2006 BCCA 183
British Columbia Court of Appeal

Topgro Greenhouses Ltd. v. Houweling

2006 CarswellBC 908, 2006 BCCA 183, [2006] B.C.W.L.D. 4220, [2006] B.C.W.L.D. 4231, [2006] B.C.W.L.D. 4271, [2006] B.C.W.L.D. 4278, [2006] B.C.W.L.D. 4281, [2006] B.C.W.L.D. 4327, [2006] B.C.J. No. 831, 17 B.L.R. (4th) 14, 225 B.C.A.C. 17, 371 W.A.C. 17, 53 B.C.L.R. (4th) 310

Topgro Greenhouses Ltd., Limca Developments Ltd., Best Wu Development Ltd., Steady Development Ltd., Peter Breederland and Kuo Pao Yang Development & Trading Inc. (Respondents / Plaintiffs) and Abraham Paulus Houweling a.k.a. Paul Houweling (Appellant / Defendant)

Prowse, Newbury, Kirkpatrick JJ.A.

Heard: February 20, 2006
Judgment: April 19, 2006
Docket: Vancouver CA032740

Proceedings: reversing in part *Topgro Greenhouses Ltd. v. Houweling* (2005), 2005 BCSC 180, 2005 CarswellBC 267, 3 B.L.R. (4th) 220 (B.C. S.C.)

Counsel: A.P. Houweling for himself
K.J. Robinson for Respondents

Subject: Corporate and Commercial; Civil Practice and Procedure; Torts
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Headnote

Business associations --- Specific corporate organization matters — Shares — Transfer — Restrictions on transfer — Shareholder agreement — General principles

Assistant manager of greenhouse offered to sell his 50 Class A common shares to other shareholders for $650,000, with 10 per cent non-refundable deposit paid within 24 hours, and full purchase price, including deposit, paid by solicitor's trust cheque on closing — When shareholders declined, assistant manager sold shares to purchaser, purportedly on same terms as required by shareholder agreement — Purchaser paid deposit two weeks late, balance was paid by cheque on account of company that was not party to agreement, cheque was not deposited into assistant manager's solicitor's trust account, and cheque was negotiated by assistant manager 4.5 months later — Greenhouse's and manager's action against purchaser for damages was allowed — Trial judge found that substantially different arrangement existed between assistant manager and purchaser than that which had been offered to plaintiffs — Trial judge rescinded share purchase agreement — Purchaser appealed — Appeal allowed in part — Rescission of agreement was not available remedy, as greenhouse was not party to agreement, and had not joined assistant manager as party to action — As rescission would affect assistant manager's rights under his agreement with purchaser, he was essential party to be joined in action — Since trial, assistant manager had sold shares to unidentified third party — Because interests of third party could be affected by setting aside rescission order, prudent course was to return issue to trial court to sort out equities between parties and persons affected by share purchase agreement — Greenhouse was required to add assistant manager and unidentified third party purchaser as parties to action.

Injunctions --- Availability of injunctions — Prohibitive injunctions — Permanent injunctions — General

Neighbour of greenhouse business assumed burden of righting alleged wrong between greenhouse's manager and assistant manager — When shareholders declined assistant manager's offer to sell his shares, he sold them to neighbour — Neighbour wrote to umbrella marketing organization urging manager's resignation as director — Despite requests from manager and his solicitor, and restraining order, neighbour continued to visit property — Neighbour faxed collection of writings to 350 people including greenhouse creditors, provincial Attorney General, Premier, Minister of Agriculture, and large number of individuals in industry with whom manager did business — Writings referred to manager in list of "unscrupulous characters" engaged in "conspiracy and fraud" — Manager's work performance declined and his and greenhouse's reputation as propagators and growers were adversely affected in business community — Greenhouse's and manager's action against neighbour seeking permanent injunction restraining him from interfering with greenhouse's business and from harassing or communicating with manager or greenhouse employees was allowed — Trial judge found that neighbour's continuous interference in greenhouse's business and with its employees, particularly manager, resulted in considerable disruption, mandating permanent order — Neighbour appealed — Appeal dismissed — No fundamental error in trial judge's findings as to credibility had been demonstrated — Trial extended over 17 days and trial judge had ample opportunity to assess witnesses — Nothing in trial judge's reasons supported neighbour's contention that judge's assessment of credibility was based on prior injunction and contempt order against neighbour.

Defamation --- Actions related to defamation — Injurious statements

Defendant neighbour of greenhouse business assumed burden of righting alleged wrong between greenhouse's manager and assistant manager — When shareholders declined assistant manager's offer to sell his shares, he sold them to neighbour — Neighbour wrote to umbrella marketing organization urging manager's resignation as director — Neighbour faxed collection of writings to 350 people including greenhouse creditors, provincial Attorney General, Premier, Minister of Agriculture, and large number of individuals in industry with whom manager did business — Writings referred to manager in list of "unscrupulous characters" engaged in "conspiracy and fraud" — Neighbour expounded his belief that greenhouse and manager used pesticides, and in his original statement of defence referred

to greenhouse as "crooked greenhouse operation" — Neighbour repeatedly described manager as "little Hitler" — Manager's work performance declined and his and greenhouse's reputation as propagators and growers were adversely affected in business community — Greenhouse's and manager's action against neighbour for damages for defamation was allowed — Trial judge found that neighbour published, with malice, unjustified and false statements regarding greenhouse to third parties that caused harm to greenhouse and manager — Trial judge awarded greenhouse and manager $75,000 and $25,000 respectively, in damages — Neighbour appealed — Appeal dismissed — Trial judge did not err in refusing to admit into evidence letter that neighbour claimed would establish veracity of his allegation that greenhouse used pesticides — Trial judge properly excluded letter as irrelevant to matters in issue between parties — Manager did not make admission of pesticide use at trial.

