
CANADA / JUDGMENT

Biehl v. Strang

2011 BCSC 1373

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 1373 Biehl v. Strang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Biehl v. Strang,

2011 BCSC 1373

Date: 20111013

Docket: S073341

Registry: Vancouver

Between:

Eric Eugene Biehl

Plaintiff

And

Gavin Michael Strang, Lorinda Gayle Strang,

Orchard Recovery Center Ltd., Snug Cove Enterprises Ltd.

Defendants

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Corrected Judgment: The text of the judgment was corrected at
paragraph 371 on June 28, 2012

Reasons for Judgment

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Defendant Gavin Michael Strang:

In Person

Counsel for the Defendant

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Place and Date of Trial:

Vancouver, B.C.

September 7 - 10, 2010

September 13 - 17, 2010

March 7 - 10, 2011

Place and Date of Judgment:

Vancouver, B.C.

October 13, 2011

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I. Introduction

- [1] The plaintiff, Eric Biehl, and the defendant, Gavin Strang, have been friends for over 30 years. During that time, separately and together, they have both consumed much in the way of drugs and alcohol, and periodically addressed their individual substance abuse problems by way of treatment. Based in part on his own personal experience with alcohol and drug rehabilitation, Mr. Strang decided it would be a worthwhile venture to start a substance abuse recovery centre on Bowen Island, British Columbia, where he and his wife, the defendant Lorinda Strang, already owned some property. Mr. Biehl agreed. Mr. Biehl had access to some funds through an investment in an American company his father started. Mr. Biehl cashed in some of his shares in that investment, and in 2001/2002 made a series of payments to Mr. Strang and the private company that became the recovery centre business. Until just before this trial the total in US funds the parties believed to have been advanced was US \$1,030,000, but in fact I find the total to be US \$980,000.
- [2] Mr. Strang invested the funds he received from Mr. Biehl in the construction and development of a recovery centre on Bowen Island, where, through a private company, he already owned a commercial property at 809-811 Grafton Road ("the Grafton Road property"). The majority of the funds from Mr. Biehl were paid directly into a bank account of the recovery centre and a portion has been repaid by it. The agreement between Mr. Biehl and Mr. Strang, which Mr. Biehl described as "a deep handshake," was never documented, although both men had business experience and access to legal resources. A dispute has

arisen regarding the terms of their agreement, including when the total amount advanced was to be repaid, the amount of interest owed, and whether Mr. Biehl has an interest in the proceeds of the recovery centre, the recovery centre itself, and the real property it operates on.

- [3] The recovery centre is owned by the defendant, Orchard Recovery Center Ltd. (the "Orchard"); it uses properties owned by the defendant, Snug Cove Enterprises Ltd. ("Snug Cove"). Mr. Strang owns 100% of the shares in both the Orchard and Snug Cove (the "corporate defendants"). Mr. Strang and Ms. Strang worked hard to develop the Orchard, which opened its doors to clients on April 1, 2002. The "seed money", to use Mr. Biehl's term, to develop the recovery centre was provided by Mr. Biehl. It was used to fund extensive renovations to the buildings on the Grafton Road property, which became the main administration buildings for the Orchard. The funds advanced by Mr. Biehl were also used to adapt a nearby residential property that was leased to provide accommodation for the Orchard's clients that was subsequently purchased by Snug Cove in 2003. The early operation of the Orchard was facilitated by the monies provided by Mr. Biehl and undertaken by the Strangs, assisted by staff they hired.
- [4] Mr. Biehl, who lives in Hawaii, visited the Orchard on occasion and once spent several months there being treated by an addictions' doctor who prescribed him methadone. By 2003 Mr. Strang, the first executive director of the Orchard, was periodically absent due to a relapse into substance abuse, and a new executive director was hired.
- [5] Plaintiff's counsel aptly described the Orchard as a "high-end type of drug and alcohol treatment centre," "more Four Seasons than Travelodge." Clients pay privately to attend. Although the Orchard was not profitable for the first few years, it has prospered recently, with significant profits. The Orchard presently employs 38 full or part-time staff, and has had over 2,300 clients since its inception.
- [6] Over the years discussions took place between Mr. Biehl and Mr. Strang and others as to what the terms of the agreement between Mr. Biehl and Mr. Strang were regarding the funds he advanced to Mr. Strang and the Orchard. Attempts were made to put the terms of their agreement in writing. They attempted to do so when prompted by inquiries from the Internal Revenue Service in relation to Mr. Biehl sending such large sums out of the United States. An initiative by Hawaiian attorneys, including Mr. Biehl's ex-wife, Ms. Purcell, to negotiate an agreement with Mr. Strang, and his wife, Lorinda, failed. No written agreement was ever agreed to by Mr. Biehl and Mr. Strang in relation to the funds advanced by Mr. Biehl.
- [7] However, it is clear that Mr. Biehl and Mr. Strang agreed that the funds were to be used by Mr. Strang to start a recovery centre on Bowen Island, and that the funds advanced by Mr. Biehl were not a gift to Mr. Strang or to the Orchard. Beyond that, the parties did not agree as to when or how all the funds were to be repaid, what the interest on them was to be, whether Mr. Biehl was to receive an equity interest in the Orchard in lieu of interest or in

addition to it, and whether any such interest was to include an interest in the real property used by the Orchard in its operations and owned by Snug Cove. The Orchard has made some payments to Mr. Biehl to repay a portion of the total sum advanced.

- [8] The defendants, Gavin Strang and Lorinda Strang, a married couple, became estranged in late 2005. Whereas Ms. Strang continues to run the Orchard and Snug Cove, Mr. Strang is bound by an order of Preston J., dated March 15, 2007, in their matrimonial action to facilitate her doing so and to not otherwise interfere in the day-to-day operations of the Orchard. Upon the conclusion of this matter, the matrimonial litigation, including property issues between the Strangs regarding the Orchard and Snug Cove, will be determined.
- [9] Apart from the US \$455,290.81 repaid to Mr. Biehl by the Orchard (several payments of which are disputed), Mr. Biehl has not received any other funds or proceeds from the operation of the Orchard. Both Mr. and Ms. Strang each draw significant annual salaries from the Orchard. This is so although Mr. Strang has been effectively absent from directing operations at the Orchard since 2006 or earlier, and absent by virtue of court order since March 15, 2007. Ms. Strang has worked at the Orchard since the beginning and became its executive director in 2007.
- [10] Both Mr. and Ms. Strang have, since the inception of the Orchard, derived related benefits. In its early days the Orchard paid the mortgages on the Grafton Road property and their matrimonial home. The "debt" owed by the Orchard to Mr. Biehl was changed to a shareholder's loan from Mr. Strang to the Orchard which, as it has been paid down, has resulted in tax benefits to the Strangs. At present both Mr. and Ms. Strang have had their respective residential mortgages, vehicle leases, and other personal expenses paid by the Orchard.
- [11] Initially and prior to trial, all the defendants except Ms. Strang had the same counsel, Mr. Gordon Johnson. After filing a statement of defence on behalf of Mr. Strang and the corporate defendants, Mr. Johnson withdrew. The corporate defendants were without counsel until present counsel was retained as a result of a court order in May 2010. Mr. Johnson was called as a witness on behalf of the corporate defendants.

II. The Issues

- [12] The main issues to be decided are:
1. Is there an enforceable agreement between Mr. Biehl and Mr. Strang as to the terms upon which Mr. Biehl provided funds to Mr. Strang and the Orchard?
 2. If no enforceable agreement is found, does Mr. Biehl have a valid claim for unjust enrichment? Are the corporate defendants successful with regards to the change of position defence? If not, and in any event with regards to Mr. Strang and Ms. Strang, what is the appropriate remedy and how ought it to be quantified?

3. Depending on the nature of the remedy and how it is quantified, should Mr. Biehl's interests be secured by an equitable lien or a constructive trust for a proportionate share of assets of the Orchard and/or Snug Cove?
 4. Which defendants are jointly and severally liable?
 5. Did Mr. Strang, Ms. Strang, and/or the Orchard, breach a fiduciary duty owed to Mr. Biehl in light of his vulnerability due to his substance abuse issues, by the manner in which they obtained, used, and accounted for the funds advanced by Mr. Biehl,?
 6. In the alternative to a constructive trust based on unjust enrichment, is Mr. Biehl entitled to a "wrong-based constructive trust (the Soulos constructive trust)"?
- [13] A number of factual issues arise specific to the funds advanced and the amounts repaid, including:
1. How much money was advanced by Mr. Biehl?
 2. What is the total amount that has been repaid to Mr. Biehl?
 3. What interest rate should be awarded?
 4. How should the interest be calculated?
 5. Are the amounts repaid by the Orchard to Mr. Biehl to be characterized as principal or interest?
 6. When should the conversion from US dollars to Canadian dollars be made (as of the date each advance was paid, as of the date of repayments by the Orchard to Mr. Biehl, or as of the date of judgment)?

III. The Trial

- [14] During this 13-day trial the parties pointed to the testimony of witnesses (including Mr. Biehl but not Mr. Strang), the pleadings, letters, faxes, draft agreements, notes in Mr. Biehl's diary, bank and credit card records, emails, read-ins from examinations for discovery, and taped conversations between Mr. Biehl and Mr. Strang as evidence of what their agreement was or might have been. Detailed evidence, particularly in the testimony of Ms. Strang, on her own behalf and on behalf of the corporate defendants (accompanied by voluminous business and financial records), is before the Court in relation to the personal dealings of the Strangs, and the business dealings of the Orchard and Snug Cove.
- [15] The plaintiff's case was comprised of the testimony of Mr. Biehl; Madalyn Purcell, Mr. Biehl's former wife and an Hawaiian attorney (who, in 2005, in conjunction with lawyers from her former firm, tried unsuccessfully to commence negotiations with the Strangs and the Orchard to document the agreement regarding Mr. Biehl's advances of funds); Mr. Riback, a chartered accountant with expertise in venture capital investments, who offered his opinion on how an investment of capital such as was made by Mr. Biehl in a start-up recovery centre

business might have been structured; and read-ins from the examination for discovery of Mr. Strang and Ms. Strang.

- [16] The defendant Mr. Strang was self-represented. He absented himself from a portion of the trial and left prior to its conclusion. He made brief comments to the Court stating his position in relation to this litigation, which was "let the chips fall - fall where they do". He indicated that, because he no longer has access to the resources and records available to Ms. Strang and the corporate defendants, he could not afford counsel. He advised the Court that he had experienced several serious bi-polar episodes. When this trial continued in March 2011 Mr. Strang advised that he was residing in Cambodia.
- [17] Mr. Strang did not testify on his own behalf and did not call any evidence, although at the conclusion of evidence he was afforded an opportunity, and declined to attend. He advanced his own case by limited cross-examination of several witnesses. Mr. Strang was not called by any of the other defendants.
- [18] Evidence relating to Mr. Strang comes from examination for discovery read-ins put into evidence by the plaintiff; the evidence of others; a large number of documents and correspondence related to the business of the Orchard and his dealings with Mr. Biehl; documents related to the Orchard and Snug Cove; and the telephone conversations between him and Mr. Biehl, surreptitiously recorded by Mr. Biehl, which Mr. Strang consented to going into evidence.
- [19] The defendant Ms. Strang gave evidence on her own behalf. She provided a detailed history of the development of the Orchard and the properties owned by Snug Cove.
- [20] The corporate defendants also called Ms. Strang; Mr. Martin McKenzie, a friend of Mr. Strang's who went with him to Hawaii in November 2001 to meet Mr. Biehl; Mr. Gordon Johnson, the former counsel for the corporate defendants and Mr. Strang; and Ms. Nicole Martin, an administrative assistant and bookkeeper at the Orchard from 2002 to 2004. They tendered a report from Mr. Bowie, an expert in business evaluation, in response to the report and evidence of Mr. Riback. The corporate defendants also tendered a report by Dr. Sobey with regard to the likely effects of certain drugs on memory in relation to Mr. Biehl's history of prescribed substances, which counsel agreed was to be admitted.
- [21] At the conclusion of the trial all parties except Mr. Strang made submissions.
- [22] Extensive documents have been filed as exhibits in this case, most by way of the common books of documents. A handful of documents were not agreed to be sent on the dates indicated on them, and several documents relating to Mr. Biehl's ostensible consent to the North Shore Credit Union mortgage taking priority over the funds owed to him by the Orchard were not admitted to be signed by those who purported to sign them. Mr. Strang was present at the start of the trial when Exhibit 2, the books of common documents, was filed. He did not object and he was provided with copies.

IV. The Plan

- [23] I propose to set out some additional information about the parties. I will then set out the reasons for several evidentiary rulings made during the trial (the surreptitiously taped telephone calls, the admissibility of Mr. Riback's expert evidence, and the use of the plaintiff's read-ins of portions of Mr. Strang's examination for discovery). Certain questions and answers by Mr. Strang at his examination for discovery conducted by counsel for the plaintiff gave rise to the corporate defendants' application during the trial regarding waiver of privilege by Mr. Strang. Issues related to this were decided in *Biehl v. Strang*, 2011 BCSC 213.
- [24] I will then set out the facts as I find them in a chronology, many of which are not in dispute. Next, I will refer to some of the testimony of witnesses called, and I will include my findings as to their reliability and credibility, and comment on the significance of their evidence to the case. In addition, the expert evidence of Mr. Riback, whose testimony and report is relevant to the plaintiff's claim of unjust enrichment, is set out in some detail. I will refer to the report by Mr. Bowie, a business evaluation expert, called by the corporate defendants in response. I will also make reference to the report of Dr. Sobey, an addiction medicine physician, who opines as to the alleged frailties of Mr. Biehl's memory due to substance abuse. I will summarize the positions of the parties. I will then provide my analysis and findings with regard to the legal issues that arise, set out my further findings in relation to some factual matters and summarize my conclusions.

V. The Parties

A. The Plaintiff, Eric Biehl

- [25] Mr. Biehl is a 55-year-old semi-retired civil engineer, who is an American citizen and resides in Hawaii. He has a degree in mathematics from the University of California (San Diego). He has a background in "general contracting" and in real estate development. He is divorced from Ms. Madalyn Purcell, with whom he has two adult children. She is an attorney in Hawaii and became involved in this matter in 2005 to try to assist her former husband clarify the terms upon which he had provided funds to Mr. Strang and the Orchard. Mr. Biehl's common law wife, Linda Bradford, is referred to only to the extent of receiving communications to be passed on to Mr. Biehl.
- [26] Mr. Biehl met Mr. Strang in 1977 when the latter was attending the Gemological Institute of America in Los Angeles. Mr. Biehl said that they became good friends - "daytime friends, night time friends" - and shared the common interests of "rock and roll music, sports activities, girls". Ms. Purcell described Mr. Strang as a "drinking buddy" of Mr. Biehl's. It is clear from several sources that Mr. Biehl and Mr. Strang have "partied hard" together over the years and at times have consumed excessive quantities of drugs and alcohol together. Mr. Biehl and Mr. Strang's friendship seems to have ebbed and flowed. Mr. Biehl still appears genuinely impressed with Mr. Strang's entrepreneurial abilities.

