* and his fiduciary duties.

[205] 1010 submits that Mr. Marcello also breached these duties by failing to disclose the Bayview/Wellington transaction, his business relationship with Mr. Stronach, or his investment in the Keswick project.

[206] Mr. Marcello told 1010's lawyer, Mr. Macdonald, of his joint venture agreement with Treasure Hill with respect to development of Lot 10 and 27. Mr. Macdonald advised Mr. Marcello that this did not amount to a conflict of interest, but he suggested that language be included in the Information Circular with respect to these dealings.

[207] The Information Circular that was sent to unit owners before the July 4, 2016 meeting included the following language:

Section 40 of the *Condominium Act, 1998* requires a director having a conflict of interest in a transaction upon which the board is voting to disclose that interest in writing and to absent himself or herself from any discussion or vote in respect of that transaction. Mr. Rocco Marcello has disclosed to the Board that while he has no direct or indirect interest in the Adjacent Lands or in the Proposed Development, he has an interest in Windsor Private Capital, a limited partnership which has a business relationship with the Treasure Hill Group in respect of other, unrelated matters. While such a business relationship does not constitute a conflict of interest within the meaning of Section 40 of the *Condominium Act, 1998*, Mr. Marcello has made this disclosure for the benefit of all unit owners in the interest of transparency and full disclosure.

[208] As explained above, I accept the evidence of Mr. Stronach and Mr. Marcello that their agreement with respect to the orphan lot which became Lot 37 was cancelled by Mr. Stronach within a week of the March 2016 telephone call. Mr. Marcello had no interest in Lot 37 at the time of the July 4, 2016 meeting with unit owners. Mr. Marcello had no personal interest in the creation of Lot 37 when this meeting was held.

[209] Mr. Marcello's 2012 joint venture agreement with Mr. Stronach and Mr. Campoli led to the 2016 agreement for Mr. Marcello's purchase of Lot 30. This agreement was unrelated to the sale of the Adjacent Land.

[210] With respect to discussions involving Treasure Hill in respect of the Bayview/Wellington property, the fact that Mr. Marcello, through WPC, had a business relationship with Treasure Hill in respect of other, unrelated matters was disclosed to unit owners in the Information Circular. This disclosure covered Mr. Marcello's interest acquired in October 2016, through Windsor LP, in the Keswick project.

[211] 1010 has failed to prove that Mr. Marcello breached his fiduciary duties by failing to disclose actual and potential conflicts of interest.

Did Mr. Marcello breach his fiduciary duties and s. 37(1)(a) duties by failing to recuse himself from decisions in relation to release of the Easements?

[212] 1010 submits that Mr. Marcello failed to recuse himself from the transaction involving release of the Easements as he was required to do pursuant to his fiduciary duty and section 40 of the *Condominium Act*.

[213] 1010 submits that at the moment that Mr. Marcello decided to secure personal benefits for himself in exchange for his assistance in securing release of the Easements, he should have declared a conflict and recused himself. 1010 submits that Mr. Marcello chose not to do so because, if he had, the Treasure Hill deal would have had no champion and may not have proceeded. In this event, Mr. Marcello would not have received all the benefits he ultimately secured for himself.

[214] I have found that Mr. Marcello did not set out to secure personal benefits for himself involving the release of the Easements, and that he received no such personal benefits as an inducement or reward for assisting in the release of the Easements.

[215] I find that Mr. Marcello did not breach his duties to 1010 by failing to recuse himself from the transaction involving release of the Easements.

Did Mr. Marcello breach his fiduciary duties and s. 37(1)(a) duties by putting his own interests ahead of the interests of 1010?

[216] 1010 submits that Mr. Marcello's conduct reflects the conduct of a director taking all measures to ensure that the vote of unit owners approving release of the Easements passed, in breach of his fiduciary duty, where this vote furthered the self-interest of Mr. Marcello.

