

CITATION: Claridge December Holdings Inc. v. Co-operative d’Habitation Desloges Inc.,
2026 ONSC 4381
COURT FILE NO.: CV-18-75280 and CV-18-78704
DATE: 2026/07/28

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CLARIDGE DECEMBER HOLDINGS	)	
INC.	)	<i>Ronald F. Caza and Robert Ruddock, for</i>
	)	Claridge December Holdings Inc.
Applicant/Respondent on the Cross-	)	
Application	)	
– and –	)	<i>Charles Gibson and Ian Houle, for the Co-</i>
	)	Operative d’Habitation Desloges Inc.
CO-OPERATIVE D’HABITATION	)	
DESLOGES INC. and SCOTIA	)	
MORTGAGE CORPORATION	)	
	)	
Respondents/Applicant on the Cross-	)	
Application	)	
	)	
	)	HEARD at Ottawa: December 3 and 4,
	)	2025, and written submissions January 19,
	)	2026

REASONS FOR JUDGMENT

REES J.

[1] In 1991, Claridge December Holdings Inc. (“Claridge”)’s predecessor company, 898640 Ontario Inc. (“898”),¹ entered into a commercial real estate transaction with Co-Operative d’Habitation Desloges Inc. (“Desloges”). Malhotra Developments Inc., which is related to Claridge through its common directing mind, agreed to build Desloges a social housing

¹ For simplicity, I will refer to Claridge throughout.

development in the east end of Ottawa. Under the Offer to Purchase, Desloges acquired legal title to the whole property and would hold a portion of the land – referred to in the agreement as the “Adjacent Lands” – in trust for Claridge subject to certain terms. These terms included that Claridge would obtain the necessary subdivision control approval and register the transfer of the Adjacent Lands by July 1, 1992. At the time of the transaction, Desloges executed a back-deed transferring the Adjacent Lands back to Claridge. Ultimately, however, Claridge did not obtain planning approval and did not register the back-deed within the time required. Given the passage of time, why it did not do so is unclear.

[2] In the intervening years, Claridge managed the site plan control, entered into several Amending Site Plan Control Agreements with the City of Ottawa, filed zoning appeals, and posted a letter of credit in relation to the Adjacent Lands. But it did not seek severance or to register the back-deed until 2012. At that point, the paper document was no longer registerable, so Claridge required Desloges’s cooperation to obtain severance. Although Claridge made half-hearted efforts in 2012 to contact Desloges through its former solicitor on the transaction, it was not until 2015 that Claridge finally contacted Desloges directly. Desloges refused to cooperate. It takes the position that the Adjacent Lands now belong to it, not Claridge.

[3] In response, Claridge brought this application for a vesting order. Claridge says that it is the beneficial owner of the Adjacent Lands under an express trust and that this court ought to make a vesting order aligning legal title with its beneficial ownership. Alternatively, it says that Desloges holds the Adjacent Lands in a resulting trust for the benefit of Claridge.

[4] Desloges disputes this. It argues that Claridge is not the beneficial owner of the Adjacent Lands because Claridge did not comply with the conditions precedent to vesting the beneficial interest in Claridge. It also says that the express trust failed because it is inconsistent with the *Planning Act*, R.S.O. 1990, c. P.13, and the *Perpetuities Act*, R.S.O. 1990, c. P.9. It contends that there is no resulting trust to Claridge’s benefit. It also argues that the limitation period has passed for Claridge to obtain a vesting order.

[5] Finally, Desloges brings a cross-application seeking reimbursement of its expenses since 1991 for the Adjacent Lands under the agreement or, alternatively, as restitution for unjust

enrichment. Claridge opposes the cross-application, arguing that Desloges's claim is statute-barred and that it has not proven its damages.

[6] For the reasons below, I grant Claridge's application. It is not statute-barred, nor barred by laches. Although the express trust in the Adjacent Lands failed because Claridge did not obtain planning approval by July 1, 1992, the lands are held by Desloges in a resulting trust for Claridge. An order vesting Claridge with title ought to be made. Finally, Desloges's cross-application is granted in part. I award \$46,304 in damages for its maintenance costs for the Adjacent Lands.

Issues

[7] The application and cross-application raise the following principal issues:

- a. Is Claridge's application statute-barred or barred by laches?
- b. Does Desloges hold the Adjacent Lands subject to an express trust for Claridge?
- c. If the express trust failed, are the Adjacent Lands subject to a resulting trust?
- d. Should an order be made vesting Claridge with title in the Adjacent Lands?
- e. Should an order be made compensating Desloges for property taxes, insurance, and maintenance for the Adjacent Lands?

Fact-finding

Evaluation of credibility and reliability

[8] Mr. Subash "Bill" Malhotra, the directing mind of Claridge and Malhotra Developments, swore several affidavits and was cross-examined. His affidavits contain inaccuracies, some of which I specifically address below. During cross-examination, he was frequently argumentative. At one point he broke off during cross-examination to speak with colleagues about matters in dispute, contrary to the instructions of opposing counsel and his own lawyer. As a result, I do not accept all his evidence. But I do accept his evidence on the essentials of the surrounding circumstances to the transaction, because his evidence is largely consistent with the contemporaneous documents, which I discuss below.