[27] Mr. Biehl has a long history of alcohol and drug abuse. This is very clear based on his evidence and the testimony of others, Ms. Strang in particular, and the prescription records and B.C. Methadone Program records in evidence. After advancing funds to develop the Orchard, Mr. Biehl came to Bowen Island, and stayed with the Strangs in August and September 2002 while receiving treatment for his addictions, including methadone, from a doctor associated with the Orchard. Mr. Biehl has been involved in at least one other unrelated legal dispute in Hawaii where the funds he gave to others were then characterized as a gift instead of a loan, in relation to which Mr. Strang was a potential witness.

B. The Defendant, Gavin Strang

- [28] Mr. Strang is 50 years old. He grew up in West Vancouver. He obtained a degree in economics and a law degree from UBC. He was called to the bar but did not practice. He indicated to the Court that he disliked the practice of law intensely. Given Mr. Strang's present mental health and addiction issues, his legal education is not to be confused with an ability to effectively represent himself.
- [29] Mr. Strang married Lorinda in July, 1984. They have three children who are young adults. Between 1989 and 1996 he had a hotel business in Whistler.
- [30] In 1990 Mr. Strang and Ms. Strang jointly purchased a house on Bowen Island (the "Harding Road property") where they resided with their family until separation.
- [31] Mr. Strang is inclined to do business through private companies.
- [32] In 1996 Mr. Strang acquired 100% of the shares in Snug Cove, which owns the Grafton Road property, by using a numbered company, 525718 B.C. Ltd., wholly owned by Mr. Strang. He then developed the Grafton Road property into a fitness centre and restaurant. Then in 2001/2002 Mr. Strang obtained the funds to develop a recovery centre from Mr. Biehl. The funds were used to develop the Grafton Road property into the main site for the Orchard, and to pay for a myriad of other expenses related to starting a recovery centre. Snug Cove initially leased a nearby bed and breakfast property at 687 Cates Lane ("Cates No. 1") for "primary care clients" and purchased it in May 2003. It too had to be renovated and adapted to suit. Many of the renovations funded by Mr. Biehl were paid for through 525718 B.C. Ltd., which was later wound up. Its shares in Snug Cove were transferred to Mr. Strang in August 2004.
- [33] In June 2006, Snug Cove purchased an additional residence at 662 Cates Lane ("Cates No. 2") for "secondary care clients". At one point a property in New Westminster was bought on the initiative of Mr. Strang as a prospective recovery house, and then later sold at a profit received by the Orchard.

- [34] Mr. Strang impressed the Court as a bright man infused with the entrepreneurial spirit, who suffers from addictions. He is erratic. He did not really participate in this trial. The evidence of Ms. Strang shows that Mr. Strang was fully engaged and very enthusiastic about developing the Orchard as a recovery centre to assist others with their addictions. Thus, he approached his long-time friend, Mr. Biehl, for the money to do so. After much hard work on the part of Mr. Strang (and Ms. Strang) the Orchard opened on April 1, 2002.
- [35] The Orchard presently operates on the Grafton Road Property, Cates No. 1, and Cates No. 2, and Snug Cove receives regular lease payments as compensation. Mr. Strang also owns 100% of the shares in the Orchard. When the Orchard opened Mr. Strang was its executive director.
- [36] However, once the Orchard was operating Mr. Strang was regularly away in treatment himself due to relapses. He and Ms. Strang separated at the end of 2005. The court order granted by Preston J. on March 15, 2007 (by consent, which is important to Mr. Strang) requires Mr. Strang to cooperate with Ms. Strang's running of the Orchard and Snug Cove, and not to attend the properties or otherwise interfere with the Orchard's business. Mr. Strang has purchased a house in Chico, California, for which the Orchard pays the mortgage. The Orchard also pays Mr. Strang a monthly salary, although he is not involved in its operations.

C. The Defendant, Lorinda Strang

- [37] Ms. Strang is 50 years old. Since 2007 she has been the executive director of the Orchard. She is a self-professed former addict who has been clean and sober for many years. She appears to be very committed to the work of the Orchard.
- [38] Over the years Ms. Strang gradually became more involved in the business ventures of her husband; first with the operation of the fitness centre and restaurant on the Grafton Road property, then with the development of Cates No. 1, the transformation of the Grafton Road property into the main facility for the treatment centre, and later with the development of Cates No. 2. She has a Grade 12 education and has taken several short courses over the years to assist with her business and management responsibilities. When the Orchard first started she was involved in physical and organizational work setting up the facilities, and then worked in the office, doing promotion and enrolment duties. She was not involved in significant management decisions in the early days of the Orchard, including during the time when Mr. Biehl was advancing funds for its development, nor was she involved in management when the funds were being spent.
- [39] Gradually, Ms. Strang took on more responsibilities for the running of the Orchard. This intensified as Mr. Strang was away more, from about June 2003 onwards.
- [40] In the outstanding matrimonial litigation, Ms. Strang claims an interest in assets the Strangs acquired during their marriage, which includes the Orchard, Snug Cove as owner of the Grafton Road property and the Cates properties, and the Harding Road property, which is

their former matrimonial home and owned jointly. At the present time the Harding Road property is being used as an additional residence for Orchard clients. At the time of trial Ms. Strang was authorized to carry on the business of the Orchard and Snug Cove. She testified on her own behalf and on behalf of the corporate defendants.

D. The Defendant, the Orchard Recovery Center Ltd., "the Orchard"

[41] The Orchard, a private company, runs the recovery centre on the three properties on Bowen Island owned by Snug Cove. The Orchard opened on April 1, 2002, and at the time of the trial continues to operate.

[42] The Orchard was incorporated as 625656 B.C. Ltd. in April 2001, and assumed its present name on February 1, 2002. Although it appears in various forms, the correct name is "Orchard Recovery Center Ltd." (as opposed to "Centre"). Mr. Strang is the Orchard's sole officer and director, and owns 100% of its shares.

[43] The Orchard's year end is August 31. In 2002 and 2003 it operated at a loss. Since 2004, its annual net earnings have been: in 2004, \$79,479; in 2005, \$390,326; in 2006, \$324,115; in 2007, \$402,413; in 2008, \$375,367; in 2009, \$228,760; and in 2010, \$315,545. The total net earnings of the Orchard have been \$2,116,005.

E. The Defendant, Snug Cove Enterprises Ltd., "Snug Cove"

[44] Snug Cove, another private company, owns the three properties upon which the Orchard operates, namely the Grafton Road property, Cates No. 1, and Cates No. 2. Mr. Strang is Snug Cove's sole officer and director, and owns 100% of its shares. Before the Orchard opened Snug Cove owned the Grafton Road property only. Cates No. 1 and Cates No. 2 were purchased after the Orchard was operating. As of 2010, the Orchard pays Snug Cove a total in annual lease payments of \$324,000 for its use of the lands and buildings on the three properties, which are mortgaged to the North Shore Credit Union.

VI. The EVIDENTIARY RULINGS

A. The Admissibility of the Riback Report and Testimony

[45] The admissibility of the expert evidence of Mr. Howard Riback, a chartered accountant with an expertise in venture capital, on behalf of the plaintiff, was a contested issue in this case. I determined that his evidence was admissible. I indicated during the trial that I would provide reasons later to explain that decision. These are the reasons.

[46] In opposing its admissibility, counsel for the corporate defendants submitted that the evidence of Mr. Riback was not relevant, not necessary to assist the trier of fact, and not given by a properly qualified expert, thereby failing to meet three of the four well known criteria that determine admissibility of expert evidence as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 [Mohan].

[47] Based on his cross-examination of Mr. Riback's qualifications, counsel for the corporate defendants submitted that the following answers by Mr. Riback undermined the admissibility of his opinion:

- each negotiation of terms with a start-up company is different;
- he has been surprised in the past by terms that parties have requested in such negotiations;
- venture capitalism is only one form of investing among many;
- while he is comfortable with terms like "venture capital" and "private equity" others may understand those terms differently;
- for the past five years the firm in which Mr. Riback works has been exclusively involved with technology and biotechnology companies;
- he has never been involved in negotiating terms with respect to a start-up counselling business like the Orchard;
- the kind of exit strategies that venture capitalists are looking for with start-up technology companies are initial public offerings or sale to a major company; and
- the risk profile of a technology company is not comparable to the risk profile of a counselling business like the Orchard.

[48] Counsel for the corporate defendants submitted there was nothing in the evidence of Mr. Riback that would assist the Court beyond what the Court would already know about commercial agreements, the negotiation of terms, the share structure of companies, and the types of debt instruments and security available. In this regard he relied upon a number of cases, including *Witt v. Canada*, 2008 TCC 407, in which the court refused to permit the expert opinion evidence of a hedge fund manager regarding convertible hedge transactions.

[49] In terms of the opinion of Mr. Riback, counsel for the corporate defendants submitted that: it was merely what Mr. Riback would want if he was going to finance the Orchard; there is no predictable body of knowledge that Mr. Riback can draw upon to extrapolate his own subjective views into the broader views of the marketplace as a whole; and there is no recognized body of knowledge regarding venture capitalism. In the event the Court did not find that Mr. Biehl and Mr. Strang reached an agreement regarding Mr. Biehl's provision of funds to the Orchard, the Court would have to consider whether the law of unjust enrichment applied and, if so, fashion a proper remedy, relying on its findings of fact and the applicable legal precedents - an area where Mr. Riback's opinion would not be of assistance.

[50] The submissions of the plaintiff, which I accepted, were that the scope and substance of Mr. Riback's opinion, particularly with regards to what terms, forms of security, and returns a third-party arm's-length investor would expect (as a loan or other form of debt instrument, an equity investment, or a convertible debt) on funds advanced in a scenario similar to that

in the case at bar, would likely be of assistance to the Court. The plaintiff submitted that while the role of a trial judge as "gatekeeper" with regard to expert evidence is an important one, in a judge alone trial the risk of prejudice due to the improper use of evidence is diminished. In each case the question is whether the expert's report is capable of providing the Court with assistance.

- [51] I note that with regard to relevance, the threshold for admission is not particularly high, as expert evidence is *prima facie* admissible if it is "so related to a fact in issue that it tends to establish it" (Mohan at 20-21). This is not an instance where Mr. Riback's opinion's "probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability" (Mohan at 21).
- [52] Given that the primary focus of Mr. Riback's business expertise, admittedly in the area of venture capitalism with regard to technology and biotechnology start-ups, is the placement of money on the private market for potentially high return, it was my view that his evidence was potentially relevant, and could be necessary to assist the trier of fact if no agreement was found between Mr. Biehl and Mr. Strang and unjust enrichment was to be considered. I find that his specialized knowledge went beyond what the Court would normally know in terms of how to structure high risk start-up ventures outside more conventional financing options.
- [53] I do not accept the submission that because Mr. Riback had never encountered the start-up financing of a counselling business like the Orchard, he could not usefully offer his opinion as to what an investor would seek as a reasonable return and/or appropriate security for an advance of funds of the size made by Mr. Biehl. It is, in my view, more appropriate to deal with the Riback evidence as a matter of weight as opposed to threshold admissibility, in the event it became necessary to consider it. To exclude it in the early stages of the trial would have been "an overly fine cut", when what Mr. Strang would say, if anything, about the nature of an agreement with Mr. Biehl was unknown, and without the Court having a full sense of the case at hand, particularly if required to consider value received in an unjust enrichment analysis.
- [54] Finally, in terms of threshold admissibility, I note that the corporate defendants made much of the fact that Mr. Riback was not able to draw on a predictable body of knowledge for his opinions, and against which they could be tested. The areas of expert evidence offered to a court are many and diverse, and I have no doubt that there is a predictable body of knowledge upon which the basic tenets of venture capitalism rest. Ironically, the expert report of Dr. Sobey, offered on behalf of the corporate defendants (admitted by consent) as an "addiction medicine physician", falls prey to a number of the same criticisms.

B. The Admissibility of Taped Telephone Calls between Mr. Biehl and Mr. Strang

- [55] Between December 2008 and March 2009, Mr. Biehl surreptitiously recorded a number of his telephone conversations with Mr. Strang. Transcriptions of a number of telephone conversations are in evidence (Exhibit 2, Volume 1, Tab 68). During this trial I ruled that the transcriptions of these calls were admissible in evidence. The plaintiff was cross-examined on five such calls by counsel for Ms. Strang.
- [56] The recorded conversations between Mr. Biehl and Mr. Strang came to light in the course of an application to admit fresh evidence and an appeal of a decision of Master Scarth heard by former Chief Justice Brenner on June 22, 2009. The Chief Justice admitted the fresh evidence and allowed the appeal, ordering that portions of the examinations for discovery of Mr. Strang in the matrimonial action be produced by the defendants in this action.
- [57] In a subsequent application in the matrimonial action between the Strangs heard February 10, 2010, Mr. Biehl applied for intervenor status and sought to vary the order of Preston J. of March 15, 2007, that permits Mr. Strang and Ms. Strang to withdraw money from the Orchard and Snug Cove pending its resolution. In that application Mr. Strang was self-represented and objected to the transcriptions of the telephone calls being disclosed, claiming they were covered by settlement privilege. In *L.G.S. v. G.M.S.*, 2010 BCSC 297, Bruce J. found that the recorded telephone conversations were not covered by settlement privilege:
- [3] Both L.G.S. and Mr. Biehl sought an order releasing them from the implied undertaking attached to the discovery transcripts in the contractual proceeding for the purpose of this application. In addition, L.G.S. sought an order permitting her to refer to transcripts of recorded telephone conversations between Mr. Biehl and G.M.S. that were produced in the contractual proceeding. None of the parties objected to the first application and thus I granted an order waiving the implied undertaking with respect to the discovery transcripts of all parties in the contractual proceeding for the purpose of this application.
- [4] In regard to the recorded telephone conversations, G.M.S. argued that some portions of the transcripts were privileged as settlement discussions. I permitted L.G.S. to refer to these recorded conversations in response to Mr. Biehl's applications; however, this order was subject to any determination I made with respect to the privileged nature of the recorded conversations. After reviewing the transcripts, I find that the conversations are not in the nature of settlement discussions and are thus not privileged.
- [58] Initially, in this trial Mr. Strang objected to these calls being admitted into evidence and the Court indicated it would rule on the matter. Then Mr. Strang withdrew his objection. The Court indicated that having considered the matter, the transcriptions of the calls were admissible. It seems prudent to provide reasons, even in the face of Mr. Strang's withdrawal of his objection. No issue was raised with the accuracy of the transcriptions or the identity of the speakers.