[217] 1010 submits that Mr. Marcello failed to disclose to Goodmans or unit owners that the effect of the Manziana transaction, if completed, would be that condominium fees for 1010 unit owners would increase because the contribution to such fees under the Shared Facilities Agreement by Leslie-Wellington, the owner of the Adjacent Land, would end. 1010 relies on evidence that, instead, Mr. Marcello told unit owners that fees would decrease due to the addition of new lot 37.

[218] At the July 4, 2016 meeting, Mr. Marcello did not tell unit owners that the fees would increase with completion of a sale of the Adjacent Land. Leslie-Wellington, as owner of the Adjacent Land, had been making a contribution to fees pursuant to the Shared Facilities Agreement. Upon completion of a sale, this obligation would end. This would be the case no matter the identity of the purchaser of the Adjacent Land.

[219] Mr. Marcello testified that he discussed the issue of fees with Mr. Mangat during the meeting and Mr. Marcello said they would have to look at this question. He testified that his view at the time was that any increase in fees could be fixed by reducing the security, which would not be needed to the same extent after development, with proper fencing, of the Adjacent Land.

[220] Mr. Marcello should have disclosed to unit owners that the contribution to fees by Leslie-Wellington under the Shared Facilities Agreement would end upon completion of a sale of the Adjacent Land. I do not agree that his failure to do so led to any material consequence. I find that the disclosure of this fact would not have caused unit owners to oppose the release of the Easements which would facilitate completion of the sale of the Adjacent land to Manziana.

[221] When the budget was discussed, the unit owners preferred to keep the existing security arrangements which resulted in a monthly increase in fees of approximately \$300 per month per unit. The reduction of fees from the addition of Lot 37 would continue. I find that in failing to disclose the effect on fees of completion of the sale to Manziana, Mr. Marcello was not preferring his personal interests over the interests of 1010.

[222] For these reasons, I conclude that Mr. Marcello did not breach his fiduciary duties owed to 1010. In reaching this conclusion, I reject the submission by 1010 that Mr. Marcello intentionally withheld information about the easement release provisions from the Stronach Group, unit owners, and Treasure Hill representatives so that he could secure personal benefits by using his influence to assist with the release of the Easements. There is no direct evidence that he did so, and the circumstances do not justify an inference that he did so. I accept Mr. Marcello's evidence where he denied the proposition put to him that he did so.

Did Mr. Rogers breach his fiduciary duty?

[223] 1010 submits that Mr. Rogers breached his fiduciary duty in several respects.

Did Mr. Rogers breach his fiduciary duty by failing to declare a conflict of interest as an executive with the Stronach Group and by failing to recuse himself?

[224] Mr. Rogers was appointed to the first board of directors of 1010 by the Declarant, Adena Meadows Limited. He remained a director of 1010 until July 2016. During this period of time, Mr.

Rogers was an executive with the Stronach Group and its nominee on the board of directors of 1010.

[225] 1010 submits that Mr. Rogers breached his fiduciary duties owed to 1010 to act in its best interest in three respects:

- (a) By failing to disclose that, through his position as an executive with the Stronach Group and as its nominee on the board of directors of 1010, he was in a position of conflict of interest and by failing to recuse himself from decisions in respect of release of the Easements;
- (b) By assisting with and failing to disclose the March 24, 2016 agreement regarding Lots 30 or 31 and Lot 37;
- (c) By placing the interests of the Stronach group ahead of those of 1010.

[226] In the Statement of Claim, 1010 claims against all defendants disgorgement of profits directly or indirectly made by Mr. Marcello, WPC and Windsor LP from Unit 30, Unit 37, and the Keswick Project. In the amendments granted at the opening of trial, 1010 claims against Mr. Rogers, as an alternative to damages:

- (a) disgorgement of at least \$709,250 on a joint and several basis as against Mr. Marcello, Michael Marcello, and Mr. Rogers in relation to Unit 30.
- (b) disgorgement of at least \$3,660,000 on a joint and several basis as against Mr. Marcello, Mr. Rogers, WPC, Windsor LP, Podere and Mr. Fidei in relation to the sale of Lot 37.