[9] Shawn Malhotra is Subash Malhotra's son, and is a director and officer of Claridge. I have not relied on his evidence. He was not working for Claridge or Malhotra Developments at the time of the transactions and therefore does not have any contemporaneous information regarding the surrounding circumstances. In preparing his affidavit he relied on information provided to him by his father. He is thus incapable of providing independent, contemporaneous evidence about the transaction in dispute. That said, I have relied on some of the documents exhibited in his affidavit as these are part of Claridge's business records.

[10] Jim Burghout is Development Manager with Claridge. He joined the company in 1996. While he does not have contemporaneous evidence of the negotiations between the parties, he provided evidence of the subsequent planning and site control issues and Claridge's attempts to obtain Desloges's consent to severance. I found his evidence to be credible and reliable.

[11] Desloges's fact witness is Marc Trudel. He was a founding member of the cooperative and was, between 1988 and 1993, the president of Desloges. Since then, however, he has not been an officer or involved in Desloges's governance or financial affairs. Given the passage of time, I have concerns regarding the reliability of Mr. Trudel's recollection of some of the surrounding circumstances, particularly with respect to 697787 Ontario Limited ("697"). There are other problems with his evidence, which I return to below in considering Desloges's cross-application.

[12] Most importantly for my fact-finding, much, if not most, of the transaction and surrounding circumstances are established through the contemporaneous documents. I have accorded the greatest weight to the contemporaneous documents, which provide the most objective evidence of the factual matrix surrounding the Offer to Purchase. These documents should be read as an interlocking whole.

Surrounding circumstances

[13] The property comprising the land on which the Desloges housing development would be built and the Adjacent Lands (collectively, the "Property") was originally held by the City of Ottawa. It was transferred from the City to '697 in "In Trust" in September 1987. This is evidenced by a Transfer/Deed of Land. I will return to the relationship between '697 and Claridge below.

[14] Desloges's acquisition of the land and Claridge's construction of the social housing development took place in the context of an Ontario housing program. This housing program enabled Desloges to obtain financing and grants to acquire the land and build on Part 1 of the Property.

[15] Claridge essentially contemplated two phases in developing the Property. The first was building Desloges's housing development on Part 1 of the Property. The second was building an apartment complex for another social housing cooperative on the Adjacent Lands sometime in the future. Ultimately, the second phase did not come to pass and the Adjacent Lands remain vacant to this day.

[16] Claridge entered into a series of agreements to carry this out. Claridge² entered into an Offer to Purchase with Desloges (the "Offer to Purchase"). This is the principal contract relevant to the dispute. The Offer to Purchase contemplates that Desloges would buy the vacant land known municipally as 906 Montreal Road in the City of Ottawa, shown as Part 1 together with certain easements on the draft reference plan for \$1.675 million. This is explained in the first paragraph of the Offer to Purchase:

Coopérative d'Habitation Desloges Inc., (the "Purchaser") offers to buy from 898640 Ontario Inc. (the "Vendor") the vacant land known municipally as 906 Montreal Road in the City of Ottawa (the "Property"), shown as Part 1 together with easements over Parts 2, 4, 5 and 7 on a draft Reference Plan of Farley, Smith & Murray Surveying Limited, File # J-979, as initialled by the parties, at the purchase price of One Million Six Hundred and Seventy-five Thousand Dollars (\$1,675,000) on the following terms:

[17] The Offer to Purchase also identified and defined the Adjacent Lands, which were Parts 2 and 3 on the draft reference plan. The Offer to Purchase contemplated that on closing, Desloges would take title to the Adjacent Lands, and hold them in trust as nominee for Claridge, which would be the beneficial owner of the Adjacent Lands, subject to certain terms.

² The agreements were entered into by Claridge's predecessor corporation, '898. For simplicity, I will refer to Claridge. Nothing turns on this.

[18] Malhotra Developments³ entered into a Construction Contract with Desloges to construct a non-profit housing development on Part 1 of the Property.

[19] In parallel, Claridge entered into a letter agreement to sell the Adjacent Lands to the Ottawa Federation of Housing Co-operatives Inc., in trust (the “OFHC Agreement”). This agreement contemplated that Claridge would use its best efforts to obtain, within a year from the day of closing of the Offer to Purchase, the necessary agreements, amendments, by-laws or other legal rights to permit the development of an apartment building, parking spaces, and amenities. The agreement contemplated that the purchase price for the Adjacent Lands would be \$1.360 million. It also provided that the agreement was being entered into by the Ottawa Federation of Housing Co-operatives Inc. in trust on behalf of a corporation to be determined in the future, and it specified that this could be Desloges, a corporation to be incorporated, or an existing corporation.

[20] Concurrently, Malhotra Developments entered into a letter agreement with the Ottawa Federation of Housing Co-operatives Inc., in trust, confirming that, when it, a cooperative or other corporation that is its client acquired the Adjacent Lands, Malhotra Developments would enter into a construction contract with that party to build an apartment development on the Adjacent Lands.