Damages --- Damages in tort — Personal injury — Principles relating to awards for damage to psychological health — Claim by victim of tort — Nervous shock

Defendant neighbour of greenhouse business assumed burden of righting alleged wrong between greenhouse's manager and assistant manager — When shareholders declined assistant manager's offer to sell his shares, he sold them to neighbour — Neighbour wrote to umbrella marketing organization urging manager's resignation as director — Neighbour faxed collection of writings to 350 people including greenhouse creditors, provincial Attorney General, Premier, Minister of Agriculture, and large number of individuals in industry with whom manager did business — Writings referred to manager in list of "unscrupulous characters" engaged in "conspiracy and fraud" — Neighbour expounded his belief that greenhouse and manager used pesticides, and in his original statement of defence referred to greenhouse as "crooked greenhouse operation" — Neighbour repeatedly described manager as "little Hitler" — Manager's work performance declined and his and greenhouse's reputation as propagators and growers were adversely affected in business community — Manager's action against neighbour for damages for nervous shock was allowed and manager was awarded $20,000 — Neighbour appealed — Appeal dismissed — Despite absence of medical evidence supporting finding of nervous shock, no basis existed upon which to disturb trial judge's findings or award of damages for nervous shock — Trial judge clearly found conduct of neighbour to be flagrant and intentional — Trial judge chose to accept testimony of manager and other witness regarding harm caused by neighbour's conduct.

Damages --- Exemplary, punitive and aggravated damages — Grounds for awarding exemplary, punitive and aggravated damages — Miscellaneous issues

Defendant neighbour of greenhouse business assumed burden of righting alleged wrong between greenhouse's manager and assistant manager — When shareholders declined assistant manager's offer to sell his shares, he sold them to neighbour — Neighbour wrote to umbrella marketing organization urging manager's resignation as director — Neighbour faxed collection of writings to 350 people including greenhouse creditors, provincial Attorney General, Premier, Minister of Agriculture, and large number of individuals in industry with whom manager did business — Writings referred to manager in list of "unscrupulous characters" engaged in "conspiracy and fraud" — Neighbour expounded his belief that greenhouse and manager used pesticides, and in his original statement of defence referred to greenhouse as "crooked greenhouse operation" — Neighbour repeatedly described manager as "little Hitler" — Manager's work performance declined and his and greenhouse's reputation as propagators and growers were adversely affected in business community — Greenhouse's and manager's action against neighbour was allowed — Greenhouse and manager were awarded punitive damages of $15,000 and $30,000 respectively — Trial judge found that neighbour set out on deliberate course to insult and injure plaintiffs and to link their names with fraud, improper use of pesticides, and shady business dealings, and that neighbour's persistent actions deserved punishment — Neighbour appealed — Appeal dismissed — Trial judge did not err in refusing to admit into evidence letter that neighbour claimed would establish veracity of his allegation that greenhouse used pesticides — Manager did not make admission of pesticide use at trial — No fundamental error in trial judge's findings as to credibility had been demonstrated.

Table of Authorities

Cases considered by *Kirkpatrick J.A.*:

Clark v. Teamsters, Local 464 (1998), 157 D.L.R. (4th) 499, 1998 CarswellBC 692, 49 B.C.L.R. (3d) 62, (sub nom. *Clark v. Teamsters Union, Local 464*) 106 B.C.A.C. 28, (sub nom. *Clark v. Teamsters Union, Local 464*) 172 W.A.C. 28 (B.C. C.A.) — considered

Guarantee Co. of North America v. Gordon Capital Corp. (1999), [1999] 3 S.C.R. 423, 1999 CarswellOnt 3171, 1999 CarswellOnt 3172, 178 D.L.R. (4th) 1, 247 N.R. 97, [2000] I.L.R. I-3741, 126 O.A.C. 1, 49 B.L.R. (2d) 68, 15 C.C.L.I. (3d) 1, 39 C.P.C. (4th) 100 (S.C.C.) — considered

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

K.R.M. Construction Ltd. v. British Columbia Railway (1982), 40 B.C.L.R. 1, 18 C.L.R. 159, 1982 CarswellBC 257 (B.C. C.A.) — referred to

Kalaman v. Singer Valve Co. (1997), 93 B.C.A.C. 93, 151 W.A.C. 93, 1997 CarswellBC 1459, 38 B.C.L.R. (3d) 331, [1998] 2 W.W.R. 122, 31 C.C.E.L. (2d) 1, 97 C.L.L.C. 210-017 (B.C. C.A.) — followed

McCully v. Maritime United Farmers Co-operative Ltd. (1928), 54 N.B.R. 322, 1928 CarswellNB 12 (N.B. C.A.) — considered

Newson v. Kexco Publishing Co. (1995), 17 B.C.L.R. (3d) 176, (sub nom. *Chief Provincial Firearms Officer (B.C.) v. Kexco Publishing Co.*) 67 B.C.A.C. 297, (sub nom. *Chief Provincial Firearms Officer (B.C.) v. Kexco Publishing Co.*) 111 W.A.C. 297, 1995 CarswellBC 693 (B.C. C.A.) — followed

Orman v. Canadian Mountain Minerals Ltd. (2000), 2000 CarswellAlta 674, 268 A.R. 338, 86 Alta. L.R. (3d) 307, 13 B.L.R. (3d) 279 (Alta. Q.B.) — followed

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Topgro Greenhouses Ltd. v. Houweling (2002), 2002 BCSC 404, 2002 CarswellBC 590 (B.C. S.C.) — referred to

Topgro Greenhouses Ltd. v. Houweling (October 22, 2002), Hood J. (B.C. S.C.) — referred to

Topgro Greenhouses Ltd. v. Houweling (2004), 2004 BCCA 39, 2004 CarswellBC 117, 193 B.C.A.C. 94, 316 W.A.C. 94, 23 B.C.L.R. (4th) 351 (B.C. C.A.) — referred to

Vorvis v. Insurance Corp. of British Columbia (1989), 25 C.C.E.L. 81, [1989] 1 S.C.R. 1085, [1989] 4 W.W.R. 218, 58 D.L.R. (4th) 193, 94 N.R. 321, 36 B.C.L.R. (2d) 273, 42 B.L.R. 111, 90 C.L.L.C. 14,035, 1989 CarswellBC 76, 1989 CarswellBC 704 (S.C.C.) — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

Generally — referred to

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

R. 5(9) — considered

R. 18A — referred to

APPEAL by purchaser of shares from judgment reported at *Topgro Greenhouses Ltd. v. Houweling* (2005), 2005 BCSC 180, 2005 CarswellBC 267, 3 B.L.R. (4th) 220 (B.C. S.C.), allowing action by greenhouse and manager for recission of share purchase agreement, permanent injunction, and damages.