- [59] Mr. Biehl was cross-examined on portions of the five transcribed calls. No further reference was made in the course of the trial to the other calls.
- [60] Audio recordings are recognized at common law as real evidence. The admissibility of the specific evidence is to be determined on the circumstances of each case. Two issues arise in the jurisprudence with respect to the use of such evidence: admissibility and compliance with disclosure requirements. In the present case, issues relating to disclosure have been dealt with prior to this trial.
- [61] The most pertinent authority on this issue is the decision of Barrow J. of this court in *Mathews v. Mathews*, 2007 BCSC 1825 [Mathews]. In *Mathews*, Barrow J. reviewed recent British Columbia and Ontario jurisprudence on this issue. I will briefly review the relevant authorities cited in *Mathews*.
- [62] The decision of Thackray J. in *Seddon v. Seddon*, [1994] B.C.J. No. 1729, 1994 CarswellBC 1409 (S.C.) [Seddon], supports the exclusion of such evidence, but does so on the basis that the gathering of the evidence by secret means was an "odious" practice, and considered the recordings to be illegally obtained and a violation of the mother's Charter rights (the latter being incorrect). There were also some technical problems with the many hours of taped conversations between the mother and the children.
- [63] Master Joyce, as he then was, in *Sweeten v. Sweeten*, [1996] B.C.J. No. 3138, 66 A.C.W.S. (3d) 894 (S.C.), admitted a single telephone call between the father and the child in which the father was attempting to influence the views of the child. Master Joyce held that the Criminal Code exclusion of the intercepted private communications in *Seddon* was not applicable, and that such activity between private individuals did not engage the Charter. He concluded that he had an extremely limited discretion to exclude the evidence.
- [64] In *B. (A.D.) v. B. (E.)*, [1997] B.C.J. No. 227, 68 A.C.W.S. (3d) 888 (S.C.) [B. (A.D.)], surreptitiously recorded phone conversations were led as evidence in a family matter. Grist J. indicated disapproval with the method of obtaining the evidence, but stated:
- [12] Nonetheless, in my view, the law is clear that if the information is relevant, the identity of the parties known, and the recording trustworthy, the evidence by way of taped conversations should be received.
- [65] In *Rawlek v. Rawlek*, 2003 BCSC 1466 [Rawlek], surreptitiously recorded phone conversations were raised in a family matter in an application regarding their proposed review by the court-appointed expert preparing a s. 15 report under the Family Relations Act, R.S.B.C. 1996, c. 128. Williamson J. acknowledged that the case did not concern their admissibility per se, but nonetheless reviewed authorities in the area and concluded that, as stated in *B. (A.D.)*, there is a three-part test to be applied when dealing with the admissibility of such evidence: the relevance, known identification, and trustworthiness of the evidence.

- [66] In *Rawlek*, the central consideration was the trustworthiness of the evidence, in particular the contextual and partial nature of the recordings. Williamson J. also identified the fairness and the effect of such evidence on the reputation of the administration of justice as factors to consider. Ultimately, the expert was not permitted to review the evidence of the tape recorded calls on the basis that it was of questionable trustworthiness, immense volume, and its probative value was questionable.
- [67] In *Reddick v. Reddick*, [1997] O.J. No. 2497, 14 C.P.C. (4th) 175 (Ont. C.J. (Gen. Div.)), recorded phone conversations in the context of a family law dispute were led as evidence. Bell J. admitted them based upon consideration of the relevance, reliability, and probative value of the evidence.
- [68] In *Mathews*, upon review of the jurisprudence, Barrow J. identified that there is a limited discretion to exclude relevant evidence in this context, and held, at para. 43, that, "[t]he judicial exercise of that discretion involves a balancing of competing interests which can be usefully viewed as assessing the probative value of the evidence as against its prejudicial effect." The potential manipulation of a surreptitious recording, or the use of fragments of conversation removed from their broader context, can undermine the probative value of such evidence. Whether such concerns arise with the evidence will be determined on a case-by-case basis.
- [69] With respect to prejudice, Barrow J. identified three types of prejudice, and stated:
- [53] I turn next to the issue of prejudice. Prejudice includes prejudice to the party opposing the admission of the evidence, prejudice to the trial process, and prejudice to the reputation of the administration of justice. As to the first aspect of prejudice, it is in many ways the mirror image of the probative value inquiry. To the extent evidence is of uncertain provenance, is incomplete or capable of manipulation, it will operate prejudicially. Given this, I will simply observe that there is no particular prejudice to the admission of the evidence for the reasons already given.
- [54] Prejudice to the trial process includes a consideration of the cost to the process of admitting the evidence. In *Seddon* and *Rawlek*, the two cases in which the evidence was not admitted, the prejudice to the trial process lay in the sheer volume of the evidence (some 20 hours of tape recordings in *Seddon* and recordings made over a period of three and a half years in *Rawlek*). Prejudice of that kind is not present here.
- [55] The third kind of prejudice is present here. It lays in what Thackray J., in *Seddon*, called the "odious" practice of secretly intercepting the private communications of another. It is aggravated when doing that is also a criminal offence. This sentiment is endorsed by the judges in all of the cases discussed above. It is a sentiment that I share. ...
- [56] Finally, in assessing prejudice, it is appropriate to consider the prejudice that would arise by excluding the evidence. If, for example, the evidence was highly reliable and showed active physical abuse of a young child, there can be little doubt that excluding it would adversely

affect the reputation of the administration of justice. It is in this sense that the observations about the best interests of children were made in Sweeton and Reddick. In both cases, the evidence revealed seriously alienating behavior by a parent and that militated in favour of the admission of the evidence. This is, in my view, another way of expressing the possible prejudice that would inure to the reputation of the administration of justice if the evidence were excluded.

- [70] In the present case I found that the taped telephone calls between Mr. Biehl and Mr. Strang were admissible. They are clearly relevant to the matters at issue in this lawsuit, albeit their weight is lessened by the fact that Mr. Biehl, who made the recordings, knew he was being recorded as he spoke with Mr. Strang, who did not. Further, at times Mr. Strang appeared to speak as if highly agitated and/or under the influence of intoxicating substances. However, Mr. Strang did speak freely and often on matters of relevance to this case without undue prompting or coaxing by Mr. Biehl. The calls are also relevant because they show that Mr. Strang was quite willing to try to entice Mr. Biehl to collude with him in a type of "back room deal" to diminish any interest in the Orchard or Snug Cove that Mr. Strang may be entitled to in the matrimonial proceedings. Mr. Strang indicated that he would claim that Mr. Biehl's interest was larger than was actually ever contemplated by the two of them, and then Mr. Biehl would take care of him later.
- [71] In terms of prejudice to Mr. Strang, I concluded that by withdrawing his objection to the admissibility of the calls Mr. Strang concluded that he was not overtly prejudiced in them, or decided to run that risk. In my view, there is a much greater risk of prejudice to the proper administration of justice and a fair trial in not admitting these calls, given their content. Therefore, I admitted this evidence as it satisfies the three-part test, with little prejudicial effect, and is potentially probative of matters at issue. The admissibility of this evidence was decided in relation to the cross-examination of the plaintiff.

C. The "Read-ins" of Mr. Strang

- [72] In the usual course, pursuant to R. 12-5(46) of the Rules of Court, the evidence of the personal defendant Mr. Strang from his examination for discovery read into evidence at trial on behalf of the plaintiff would only be admissible as evidence against him, and not against the corporate defendants. In the circumstances of this case the plaintiff seeks to have the read-ins of Mr. Strang's examination for discovery evidence ruled admissible against Mr. Strang and the corporate defendants. The corporate defendants are opposed.
- [73] At the August 29, 2009 examination for discovery of Mr. Strang conducted by counsel for the plaintiff, the only other represented defendant was Ms. Strang. Mr. Strang was self-represented. The examination for discovery of Mr. Strang by counsel for the plaintiff continued on June 7, 2010. Mr. Sullivan, newly-appointed counsel for the corporate defendants, was present, but did not object to Mr. Strang being questioned in some detail about the business of the corporate defendants, including his instructions to their prior counsel, Mr. Johnson, pertaining to the joint statement of defence prepared and filed by Mr.

Johnson on behalf of Mr. Strang and the corporate defendants. There is no indication in the examination for discovery transcripts that Mr. Strang was being examined in anything other than his personal capacity.

- [74] Mr. Strang has not chosen to testify on his own behalf at this trial, nor has he been called as a witness on behalf of the corporate defendants.
- [75] In an application during the first part of the trial and ruled upon separately in *Biehl v. Strang*, 2011 BCSC 213, the corporate defendants relied on a portion of Mr. Strang's evidence at his examination for discovery and read in by the plaintiff to support their application that Mr. Strang waived solicitor-client privilege when he answered questions about the instructions he provided to Mr. Johnson regarding the statement of defence. I accepted the submissions of the corporate defendants on this point, but only with regards to a limited waiver. The Court ruled as follows:
- [62] In the present case, while I have no difficulty in finding that Mr. Strang waived his solicitor-client privilege in relation to the statement of defence, I cannot find in his answers at the examination for discovery any evidence of his intention to waive the same privilege on behalf of the corporate defendants. Given that the corporate defendants, although wholly owned by Mr. Strang, are now subject to claims by Ms. Strang in the context of the family law proceeding, the Court must be exceedingly careful not to imply a waiver of privilege in circumstances where it would be unfair and inconsistent to do so.
- [63] However, if the corporate defendants choose to call Mr. Johnson to testify, they waive their solicitor-client privilege to the extent necessary to maintain their statement of defence in light of Mr. Strang's assertions. Permitting them to do so does not facilitate them using this limited waiver of their solicitor-client privilege as a sword, but rather as shield.
- [Emphasis added]
- [76] With regards to the scope of the waiver of privilege by the corporate defendants, the Court stated the following:
- [69] To summarize, in the present case Mr. Strang and the corporate defendants jointly retained Mr. Johnson to represent them. In the course of doing so, Mr. Johnson prepared and filed a joint statement of defence. Mr. Strang, by his answers to questions at examination for discovery, denied that he had provided instructions to Mr. Johnson as to the statement of defence and impliedly waived solicitor-client privilege in relation to instructions provided to Mr. Johnson regarding the preparation of the statement of defence. I have found that Mr. Strang waived his own privilege but not that of the corporate defendants. However, the corporate defendants will waive privilege as to the preparation of the statement of defence if they call Mr. Johnson. They seek to do so for the limited purpose of determining whether Mr. Strang approved the statement of defence.

- [70] The position of the plaintiff is that he is entitled to all the material in the possession of Mr. Johnson and his law firm that is relevant and material to the preparation and content of the statement of defence.
- [71] The position taken by the corporate defendants is too narrow; the position taken by the plaintiff is too broad. The somewhat unusual facts in this case dictate a very cautious and considered approach. The record is clear that as of the June 2010 discovery of Mr. Strang, he and the corporate defendants no longer jointly retained Mr. Johnson, the lawyer with whom they had privileged communications. This speaks to a waiver of privilege by Mr. Strang that is very limited in scope. Mr. Strang ought not to be considered to have waived solicitor-client privilege over anything more than the matters he spoke directly about.
- [72] On the other hand, the corporate defendants now seek to call their former solicitor to testify as to whether Mr. Strang approved the statement of defence. Although, in the present case, I accept that the corporate defendants find themselves in a difficult position given their legal relationship with Mr. Strang and what is pleaded in the joint statement of defence, I query whether they now seek to use solicitor-client privilege as a sword to only selectively disclose information over which solicitor-client privilege has been lost.
- [73] It is useful to remember that it was the examination of Mr. Strang by counsel for the plaintiff that set this particular ball in motion. It has been for the corporate defendants to respond as best they can to a situation not of their own making.
- [74] Therefore, in keeping with the need to strike the appropriate balance between a fair trial and maintaining the solicitor-client privilege regarding information that has not been compromised by Mr. Strang's implied waiver, I am of the view that Mr. Johnson, if called by the corporate defendants, may only testify and be cross-examined regarding communications between himself and Mr. Strang concerning any approval that may have been given to the contents of the statement of defence. He is therefore only required to provide documents in relation to the same.

[Emphasis added]

- [77] I note in *Bower v. Cominco Ltd.* (1998), 53 B.C.L.R. (3d) 322, 19 C.P.C. (4th) 22 (S.C.), it was held that the predecessor rule, R. 40(27) of the Rules of Court, B.C. Reg. 221/90 [Predecessor Rules], was enacted in response to *Robinson v. Dick* (1986), 6 B.C.L.R. (2d) 330 (S.C.), which permitted the admission of discovery evidence against co-defendants. In *Beazley v. Suzuki Motor Corporation*, 2009 BCSC 1575 [Beazley] at para. 26, it was held that R. 40(27) only permitted discovery evidence to be admitted against the adverse party examined. In *Donaldson v. John Doe*, 2009 BCCA 38 [Donaldson], in the case of multiple defendants, the read-in evidence of one defendant was inadmissible against the other defendants.

- [78] To hold otherwise in relation to the use of the plaintiff's read-ins of Mr. Strang's evidence would contravene the rule based on joint interest as discussed in *Beazley*. It would be contrary to the rule limiting the use of examination for discovery read-ins as evidence admissible only against the adverse party who was examined, as was considered by the Court of Appeal in *Donaldson* in the context of the predecessor to R. 12-5(46) of the Rules of Court (R. 40(27)(a) of the Predecessor Rules).
- [79] With respect to Ms. Strang, her counsel insisted on a number of occasions during the plaintiff's read-ins from Mr. Strang's discovery that they were incomplete and asked the Court to add to those read-ins, which occurred. I do not consider this to displace the normal rule in R. 12-5(46) of the Rules of Court.
- [80] The plaintiff's read-ins from the discovery of Mr. Strang are not admissible in relation to the corporate defendants or Ms. Strang.
- [81] However, I do note the transcripts from the discovery of Mr. Strang with regards to the matrimonial action, which form part of Exhibit 2, contain much of the same evidence as the read-ins.