[21] Finally, ‘697 “In Trust” transferred the Property to Desloges on October 4, 1991. This is evidenced by Transfer/Deed of Land. The total consideration for the transaction is recorded as \$1.675 million, which was the purchase price agreed to in the Offer to Purchase between Claridge and Desloges.

[22] Further to the Offer to Purchase, Desloges (through its officers Mr. Trudel and Ms. Nicole Allen) signed a back-deed, which would transfer the Adjacent Lands to Claridge’s predecessor company, ‘898 “In Trust” (the “Back-Deed”). The Back-Deed could only be registered on title once Claridge obtained a severance of the Adjacent Lands, which it never did.

³ Subhash Malhotra was and remains the directing mind of ‘898 (now Claridge) and Malhotra Developments (now Claridge Homes (Richardson) Inc.).

[23] I will address further findings of fact within my analysis below.

Analysis

Is Claridge's application statute-barred or barred by laches?

[24] Desloges argues that Claridge's application for a vesting order is barred under ss. 4 and 15 of the *Limitations Act*, R.S.O. 1990, c. L.15. They characterize Claridge as seeking to enforce a contractual obligation, for which the limitation period under the *Limitations Act* is 10 years.

[25] I disagree. In seeking a vesting order to align legal title with what Claridge says is its equitable interest in the Adjacent Lands, it is seeking to recover land: *Waterstone Properties Corporation v. Caledon (Town)*, 2017 ONCA 623, at para. 32. The applicable limitations periods are therefore found in the *Real Property Limitations Act*, R.S.O. 1990, c. L.15. Section 4 of the Act requires a person to sue to recover land within ten years of the time at which the right to bring the action first accrued. But s. 42 of the Act provides an exception for land vested in a trustee upon an express trust. It provides that the right of the beneficiary of the trust to bring an action against the trustee to recover the land shall be deemed to have first accrued at the time at which the land has been conveyed to a purchaser for valuable consideration. Section 42 applies equally to express and resulting trusts: *Andreacchi v. Andreacchi*, 2023 ONSC 4877, at paras. 42, 46, citing *Waterstone*, at para. 32. See also *McConnell v. Huxtable*, 2014 ONCA 86, 118 O.R. (3d) 561, at paras. 38-39.

[26] Here, there has not been a conveyance of the Property, including the Adjacent Lands, by Desloges – the trustee – to a purchaser for valuable consideration. Desloges has held and continues to hold legal title to the Adjacent Lands since 1991. Therefore, the time limit applicable to Claridge's right to bring an action against Desloges to recover the land has not started running under s. 42 of the *Real Property Limitations Act*. Accordingly, Claridge's application is not statute-barred.

[27] This is not the end of the analysis. The relief Claridge seeks is equitable in nature. Section 2 of the *Real Property Limitations Act* preserves the equitable defence of laches.

[28] The equitable defence of laches requires a claimant in equity to prosecute its claim without undue delay. It does not fix a specific time limit but considers the circumstances of each case. The main considerations are acquiescence on the claimant's part and any change of position that has occurred on the respondent's part that arose from reasonable reliance on the claimant's acceptance of the *status quo*: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 76-80; *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 145.

[29] Here, Claridge did not acquiesce; it simply delayed in seeking to have the legal title align with its equitable title. Delay by itself cannot be interpreted as some clear act by the claimant which amounts to acquiescence or waiver: *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited*, 2021 ONCA 201, at para. 289, leave to appeal refused, [2021] S.C.C.A. No. 176. Claridge continued to engage with the City as the beneficial owner of the Adjacent Lands.

[30] Nor do I find that Desloges changed its position through reasonable reliance on Claridge's acceptance of the *status quo*. It did not seek to deal with the Adjacent Lands in any way. Its residents simply enjoyed them as open space. I find that this is not a detrimental change in Desloges's position. As discussed below, although Desloges proved that it incurred maintenance costs in respect of the Adjacent Lands – and it ought to be compensated for this within the period of its claim that is not statute-barred – it did not prove that it incurred insurance costs or property taxes in relation to the Adjacent Lands. On balance, I find that this is not a change of position calling for the application of laches because the minimal annual maintenance costs are outweighed by the benefit the residents derived from the Adjacent Lands, which they enjoyed as common space.

[31] In addition, a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties: *Manitoba Metis*, at para. 150, citing *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 22. Neither party has engaged in unconscionable conduct in respect of the Adjacent Lands. While Claridge's delay was significant, it did not arise from bad faith. On the record, I do not accept that Claridge delayed seeking to obtain severance and register the Back-Deed because it was trying to avoid paying property taxes, insurance, and maintenance for the Adjacent Lands. As evidenced by Claridge's dealings with the City in respect of the land, Claridge understood that it was the beneficial owner of the land

throughout. It did not move to obtain severance and register the Back-Deed because there was little commercial imperative to develop the Adjacent Lands until more recently.

[32] Just as importantly, it would be inequitable to apply laches to defeat Claridge's express and resulting trust claims. The value of Adjacent Lands was, on Desloges's own evidence, around \$2 million in 2023. This vastly outweighs the minimal costs incurred by Desloges to maintain the Adjacent Lands. Applying the doctrine of laches would result in a considerable windfall to Desloges. This would be unjust.

[33] Accordingly, Claridge's application is not barred by laches.