***Kirkpatrick J.A.*:**

1 Paul Houweling appeals from the order of the Supreme Court entered 13 April 2005. It reads:

THIS COURT ORDERS that:

1. The Defendant, Abraham [Paulus] Houweling aka Paul Houweling, is hereby permanently enjoined and prohibited from:

(a) entering on those certain lands civically and legally described as follows:

1110 — 264th Street, Aldergrove, British Columbia

Parcel Identifier: 010 — 308 — 440

Municipality of Langley, Lot 4 Section 7 Township 13 NWD Plan 17869;

and

(b) molesting, annoying, harassing or communicating or attempting to molest, annoy, harass or communicate with Peter Breederland, Fu Ju Lin or Danise Breederland or with any employees of the Plaintiff.

2. The Share Purchase Agreement between the Defendant and Albert De Vries with respect to the transfer of 50 Class "A" shares in the capital of the Plaintiff, Topgro Greenhouses Ltd., be and is hereby rescinded and of no force or effect;

3. The Plaintiff, Topgro Greenhouses Ltd., recover judgment against the Defendant for the sum of $90,000.00, being:

(a) $75,000.00 in damages for business losses; and

(b) $15,000.00 in punitive damages.

4. The Plaintiff, Peter Breederland, recover judgment against the Defendant for the sum of $75,000.00, being:

(a) $25,000.00 in damages for malicious and injurious falsehoods;

(b) $20,000.00 in damages for nervous shock; and

(c) $30,000.00 in punitive damages.

5. The Plaintiffs be awarded costs against the Defendant to be taxed, with such costs to be taxed as special costs from the date of the filing of the Statement of Defence onwards.

2 The background to this protracted litigation is set out in the reasons for judgment in respect of a summary trial under Rule 18A regarding the validity of Mr. Houweling's purchase of shares of Topgro Greenhouses Ltd. ("Topgro") from a minority shareholder (2002 BCSC 404 (B.C. S.C.)); the decision of this Court on appeal from the Rule 18A order (2004 BCCA 39 (B.C. C.A.)); and the reasons of the trial judge who, by reason of this Court's decision, was called upon to decide all of the issues between the parties (2005 BCSC 180 (B.C. S.C.)).

3 The background as set out in the trial judgment may be summarized as follows.

The Topgro Share Purchase

4 Topgro is a greenhouse nursery business. The respondents and Mr. Houweling together owned all of the shares of Topgro. The method by which Mr. Houweling acquired his shares in Topgro was a central issue at trial.

5 The defendant, Peter Breederland, was the manager of Topgro. Albert De Vries, who is not a party to the action, but whose involvement was pivotal in the dispute concerning the share purchase agreement, was the assistant manager of Topgro. Both Mr. Breederland and Mr. De Vries held shares in Topgro. Relations deteriorated and Mr. De Vries was dismissed as assistant manager and wanted out of the company. On 19 June 2000, he offered to sell his 50 Class "A" shares in Topgro to the other shareholders.

6 The significant terms of Mr. De Vries' offer were:

(a) a price of $650,000 ($13,000 per share);

(b) closing date of 17 July 2000, or such other date as agreed by the parties;

(c) the buyers were to pay within 24 hours a non-refundable deposit of 10% of the purchase price;

(d) on the closing date, the seller was to deliver the endorsed shares for transfer, along with a letter of resignation and the buyers were to deliver a solicitor's trust cheque for the purchase price including the deposit; and

(e) time was to be of the essence.

7 The shareholders rejected this offer. One of the terms of the Topgro shareholders agreement was that if a shareholder's offer to the existing shareholders was rejected, the shareholder could then sell his shares to an outsider, but only for the same consideration and on the same terms and conditions as had been offered to the existing shareholders.

8 Mr. De Vries sold his shares to Mr. Houweling, allegedly on the terms of a share purchase agreement dated 14 July 2000. The trial judge found that there were several differences between the offer made to Mr. Houweling and the offer that had been made to the shareholders. The closing date was set as 15 September 2000, and the agreement between Mr. Houweling and Mr. De Vries permitted amendment, waiver or consent to a default so long as the amendment, waiver or consent was provided in writing. The original offer to the shareholders did not provide for amendment.

9 On 24 August 2000, Mr. De Vries' solicitor wrote to the plaintiffs' solicitor, Mr. Regier, advising that Mr. Houweling had purchased the De Vries shares "upon the same terms and conditions as offered to the other shareholders".

10 The plaintiffs were suspicious that the terms had not been exactly the same and sought confirmation from Mr. De Vries' solicitor that Mr. Houweling had paid the full $650,000, including the 10% deposit in accordance with the offer originally made to them.

11 On 28 February 2002, the plaintiffs applied for an order cancelling Mr. Houweling's share certificates and allowing them to buy the shares for $65,000, which was the amount of the deposit paid by Mr. Houweling.

12 The Supreme Court granted this order (2002 BCSC 404 (B.C. S.C.)). The appeal from that order was allowed and the matter was sent back to trial and was heard before a different judge from whose order this appeal is taken.

Mr. Houweling's Actions

13 In the late 1990s, Mr. Houweling and Mr. Breederland became acquainted.

14 The two men had several connections. Mr. Houweling owns property beside the Topgro premises. Both men were involved in starting a Christian charitable organization called the Fraser Valley Gleaners. Mr. Houweling's brother, Casey Houweling, sat on the board of directors of B.C. Hothouse Foods Inc. ("B.C. Hothouse"), an umbrella marketing agency, with Mr. Breederland.