VII. Chronology

- [82] There is a very large body of evidence in this case. I have reviewed it carefully. I find the following to be the facts and I have set them out chronologically.
- [83] Mr. Biehl met Mr. Strang in the late 1970s in Los Angeles. He met Ms. Strang around the same time.
- [84] The Strangs married in July 1984.
- [85] In 1990, the Strangs purchased the Harding Road property, their matrimonial home on Bowen Island. This property was subsequently used by the Strangs to provide security for several commercial mortgages to advance the development of the Orchard and Snug Cove.
- [86] Mr. Strang was a partner in a vacation rental business in Whistler, which he sold in 1996. Also in 1996, using the proceeds from the sale of the Whistler business, Mr. Strang bought the Grafton Road property on Bowen Island by acquiring 100 percent of the shares of Snug Cove, a private company, through 525718 B.C. Ltd., whose shares were owned 100 percent by Mr. Strang (525718 B.C. Ltd.'s shares in Snug Cove were transferred to Mr. Strang in August 2004, and it was wound up in 2006). There was a mortgage on the Grafton Road property.
- [87] In 1998, Mr. Strang opened up the Bowen Island Fitness Centre Ltd. on the Grafton Road property. Ms. Strang became involved part-time collecting membership fees, signing up new members, and doing the books. Mr. Strang had extensive renovations done on the Grafton Road property to open a restaurant called the Black Pearl Cafe, which included the installation of a large commercial kitchen. These renovations required significant upgrades to water and septic systems, zoning changes, and many permits and licences, all of which

were attended to by Mr. Strang, whom Ms. Strang referred to as "the set up guy". Mr. Strang received a \$400,000 loan from his father to assist with these improvements. The Black Pearl Cafe opened in approximately 1999. Ms. Strang worked in the cafe business serving food, handling the cash, doing bookkeeping, and hiring staff.

- [88] In July 1999 Snug Cove obtained a mortgage from Mahogany Capital Corp. for \$75,000 at an interest rate of 14.45 percent.
- [89] In approximately 2000, Mr. Strang relapsed into substance abuse and went into treatment in Florida. Ms. Strang ran the businesses until the cafe and a theatre space, also on the Grafton Road property, were leased to the Bowen Island Food Co-op. The fitness centre continued to operate.
- [90] Mr. Strang returned to Bowen Island in early 2001, with the idea of starting a substance abuse recovery centre on Bowen Island. Initially, it was part of a larger land development concept of Mr. Strang's that related to the Cape Roger Curtis lands, a scenic 679 acre parcel of land on Bowen Island.
- [91] Mr. Strang approached Mr. Biehl in relation to making an offer to purchase the Cape Roger Curtis lands. A lesser component of this deal, which was primarily real estate development, was a substance abuse recovery centre. As part of this initiative, on April 5, 2001, Mr. Strang, Ms. Strang, and Mr. Biehl were appointed the directors of 625647 B.C. Ltd., which appears to have been created for the Cape Roger Curtis project. Mr. Strang was its president and secretary, and corporate records indicate that Mr. Biehl and Ms. Strang ceased to be directors on January 14, 2002, and 625647 B.C. Ltd. was dissolved for failure to file on March 3, 2008.
- [92] Also in April 2001 625656 B.C. Ltd. was incorporated and its name was changed to the Orchard (Orchard Recovery Center Ltd.) on February 1, 2002. Mr. Strang was and still is the only officer, director, and shareholder of the Orchard, previously 625656 B.C. Ltd.
- [93] During the spring of 2001 Mr. Biehl came to Vancouver and Ms. Strang indicated that she, Mr. Strang, and Mr. Biehl all attended at the office of the Vancouver law firm, Legacy Tax & Trust, in relation to an offer to purchase the Cape Roger Curtis lands, which was declined. These dealings explain why the first three advances of US funds made by Mr. Biehl, each for \$35,000, were by cheques payable to Legacy Tax & Trust (May 18, 2001, May 29, 2001, and June 21, 2001). Mr. Biehl's first cheque, dated May 18, 2001, made specific reference to 679 acres on Bowen Island and 625647 B.C. Ltd. These funds eventually were deposited in a bank account associated with 625656 B.C. Ltd. which became the Orchard.
- [94] After the Cape Roger Curtis deal collapsed Mr. Strang was still motivated to open a recovery centre on Bowen Island.

- [95] At the time of Mr. Biehl's first advances of funds, the Strangs were in a very poor financial position; they were, in Mr. Strang's words, "destitute". They had a monthly income of \$4,708 and no savings. As of May 1, 2001, the Strangs had a residential mortgage on the Harding Road property with monthly payments of \$1,755.43. The Canadian Imperial Bank of Commerce ("CIBC") had commenced foreclosure proceedings against them. The Strangs also had balances owing on their credit cards of approximately \$25,000.
- [96] As of July 2001, the monthly mortgage payment on the Grafton Road property was \$3,221. The Strangs remortgaged the Grafton Road property from the North Shore Credit Union and paid out the CIBC, Mahogany Capital Corp. and a loan from Emerald Capital Corp., as well as property taxes.
- [97] While the Strangs had minimal income from the tenants at the Grafton Road property and the fitness centre, they had no savings or other funding sources sufficient to start a new business. They were not in a position to borrow funds from a traditional lender. Mr. Biehl was their only realistic source of funds to develop the recovery centre that became the Orchard, and this is freely acknowledged by Mr. Strang and Ms. Strang.
- [98] Mr. Strang found the Cates No. 1 property and negotiated a lease with its owners that commenced September 1, 2001, with an option to purchase for \$1.35 million. Cates No. 1 was to be the residence for clients attending the recovery centre. It was an eight suite guest house facility with a swimming pool, located on 3.61 acres and within walking or a short drive's distance from the Grafton Road property. The rent for Cates No. 1 was \$5,000 per month, paid from at least November 2001. A cash deposit of \$50,000 was paid to secure the Cates No. 1 property from funds advanced by Mr. Biehl.
- [99] The Grafton Road property already owned by Snug Cove, with its commercial premises and industrial-sized kitchen, was intended to be the main site for the recovery centre to accommodate its administration and treatment activities, although this was hardly mentioned in the business plan prepared by Mr. Strang.
- [100] In October 2001, after various conversations with Mr. Strang, Mr. Biehl raised the bulk of the funds he advanced to Mr. Strang, and to what later became the Orchard, by selling some shares (for US \$1,980,732.60) that he held in Science Applications International Corporation ("SAIC"), a company started by his father. His remaining shares increased in value over time.
- [101] In November 2001, Mr. Strang and his friend, Mr. Martin McKenzie, went to Hawaii to meet with Mr. Biehl to see whether he would put further funds into the development of a treatment centre. They met with Mr. Biehl on several occasions during their brief stay in Hawaii.
- [102] On November 16, 2001, Mr. Biehl advanced US \$250,000 to Mr. Strang to develop the recovery centre and the funds were deposited into the Orchard's bank account.

- [103] The mortgages on the Grafton Road property and the Strangs' home at Harding Road were paid by Snug Cove from at least August 2001 through August 2002, with the total amount of \$53,928.83 being paid from October 1, 2001, to August 31, 2002. The total paid on the Harding Road property alone was \$10,534.38.
- [104] On December 6, 2001, Mr. Biehl was shown to have received a \$2,000 cheque from the Orchard. He was not able to say what the funds were for. I decline to count this as money repaid to him regarding the funds he advanced, as like several other smaller amounts, it predates both his payment of the remaining advances and the decision taken on behalf of the Orchard to begin repayments to him.
- [105] In January 2002, Mr. Biehl visited Bowen Island to view the progress on the construction of the recovery centre and liked what he saw.
- [106] On February 5, 2002, Mr. Biehl advanced another US \$250,000 to the Orchard.
- [107] Between the summer of 2001 and the summer of 2002, the Cates No. 1 and the Grafton Road properties were extensively renovated, upgraded and furnished in a high-end way by the Strangs and those they hired. Hundreds of thousands of dollars were spent. Their source was the funds advanced by Mr. Biehl to the Orchard, which were either expended directly by it or transferred to 525718 B.C. Ltd. (the company owned by Mr. Strang that initially held the shares in Snug Cove), which in turn paid for the bills to renovate both properties.
- [108] The Orchard opened on April 1, 2002, with the main focus of its activities being at Cates No. 1, as the main administration and day activity site on the Grafton Road property was not ready until August 2002.
- [109] Mr. Biehl attended for the opening and after a conversation with Mr. Strang was given a box of business cards with the Orchard logo on them that described him as "Principal".
- [110] Mr. Biehl visited the Orchard in April to early May 2002.
- [111] On April 13 and April 15, 2002, Mr. Biehl received cheques from the Orchard in the amounts of US \$9,000 and US \$1,000 respectively. He did not regard them as repayments on the funds he had advanced, but rather thought the \$1,000 was to reimburse him for money he had given Mr. Strang when the latter was in Hawaii "to enhance his trip". Mr. Biehl thought the \$9,000 cheque was repayment to him of funds given to "a man called Martie" (Mr. McKenzie, who travelled to Hawaii with Mr. Strang). I do not consider either of these payments to Mr. Biehl to be repayments of the funds advanced by Mr. Biehl, but to have been made for other purposes. (I also note that the US \$1,000 amount is not included in the schedule of amounts repaid as prepared on behalf of the corporate defendants, whereas the US \$9,000 is.)
- [112] On April 16, 2002, Mr. Biehl advanced a further US \$100,000 to the Orchard.
- [113] On May 7, 2002, Mr. Biehl advanced a further US \$250,000 to the Orchard.

- [114] In August and September 2002, Mr. Biehl returned to Bowen Island and stayed at the Strangs' home while he received treatment for his own substance abuse problems.
- [115] On September 20, 2002, Mr. Biehl advanced the final amount to the Orchard, a further US \$25,000.
- [116] Based on the evidence of Ms. Strang on behalf of the corporate defendants, 525718 B.C. Ltd. spent \$574,651.90 on renovations and improvements to the Grafton Road property and Cates No. 1 between May 22, 2001 through September 20, 2002, and a further \$1,059,231.40 was spent on other expenditures related to the Orchard (for a total of CDN \$1,633,883.30). While this evidence does not constitute an accounting of the funds advanced by Mr. Biehl, and it is clear that the Orchard had income from clients after its opening on April 1, 2002, as well as some other modest sources of revenue (including from the fitness centre still operating during some of that time), it does demonstrate that an amount in Canadian dollars roughly equivalent to the total of the US funds advanced by Mr. Biehl was spent developing the recovery centre.
- [117] During his last stay with the Strangs in September 2002 Mr. Biehl indicated that something "monumental" may have happened, but declined to provide any details. After this time it appears that he did not visit the Strangs or the Orchard again.
- [118] In December 2002 Mr. Shimoda, a special agent of the U.S. Internal Revenue Service, approached Mr. Biehl with regards to the large amounts of money he had been sending out of the U.S. In correspondence to Agent Shimoda dated December 2, 2002, Mr. Biehl referred to having Mr. Strang's attorney "prepare or have the existing loan agreement faxed" to him.
- [119] This was followed up on by Mr. Strang forwarding to Mr. Biehl by fax on January 18, 2003, a draft agreement for consideration. The draft agreement was in the form of a letter that purported to confirm "the loan agreement between you and I ("Gavin") and the Orchard Recovery Center Ltd. (ORC) regarding a loan from you (the "Loan")..." with a principal amount of US \$1,030,000 that would be advanced in full by September 20, 2002. The draft agreement stated:

4. Repayment

The Principal Amount shall be paid at a date to be agreed on by the parties. In the event that the parties do not reach an agreement as to repayment, the Principal Amount shall be repaid not later than April 1, 2012. You will not demand payment of the Principal Amount, and the Principal Amount shall not be repaid otherwise than on the date agreed or determined under this paragraph.

5. Interest

5.1 ORC will pay you interest directly, on the Principal Amount, equal to one-half of The ORC's annual net after tax profits (the "Interest Amount"), calculated as at ORC's year end for income tax purposes (the "Year End"), commencing with ORC's Year End for 2002. The Interest Amount will be calculated and paid by ORC to you no later than 90 days after each Year End.

[120] It had places for signatures of both Mr. Strang as President of the Orchard, and Mr. Biehl, but was unsigned.

[121] The same fax included an income statement for the Orchard from September 1, 2002 to December 31, 2002, and the following letter:

Date 13, 2002 [sic]

Dear Eric,

My records indicate that these are the dates and the amounts that you advanced. If your records indicate differently let me know.

May 22 2001 \$35,000

May 29 2001 \$35,000

June 21 2001 \$35,000

Nov 16 2001 \$250,000

Nov 20 2001 \$50,000[*]

Feb 05 2001 \$250,000

Apr 16 2001 \$100,000

May 07 2001 \$250,000

Sept 20 2001 \$25,000

The total of these deposits is \$1,030,000.

[122] I find based on the banking evidence presented by the corporate defendants that the amount above marked [*] is not proven to have been paid, and therefore the total amount of the funds advanced by Mr. Biehl to Mr. Strang and the Orchard is US \$980,000.

[123] Mr. Biehl wrote to Agent Shimoda on January 20, 2003, enclosing the letter agreement referred to above unsigned (as sent to him by Mr. Strang) and stating that he had not signed it yet because he was "reluctant only because [he] would like to verify the figures and terms prior to signing."

[124] On March 7, 2003, Mr. Biehl sent a fax to Mr. and Ms. Strang saying that he needed "a document/agreement/loan" that pre-dated April 1, 2002, to indicate that:

Personal loan to Gavin Strang from Eric Biehl, whereas Eric Biehl pledges to loan monies for a business venture in rehabilitation, when needed in the amount of approx. \$1,000,000.00 U.S. interest [sic] rate, principal due date, and terms to be agreed upon the beginning genesis [sic] of the business.

[125] In this fax to the Strangs Mr. Biehl included a copy of a letter he had sent to Agent Shimoda, in which Mr. Biehl explained that the due date for "Eric's personal loan to Gavin was undecided" because the Orchard was located on leased property with an option to purchase that terminated June 30, 2003. Mr. Biehl explained to Agent Shimoda that if his loan to Mr. Strang matured too quickly "a commercial lender allowing the Orchard to purchase the property may not feel secure enough even with Gavin's free and clear real properties used as collateral in the loan." Mr. Biehl also indicated that interest on "Eric's personal loan is also to be agreed upon" and that once the commercial banker acknowledged the document the terms could not be changed.

[126] Mr. Biehl received a faxed letter dated March 7, 2003, from Ms. Strang, in which she wrote, "Further to our telephone conversation today I am writing to confirm the US dollar loans that you have given to Gavin and myself over the past year." She also stated, "As agreed upon this personal loan was used to help us start our new business. The Orchard Recovery Center As you know we would not have been able to get this project off the ground without your financial support."