Does Desloges hold the Adjacent Lands subject to an express trust for Claridge?

[34] The terms of the express trust are set out in clause 8(d) of the Offer to Purchase, which provides:

(d) The Purchaser agrees that it shall on closing take title to the Adjacent Lands, and hold the same in trust as nominee for the Vendor, which shall be the beneficial owner thereof, subject to the following terms:

(i) the Vendor shall be responsible for the payment of all taxes, charges and levies or other amounts imposed, charged or levied against or payable with respect to the Adjacent Lands;

(ii) the Vendor shall be responsible for the payment of all maintenance expenses referable to the Adjacent Lands including reasonable liability insurance and shall indemnify and save harmless the Purchaser from any cost, claim or liability with respect to or in any way related to the Adjacent Lands;

(iii) the Purchaser as the registered owner of the Adjacent Lands shall not charge, encumber, transfer or dispose of the Adjacent Lands without the prior written consent of the Vendor;

(iv) the Purchaser shall on closing deliver an executed transfer for the Adjacent Lands in favour of the Vendor as transferee, which transfer shall be held by the Vendor until

such time as the Vendor deems it appropriate to register the same;

(v) the registration of the transfer of the Adjacent Lands in the appropriate Land Registry Office shall be completed not later than the interest adjustment date under the Purchaser's under the program referred to in paragraph 3 and such registration shall be at the expense of the Vendor;

(vi) provided that this paragraph 8(d) shall be effective to create an interest in the Property only if the subdivision control provisions of *The Planning Act* are complied with by the Vendor on or before the date set out in clause (v) and the Vendor hereby covenants to proceed diligently at its expense to obtain any necessary consent on or before completion.

[35] Desloges argues that clause 8(d) created a conditional trust, and that paragraphs (v) and (vi) are conditions precedent. It argues that the conditional trust never materialized and that beneficial ownership in the Adjacent Lands did not vest in Claridge. This is so, Desloges contends, because Claridge did not register the transfer of the Adjacent Lands and did not comply with the *Planning Act* subdivision control provisions by July 1, 1992, the interest adjustment date, as required by paragraphs (v) and (vi).

[36] There is no dispute that Claridge did not fulfill the conditions in paragraphs (v) and (vi) by the interest adjustment date. The dispute is over whether the conditions in these paragraphs are conditions precedent or conditions subsequent. Claridge says that they are the latter.

[37] If they are true conditions precedent, then the trust fails. If they are not true conditions precedent, either because they are more properly characterized simply as a condition that suspends performance of an otherwise complete contract or as a condition subsequent, then the trust has not failed. As the Supreme Court of British Columbia explained, "A condition precedent may be of a nature that creates no binding agreement or it may just act as an ingredient which suspends performance of an otherwise complete contract": *Wiebe v. Bobsien* (1984), 14 D.L.R. (4th) 754 (B.C.S.C.), at p. 759, *aff'd* (1985), 20 D.L.R. (4th) 475 (B.C.C.A.); *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2012 BCCA 28, at para. 20.

[38] Desloges relies on *Turney v. Zhilka*, [1959] S.C.R. 578, at pp. 583-584. In that case, an agreement of purchase and sale for real property included the condition, “Providing the property can be annexed to the Village of Streetsville and a plan is approved by the Village Council for subdivision.” The date for the completion of the sale was fixed with reference to the performance of this condition – “60 days after plans are approved”. Neither party undertook in the contract to fulfil this condition, nor did either party reserve a power of waiver. The Supreme Court of Canada held that this was a “true” condition precedent because it was an “an external condition upon which the existence of the obligation depends”: at p. 583. In other words, it was a true condition precedent because its fulfilment depended on the approval of a non-party to the contract, the village council.

[39] The Ontario Court of Appeal has held that the intentions of the parties must be considered in determining whether a contractual term is a true condition precedent: *Wu Estate v. Zurich Insurance Co.* (2006), 268 D.L.R. (4th) 670 (Ont. C.A.), at para. 22, leave to appeal refused, [2006] S.C.C.A. No. 289. It offered the following synthesis in *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328, 95 O.R. (3d) 93, at para. 90:

A true condition precedent is one that is agreed to by the parties and is about a “future uncertain event, the happening of which depends entirely on the will of a third party”... When determining whether a contractual term is a “true condition precedent”, the intentions of the parties must be considered. It is a question of construction whether the obligations of a contract are absolute and immediately binding or are contingent on an external event... [internal citations omitted]

[40] The parties’ intentions are discerned by reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of contract formation: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47; *Resolute FP Canada Inc. v. Ontario (Attorney General)*, 2019 SCC 60, [2019] 4 S.C.R. 394, at para. 74.

[41] To be clear, Desloges does not contend that the Offer to Purchase failed. Its argument is that paragraphs (v) and (vi) are conditions precedent, and since they were not fulfilled, the express trust failed. More precisely, it contends that the legal transfer of the Adjacent Lands was effective, but that beneficial ownership in the Adjacent Lands did not vest in Claridge.

[42] The ordinary and grammatical meaning of clause 8(d) is that the parties agreed that, on closing, Desloges would take title to the Adjacent Lands and hold them in trust as nominee for Claridge. Claridge would be the beneficial owner of the lands.