15 The trial judge found that Mr. Houweling has had a difficult relationship with his brother ever since Casey Houweling bought him out of the family business.

16 In the late 1990s, Mr. Houweling also became acquainted with Mr. De Vries, and became concerned about what he felt was the unfair treatment of Mr. De Vries by the other Topgro shareholders.

17 Mr. Houweling's unhappiness was increased when the Fraser Valley Gleaners, of which Mr. Breederland was the president, declined Mr. Houweling's offer to build a home for the organization on his property.

18 The trial judge found that in the early morning of 24 August 1999, Mr. Houweling sent a fax to the board of directors of B.C. Hothouse suggesting that his bother and Mr. Breederland should resign from the organization, given the "serious allegations" which he had levelled against them.

19 Later that same morning, Mr. Houweling went for breakfast with Mr. Breederland and told him he felt Mr. Breederland had acted wrongly towards Mr. De Vries and that he should repent. He said nothing about the fax he had sent to B.C. Hothouse.

20 On 16 September 1999, Mr. Houweling sent another fax to B.C. Hothouse, repeating his wish that his brother and Mr. Breederland resign. The fax also stated that the plaintiff, Mr. Fu Ju Lin, should go back to Taiwan as he was ungrateful to Canada.

21 Throughout the fall of 1999, Mr. Houweling continued to visit Mr. Breederland and to pressure him to do something about the unfair treatment he felt had been inflicted on Mr. De Vries.

22 On 17 January 2000, Mr. Breederland sent a fax to Mr. Houweling asking him not to come onto his property. Mr. Houweling continued to visit.

23 On 7 February 2000, Topgro's solicitor, Mr. Regier, wrote to Mr. Houweling telling him not to communicate with anyone from Topgro and not to attend the Topgro premises.

24 On 15 August 2000, Mr. Houweling went to Mr. Breederland's residence. On 16 August 2000, Mr. Breederland faxed Mr. Houweling, asking him not to come by unannounced again.

25 On 3 October 2000, Mr. Houweling came to Mr. Breederland's home again. Mr. Houweling was angry and Mr. Breederland felt threatened.

26 On 5 October 2000, Mr. Regier sent another letter telling Mr. Houweling not to attend at Mr. Breederland's property and warning that further such behaviour would result in an application for a restraining order.

27 On 2 November 2000, Mr. Houweling wrote to the chief executive officer of B.C. Hothouse, calling Mr. Breederland a "little Hitler" and suggesting that Mr. Breederland "takes Casey [Mr. Houweling's brother] as his role model, and imitates many of Casey's crooked practices".

28 On 21 November 2000, Sigurdson J. granted the plaintiffs an order enjoining Mr. Houweling from entering the premises of Topgro or interfering with any of Topgro's employees, Mr. and Mrs. Breederland, or Mr. Fu Ju Lin.

29 On 21 November 2000, Mr. Houweling entered a meeting of the B.C. Hothouse directors, uninvited, and left a pile of documents on the boardroom table. Included in the pile was a copy of the statement of claim in this action on which Mr. Houweling had handwritten his statement of defence.

30 In the spring of 2001, Mr. Houweling set a number of fires on his property, some of which were close enough to the Topgro greenhouse that Mr. Breederland felt it necessary to call the fire department.

31 In the summer of 2001, Mr. Houweling came on to Mr. Breederland's property again, ostensibly to tell him of the death of a mutual acquaintance. He also had his children deliver a statement of claim to Mr. Breederland on Mr. Breederland's property.

32 On 22 October 2002, Hood J. [*Topgro Greenhouses Ltd. v. Houweling* (October 22, 2002), Hood J. (B.C. S.C.)] found that Mr. Houweling had breached the order of Sigurdson J. and found Mr. Houweling guilty of contempt.

33 On 30 April 2003, Mr. Houweling faxed Mr. Breederland and several persons from B.C. Hothouse with further suggestions that Mr. Breederland and his counsel had been "taking lessons" from Casey Houweling and further allegations that they were involved in some sort of conspiracy or fraud.

34 Mr. Breederland consulted his doctor as a result of Mr. Houweling's conduct and has been taking medication since March 2003.

35 At some point, Mr. Houweling sent a collection of writings to some 350 persons, including a large number of persons in Mr. Breederland's industry, alleging that Mr. Breederland was unscrupulous and was involved in conspiracy and fraud and should be removed from his profession.

36 The trial judge found that Mr. Houweling's behaviour caused Mr. Breederland a significant amount of stress. Mr. Breederland resigned from his position with the Fraser Valley Gleaners and did not run for re-election to the board of B.C. Hothouse.

Trial Decision

37 The conclusions of the trial judge fall into two broad categories: those relating to the Topgro share purchase between Mr. De Vries and Mr. Houweling; and those relating to the conduct of Mr. Houweling towards Topgro and Mr. Breederland.

38 As to the share purchase, the trial judge found that the 10% deposit required by Mr. De Vries was paid on 29 July 2000, approximately two weeks late. No solicitor's trust cheque for the balance of $585,000 was delivered on the 15 September 2000 closing date, but rather a cheque on the account of a company not party to the agreement was given directly to Mr. De Vries. Mr. De Vries did not negotiate that cheque until 1 February 2001.

39 The trial judge found that there was a substantially different arrangement between Mr. De Vries and Mr. Houweling than that which had been offered to the Topgro shareholders. Mr. Houweling failed to disclose that the closing date had been moved, the deposit was late and the balance was not paid until 1 February 2001.

40 The trial judge was satisfied on the evidence that Mr. Houweling paid $650,000 for the shares, though he undoubtedly received some side benefits which had not been offered to the Topgro shareholders.