[227] The remedy of disgorgement refers to awards that are calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and irrespective of whether the plaintiff suffered damage at all. See *Atlantic Lottery*, at para. 23.

[228] Section 40(1) of the *Condominium Act* provides:

40 (1) A director of a corporation who has, directly or indirectly, an interest in a contract or transaction to which the corporation is a party or a proposed contract or transaction to which the corporation will be a party, shall disclose in writing to the corporation the nature and extent of the interest.

[229] 1010 submits that Mr. Rogers, an executive with the Stronach Group and a nominee of the Stronach Group on the board of 1010, was in a conflict of interest from the time he acted to secure Mr. Marcello's support for the Manziana purchase transaction in October 2015. 1010 submits that Mr. Rogers should have declared his conflict and recused himself from consideration of this transaction, including release of the Easements. 1010 submits that Mr. Rogers' failure to declare this conflict and recuse himself was a breach of his fiduciary duty owed to 1010.

[230] The fact that Mr. Rogers was a senior executive with the Stronach Group and its nominee on the board of directors of 1010 was known to the other directors of 1010 at the time, Mr. Marcello and Mr. Coriat. This fact was also known by Mr. Macdonald, legal counsel to 1010 in respect of release of the Easements. Mr. Rogers' evidence is that his position with the Stronach Group was known to unit owners through introductions made at meetings of unit owners and through his dealings with unit owners in respect of its day-to-day operations. When Mr. Rogers sought re-election as a director of 1010, he submitted a resume for his nomination. This was available to residents and disclosed that Mr. Rogers was the President of racing and gaming for the Stronach Group. I find that Mr. Rogers' role with the Stronach Group was known to unit owners at the time of the July 4, 2016 meeting.

[231] At the July 4, 2016 meeting with respect to proposed By-Law No. 4, Mr. Rogers did not vote as a director. He voted as a representative of the Stronach Group, which owned two units. Mr. Rogers did not, however, formally disclose his role with the Stronach Group in the notice calling the meeting of unit owners.

[232] I have found that Mr. Marcello's March 24, 2016 agreement with Mr. Stronach in respect of Lot 30 and Lot 37 was unrelated to the release of Easements by 1010. Mr. Marcello did not receive a secret benefit from the Stronach Group as an inducement or reward for securing release of the Easements. Mr. Rogers did not breach his fiduciary duty to 1010 through his assistance with or knowledge of this agreement.

[233] Mr. Rogers did not place the interests of the Stronach Group ahead of the interests of 1010 in relation to release of the Easements. 1010 had a contractual obligation to release the Easements. The SFA plainly so provided. As Mr. Coriat testified, this was a given. It was not necessary for Mr. Rogers to recommend that 1010 seek legal advice about Mr. Marcello's agreement with Mr. Stronach regarding Lot 30 and Lot 37. Mr. Rogers believed that the Manzianna sale transaction was in the best interest of 1010. He also believed that a delay in the vote on By-law No. 4 would present an unnecessary risk to 1010 and he truthfully expressed this concern at the July 4, 2016 meeting.

[234] In these circumstances, I do not find that Mr. Rogers breached his fiduciary duty to act in 1010's best interests.

[235] If I had concluded that Mr. Rogers breached his fiduciary duty owed to 1010 to act in its best interests by failing to disclose in writing his role with the Stronach Group, I would conclude that Mr. Rogers is not jointly and severally liable to disgorge any amounts in relation to Lot 30 or Lot 37. I have found that Mr. Marcello's agreement with Mr. Stronach in respect of these two lots was unrelated to the release of the Easements. There was no wrongful benefit received by any defendant in relation to Lot 30 or Lot 37.

Are the defendants (other than Mr. Marcello) liable for the tort of knowing assistance in the breach of a fiduciary duty?