[127] On March 8, 2003, Mr. Biehl again wrote to the Strangs reiterating that he needed "an agreement/note/loan/proforma letter of credit/obligatory note/pledge/etc. stating that on a date well prior to April 1, 2002 Eric Biehl is to loan Gavin Strang \$1,000,000.00 US +- for the means of a business venture and signed by Eric and Gavin" which was to be faxed to Agent Shimoda.

[128] On March 10, 2003, Mr. Biehl sent an email to his spouse, Ms. Bradford, with a copy to Mr. Strang, in which he said that he had been trying to communicate with Mr. Strang regarding "Kevin Shimoda per our April 2, 2002 hand-written base agreement stating that I would pledge approximately \$1,000,000.00 USD to assist and provide capital for the Rehabilitation Business. No Principal Due Date or Interest on the Principal was noted."

[129] In response, also on March 10, 2003, Mr. Strang responded by email as follows:

I am back in the office now. As you may be aware we have been full for the past month and a half and have been netting between 15 and 20 thousand per week. We are going to increase our beds to twenty very shortly and are considering raising our rates. This potentially could double the net. Perhaps it is time to implement a formal payment schedule for repayment of the loan. Once this is in place and the payments are coming back to you perhaps the IRS etc. will find the situation more in line with what they are used to. Anyway I will do whatever you need done to resolve this. I would like to start returning money to you so I am not like every other asshole.

- [130] On March 11, 2003, Mr. Biehl wrote Agent Shimoda and enclosed "two letters authored by Gavin Strang indicating the loose terms of the loan and it's [sic] justification." He wrote "This is about it for any formal loan agreement, as foolish as it seems." One of the letters from Mr. Strang that Mr. Biehl enclosed to Agent Shimoda, dated May 22, 2001, and addressed to Mr. Biehl, said in part, "As we discussed the business can be quite lucrative therefore the exact terms of the loan above and beyond principal payments are best looked at once we're off the ground (If you feel you can trust me on this)", and "If this money is received I trust we have an agreement for the \$1 million USD loan." I note that Mr. Biehl indicated he thought this letter was drafted by Mr. Strang in 2003.
- [131] The Orchard books, namely a trial balance sheet printed on February 25, 2003, showed as "due to Eric Biehl" an amount of \$1,522,787.96. As of March 31, 2003, the amount is still shown as due to Eric Biehl, except it is slightly reduced to \$1,520,787.96.
- [132] In March 2003 Snug Cove sought to exercise the option to purchase Cates No. 1.
- [133] In a faxed letter to Mr. Strang and Snug Cove, dated March 25, 2003, the North Shore Credit Union proposed terms and conditions for a commercial mortgage over Snug Cove's properties (the Grafton Road property and Cates No. 1) in the amount of \$1,550,000. A condition of the financing was "Postponement by Mr. Eric Biehl of his loan to Gavin Strang for \$1.5 mln, pending payout of the subject mortgage with the Credit Union in full."
- [134] On March 25, 2003, Mr. Biehl received by fax the same offer of credit for a commercial mortgage from the North Shore Credit Union relating to the purchase of Cates No. 1 by Snug Cove. I accept Mr. Biehl's evidence that he did not respond, and that he did not provide his consent to the North Shore Credit Union's mortgage taking priority over repayment of the funds he had provided to Mr. Strang and the Orchard.
- [135] The Orchard books, namely the trial balance as of April 30, 2003, printed on August 12, 2003, no longer showed a loan from Eric Biehl in the prior amount, but rather a shareholder's loan "due to Gavin Strang" in the amount of \$1,520,787.96.
- [136] The conversion of what was recognized on the Orchard books as Mr. Biehl's loan to the Orchard, to a shareholder's loan to the Orchard by Mr. Strang of the exact same amount, is unsupported by any documentation. The funds that Mr. Strang is thereby claiming to loan to the Orchard are the funds advanced to him and the Orchard's bank accounts by Mr. Biehl. The legitimacy of this transaction hangs on the correct characterization of the funds advanced by Mr. Biehl being a personal loan to Mr. Strang, which is a key issue in this lawsuit.
- [137] The timing in April 2003 of the re-characterization of Mr. Biehl's funds as a loan to the Orchard from an "investor", to a shareholder's loan due to Gavin Strang, in which Mr. Strang must have participated, corresponds with the need to grant the North Shore Credit Union first priority on the commercial mortgage necessary to purchase Cates No. 1. Any issue as to the propriety of amounts the Orchard claims to have subsequently repaid on the

shareholder's loan to Mr. Strang upon the direction of Ms. Strang will be required to be addressed in the matrimonial action.

- [138] I find that it is proven that Mr. Biehl did not sign this release or the accompanying promissory note attributed to him. The release dated May 1, 2003, "for reference" in which he "hereby irrevocably agree[s] to postpone demand and receipt of any payments, whether in part or full, from GAVIN STRANG of that personal loan of USD \$1,050,000.00 (CDN \$1,500,000.00) pending pay-out in full of the Commercial First Mortgage to be registered in favour of the North Shore Credit Union" secured by the Cates No. 1 and Grafton Road properties.
- [139] The release and the accompanying promissory note, which Mr. Biehl denies signing, were purportedly witnessed by a "Susan Hughes". Both Mr. Biehl and Susan Hughes are shown as resident in Hawaii. In fact, Mr. Biehl resides at 61-171 Punalau Place, whereas Ms. Strang testified that Susan Hughes is a school friend of hers who lives in North Vancouver, not Hawaii. Both the release and the promissory note provide an address for Ms. Hughes at 16171 Punalau Place (an address slightly different than Mr. Biehl's). The signature attributed to Mr. Biehl does not appear to closely resemble his signature, and the writing of the word "Susan" is very similar to the hand of Mr. Strang when he wrote "Susan" in another context.
- [140] In his examination for discovery evidence as read in by the plaintiff, admissible only against himself, Mr. Strang said that he did not "have a clue" who signed the documents to facilitate the mortgage from the North Shore Credit Union, but he indicated the signature that purports to be Mr. Biehl's was "definitely" not Mr. Biehl's signature, and Mr. Strang said that he did not think that Mr. Biehl signed the documents. Mr. Strang thought the signature said "F off".
- [141] Ms. Strang agreed that Mr. Strang had the authority to do business on behalf of the Orchard and Snug Cove in 2003.
- [142] In May 2003 the North Shore Credit Union granted Snug Cove a commercial mortgage secured by the Grafton Road and Cates No. 1 properties. Cates No. 1 was purchased by Snug Cove. The commercial mortgage as of April 2004 had an outstanding principal balance of \$1,528,756.75, with priority over the funds owed to Mr. Biehl.
- [143] Without taking into account Mr. Strang's evidence in relation to these documents (admissible only against himself) I find that Mr. Strang likely forged the signatures of Mr. Biehl and Susan Hughes on the release and promissory note referred to above, or caused that to occur, in order to obtain the necessary approval for the commercial mortgage from the North Shore Credit Union to purchase Cates No. 1.
- [144] On August 28, 2004, Mr. Strang purchased a residential property in New Westminster, B.C., with plans to develop it into a further recovery facility.

- [145] In mid-2005 Mr. Strang was in the United States trying to start a recovery centre business in California.
- [146] In spring 2005 Ms. Purcell (Mr. Biehl's ex-wife and an attorney) became involved on Mr. Biehl's behalf to try to clarify the terms upon which Mr. Biehl had advanced funds to Mr. Strang and the Orchard.
- [147] Ms. Purcell called Mr. Strang on May 30, 2005. She made a memorandum of her conversation with Mr. Strang.
- [148] On June 7, 2005, Mr. Biehl sent the memorandum generated by Ms. Purcell regarding the telephone conversation she had with Mr. Strang on May 30, 2005, to Ms. Strang to be reviewed by her and Mr. Strang. Mr. Biehl wrote out the text of her memorandum by hand and included it in the fax, asking Mr. Strang to advise him regarding the contents.
- [149] Later, Ms. Purcell corrected her memorandum regarding whether Mr. Strang was in a rehabilitation centre in Beverly Hills; that Mr. Strang had been contacted by the IRS and not the FBI; that Mr. Strang had dented a surf board with a baseball bat, rather than having "broken some things up". Corrections aside, I find the substance of their conversation remained intact. In it Mr. Strang acknowledged to Ms. Purcell that Mr. Biehl had loaned him CDN \$1.5 million, which was equivalent to US \$1,030,000; Mr. Strang had never intended that it be an interest-free loan; he and Mr. Biehl had discussed that it was a personal loan between them; and that he could repay it in three years, but then thought that five years was better.
- [150] On June 29 and 30, 2005, Ms. Purcell and Ms. Bradford exchanged emails, as the latter was travelling with Mr. Biehl in Tierra del Fuego. Ms. Bradford emailed first with their contact information and Ms. Purcell responded with a number of points she wished Mr. Biehl to consider including: an incorrect start date for the promissory note she was proposing to the Strangs regarding the funds advanced to prompt them to respond; that Mr. Biehl had indicated to Ms. Purcell that the interest rate should be 10%; what the security should be for the loan and that it should be capable of registration; that Mr. Biehl had indicated to her that Mr. Strang had offered him an ownership position in his new venture in lieu of paying back the full loan; and that Mr. Biehl was in a weak position as the money was out without any written commitment that it be repaid.
- [151] On June 30, 2005, Mr. Biehl wrote a fax to Ms. Strang asking her to advise him of the dates and amounts of the funds he had sent.
- [152] Ms. Purcell enlisted the assistance of another law firm to help deal with this matter. On July 27, 2005, Mr. Iwanaga of the Hawaiian law firm of Sakai Iwanaga wrote to the Strangs regarding "the loan that Mr. Biehl made to you in the amount of \$1,030,000 U.S. dollars for the purchase of The Orchard at Bowen Island" and enclosing a promissory note "which has been approved by Mr. Biehl." The promissory note enclosed made reference to the principal amount and interest at 10 percent per year non-compounding. It contained a

provision securing the note by the Grafton Road property. No response was received from the Strangs or on behalf of the Orchard.

- [153] On July 29, 2005, the Strangs sold the New Westminster property with a net payout deposited to the Orchard's bank account of \$233,743.91.
- [154] On September 30, 2005, the Orchard made its first repayment to Mr. Biehl of US \$49,998, and payments of approximately US \$10,000 continued more or less on a monthly basis until February 2008. The payments were made and accepted in US currency.
- [155] In October 2005 Mr. Biehl wrote Ms. Strang to thank her for the initial payment towards the loan and asked if she could provide further payments, and the letter included "Re: Request for a portion of the \$1,030,000.00 loan made to you and Gavin some 4 years ago".
- [156] In November 2005 Mr. Strang, Ms. Strang, Snug Cove, Bowen Island Fitness Centre Ltd. and the Orchard borrowed \$150,000 from Reliant Capital Corp., which was secured by mortgages on the Grafton Road property and the Harding Road property. The amount borrowed was then increased by an additional \$300,000 to a total of \$450,000, and the interest rate was 15.25 percent.
- [157] The Strangs separated in late 2005.
- [158] In June 2006 Snug Cove purchased 662 Cates Lane on Bowen Island (Cates No. 2) as a further facility for the Orchard.
- [159] In July 2006 Mr. Strang purchased residential property in Chico, California.
- [160] In January 2007 Ms. Strang became the executive director of the Orchard's operations.
- [161] On March 15, 2007, the order of Preston J. was made in the matrimonial action curtailing the involvement of Mr. Strang in the business of the Orchard and Snug Cove, and permitting Ms. Strang to operate the corporate defendants. The order stated that both Mr. and Ms. Strang were to have their mortgages paid on their respective residences, their vehicle leases paid, and each receive payments of \$15,000 per month inclusive of all salaries, bonuses, management fees, and repayment of shareholder's loans or dividend payments.
- [162] On May 11, 2007, Mr. Biehl wrote to the Strangs and stated, "You have defaulted on the loan I made to you and I am requesting you repay the amount of \$1,530,000 Canadian dollars plus the return on seed monies as agreed by May 14, 2007."
- [163] On May 15, 2007, Mr. Biehl commenced this action, several amended statements of claim were filed on his behalf, and Mr. Johnson filed the common statement of defence on behalf of Mr. Strang and the corporate defendants on December 17, 2007. Ms. Strang filed a separate statement of defence.
- [164] The Property Assessment valued the Grafton Road property at \$1,239,400 in 2008. It was appraised at \$2,000,000 in April 2008.

[165] The Property Assessment valued Cates No. 1 at \$1,752,000 in 2009 (2010 - \$1,619,000), and Cates No. 2 at \$933,000 in 2009 (2010 - \$909,000). Cates No. 1 was appraised at \$1,840,000 in May 2008, and Cates No. 2 was appraised at \$975,000 in April 2008.

[166] In December 2008 and January 2009 Mr. Strang and Ms. Strang were in examinations for discovery and at mediation in relation to their matrimonial case, which was set for trial on January 12, 2009, and was then adjourned. During this time Mr. Biehl and Mr. Strang had a number of telephone conversations, surreptitiously taped by Mr. Biehl.

[167] The 2010 financial statements for Snug Cove show a mortgage balance due to the North Shore Credit Union of \$2,424,617 and current assets relating to property, plant, and equipment of \$2,566,600 pertaining to the three properties. A further refinancing with the North Shore Credit Union occurred to permit the purchase of Cates No. 2. The financial statements for Snug Cove also contain the following note regarding related party transactions:

During the year, the company borrowed and advanced funds to Orchard Recovery Center Ltd. on an interest-free basis with no fixed terms of repayment. Orchard Recovery Center Ltd. has waived the right to demand payment for more than one year.

The company received rental income of \$324,000 (2009 - \$324,000) from Orchard Recovery Center Ltd., a company owned 100% by the sole shareholder.

[168] The Orchard resumed making payments to Mr. Biehl on July 1, 2010, in the amount of US \$15,000, and made payments for a total of nine months, including on March 1, 2011.

[169] As indicated above, I find that the total amount advanced by Mr. Biehl to Mr. Strang and the Orchard is US \$980,000, and not the amount of US \$1,030,000 as originally thought, as I do not find the alleged payment on November 20, 2001, of US \$50,000 to be proven.

[170] As calculated by Mr. Riback, based on the exchange rates in effect at the time of each advance, the total of Mr. Biehl's advances amounted to CDN \$1,547,141.50 (after the deduction of the US \$50,000 not proven).

[171] I also find the total amount repaid by the Orchard, up to and including the last payment of US \$15,000 on March 1, 2011, to be US \$444,290.81, as I decline to regard the payments of US \$2,000 and US \$9,000 to be repayments to Mr. Biehl on account of the funds he advanced.