41 On the evidence before him, the trial judge could not determine the actual price, terms, and conditions of the sale of Mr. De Vries' shares. He held that the appropriate remedy was to rescind the share purchase agreement between Mr. Houweling and Mr. De Vries and to place the parties in their original position and he so ordered. I note, however, that no mention is made as to the $650,000 paid by Mr. Houweling to Mr. De Vries and the evident hardship such an order would impose on Mr. Houweling.

42 As to Mr. Houweling's conduct, the trial judge found that the plaintiffs established that a permanent injunction was required in this case. He found that Mr. Houweling interfered with the ordinary course of business of Topgro, entered its premises without authority, spoke to the employees and wilfully interfered with Mr. Breederland's daily life. He also found that Mr. Houweling told others that Topgro and Mr. Breederland were using pesticides, a particularly damaging allegation in the propagation business.

43 The trial judge found that Mr. Houweling's many scandalous statements, including his description of Mr. Breederland as a "little Hitler," were completely unjustified and caused harm both to Topgro and to Mr. Breederland.

44 The trial judge concluded Topgro and Mr. Breederland's claims for injurious falsehood were established. Mr. Houweling published false statements regarding Topgro and Mr. Breederland to third parties, he did so maliciously and both Topgro and Mr. Breederland suffered damage as a result.

45 Mr. Breederland was awarded $25,000. The damage suffered by Topgro was more difficult to determine as there was some evidence that the greenhouse industry as a whole had fallen during the relevant period. The trial judge took note of this evidence and Mr. Breederland's evidence and assessed damages to Topgro at $75,000.

46 The trial judge reviewed the elements of nervous shock and found that all were established. Mr. Houweling's behaviour was flagrant and extreme. It was motivated by pure malice and resulted in actual harm to Mr. Breederland. He awarded Mr. Breederland $20,000 for nervous shock.

47 The trial judge then applied *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 (S.C.C.), and found that an award of punitive damages was appropriate. He found that Mr. Houweling set out on a deliberate course to insult and injure both Mr. Breederland and Topgro. He ordered Mr. Houweling to pay $15,000 in punitive damages for his behaviour towards Topgro and $30,000 in punitive damages for his behaviour towards Mr. Breederland.

48 Lastly, the trial judge awarded special costs against Mr. Houweling for his persistent and completely unfounded allegations of fraud and his slurs against the reputation of counsel.

Issues on Appeal

49 It would be an understatement to say that Mr. Houweling's grounds of appeal are unclear. From his factum, it appears that he raises the following issues:

> (a) the trial judge's ruling that certain letters regarding B.C. Hothouse were irrelevant and inadmissible as evidence;
>
> (b) the absence of medical evidence sufficient to support the finding that Mr. Breederland suffered nervous shock;
>
> (c) the trial judge's findings of credibility, especially with regard to Mr. Breederland; and
>
> (d) the decision to rescind Mr. Houweling's share purchase agreement with Mr. De Vries.

50 It is important to note that in his factum Mr. Houweling has not appealed the granting of the permanent injunction, the damage awards, punitive damages or special costs.

51 Mr. Houweling's factum can only be described as incoherent. His oral submissions did little to assist us. We are not obliged to create arguments for an in-person litigant such as Mr. Houweling. As this Court stated in *Newson v. Kexco Publishing Co.* (1995), 17 B.C.L.R. (3d) 176, 111 W.A.C. 297 (B.C. C.A.) at para. 19:

> Our obligation, as with all litigants in persons, is to put our deepest understanding to the arguments being made without becoming advocates for the personal litigant or creating new arguments which he has not advanced. ...

52 I will address each of the issues that Mr. Houweling has raised in turn.

(a) Exclusion of evidence

53 As I have noted, the trial judge concluded that a particularly damaging allegation by Mr. Houweling against Topgro was that Topgro used pesticides in its propagation business. The trial judge found the allegation to be false and awarded Topgro damages. Mr. Houweling appears to claim that the trial judge's finding was in error based on his refusal to admit certain evidence.

54 At trial, Mr. Houweling sought to introduce into evidence a letter that he believed would establish the veracity of his allegation that Topgro used pesticides. It appears from the trial transcript that the letter in question was dated 12 May 1998, and was sent from B.C. Hothouse to Casey Houweling of Houweling Nurseries Ltd.

55 Mr. Houweling claims that the letter supports his contention that Topgro violated pesticide use rules. His reasoning seems to be that because Mr. Breederland was a director of B.C. Hothouse at the time the letter was sent to Casey Houweling, Mr. Breederland was somehow implicated in violating pesticide use rules. However, Mr. Houweling was unable to provide a reprimand in respect of any pesticide use against Mr. Breederland by B.C. Hothouse or otherwise. He nevertheless asserted that Mr. Breederland had admitted using pesticides.

56 The evidence that Mr. Houweling asserts constituted an admission by Mr. Breederland arises from his cross-examination of Mr. Breederland as follows:

> MR. HOUWELING:
>
> > Q Could, Mr. Breederland, your decrease in propagation sales have anything to do with your illegal chemical use on these small plants?
> >
> > A No, I don't think so.

57 In my opinion, the foregoing exchange does not constitute an admission of pesticide use by Mr. Breederland.

58 The trial judge, properly in my view, excluded the evidence of the correspondence between B.C. Hothouse and Casey Houweling as irrelevant to the matters in issue between the parties. Mr. Houweling was unable to articulate persuasive reasons for its acceptance in evidence either before the trial judge or before us.

59 I would not give effect to this ground of appeal.

(b) Absence of medical evidence in support of Mr. Breederland's claim of nervous shock

60 Mr. Houweling argues that no finding of nervous shock in respect of Mr. Breederland could be made without medical evidence to support such finding. From that argument, I assume, although it is not explicitly stated in his factum, that Mr. Houweling seeks to overturn the trial judge's award of damages for nervous shock.