[43] Paragraphs (i) through (v) created certain rights and obligations for the parties. Paragraphs (i) through (v) are not conditions precedent. Paragraphs (i) and (ii) impose obligations on Claridge for the payment of all taxes, charges and levies, and maintenance expenses (among other things) with respect to the Adjacent Lands following the transfer of title to Desloges. Paragraph (iii) imposes an obligation on Desloges not to charge, encumber, transfer or dispose of the Adjacent Lands without Claridge's prior written consent. Paragraph (iv) requires Desloges to deliver, on closing, an executed transfer for the Adjacent Lands in favour of Claridge. This is the Back-Deed which Desloges delivered to Claridge.

[44] Paragraph (v) requires the registration of the transfer of the Adjacent Lands in the appropriate Land Registry Office by July 1, 1992, the interest adjustment date. I do not conclude that paragraph (v) is itself a condition precedent. Although the transfer of the Adjacent Lands is contingent on obtaining a severance, which is addressed in paragraph (vi), if the severance is obtained, the registration of the transfer – that is, the Back-Deed – is within the parties' control.

[45] Unlike the other paragraphs of clause 8(d), paragraph (vi) is framed as a condition precedent: “provided that this paragraph 8(d) shall be effective to create an interest in the Property only if...” [emphasis added]. And unlike the other paragraphs, the fulfilment of paragraph (vi) is dependent on the approval a non-party under the *Planning Act*. It is thus a condition precedent.

[46] In my view, the parties' intentions could not be clearer. The transfer of title in the Adjacent Lands to Desloges was effective on closing, but the creation of Claridge's beneficial ownership in the Adjacent Lands would be effective only if it obtained severance under the *Planning Act* by July 1, 1992 (the interest adjustment date).

[47] This is also consistent with the surrounding circumstances. Paragraph 8(d)(vi) was included to comply with s. 50(3) and s. 50(21) of the *Planning Act*. The purpose of the *Planning Act* is to provide for land use planning, including subdivision control. The principal provision of the subdivision control process is s. 50(3) of the *Planning Act*. It essentially prohibits

conveyancing unless the conveyance satisfies one of the enumerated categories set out in subparagraphs 50(3)(a) to 50(3)(h) of the Act: *Lapolla v. The Estate of John Bostock*, 2017 ONSC 7448, at paras. 60-62. None of those categories were satisfied here. Subsection 50(21) provides that an agreement in contravention of s. 50 is invalid unless the agreement expressly provides that it is effective only if the provisions of the section are complied with. In other words, the effect of s. 50(21) is that it does not violate the *Planning Act* to enter into a non-compliant agreement that expressly states that its operation is subject to compliance with the *Planning Act*: *Lapolla*, at para. 89.

[48] Here, the express trust could not have been constituted and Claridge's beneficial interest effective without obtaining severance under the *Planning Act*, otherwise the express trust would run afoul of s. 50(3) of the *Planning Act*.

[49] Therefore, the express trust failed.

[50] In light of this conclusion, it is unnecessary for me to address Desloges's arguments that the express trust was void by operation of s. 50 of the *Planning Act* and the *Perpetuities Act*.

Are the Adjacent Lands subject to a resulting trust?

[51] Claridge argues that if the express trust failed, I should find that Desloges holds the Adjacent Lands in a resulting trust for the benefit of Claridge. I agree.

[52] Broadly, a resulting trust arises when legal or equitable title to property is in one party's name, but the party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795, at para. 20. The term "resulting trust" describes what happens to the property – it "results" or returns to the settlor. One category of resulting trust arises where there has been a failure of an express trust. A second category of resulting trust may arise where there has been a gratuitous transfer. Under the second category, there will be, depending on the circumstances, a presumption of resulting trust or presumption of advancement: *Pecore*, at para. 22.

[53] Here we are concerned with the first category: there was a failure in the express trust. While legal title vested in Desloges on closing, the beneficial interest failed to vest in Claridge because

the precondition was not satisfied. If there is a failure of an express trust, the property results to the settlor: D.W.M. Waters, M. Gillen, L. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021), at p. 415; E. Gillese, *Essentials of Canadian Law – The law of Trusts*, 3d ed (Toronto: Irwin Law, 2014), at p. 113.

[54] Having found that the express trust failed, it is unnecessary for me to determine whether the transfer of the Adjacent Lands was a gift. Because the parties made submission on this basis, however, I will simply add that I would have found that Claridge did not make a gift of the Adjacent Lands to Desloges. Clause 8(d) expressly states that Desloges holds title to the Adjacent Lands as nominee for the benefit of Claridge. This aligns with the surrounding circumstances. At the same time as the Offer to Purchase, Claridge entered into the OFHC Agreement to sell the Adjacent Lands to the Ottawa Federation of Housing Co-operatives, in trust. Malhotra Developments also entered into a letter agreement with the Ottawa Federation of Housing Co-operatives to eventually enter into a construction contract to build an apartment complex on the Adjacent Lands. Although this ultimately did not happen, that does not change the fact that the transfer of the Adjacent Lands to Desloges was never a gift.