A. Evidence on behalf of the Plaintiff

1. Mr. Eric Biehl

[172] Given my ultimate view of this matter I do not propose to review the evidence of Mr. Biehl, the plaintiff, in any great detail, particularly as much of the history of this matter is reflected in the chronology. It is however, useful to refer to several aspects of his testimony.

- [173] In about 2000 Mr. Biehl said Mr. Strang told him about an idea to start a treatment centre on Bowen Island, and that this would be a lucrative proposition. In terms of their background to start such a venture Mr. Biehl said they both had experience with traditional Twelve Steps programs to treat those who suffer from addictions to drugs and alcohol. Mr. Strang asked if Mr. Biehl would be a silent partner in a treatment centre where Mr. Biehl would put up the money and Mr. Strang would provide his expertise. Mr. Biehl said that by this time Mr. Strang was no longer involved in precious metals and stones, but had graduated in law from UBC, had been called to the bar, and was not enjoying the work or living in the city. Thus, Mr. Strang wanted to be an entrepreneur and build a rehabilitation clinic. Mr. Biehl said that Mr. Strang had attended many Twelve Step programs - from the highest like the Betty Ford to the lowest in places like Nanaimo as a patient, not a counsellor.
- [174] Mr. Biehl described how he provided the funds to Mr. Strang on "a need-to-have basis" by wiring them to the Royal Bank of Canada or by sending him cheques, and even blank cheques on one occasion when he was busy. Mr. Biehl said that he "very much trusted" Mr. Strang; that they did not have a formal business plan, and that they had many conversations about what the money was to be spent on; and that it was not to be comingled with anything "but the eye on the prize... to build a business and physically build a structure and acquire land, purchase land, for the purpose of building a rehabilitation centre on Bowen Island."
- [175] With regards to the terms for the funds he advanced, Mr. Biehl said, "Chicken scratch or back of an envelope is as close as we came to anything, really anything written, and they were few and far between." Mr. Biehl said they called the monies he advanced to Mr. Strang "seed monies" and that the funds advanced would not exceed "\$1 million plus or minus a hundred thousand over the period of ... say nine months or a year, or 14 months and then [he] was to receive -- for the high speculation involved, in return [he] was to receive one-half ownership in the real property, the improvements, and hopefully if successful the blue sky or the business itself."
- [176] Mr. Biehl described how the first three cheques (to Legacy Tax & Trust) were not large, \$35,000 per cheque, for "soft costs" like setting up a corporation and getting the permits to acquire the land. As time progressed the money went more toward purchasing land, purchasing land that was improved, and then to purchase land and construction materials. As to what discussions Mr. Biehl had with Mr. Strang about the return of funds Mr. Biehl said:

Those discussions were not etched in stone. They were upon my request that he not set himself out too thin but have ample working capital so as not to fall into a typical business failure where the working capital is insufficient. And the monies, if everything went well, because it was quite speculative, if things went well, that my principal would be returned within a year plus or minus two months, or I was fairly loose on that... A year from the first payment... Something like that. It could be plus or minus 75 days.

- [177] Later in his evidence Mr. Biehl said:

My principal was to be returned upon roughly a year after, and I believe I may need to correct myself on this one, after the Orchard opened. It opened April 1, 2002, and returned one year after that, at or around. I was loose about it. It could be 14 months, it could be 12 months, preferably 12 or less so as to have a track record showing income stream and provide the ability of whoever's running the Orchard, hopefully Gavin's at the helm, so he'd go procure conventional financing from a bank, for instance, and pay down my principal, in which case I'd be made whole again, and I, for the risk I took, high speculation, I receive one half of the profits and one half of the business...if sale did occur.

[178] Mr. Biehl said that Mr. Strang told him the funds would be unsecured and that "it was pretty well known" that the funds would come "either from proceeds from the business, the sale of the real estate, improvements, business, a combination of those three, and most importantly Gavin [Strang] was to receive an inheritance from his parents..." Mr. Biehl said that he "believed in Gavin, past tense, and trusted him that if all fell through the cracks and the project did not go well, that [he] would be compensated with inherited funds from Gavin's parents."

[179] Mr. Biehl referred to copies of notes he made in his daytimer/diary that referenced the Orchard with an estimate of "\$45K/mo a month", which was what Mr. Strang optimistically said the Orchard should be netting per month after expenses. He noted "expansion/franchise", "USA/Canada", and "1/2 Business", and said the latter referred to the one-half of the business of the Orchard that he was to own, and in fact, does own. On another page Mr. Biehl noted Mr. Strang's cell phone number and then "45 K/mo + ½ sale", which he explained referred to "again, projecting the business to me after expenses a profit of \$45,000 per month plus one-half sale..." This meant to Mr. Biehl that "...if an interested party came along [he] would receive one half the sale of the business, the business as [he] said including real property, improvements and intangible, furniture, fixtures..."

[180] Mr. Biehl identified the business cards that Mr. Strang had made for him that had printed on them the Orchard's name and logo, "Eric Biehl Principal", Mr. Biehl's Hawaii telephone number and the telephone of the Orchard. He received the cards around the time the Orchard opened for business. He said that he and Mr. Strang discussed what his title should be and Mr. Strang suggested "director", which was more hands-on than Mr. Biehl wanted to be, whereas "principal" was more accurate given that he lived in Hawaii and would be "more of a silent guy". Being a principal meant to Mr. Biehl that he was "an investor, owner, in some capacity, in this case one-half owner of Orchard..." He said that within 36 hours of this conversation Mr. Strang presented him with a box of 500 cards. Mr. Biehl said he played a very minor role regarding spending decisions related to the funds he advanced, which was mainly limited to asking questions. Mr. Strang did not need his approval to spend the funds advanced.

- [181] Mr. Biehl indicated that his only prior experience with alcohol and drug treatment centres was personal as he had been in four or five different facilities for the use of alcohol and opiates, with the longest period being 20 days. He also recalled staying with the Strangs in 2002 for a period of 45 days while he was being treated by the addictions' doctor associated with the Orchard and placed on methadone.
- [182] Mr. Biehl identified the three cheques of US \$35,000 to Legacy Tax & Trust that were sent initially in relation to the Cape Roger Curtis proposal. Mr. Biehl identified a wire transfer of US \$250,000 from First Hawaiian Bank on November 16, 2001, shown on his bank statement for that period. This was the first of a number of transfers of funds from Mr. Biehl to the Orchard's account.
- [183] Mr. Biehl noted that the starting balance in his bank account as of November 5, 2001 was \$1,976,588.20. He indicated that he had sold some of his SAIC shares on October 26, 2001, for \$32.27 a share with net proceeds to him of \$1,980,732.60. He kept other SAIC shares that later became more valuable. He described how he had sold shares in SAIC to obtain the funds to advance to the Orchard and paid capital gains tax at a rate of 38%.
- [184] Mr. Biehl described in some detail his dealings with the IRS and Special Agent Shimoda between December 2002 and March 2003, in which he was called upon to explain the transfers of funds to Mr. Strang in Canada in a post 9-11 world. Mr. Biehl said that he discussed this with Mr. Strang, who got in touch with the IRS. Mr. Strang told Mr. Biehl to tell the IRS it was a personal loan to Mr. Strang, and not to bring the business into it.
- [185] Mr. Biehl testified that he never agreed to the interest on the principal being equal to one half of the Orchard's after-tax monies, as asserted by Mr. Strang in the draft loan agreement prepared by Mr. Strang. He said that this was never discussed. Mr. Biehl said that "the juice of the whole thing was 50/50" and everything he knew about Mr. Strang - his parents, his intelligence, his education, his inheritance - caused him to trust him, despite knowing about Mr. Strang's drug use. He did not consider Mr. Strang to be a thief.
- [186] Mr. Biehl wrote to Agent Shimoda on January 20, 2003, enclosing the letter agreement referred to above unsigned (as sent to him by Mr. Strang) and stated that he had not signed it yet because he was "reluctant only because [he] would like to verify the figures and terms prior to signing." When asked why he sent it to Agent Shimoda if it did not reflect the terms of their agreement Mr. Biehl, after some difficulties in responding to the question, explained:

Because Gavin runs the ship when it comes to being hassled by Shimoda. He was being harangued by Shimoda more than I was. He was the recipient of the money.

...

Because Gavin told me to.

- [187] When Mr. Biehl was asked why he referred to the money as a "personal loan" in correspondence to Agent Shimoda, Mr. Biehl said he wrote it that way because "Gavin told [him] to because it's true." Mr. Biehl said that the word "loan" can be very mixed up and it was an "interim loan" that could, if one was building a house or a condominium, be followed by a "take-out loan for 30 years", and that "your interim loan is seed money essentially."
- [188] Among the many documents Mr. Biehl was referred to was a faxed letter dated March 7, 2003, to him from Ms. Strang, in which she wrote, "Further to our telephone conversation today I am writing to confirm the US dollar loans that you have given to Gavin and myself over the past year." He indicated that he had a problem with referring to the funds he provided as a loan as "the defence would love to call it a loan since it's a successful business now"; and he is a 50 percent owner of the business.
- [189] I find that it is possible that Mr. Biehl accurately recalls the deal he made with Mr. Strang to the extent it included repayment of the principal, some amount of interest and/or an interest in the business. However, whatever the agreement was Mr. Biehl consistently failed to fully articulate it when opportunities arose to do so. Further, he and Mr. Strang now articulate such different versions it is simply not possible for the Court to accept that their agreement was as Mr. Biehl claims. I have an abiding sense that in the early years neither Mr. Biehl nor Mr. Strang wished to fully define their agreement regarding the advances of funds as each perceived an advantage in not doing so, perhaps for tax purposes.
- [190] I did not find Mr. Biehl to be a particularly reliable witness. His memory is suspect, perhaps from all the drugs and alcohol he has consumed at the time he and Mr. Strang had their initial conversations, or since. In this regard I do not need Dr. Sobey's opinion to reach such a conclusion. Alternatively, his views of what he agreed to may be tainted by what he wishes he had agreed to, in light of the financial success of the Orchard.
- [191] However, I accept that it is highly unlikely that Mr. Biehl would have witnessed the expenditure of the funds he advanced on the development of the Orchard as he did, and continued to advance more, without a well-founded expectation that the funds he advanced would be reflected in the tangible manner associated with the obvious improvements that he personally observed to the Grafton Road property and Cates No. 1.
- [192] At times during cross-examination Mr. Biehl's reliability and credibility was seriously compromised. This is particularly so when he professed to have Mr. Strang telling him what to say to the IRS and Agent Shimoda, even during his first unexpected encounter with Agent Shimoda before he had an opportunity to contact Mr. Strang. The IRS investigation was clearly more of a problem for Mr. Biehl than Mr. Strang, although Mr. Strang appears to have cooperated with their inquiries.

[193] However, I do accept that it was in Mr. Strang's interest to have Mr. Biehl keep things simple with the IRS and portray whatever their agreement was as just a personal loan between two friends, as opposed to a business investment. At a minimum it would have been bothersome for Mr. Strang and the Orchard in early 2003 to have the IRS precipitate an investigation by Canadian authorities into the legitimacy of their funding in the first months of operation.

[194] In short, Mr. Biehl may be telling the truth regarding his agreement with Mr. Strang, but I cannot accept any particular version as proven.

[195] Mr. Strang has chosen not to provide the Court with his version or versions of his agreement with Mr. Biehl. What the Court has to consider is contained in the various documents, the testimony of others, the chronology of events, his comments in the recorded telephone calls, none of which I consider reliable enough to support the finding of an enforceable agreement.

2. Ms. Madalyn Purcell - Attorney in Hawaii

[196] Ms. Purcell testified that she had very little contact with Mr. Biehl after their divorce in 1992 until their son's graduation, when in a brief conversation Mr. Biehl produced his card associated with the Orchard and told her how he was a "principal" in the recovery centre with Gavin and Lorinda Strang. She said she was amused at the time and thought to herself that was a good business for Mr. Biehl to be in.

[197] Once Ms. Purcell resumed casual contact with Mr. Biehl she helped him several times in relation to legal problems he had. She helped him communicate with a lawyer he had retained because she noticed that Mr. Biehl seemed to have trouble staying on topic and would "kind of doze off" when meeting with this lawyer.

[198] Ms. Purcell told the Court about another lawsuit of Mr. Biehl's where he had transferred some money to a couple named Talboys who had apparently taken advantage of Mr. Biehl, and then refused to return his money, claiming it was a gift.

[199] Ms. Purcell said that when she realized that Mr. Biehl had invested about a million dollars in the recovery business in Canada with the Strangs without a written contract she became concerned. Somewhat reluctantly, Ms. Purcell called Mr. Strang at Mr. Biehl's request, and then events unfolded as described in the chronology.

[200] Ms. Purcell said that she understood Mr. Biehl wanted his seed money out of the recovery centre, but he would still have an ownership interest in the business. Ms. Purcell testified that she and Mr. Sakai came up with the promissory note "as a way of communicating to the Strangs, and as a way of inducing them into a negotiation of the deal", but said that a promissory note was "as a part of what would be an agreement that would include all the terms." She understood "all the terms" to mean "the actual stock, the ownership of the corporation, the investment portion, which was not included in the promissory note."