61 McLachlin J. (as she then was) articulated the test necessary to establish nervous shock in *Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200, 29 C.C.L.T. 78 (B.C. S.C.) [*Rahemtulla*] at para. 56:

> [I]t must be established that the conduct produced actual harm, a "visible and provable illness": *Radovskis v. Tomn* (1957), 21 W.W.R. 658 at 664. I have earlier described the distress which the plaintiff suffered as a consequence of the defendant's accusations. Notwithstanding the absence of expert medical evidence, I am satisfied that the plaintiff suffered depression accompanied by symptoms of physical illness as a result of Mr. Flack's accusations.
>
> [Emphasis added.]

62 The test for the intentional infliction of nervous shock articulated in *Rahemtulla* was summarized and adopted by this Court in *Kalaman v. Singer Valve Co.* (1997), 38 B.C.L.R. (3d) 331, 31 C.C.E.L. (2d) 1 (B.C. C.A.) at para. 63:

> The test which the trial judge applied in awarding damages for mental distress is taken from *Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200 at 215-216, a decision of Madam Justice McLachlin when she was a member of the Supreme Court of British Columbia. The test may be summarized in this way:
>
> > To support an award for mental distress in tort, the employer's conduct must constitute an independent and actionable wrong and:

(a) must be flagrant and extreme;

(b) must be plainly calculated to produce some effect of the kind that was produced; and

(c) must have caused actual physical harm, a "visible and provable illness".

63 In *Rahemtulla*, the plaintiff had been wrongly accused of theft and summarily dismissed by her employer. The effect on the plaintiff was described by McLachlin J. as follows at para. 35:

> Her initial reaction was one of shock and despair. For a period in excess of a month she suffered severe depression, such that she was unable to leave the house or engage in any of her normal pursuits. She felt life was not worth living. She suffered from sleeplessness and she stopped eating. She had blackouts and headaches. On several occasions medical attendants were called to the home and she was twice briefly hospitalized. While other problems such as the tumour she discovered in her chest may well have contributed to her distress, I am satisfied that the most significant cause of her depression and continuing unhappiness has been the treatment she has received at the hands of the defendant and the effect that has had upon her prospects for employment.

64 In deciding the case, McLachlin J. was satisfied on the *vive voce* evidence that harm had been suffered as a result of the actions of the defendant.

65 In the case at bar, the trial judge recounted the evidence regarding the harm suffered by Mr. Breederland as follows:

> [67] Mr. Breederland testified that upon seeing his name in the fax he felt nauseous, particularly as the defendant was still using his name in connection with the words "conspiracy" and "fraud". He testified he has been obliged to consult his doctor because of the defendant's conduct and he has been taking medication since March 2003.
>
> . . . . .
>
> [73] Between August 24 and September 16, 1999, Mr. Denny saw Mr. Breederland at B.C. Hothouse board meetings. He said he saw a marked change in Mr. Breederland's appearance. He described him as "hollowed out" and "like a deer in the headlights". He testified that Mr. Breederland was withdrawn and not the same individual as before. He testified that he recognized that Mr. Breederland was under extreme stress, which Mr. Denny assumed was the result of the actions of Mr. Houweling, who was threatening to expose the alleged practice of the use of pesticides which he believed were being used by B.C. Hothouse, which advertised itself as a wholly natural operation. Mr. Denny testified that this belief was unfounded and that he had tried without success to reason with the defendant.
>
> . . . . .
>
> [76] Mr. Denny described the appearance of Mr. Breederland in November 2001 as having visibly deteriorated. He said he was haggard and looked withdrawn. Mr. Breederland did not run for re-election to the board of B.C. Hothouse.

66 The trial judge's conclusions on the issue of intentional infliction of nervous shock were:

> [92] Mr. Breederland claims damages for nervous shock in addition to his claim for malicious and injurious falsehood. Damages for nervous shock may be recovered where an outrageous course of conduct causes humiliation and anguish and results in mental distress. This may be the result where false words are uttered with the knowledge that they are likely to cause, or reckless disregard as to whether they will cause, and which actually cause, nervous shock and physical injury: *Wilkinson v. Downton*, [1897] 2 Q.B. 57 and *Abramzik v. Brenner* (1967), 65 D.L.R. (2d) 651, 62 W.W.R. 332 (Sask. C.A.), both referred to by Madam Justice McLachlin (as she then was) in *Rahemtulla v. Vanfed Credit Union* (1984), 51 B.C.L.R. 200, 29 C.C.L.T. 78 (S.C.).

> [93] McLachlin J. held, at [paragraph] 53, that in the case before her the conduct was flagrant and extreme, going beyond mere insult. Damages for nervous shock were accordingly awarded.
>
> [94] In my view, such was the conduct of the defendant in this action. He was motivated by pure malice directed at Mr. Breederland primarily, but also at Topgro, and incidentally at Mr. Lin. The evidence of both Mr. Breederland and Mr. Denny satisfies me that actual harm resulted from the defendant's conduct.

67 The trial judge clearly found that the conduct of Mr. Houweling was flagrant and intentional. The trial judge also chose to accept the testimony of Mr. Breederland and Mr. Denny regarding the harm caused by Mr. Houweling's conduct.

68 I can see no basis upon which we should disturb the trial judge's finding or his award of damages for nervous shock.

(c) Credibility findings

69 Throughout his factum and oral argument, Mr. Houweling argued that the trial judge's findings in respect of the credibility of witnesses and parties were in error.

70 As the Supreme Court of Canada has said in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.) at para. 24, appellate courts must give special deference to findings of credibility made by trial judges:

> ...although the same high standard of deference [palpable and overriding error] applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged.

71 Mr. Houweling urged us to conclude that the trial judge's adverse findings of credibility against him were rooted in what he says were falsely obtained injunctions. In particular, Mr. Houweling says that, notwithstanding the express words of the chambers judge who granted the interim injunction, counsel for Topgro nevertheless included the word "communicate" as conduct from which Mr. Houweling was restrained from engaging in with respect to the plaintiffs and others. In this respect, Mr. Houweling is correct. It is clear from the transcript of the proceedings before Sigurdson J. that he considered it inappropriate to enjoin Mr. Houweling from communicating with the plaintiffs given the ongoing litigation between the parties. Nevertheless, Topgro's counsel included "communicate" in the order as an activity from which Mr. Houweling was enjoined from engaging in.