[55] Given that the express trust failed, Desloges cannot continue to hold the trust property. The Offer to Purchase does not provide that Desloges can take the Adjacent Lands beneficially if the trust should fail. The Adjacent Lands must be returned to the settlor, that is Claridge: *Waters' Law of Trusts*, at p. 477.

[56] Desloges argued that the Adjacent Lands should be returned to it as the settlor of the trust. It contends that by operation of s. 16(2) of the *Perpetuities Act* and the transfer of title from '697 to Desloges, after 21 years the Adjacent Lands reverted to Desloges.

[57] There is no merit to this argument. Desloges's reliance on s. 16(2) of the *Perpetuities Act* to determine who is the settlor is misplaced. The *Perpetuities Act* does not help determine who is the settlor of an express trust. Rather, it is a question of construction of the agreement. The Offer to Purchase leaves no uncertainty as to who is the settlor. Claridge is the settlor, even though the land was transferred by '697.

[58] ‘697 no longer exists. Earlier in the proceeding, Subash Malhotra and Shawn Malhotra swore affidavits stating that ‘697 was a corporation related to Claridge. This was incorrect and Claridge no longer maintains this position. Due to the passage of time, there is no direct evidence about ‘697’s relationship to Claridge. Nor is there a written declaration of trust between ‘697 and Claridge. As a result, Desloges argues that the *Statute of Frauds*, R.S.O. 1990, c. S.19, prevents Claridge from arguing that it was the beneficiary of the Property held in trust by ‘697 because it was unable to prove the trust agreement in writing. I disagree for two reasons.

[59] First, s. 9 of the *Statute of Frauds* requires only that the trust be “manifested and proved” by writing. The requirement “is satisfied so long as the trust of lands is evidenced by some writing. The declaration of trust need not be in writing”: *Nicholson v. Nicholson Estate*, 1994 CarswellOnt 664 (Gen. Div.), at para. 19, citing *Wilde v. Wilde*, 1873 CarswellOnt 72 (Ch.). Here, there is evidence in writing of the trust, signed by ‘697. When the City transferred the Property to ‘697, the accompanying affidavit under the *Land Transfer Tax Act*, R.S.O. 1990, c. L.6, identifies the transferee as “697787 ONTARO LIMITED IN TRUST”, which is signed by Robert Bales. When ‘697 later transferred the Property to Desloges, the transfer/deed also identifies the transferor as “697787 Ontario Ltd., in Trust”. The transfer/deed is signed by Robert Bales as a director of ‘697. These documents are signed writings by ‘697 evidencing that it was not the beneficial owner of the Property and acknowledging that it held the Property in trust.

[60] Second, courts have been reluctant to permit a trustee seeking to avoid its obligations to rely on the *Statute of Frauds*. Although the exception in *Rochefoucauld v. Boustead* (1896), [1897] 1 Ch. 196 (E.W.C.A.), applies to prevent a trustee of an oral trust from avoiding its obligations by using the *Statute of Frauds* as an instrument of fraud, the same principle applies here for analogous reasons. Desloges should not be allowed to rely on the *Statute of Frauds* to work an injustice.

[61] Even in the absence of a written trust instrument between Claridge and ‘697, the extrinsic evidence that ‘697 held the Property in trust for Claridge is overwhelming. This is the only reasonable inference on the facts. Claridge’s contemporaneous conduct in its dealings with the City and with Desloges confirms that it was the beneficial owner of the Property held in trust. Further, the Offer to Purchase treated Claridge as the owner of the Property with the ability to deal in it, and subsequent events bore this out. Claridge caused ‘697 to transfer the Property to Desloges.

[62] I find that ‘697 held the Property in trust for Claridge. I am not persuaded that ‘697 held the Property in trust for Desloges – this is inconsistent with the weight of the evidence. I find that Claridge had the authority to deal with and indirectly transfer the Property. ‘697 was merely an intermediary.

[63] Accordingly, I conclude that Claridge is the settlor of an express trust that failed and that a resulting trust over the Adjacent Lands arises.

[64] Desloges also argued that there is uncertainty as to what constitutes the Adjacent Lands because the draft plan referenced in the Offer to Purchase was not put in evidence. There is no merit to this argument. The record is clear as to what the Adjacent Lands consists of. Desloges’s own witness, Mr. Trudel, affirmed in his affidavit that the Adjacent Lands referenced in clause 8(d) of the Offer to Purchase refer to Part of PIN: 04269-0682 being Parts 2 and 3 on Plan 5R14597; Part 2 on Plan 5R10225 subject to a right of way over Part 2 on Plan 5R14597.

Should an order be made vesting Claridge with title in the Adjacent Lands?

[65] A court has jurisdiction to make a vesting order even if such an order will contravene the *Planning Act*. In doing so, the court should proceed cautiously and non-compliance with the *Planning Act* remains a relevant factor to consider in determining whether the court should exercise its discretion: *Nobrega and Elder v. Trustees of the Estate of M. Gasparovich*, 2018 ONSC 2901, at para. 18.