- [201] As to whether the promissory note that was eventually prepared and sent to the Strangs and the Orchard represented the entire agreement Ms. Purcell said that in American law unless a promissory note contained an "integration clause" it was not meant to be a "stand-alone agreement". Ms. Purcell's assertion in this regard was not challenged. The promissory note she was involved in preparing and as was sent by Mr. Iwanaga to the Strangs and the Orchard had no such clause.
- [202] I also attach no significance to the representation by Mr. Iwanaga in the letter that the proposed promissory note had been "approved by Mr. Biehl". Mr. Biehl had provided general instructions to his counsel. The note sent was clearly designed to initiate negotiations given the interest rate of 10 percent, the way interest had been calculated, the amount of quarterly payments demanded, and security over the Grafton Road property as stipulated. Ms. Purcell's response when questioned about whether, in fact, Mr. Biehl had approved the proposed promissory note and the letter before they were sent to the Strangs by Mr. Iwanaga struck the Court as particularly honest and frank, given that what occurred was a less than ideal way to practice law. She said, "I'm not sure that's true, I think that we may have jumped the gun on this, he did - I - he did not approve this document or this letter before it went out." She said she believed Mr. Iwanaga was acting in good faith, but she did not think that Mr. Iwanaga had ever personally met Mr. Biehl.
- [203] Despite the fact that Mr. Biehl already owned an interest in the business was not referenced in her notes, Ms. Purcell denied that she was ever told by him that it was "merely a loan". She said, "My understanding was that it was a loan to a start up venture that included retaining an ownership in the venture once the money was paid back."
- [204] Ms. Purcell impressed the Court as an honest professional. While the children she shares with Mr. Biehl could conceivably benefit from Mr. Biehl being repaid by Mr. Strang and the Orchard, I had no sense that she was embellishing the nature of Mr. Biehl's claims to have an interest in the Orchard. Her recollections about conversations she had with Mr. Biehl regarding his involvement in the recovery centre and his presenting her with his Orchard business that described him as a "principal", are consistent with Mr. Biehl's evidence that the agreement he had with Mr. Strang included an interest in the Orchard.
3. Mr. Howard Riback - Venture Capital Expert
- [205] The plaintiff called Mr. Riback to provide evidence to assist the Court in determining the value of Mr. Biehl's advances to the defendants. Mr. Riback was cross-examined extensively, both in relation to his qualifications and his area of expertise, and on the substance of his opinion. I concluded that his expert opinion evidence was admissible for the reasons previously stated.
- [206] I am mindful that Mr. Riback's expertise in venture capital relates primarily to technology and biotechnology companies, and that the development of a treatment centre for substance abuse falls outside the realm of the usual start-ups he evaluates for potential capitalization. However, upon reflection, I am of the view that Mr. Biehl's unsecured

investment of almost US \$1 million (at a time when American currency was higher than Canadian currency) in a new business, without security and without an experienced management team, certainly constitutes a high risk investment. As there are relatively few such private recovery centres in Canada (as reviewed by Ms. Strang) a specific expertise in venture capital with regards to recovery centres or similar ventures is unlikely to exist. Therefore, it falls to the Court to consider those aspects of his opinion it accepts and finds useful in the unique circumstances of this case.

- [207] In particular, aspects of Mr. Riback's opinion may be useful in consideration of an appropriate remedy for unjust enrichment, in terms of what a proper return on Mr. Biehl's funds ought to be.
- [208] Mr. Riback is a chartered accountant with considerable experience in venture capital investments. He was asked to provide his opinion "as to what terms and conditions would have been expected with regard to the Advances [provided by Mr. Biehl] given [his] knowledge of terms and conditions typical in the start up of new business enterprises."
- [209] More specifically, Mr. Riback was asked to provide his opinion on what factors are generally taken into account in setting the terms of investment in a start-up venture; what factors were relevant to an investment of that nature when Mr. Biehl first provided the funds for use in the treatment centre; and assuming a third-party arm's-length investor, what were the alternate forms of investment/securities that one could make in the proposed treatment centre as of the dates Mr. Biehl advanced the funds if the agreement was a loan, an equity investment, or a convertible debt.
- [210] In his report Mr. Riback defines various types of investments and investors (venture capital, private equity, and angel investors) and concludes at p. 10 of his report:

In respect to the Advances, I conclude that:

1. The Advances should not be characterized as Private Equity;
2. The Advances should be characterized as a form of Venture Capital;
3. Biehl fits the definition as an "Angel Investor" as such definition is commonly used in the investment community;
4. Angel investors expect an average of 20 - 30% per annum rate of return and even higher expectations when making multiple investments to offset potential losses. Most angel investors desire this above average rate of return from their angel investments to compensate for the high risk investments made in early stage enterprises.

- [211] After reviewing the business plan that Mr. Strang had devised prior to approaching Mr. Biehl in November 2001 for funds to develop the Orchard, Mr. Riback concluded that it was "not a formal, complete business plan that a prudent investor would use without substantial additional information to make a prudent investment decision as to whether or not to invest in the Treatment Center nor to determine what the terms would be if such investment was to be made." Mr. Riback further concluded:
- (b) I am of the opinion that an angel investor providing the Advances to the Defendants should be entitled to a fixed, secured, term debt instrument with interest in the 15 - 18% per annum range together with 30% warrant coverage entitling such investor to own 30% of the enterprise.
- [212] In reaching the conclusions he did, Mr. Riback listed the assumptions he made, which included: that the Strangs were basically out of money and had no funds to invest themselves, but that they had \$75,000 to \$200,000 in their house (the Harding Road property) that could have been used as collateral for loans taken out for the treatment centre, but if taken these loans were only completed after Mr. Biehl's funds had been advanced; that the Strangs' only major assets were the Harding Road property and the Grafton Road property, which may have had positive equity when Mr. Biehl advanced his funds, but neither of the Strangs were prepared to invest significant cash of their own; and that the funds advanced by Mr. Biehl represented all or the "lion's share" of the money necessary to start the treatment centre.
- [213] In his direct testimony Mr. Riback stated:
- ...I'm of the opinion that this is a risky adventure[sic] for the reasons as laid out in my opinion and as such a third party investor would expect and require a higher rate of return. And one of the forms of that higher rate of return, in my opinion, would be in the form of what's called a warrant. And a warrant is something that entitles a person to an ownership position on the business. And in this case to be more specific, a warrant would entitle the third party investor to own 30% of the Orchard. (Sept. 14, 2010, p. 36)
- ...I believe that if there was no warrant, then I believe there would be a much higher interest rate. (Sept. 14, 2010, p. 37)
- [214] At p. 20 of his report Mr. Riback set out why investment security made sense with regards to Mr. Biehl's investment in the recovery centre. In particular, he noted that there was no formal business plan, no formal market study, the treatment centre was in its infancy, neither of the Strangs were experienced entrepreneurs especially regarding planning, developing and running a treatment centre, they were not contributing any significant capital towards planning, constructing or operating such a centre, there were no investors other than Mr. Biehl, key staff had not been hired, and the post tech-bubble and post 9-11 global economy was in a crisis situation, thus making access to venture capital very limited. With those factors in mind at pp. 21-22 of his report, Mr. Riback noted:

With the above in mind, I am of the opinion that the terms of the Advances could fairly be stated be [sic] very "dilutive" and "punitive" to Gavin, Lorinda and to the Treatment Center in favour of Biehl in order to protect and ensure Biehl to receive his much deserved "above-average" rate of return commensurate with the significant risks associated with making an investment in the Treatment Center.

...

In conclusion, with the tremendous high risk of investing in the Treatment Center, Biehl deserves a potential high rate of return.

The marketplace and all of the transactions that occur within it has illustrated many forms of investments and securities that are negotiated amongst the parties involved. Even in this case involving Biehl, Gavin, Lorinda and the Treatment Center, the terms relating to the Advances could range from (A) a loan (more likely secured by a first charge on the operations and real property of the Treatment Center) with a significantly high interest rate again to have Biehl earn his "above average rate of return" to (B) a complete ownership of the enterprise handed to Biehl with a carve out for the benefit of the founders and management (usually in the 15% to 20% range) as the "pre-money" value for the Treatment Center in May of 2001 when the first Advance was made would have been close to nominal.

... I believe that this above average rate of return could be realized with a combination of a high interest rate plus warrant coverage.

[215] Mr. Riback concluded:

Thus, I believe that an Angel investor in the circumstances as set out herein would have expected in return for making the Advances, the following terms, conditions and considerations:

A. A debenture with the following attributes:

- a. Principal to be repaid at the earlier of: (i) time of a more conventional financing; and (ii) three (3) years from the commencement of operation of the Treatment Center;
- b. Interest to accrue at a rate of 15% per annum compounded monthly (increased to 18% per annum compounded monthly if Principal and accrued interest were not paid on the third anniversary of the commencement of operation of the Treatment Center);
- c. Accrued interest to be paid quarterly commencing the first quarter after the commencement of operation of the Treatment Center;
- d. Security to be in the form of a first charge on all of the assets of the Treatment Center except the real property on which the Treatment Center was situated and such first charge evidenced by a general security agreement registered with the Personal Property Security Registry. With regard to the real property, a mortgage granted in favour of Biehl subordinated to any existing mortgages on this real property.

- e. Standard set of events of default
- f. Standard covenants relating to information rights, insurance coverage, restrictions on accepting additional debt, etc.

B. A warrant entitling the Angel to acquire 30% of the equity in the Treatment Center for nominal consideration. As there was virtually no value in the Treatment Center at the time of the Advances, such Angel ought not to have to pay for this 30% interest. It is usual for angel and venture capital investors when making a loan/debenture investment to protect the downside and have significant upside in high risk investments such as the Treatment Center described herein. To realize this potential upside, the form of security is this warrant. Why 30%? Firstly, the Angel in this situation was not going to participate in the management or control of the enterprise. Thus, anything approaching 50% or above 50% does not make sense. Secondly, any warrant coverage below 10% would not result in the Angel to achieve the required "above average" return... However, based on my experience and after analyzing the facts as set out herein, I believe that a 30% warrant coverage with a nominal exercise price would be fair to an Angel investor with other terms as set out herein.

C. Information rights, share transfer restriction rights and board entitlement rights granted to the Angel.

[216] In cross examination Mr. Riback was challenged on many aspects of his testimony. He agreed that he made the unstated assumption that he was treating this scenario as though all the terms were "set in stone" as at the time of the first advance by Mr. Biehl, whereas the development of the Orchard progressed over a number of months as the advances were made. He agreed that assumption tended to increase the interest rate and the warrant level in his report.

[217] Mr. Riback was challenged on his characterization of Mr. Biehl as an angel investor and he agreed that he did not know what Mr. Biehl was seeking as a return on his investment in the treatment centre, or if Mr. Biehl's expectations in terms of a return approached those he opined about. Mr. Riback also agreed that there is an accepted kind of financing referred to as "friends and family financing", and individuals in that category could be very different from venture capitalists. Based on the information provided Mr. Riback concluded that Mr. Biehl did not fall into the friends and family category of investor because he was a single investor as opposed to one of a group of friends and family contributing funds to a new venture. He did, however, agree that in preparing his report he did not receive information pertaining to Mr. Biehl's investments being in the friends and family category, nor did he know what Mr. Biehl's expectations were regarding his investment in the recovery centre.

[218] Mr. Riback confirmed that he was asked to provide an opinion regarding a third party arm's-length investor, and based on the information he received he concluded that Mr. Biehl was an angel investor. Mr. Riback also agreed that there was no "one-size-fits-all approach to the structures of an angel's investment", and in particular that an investor may have the debt converted into shares in the company or an investor may make a nonconvertible loan, but

in lieu of conversion the company would issue warrants. Mr. Riback said that neither approach was "standard" but in this scenario of the two, he picked the latter. When pressed about the likelihood of an investor having the debt repaid with significant interest and still having a significant ownership interest in the company, Mr. Riback indicated that preferred stock "can certainly provide an investor with money back and a share in the profits on a liquidation of the company, so a preferred stock can do that, as well, capital appreciation of common shares, one can argue that ... a warrant is a form of capital appreciation of common shares."

[219] When Mr. Riback was asked why he picked an interest rate of 15% in the terms of the debenture (set out above as "A") he stated:

I picked 15 because of -- in my opinion, the risk factors associated with this, if you compare combination with the warrants, but this investment deserves a higher rate of return than what other investment securities would have been available, i.e., if one wants to invest in the public markets, you know, one would expect a certain rate of return and the risks associated with that, compared to the risks associated with this investment. (Sept. 15, 2010, p.2)

[220] When Mr. Riback was asked why not a higher rate of interest, perhaps 20%, he responded:

I chose a combination of an interest rate that I believe the company should pay together with being on -- on the warrant side in -- in partners with the investor that was in partnership with the founders or the principals and so it was a combination of the debenture and the warrant. If there is no warrant then, i.e., if there's no upside, if there -- if this is a successful enterprise, then the investor ought to receive a much higher interest rate based upon the risk factors associated with this investment. (Sept. 15, 2010, p.3)

[221] Mr. Riback indicated that interest rates of 20% or 25% were too high and it was unlikely that a new business would have the cash flow to meet that kind of obligation for a loan of \$1.5 million and he explained:

So what I attempted to do in my opinion was to see what made sense for both the investor and -- the company. So I chose not to opine that, you know, the interest rate ought to be 20 or 25 percent. So a 15 percent interest rate, for me, is one that I am comfortable [with] based upon other transactions that I have seen from many other lenders that do, you know, start-up loans. (Sept. 15, 2010, p. 3)

[222] Mr. Riback agreed definitively with the proposition put to him by counsel for the corporate defendants that "it's the risk reward balance, if you will, that drives your statement that it should be a warrant entitling the angel to 30 percent of the equity for nominal consideration."

[223] Mr. Riback disagreed with the opinion of the corporate defendants' expert, Mr. Bowie, that "given the nature of the proposed operations there would have been the potential for reasonable profitability and return on investment it would not appear to have been the type of high risk high return investment referenced by Mr. Riback."

[224] Further, when it was put to Mr. Riback in cross-examination by counsel for the corporate defendants that Mr. Biehl's investment represented a "friends and family financing" that would attract more lenient terms than an angel investment, Mr. Riback rejected this suggestion and stated:

I have concluded that Mr. Biehl in these - with these facts and assumptions, is not a friend or family. In my opinion, is that friends and families financing are much less significant in dollar terms, there are usually many more persons involved in a friends and family financing versus a single investor, and I'm not - I'm very comfortable saying that I have not seen - that I am - am not familiar with - with many friends and family financings where an individual invests 1.6 million Canadian.

[225] In Mr. Strang's cross-examination of Mr. Riback, Mr. Riback acknowledged the difference between an investment between very close friends and an arm's-length deal, as well as the impact that caring passionately about a particular investment may have.

[226] Mr. Riback impressed the Court as someone very knowledgeable about venture capital investments. Based on the information he was provided and parameters of his opinion I find it to be of some considerable assistance. The characterization of Mr. Biehl as an angel investor in the present circumstances seems correct. For the reasons referred to above by Mr. Riback I accept that Mr. Biehl's investment in the Orchard was not "a friends and family" financing. He was the sole provider of a very sizable amount of start-up capital, which with the applicable exchange totalled CDN \$1,547,141.50, without security. The notion of a friends and family financing would have more traction if additional investors had invested cash, or if the Strangs had also invested more than their modest equity in the Grafton Road property and the Harding Road property.

[227] The only significant limitation I find in Mr. Riback's opinion is that based on the business plan provided by the Strangs (which places very little emphasis on the Grafton Road property as opposed to the acquisition and development of Cates No. 1), Mr. Riback does not appear to appreciate that there was a significant additional value to the proposed recovery centre from the Grafton Road property's potential use in conjunction with Cates No. 1. Mr. Bowie also did not comment on this, and focused on the development of Cates No. 1, having referred to the same early business plan.