72 Thus, when Mr. Houweling subsequently communicated with Mr. Breederland after the injunction was imposed by Sigurdson J., Topgro successfully brought contempt proceedings against him.

73 Mr. Houweling asserts that the contempt order formed the foundation of the trial judge's adverse credibility findings.

74 I must reject Mr. Houweling's argument. First, Mr. Houweling has not appealed the injunction or the contempt order. Even if he had, the only relief that I would grant would be to delete the reference to "communicating" in the permanent injunction and replace it with "enjoined from communicating with Peter Breederland, Fu Ju Lin, Danise Breederland, or with any employees of the Plaintiff except for this purpose of the litigation". Second, the trial extended over 17 days. The trial judge had ample opportunity to assess the credibility of all of the witnesses. His findings in that regard, absent some fundamental error that has not been demonstrated on this appeal, cannot be disturbed. Third, there is nothing in the reasons of the trial judge that supports Mr. Houweling's contention that the contempt order against him was the foundation of the trial judge's assessment of credibility.

75 I would not give effect to this ground of appeal.

(d) Rescission of the share purchase agreement

76 In my opinion, the only viable ground of appeal suggested by Mr. Houweling concerns the rescission remedy claimed by Topgro in its further, further, further amended statement of claim (amended pursuant to a court order made on 29 September 2004) and the trial judge's decision to grant rescission.

77 The trial judge addressed the issue as follows:

> [28] The plaintiffs ask that there be partial rescission of the contract, which, while rescinding the obligation of the directors to approve the transfer of shares to the defendant, would nevertheless leave intact the cancellation of the share certificate in Mr. De Vries' name. The plaintiffs also ask that the original members should be entitled to purchase the shares on the same terms offered to the defendant, but their view is that the price should be $65,000.
>
> [29] I cannot agree and find it impossible on the evidence to determine the price paid by the defendant to Mr. De Vries or the actual terms and conditions of the sale and purchase of Mr. De Vries shares. In my view, the appropriate remedy in these circumstances is to rescind the share purchase agreement between Mr. Houweling and Mr. De Vries and place the parties in their original position and I so order.

78 The trial judge, in ordering the remedy of rescission, relied on two cases: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1 (S.C.C.) [*Guarantee Co.*], and *K.R.M. Construction Ltd. v. British Columbia Railway* (1982), 40 B.C.L.R. 1, 18 C.L.R. 159 (B.C. C.A.). Both of these cases involved lawsuits between the parties to a contract. In addition, *Guarantee Co.* states at para. 39:

> Rescission is a remedy available to the representee, inter alia, when the other party has made a false or misleading representation. A useful definition of rescission comes from Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (H.L.), at p. 781:
>
> > Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in *status quo ante* and restores things, as between them, to the position in which they stood before the contract was entered into.
>
> See similarly G. H. L. Fridman, *The Law of Contracts in Canada* (3rd ed. 1994), at p. 807.
>
> [Emphasis added.]

79 The fundamental impediment to Topgro's claim of rescission of the contract between Mr. Houweling and Mr. De Vries is that Topgro was not a party to the contract it claimed should be rescinded. Topgro could have attacked the contract between Mr. De Vries and Mr. Houweling by claiming that Mr. De Vries breached the shareholders agreement by entering into a contract with Mr. Houweling that was in contravention of the shareholders agreement. But Topgro made no such allegation. More importantly, Topgro never joined Mr. De Vries as a party to this action. Nevertheless, it claimed relief that, if granted, would fundamentally affect Mr. De Vries' rights under his agreement with Mr. Houweling.

80 We raised this concern with the appellant and the respondents and asked for written submissions to address the issue. Regrettably, the respondents, as the plaintiffs who pleaded this relief, utterly failed to address the Court's concern.

81 In my opinion, rescission is simply not available in this case given that Mr. De Vries was not a party to the action. As the foregoing passage from *Guarantee Co.* indicates, rescission is only available between parties to a contract.

82 In the case at bar, Topgro was not a party to the share purchase agreement between Mr. De Vries and Mr. Houweling. Topgro's role under the shareholders agreement would seem to be limited to ratifying the share purchase by Mr. Houweling. If Topgro intended to claim relief that would affect both Mr. De Vries and Mr. Houweling (and

rescission of their contract would presumably affect them both), then Mr. De Vries was an essential party to be joined in Topgro's action.

83 Other courts have been confronted with what one would have expected to be an anomalous situation. *McCully v. Maritime United Farmers Co-operative Ltd.* (1928), Tru. 305, 1928 CarswellNB 12 (N.B. C.A.), concerned an action against a company which organized and operated branches of its mercantile business throughout the province. The company was subsequently broken up into its constituent branches by means of legislation. All the debts of the original company were to be divided evenly amongst the daughter companies. The plaintiff brought an action against the parent company and subsequently obtained an order compelling the defendant to assess and collect the monies owed from the daughter companies.

84 The Court of Appeal held that the order compelling assessment and collection could not be enforced against the daughter companies because (at para. 4): "They are not before the Court, and to give a judgment which would hold them liable, without their being parties to the suit and having an opportunity of being heard, would be a course which we do not think we should follow". The order was vacated and the case was ordered to be re-heard with the daughter companies joined. If the plaintiffs failed to join the required parties and bring the action for re-hearing within a reasonable time the Court was prepared to dismiss the action with costs.

85 The question of what makes a party necessary to an action was discussed in *Orman v. Canadian Mountain Minerals Ltd.* (2000), 268 A.R. 338, 86 Alta. L.R. (3d) 307 (Alta. Q.B.) at para. 27:

> It is clear that a party is not necessary merely because he has an interest in the matter. A party is necessary only if the questions involved in the action cannot be adjudicated upon without him being made a party, or if it is necessary to add him so that he should be bound by the result of the action: *Fullwood and Fullwood v. Master Excavators Ltd. et al* (1981), 34 A.R. 541 at pg. 550.