[66] Here, I am satisfied that an order should issue. I am satisfied based on the evidence of Mr. Burghout, Development Manager with Claridge, that in June 1992 the City had granted a Revised Site Plan Approval to include development on the Adjacent Lands. Claridge periodically entered into Amending Site Plan Control Agreements with the City for the development of the Adjacent Lands. Claridge did not pursue a development on the land in 2003. In June 2015, Claridge sought Desloges’s consent to a severance. This was not forthcoming, hence this application. Based on the City’s earlier Revised Site Plan Approval to include development on the Adjacent Lands and repeated approval of the Adjacent Lands for development, I am persuaded that Claridge would have obtained severance of the Adjacent Lands had it had legal title to it. No real mischief would result under the *Planning Act*.

[67] Desloges must return the Adjacent Lands to Claridge. A vesting order shall issue to align legal title with Claridge's beneficial ownership of the Adjacent Lands.

Desloges's cross-application

[68] Having granted Claridge's application for a vesting order, I now turn to consider Desloges's cross-application.

[69] Desloges seeks an order that Claridge pay it \$450,000, plus HST, inclusive of pre-judgment interest to December 3, 2025, plus pre-judgment interest from that date and post-judgment interest. Its claim is based on the sums it says is owing under clause 8(d) of the Offer to Purchase. Desloges seeks compensation for property taxes, insurance, and maintenance for the Adjacent Lands since 1991 to the present. In the alternative, it advances a claim for unjust enrichment.

[70] Desloges also seeks, if necessary, rectification of the Offer to Purchase to include the word "mortgage" after the word "Purchaser's" in paragraph 8(d)(v) of the Offer to Purchase.

Are portions of Desloges's cross-application for compensation statute-barred?

[71] Claridge argues that significant portions of Desloges's cross-application for compensation under clause 8(d) of the Offer to Purchase are statute-barred. First, Claridge argues that Desloges is barred, under s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, from claiming compensation for amounts incurred more than two years before Desloges commenced its claim. Second, it also argues that the ultimate limitation period in s. 15 of the Act applies. Claridge argue that these limitations periods apply equally to Desloges's primary claim in contract and its alternative claim in unjust enrichment. Unjust enrichment is an equitable claim also subject to the Act: *McConnell*, at para. 50.

[72] Here, Desloges's claim for compensation was discoverable from the date of transfer of the Adjacent Lands, that is October 4, 1991. At that time, Desloges was aware that it had a contractual claim or a claim for unjust enrichment for its alleged property taxes, insurance, and maintenance for the Adjacent Lands. Given that these alleged expenses would have accrued annually, I agree with Claridge that amounts incurred more than two years before Desloges commenced its claim are statute-barred. Desloges's Notice of Application was issued on December 13, 2018. It is

therefore barred, under s. 4 of the *Limitations Act, 2002*, from claiming compensation for property taxes, insurance, and maintenance for the Adjacent Lands incurred before December 13, 2016.⁴

Are Desloges's audited financial statements admissible?

[73] Desloges has not put any evidence before me of invoices for property taxes, insurance or maintenance specific to the Adjacent Lands. Rather, Desloges relies on extrapolations from its audited annual financial statements.

[74] Claridge objects to the admissibility of Desloges's audited financial statements. Desloges's audited financial statements from 2000 to 2018 are exhibited to one of Mr. Trudel's affidavits. As discussed, Mr. Trudel was a founding member of the cooperative and was, between 1988 and 1993, its president. But since then, he has not been an officer or involved in Desloges's governance or financial affairs. Mr. Trudel has no personal knowledge of Desloges's financial affairs after 1993. Instead, he relies on information, principally Desloges's audited annual financial statements, provided to him by Thierry Irakiza, Desloges's treasurer.

[75] The general rule for the contents of affidavits is stated in r. 4.06(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: they are to be confined to the personal knowledge of the deponent or "to other evidence that the deponent could give if testifying as a witness in court, except where these rules provide otherwise". Rule 39.01(5) provides that an "affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit" [emphasis added]. The property taxes, insurance, and maintenance for the Adjacent Lands claimed by Desloges are in dispute. Desloges is therefore not entitled to adduce this evidence by way of information and belief. Nor does it appear that Desloges served a business records notice in respect of the financial statements.

⁴ In this regard, since some of the amounts allegedly incurred accrued before January 1, 2004, the transitional provisions in s. 24 of the *Limitations Act, 2002* apply. This does not affect the result.

[76] It would have been a simple matter to file an affidavit from a current officer or director of Desloges exhibiting the financial statements. Given that this a technical breach of the rules of evidence on applications and is easily cured, I will admit the audited financial statements in Mr. Trudel's affidavit subject to Desloges filing an affidavit from a current officer or director of Desloges within two weeks of this judgment confirming that they are the audited financial statements of the corporation and that they remain accurate. To be clear, I am not granting leave to Desloges to file any evidence beyond this.

Is the Vaive opinion admissible as expert opinion?

[77] Desloges tendered an affidavit from J. Rolland Vaive, a Chartered Accountant, as expert opinion to assist in proving its damages claim. Mr. Vaive's opinion evidence is based on Desloges's audited financial statements from 2000 to 2018.

[78] Based on the relative square feet of the Adjacent Lands and the property as a whole, he opined that the Adjacent Lands represent 22.5% of the property as a whole. He opined that 22.5% of the land maintenance costs should thus be allocated to the Adjacent Lands.