[236] In *Extreme Venture Partners Fund I LP v. Varma*, 2021 ONCA 853, the Court of Appeal for Ontario, at para. 74, confirmed that the constituent elements of the tort of knowing assistance in the breach of a fiduciary duty are that: (i) there must be a fiduciary duty; (ii) the fiduciary must

have breached that duty fraudulently and dishonestly; (iii) the stranger to the fiduciary relationship must have had actual knowledge of both the fiduciary relationship and the fiduciary's fraudulent and dishonest conduct; and (iv) the stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

[237] In *Extreme Venture*, the Court of Appeal held, at para. 89, that it is open to a court to make a finding of joint and several liability between the faithless fiduciary and the knowing assistant, although there is no rule that this is always the case and there may be circumstances where a different order should be made. The Court of Appeal confirmed that courts should be given sufficient flexibility to fashion a fair remedy in the circumstances of a particular case.

[238] 1010 submits that the defendants other than Mr. Marcello knowingly assisted in the fraudulent and dishonest breaches by Mr. Marcello of his fiduciary duty owed to 1010. 1010 submits that they should be held jointly and severally liable with Mr. Marcello for the remedy of disgorgement in relation to the particular transactions in which they participated with or assisted him.

[239] For reasons I have given, I find that Mr. Marcello did not breach his fiduciary duty owed to 1010. He did not act fraudulently or dishonestly. I find that Mr. Rogers did not breach his fiduciary duties or act fraudulently or dishonestly.

[240] The defendants are not liable for the tort of knowing assistance in the breach of a fiduciary duty by Mr. Marcello or Mr. Rogers.

Is 1010 entitled to an award of punitive damages?

[241] 1010 seeks an award of punitive damages against the defendants.

[242] There is no evidentiary basis for such an award. The actions of the defendants were not malicious or high-handed. They did not show a reckless disregard for the rights and interests of 1010. This claim is denied.

The counterclaim

[243] Mr. Marcello, WPC, Windsor L.P., Treasure Hill, and Manziana counterclaim against 1010, Alan Benlolo, Rick Mangat and Nino Campoli.

[244] Mr. Marcello, WPC, Windsor L.P. seek a declaration that the defendants by counterclaim shall indemnify and hold harmless the plaintiffs by counterclaim for (a) all damages they suffer or amounts they may be required to pay (and declaring that no plaintiff by counterclaim can be assessed any costs associated with this lawsuit and damages against 1010 for interference with the Manziana project), and (b) these claimants' respective share of 1010's expenses in pursuing this claim or defending the counterclaim.

[245] These parties accept that this is not the time for making submissions about costs. The submissions concerning costs of the main action, even against non-parties, should be made in costs

submissions and not by way of counterclaim. None of the other claims for indemnification were pursued at trial.

[246] Manziana claims damages to the extent that the defendants by counterclaim interfere with the Manziana project. Manziana did not pursue the counterclaim at trial.

[247] All plaintiffs by counterclaim seek interest and costs. No damages are awarded to the plaintiffs by counterclaim.

[248] The counterclaim was not seriously pursued at trial. The counterclaim should be dismissed.

DISPOSITION

[249] For these reasons, 1010's claim is dismissed. The counterclaim is also dismissed.

[250] If the parties are unable to resolve costs, I may be spoken to at a case conference to be arranged through the Commercial List Office where a timetable for written submissions may be approved.

Cavanagh J.

Released: August 11, 2025

CITATION: York Region Vacant Land Condominium Corporation No. 1010 v. Marcello, 2025
ONSC 4604

COURT FILE NO.: CV-20-00636171-00CL

DATE: 20250811

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

**YORK REGION VACANT LAND CONDOMINIUM
CORPORATION NO. 1010**

Plaintiff

– and –

**ROCCO A. MARCELLO, TREASURE
HILL DEVELOPMENTS INC., WINDSOR
PRIVATE CAPITAL INC., WINDSOR PRIVATE
CAPITAL L.P., MANZIANA BUILDERS (BT)
CORP., PODERE CONSTRUCTION LTD.,
NICHOLAS FIDEI and MICHAEL MARCELLO**

Defendants

REASONS FOR JUDGMENT

Cavanagh J.

Released: August 11, 2025