86 The decisions referred to in *Orman* and the above passage were in regard to applications by a third party to be joined in an ongoing action and relate specifically to the Alberta Rules of Court, although the definition has a general application. Based on this definition, I conclude that Mr. De Vries was a necessary party.

87 The B.C. Supreme Court Rules seek to prevent defeat of an action as a result of misjoinder or nonjoinder of a party. Rule 5(9) provides:

> **Misjoinder or nonjoinder of parties**
>
> (9) No proceeding shall be defeated by reason of the misjoinder or nonjoinder of a party and the court may deal with the matter in controversy so far as it affects the rights and interests of the parties before it.

The question then is whether this rule renders inconsequential the failure of Topgro to join Mr. De Vries to the action.

88 Rule 5(9) was considered in *Clark v. Teamsters, Local 464* (1998), 157 D.L.R. (4th) 499, 49 B.C.L.R. (3d) 62 (B.C. C.A.) [*Clark*]. Southin J.A. relied on *Performing Right Society Ltd. v. London Theatre of Varieties Ltd.* (1923), [1924] A.C. 1 (U.K. H.L.), at 14, where Lord Cave L.C. said of the English rule that was the direct precursor of the British Columbia rule in question:

> Further, under Order XVI., r. 11, no action can now be defeated by reason of the misjoinder or non-joinder of any party; but this does not mean that judgment can be obtained in the absence of a necessary party to the action, and the rule is satisfied by allowing parties to be added at any stage of a case.
>
> See, also, *Van Gelder, Apsimon & Co. v. Sowerby Bridge United District Flour Society* (1890), 44 Ch.D. 374 at 394, per Bowen L.J.
>
> [Emphasis added.]

89 Southin J.A. concluded:

> ¶ 29 In *Insurance Corporation of British Columbia v. Piche* (1983), 44 B.C.L.R. 90, this Court (per Macfarlane J.A.) allowed an appeal from an order refusing to permit the Insurance Corporation of British Columbia, which had a right to sue the defendant arising from subrogation, to substitute its insured's name for its own as plaintiff. In doing so, the Court relied upon Rules 5(9) and 15(5)(a)(ii). That, if I may say so with respect, was a proper application of the rule in issue. Subsequently, in *Tiger Williams Enterprises Ltd. v. Under the Car Repairs Inc.* (1994), 91 B.C.L.R. (2d) 390, this Court used Rule 5(9) to permit an assignee who ought to have joined his assignor as plaintiff to recover judgment nonetheless. No authority was cited and, indeed, the decision in the *Tiger Williams* case might be said, no reference having been made to the *Performing Right* case, to be *per incuriam*. Under the present provisions, however, of Rule 15, it may be that an order either adding the assignor or substituting the assignor for the plaintiff could have been made *ex mero motu*.
>
> ¶ 30 It is not necessary to say anything more about this point because the proceeding below, in seeking the relief which it did, was fundamentally misconceived and the order which declared a nullity only part of the election was also misconceived.
>
> ¶ 31 In my opinion, all this Court can do is to allow this appeal and set aside the order below, leaving the petitioners to take such further proceedings as they may be advised. . . .

90 The respondents submit that the rescission order was appropriate because it "unravelled the contract" that, in their submission, Mr. De Vries and Mr. Houweling entered into to circumvent the shareholders agreement. Whether that be the case or not, the simple fact is that Mr. De Vries, as the vendor of the shares under the impugned share purchase agreement, was a necessary party to the action. Mr. De Vries' participation in this action was limited to that of witness. If Topgro desired to set aside the agreement between Mr. De Vries and Mr. Houweling, the only mechanism by which such relief might be obtained was if Mr. De Vries were joined as a party. He was not.

91 Where that leaves the actors in this case is unclear. We were advised that Mr. De Vries has, since the trial order, sold "his" shares. We have no evidence before us as to the purchaser of the shares, the terms upon which the shares were sold or, indeed, anything beyond the advice that the shares have been sold.

92 From the foregoing discussion, I conclude that even if Topgro had a role in sanctioning the contract between Mr. Houweling and Mr. De Vries, Mr. De Vries was a necessary party to the action. In ordinary circumstances, I would set aside the order rescinding the share purchase agreement.

93 However, because the interests of an unidentified third party may be unduly affected by the setting aside of the rescission order, I think the prudent course is to return the issue to the trial court to re-open the trial and to sort out the equities between the parties and persons affected by the share purchase agreement(s). It should go without saying that it will be necessary for Topgro to join Mr. De Vries as a party to the action, as well as the person to whom Mr. De Vries has since sold "his" shares.

94 I would not confine the manner in which the issue is to be addressed. It is likely that it will be necessary to amend pleadings, conduct discoveries and adduce evidence. Those matters are best left to the direction of the trial court.

95 I nevertheless emphasize that the sole issue to be determined on the re-opened trial concerns the remedies available to Topgro, Mr. De Vries, the unknown purchaser, and Mr. Houweling. The trial judge's findings of fact stand. Only the decision to grant rescission and any other available remedies is left open for reconsideration on the re-opened trial.

Summary

96 The appeal against the orders contained in paras. 1, 3, 4 and 5 is dismissed.

97 The appeal against the order rescinding the share purchase agreement is allowed to the extent that the issue of the remedies available to the parties is remitted to the Supreme Court for further hearing at a re-opened trial after Mr. De Vries and the subsequent purchaser of the 50 Class "A" shares in question have been joined as parties to the action and all process directed by the Supreme Court has concluded.

98 In my opinion, success on the appeal has been divided. I would order that the appellant and the respondents bear their own costs of the appeal.

***Prowse J.A.*:**

I agree.

***Newbury J.A.*:**

I agree.

Appeal allowed in part.