[79] Based on the 2018 audited financial statements, the value of the buildings is \$10,718,337, and the value of both the vacant and non-vacant land is \$1,745,477. He opined that the value of both the vacant and non-vacant land as a percentage of the total value was 14%. He multiplied this by the percentage of vacant land, i.e. 22.5%. Based on this, he opined that the Adjacent Lands represents 3.15% of the value of the property as a whole. He therefore allocated costs for insurance and property taxes to the Adjacent Lands on this basis – i.e. 3.15% of the total.

[80] Mr. Vaive's opinion is not based on any specialized knowledge or expertise. He admitted on cross-examination that the methodology for allocating expenses to the Adjacent Lands is not recognized by Generally Accepted Accounting Principles (this is also set out in his report). He also admitted that he is not an expert in insurance underwriting and has no knowledge of how the use of a portion of land affects insurance premiums.

[81] For these reasons, I conclude that Mr. Vaive's opinion is not properly admissible as expert opinion evidence. The court has a duty to guard against the admissibility of expert opinion

evidence of dubious value: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 16.

Is Vaive’s methodology for allocating costs for insurance and taxes flawed?

[82] In any event, I do not accept Mr. Vaive’s methodology for allocating costs for insurance and taxes. His methodology is unsound. Property insurance premiums are influenced by several factors, but largely they are affected by the rebuilding or repair costs in the event of a loss. As a matter of logic and common sense, insurance premiums are not allocated proportionately between buildings and vacant land.

[83] In addition, Mr. Vaive’s methodology in allocating property taxes is not based on any knowledge of how property taxes are assessed. In this regard, I prefer the evidence of Claridge’s expert Jeff Arnott. I find that Mr. Arnott is a properly qualified expert in property assessment and realty taxes, and I admit his opinion evidence. His evidence is that the Municipal Property Assessment Corporation (“MPAC”) assesses multi-residential properties using an income approach based on rental units. The assessment captures the value of the land required to support those units. Unless MPAC classifies a portion of the property as “excess land”, no additional value, and therefore no additional tax, is attributed to excess land.

[84] Desloges’s property tax bills and MPAC assessments confirm that the taxes paid by Desloges relate solely to the income-generating units and the land required to support them. None of the Property was classified as “excess land”. Put differently, Mr. Arnott explains, if the Adjacent Lands were severed or not owned by Desloges, Desloges’s property assessment and its property taxes for the improved portion of the Property would be the same as they currently are.

[85] I accept Mr. Arnott’s evidence. Based on this, I conclude that the Adjacent Lands did not attract property tax.

Can the land maintenance costs be allocated proportionately to the Adjacent Lands?

[86] That said, while I do not admit Mr. Vaive’s evidence as expert opinion evidence, I do borrow his methodology for maintenance costs as a matter of logic and common sense. Because the annual audited financial statements specifically identify the maintenance costs related to land

(as distinct from buildings and equipment), the maintenance expenses incurred by Desloges can be allocated to the Adjacent Lands. I therefore allocate land maintenance costs based on the relative size of the Adjacent Lands to the Property as a whole, that is 22.5%. On this basis, I find that Desloges incurred maintenance costs for the Adjacent Lands of \$5,209.88 in 2017 and \$5,343.98 in 2018, the two years before commencing its cross-application. The costs increase incrementally year-on-year but are relatively stable. Based on this and for simplicity, I find \$5,500 was the cost of maintenance for the Adjacent Lands for subsequent years. For 2026, I have awarded half of this. Therefore, I award \$46,304 in damages for maintenance costs for the Adjacent Lands from December 2016 until the present.

[87] In adopting this approach to assessing the damages for maintenance costs, however imperfect, I have been guided by the principle that “the court must do the best it can in the circumstances”: *Martin v. Goldfarb* (1998), 41 O.R. (3d) 161 (C.A.), at p. 187. Unlike its claims for insurance and taxes, which Desloges failed to prove at all, it has proved that it incurred costs for land maintenance which can be apportioned to the Adjacent Lands on a principled basis.

Should rectification of paragraph 8(d)(v) of the Offer to Purchase be granted?

[88] Finally, it is not contentious that the parties intended that the Offer to Purchase include the word “mortgage” after the word “Purchaser’s” in paragraph 8(d)(v) of the Offer to Purchase. It is merely a drafting error. Nothing turns on this in any event. Therefore, I grant Desloges rectification of the Offer to Purchase.

Disposition

[89] Claridge’s application is granted and an order shall issue granting Claridge fee simple title of the property, legally described as Part of PIN: 04269-0682 being Parts 2 and 3 on Plan 5R14597; Part 2 on Plan 5R10225 subject to a right of way over Part 2 on Plan 5R14597.

[90] Desloges’s cross-application is granted in part. It is awarded damages of \$46,304, plus pre- and post-judgment interest, and rectification of paragraph 8(d)(v) of the Offer to Purchase.

[91] If the parties cannot agree on costs, each party may file bills of costs and make submissions of no more than 1,250 words, within 14 days of the release of this decision.

Justice Owen Rees

Released: July 28, 2026