[228] However, in my view with regards to a potential remedy for unjust enrichment, Mr. Riback's approach certainly represents the "high water mark" in terms of what Mr. Biehl may be entitled to.

4. Mr. Strang - Read-ins from Examination for Discovery

- [229] The following is a brief summary of the read-ins from the plaintiff's examination for discovery of Mr. Strang, admissible only against Mr. Strang.
- [230] In the portions read in Mr. Strang provided details relating to his background and the development of the Orchard and the Snug Cove properties, most of which are in evidence elsewhere. He denied giving instructions to Mr. Johnson in relation to the statement of defence prepared and filed by Mr. Johnson on behalf of the corporate defendants and himself (which is contradicted by Mr. Johnson).
- [231] Mr. Strang stated that his deal with Mr. Biehl was that Mr. Biehl was going to put money up, and get his money back, and he would be "half owner". Mr. Strang said that he put in a piece of real estate worth a million dollars and Mr. Biehl put in a million dollars in cash that Mr. Biehl was going to get back, and Mr. Strang was going to get his money back. Mr. Strang said that Mr. Biehl "was going to be half owner. He is half owner." With regards to whether this meant Mr. Biehl would be a shareholder or just receive 50 percent of the net profits every year, Mr. Strang indicated that Mr. Biehl, as a half owner, had "just left the shares in my name" and they never got around to transferring them because Mr. Biehl trusted him. With regards to net profits from the Orchard, Mr. Strang said they put them back in by way of eight additional rooms in 2004. He went on to say that Mr. Biehl was entitled to "half of the fruit of the vine" which meant "[t]he profit from 50 percent of the deal " With regards to interest Mr. Strang said that he "understood that he [Mr. Biehl] would get his money back and the business was the interest." Mr. Strang said that the "50/50 deal" included Snug Cove.
- [232] When he started developing the Orchard Mr. Strang said that he and his wife had about \$200,000 worth of equity in the Harding Road property and a mortgage. That property was used to secure loans for 525718 B.C. Ltd. and Snug Cove. In 2001 Mr. Strang said there was a mortgage on the Grafton Road property. Mr. Strang considered the Grafton Road property to be worth about a million dollars in 2001.
- [233] Mr. Strang confirmed that in 2003 he spoke to Agent Shimoda of the IRS and he and Mr. Biehl discussed what information to provide.
- [234] Mr. Strang also provided the previously-quoted evidence about the purported signature of Mr. Biehl on the documents to give the mortgage from the North Shore Credit Union priority over Mr. Biehl's "loan".
- [235] When asked about the financial statements that showed \$1,497,788 "due to investor" Mr. Strang agreed that there was no one else who advanced funds in the range of \$1.5 million Canadian to the Orchard, and "if it was a single person, yeah, it would have to be Eric, wouldn't it?" When asked about the amount of \$1,510,868 shown as "advances from shareholder" in the later financial statement Mr. Strang said that he was not aware of anyone else advancing an amount in that range to the Orchard. Mr. Strang strongly disagreed with the suggestion that he had been repaid by the Orchard over one million dollars in a shareholder's loan in 2007 and 2008, since he was not permitted on the property and lost control of the corporate defendants. He regarded this as a ploy by Mr. Strang to get

"the whole company" by saying that a shareholder's loan by him had been repaid in this amount.

[236] Mr. Strang agreed that initially funds to pay the mortgages on their residence and the Grafton Road property came from the Orchard. He said "everything I had came from the Orchard." Mr. Strang agreed that from October 1, 2001, to August 1, 2002, about \$50,000 was received by Snug Cove that was from Mr. Biehl's advances, some of which went to pay his residential mortgage.

[237] Mr. Strang agreed that he did not draw a hard distinction between 525718 B.C. Ltd., Snug Cove, and the Orchard and that he regarded it as "one pot".

5. Taped Telephone Conversations between Mr. Biehl and Mr. Strang

[238] Of the taped telephone conversations in evidence the five put to Mr. Biehl in cross-examination by Ms. Strang's counsel are the most relevant. Mr. Biehl knew his conversations were being recorded, whereas Mr. Strang did not.

[239] In the first call, which was prior to the family mediation scheduled for the Strangs on January 5, 2009, the following was said:

Gavin: Yeah, well, I would like to sit down with you and just - - you know, when it - - come to agreement on exactly what, you know, you'll be happy with. And then if anything (unintelligible) you know.

Eric: Right. Well, you know what it was and I know what it was. I mean, we looked each other in the eye and I believed you, you believed me. So why don't we do the following.

Gavin: So are you happy with half?

Eric: I want my attorney to check it out. That's why I hired my attorney.

Gavin: Okay. Well, what's, you know, like - -

Eric: But I don't want to spend a whole lot more money either. I've gone through so much money, Gavin.

Gavin: I know it. I know. So that's why I'm calling. I mean, I don't want to go - - I don't want to go in and say, okay, Eric's got half of this thing and then - - and then I have to go to court against you.

Eric: Right. I can - - I can understand not wanting to go to court and mediate the thing. I just don't - - I just don't understand the whole complexity of it all relative to Lorinda, your children. ... But I just don't want to make a big deal out of everything.

Gavin: Well, neither do I. What I am figuring, it might be you and me against Lorinda.

Eric: Well, that's a battle I don't want to pursue either. I don't know. ...

[240] In the second call, which was prior to an examination for discovery of Mr. Strang in the family matter, the following was said:

Gavin: Okay. So I'm going to go to a place of no return. I'm going to go in and say it's half yours. I'm going to fuckin' - - I'm going - - I'm going to a place of no return for my own - - I'm jumping off the cliff here, okay? I'm going to go in and say Eric money, blah blah blah, he owns half this company, he's entitled to half. I'm going to go in and I'm going - - it's going to be on a public record for the court and everybody to see.

Eric: Well, you said you'd be honest and, you know, I appreciate that.

Gavin: That's what I'm telling you, on Monday I go in and do it. Okay?

Eric: Wow. Well, thanks for being honest. I mean - - I mean, I - -

Gavin: Yeah. I'm just asking you one thing. Here's what I'm asking you back.

Eric: Okay.

Gavin: If you get everything and you get whole and you get half the company and everything else, you got the power to fuckin' rub my nose in the ground forever and fuckin' go after things beyond everything that's there. You know what I'm saying. Like, you know how lawsuits work. If I go in and just lay it out and you get your half.

[241] In the third call, which was after Mr. Strang's examination for discovery, the following are portions of the conversation:

Gavin: And it's like - - okay? So it's like, if you could show up and, you know, figure out what you want and stuff, and I want to fuckin' go to bat, you know, whatever it takes to get it for you. And as far as I'm concerned, you can have whatever the fuck you want, you can have the whole thing, but I just want you to know that it's like - - you know what I'm saying, right? Like they cross-examined me for eight hours. Okay?

Eric: Right.

Gavin: They're going on and on. And they got letters from Shimoda. Remember the one they needed, write a loan document, you did that because they raided your house or whatever they did, right?

Eric: They didn't believe that the monies I was taking was for legitimate purposes.

Gavin: Right, exactly. And that's what I said 'cause it's from you 'cause I need a loan document, blah blah, so that's how I explained it away. I'm telling you, it's like, I got another day on cross-examination just on that alone going on.

Eric: I understand that you were supposed to refinance and pay me back as soon as Orchard could show that - - could show the bank it was a viable business.

Gavin: No. No, no. No, no. The only reason you said that, listen to me, the only reason you said that was because you hadn't made any payments - you hadn't had any payments made and we needed to explain it to the IRS.

Eric: Right. Right.

Gavin: We needed a convenient agreement. You own half that business and, you know, whatever, and (unintelligible) money back, the principal back and all that stuff, it's all just up in the air because you own half anyway. And we never really got - - you know, we never had the details worked out - - this is the story I'm going with because this is - - this is what the documentation reveals

Gavin: (Unintelligible) you know what. You know what, I will leverage my half and buy hers out and give it to you. Like, we can sell the thing for 10 million bucks. Okay? I got buyers, but they're trying to buy it for, like, fuckin' 800,000.

Eric: Right.

Gavin: We want to turn around - -I want to turn around and shotgun her

Gavin: That's all I can tell you. Okay. I don't want nothng. I'll fuckin' live in a camper the rest of my life. . I just want - - I just want you to fuckin' - - I just want you to be happy, man. I just want you as my friend.

Eric: I own half the real estate too.

Gavin: Well, you know what, you can own half the real estate, but that's another - - that's a whole other story. But you know what, you can have half the real estate, but get half the business because she's - - the real estate right now - - you're welcome to half of it. I'm almost - - I'm trying to exclude her from any of it because I bought the company with an inheritance.

Eric: Well, I don't know the equity in the real estate or anything like that.

Gavin: The equity in the real estate right now is not a big deal to fight about because it's dropping like a mother fucker, right? But the fuckin' business we need to fight about 'cause it's recession proof.

Eric: As far as I understand, I put money into the real estate also. So - -

Gavin: That's fine and dandy, but you know what - -

Eric: The improvements and all that stuff

Gavin: I just want you to really know (unintelligible) the real estate, fuckin' half of that's a piece of cake, man, half of that's a piece of cake. Okay? I can give you that with a signature. Okay? We need to fight for the business because that's the - - that's worth the money, that's the deal. The real estate, fuckin', don't even shit, man. You can have half of it. You can get half, don't worry.

Eric: Don't turn her pockets inside out and leave me high and dry.

Eric: Okay. I own half the real estate too, and I'm going to come up there and deal with my attorney and possibly triangulate it with you or just deal with him and --.

[242] In a fourth call on February 1, 2009, Mr. Strang indicated to Mr. Biehl that he had lied during the matrimonial examination for discovery about his trust fund, that he had another million or two million dollars coming in, and he would give Mr. Biehl "whatever you want to make you happy." In this call Mr. Strang indicated that he was not allowed to talk about the proposed matrimonial settlement contingent on a settlement with Mr. Biehl, but said that Mr. Biehl should come and talk to him face to face. He also asked Mr. Biehl not to record their conversation and Mr. Biehl agreed that he would not.

[243] In that call Mr. Strang explained to Mr. Biehl that in his matrimonial case Ms. Strang received the business and the real estate. Their conversation included the following:

Gavin: Eric, the thing is is that I'm on your side. You go in and fuckin' - - I don't know what, you know, telling you, like fuckin' what do I do, what do I do. There's nothing I can fuckin' do. Okay? I told them that. I fuckin' said in the thing, I said Eric's half, blah blah blah. So everything is in limbo. Like she's got the thing, but pending your lawsuit. Everything's pending what happens with you, with your settlement. Okay? So if you get half the business and half of everything, the whole thing, it's all unwound, it's like - like - you know what I mean? It's like taking everything that you get, she gets the rest

Eric: So she just got the business and she did not get any real estate; is that what you're telling me?

Gavin: I'm telling you she has everything, all the real estate and all the ben - everything. I got nothing.

[244] In the fifth call Mr. Strang explained to Mr. Biehl how tough a trial would be given their histories and issues with substance abuse, and urged Mr. Biehl to take an amount in settlement that he would be "happy with" because Mr. Biehl was not going to be permitted to step in and run the recovery centre. Mr. Strang said, "Right now you can come out of it with your principal and maybe a fuckin' - - not what you deserve, but some interest and shit" and that Mr. Strang would make up the rest.

[245] Part of their conversation was as follows:

Gavin: You know what I'm trying to say? Like take your million 30, take another 500, keep the 400 you got, and I'll fuckin' get you another million, but I can't get it for you 'till all this settles.

Eric: Yeah, but that wasn't the deal.

Gavin: I know, but it wasn't the deal with me and Lorinda either, but fuckin' when I went to court I came out of it fuckin' feeling like I'd been kicked in the nuts, and I just don't want the same thing to happen to you. But if you want to go and do it, I'm on your side and I'll fuckin' say everything I can in your favour. But I'm just saying what's going to happen when you get in there, it's fuckin' hell.

Eric: Well, that wasn't the deal. I mean, we - - we talked and I thought you were going to be honest about it.

Gavin: I am going to be honest about it, Eric, but (unintelligible).

Eric: They didn't believe you then, huh?

Gavin: No, they don't.

Eric: Just speak the truth because I'm going to.

[246] It is interesting that in their various discussions neither Mr. Strang nor Mr. Biehl clearly articulate their deal. They did not appear to agree as to whether it included interest or a share in the annual profits, or both, and was comprised of Mr. Biehl owning a share in the Orchard, or a share in the Orchard and the real estate held by Snug Cove. These calls are seriously damaging to the overall credibility and reliability of Mr. Strang. They also do not enhance the credibility of the plaintiff because of the obtuse nature of his comments about what he thought their agreement was.

6. Ms. Strang - Read-ins from Examination for Discovery

[247] It was agreed that the plaintiff's read-ins from Ms. Strang's examination for discovery were on her behalf and on behalf of the corporate defendants.

[248] Ms. Strang provided much background information as to the development of the recovery centre, the Orchard, and Snug Cove that either is not at issue, has other sources, or was to a large degree repeated in her testimony at trial. Ms. Strang agreed that there were times when she paid personal expenses through the Orchard without a particular concern as to how the accountants sorted it out, as she "was feeling rather annoyed with [her] ex-husband" and she would "think this is coming out of my pocket, it should be coming out of both of our pockets, and it's our business." Ms. Strang agreed that the Strang children are employed at the Orchard when she needs their help. In answering questions about how the development of the Orchard came about with Mr. Biehl's financial support, she said "I mean, we don't know anyone else like Eric."

[249] With regards to the shareholder's loan that the Orchard is repaying to Mr. Strang, Ms. Strang said "If the money is loaned to Gavin and Gavin put the money into the Orchard, then - and right now Gavin - or at this point Gavin is the hundred percent shareholder. Then that's why. It's paid for on Gavin's behalf."

- [250] Ms. Strang also agreed with regards to the amount of the shareholder's loan shown "as due to Gavin Strang" from the Orchard (\$1,520,787.96) that she was not aware of anyone else writing a cheque to the Orchard for that amount. She said that while the amount was similar to one of their mortgages, she "imagined" that amount represented Mr. Biehl's funds. Ms. Strang also indicated that she did not consider it to be the case that the Orchard owes Mr. Strang \$1.5 million. She also confirmed on behalf of the Orchard that she was unaware of any shareholder's loan agreements between Mr. Strang and the Orchard and that none had been produced.
- [251] Ms. Strang was asked if, when the Orchard started making payments to Mr. Biehl, it was doing so on Mr. Strang's behalf, and she replied, "Well, the company being Gavin's, yes." When she was asked if she understood the company (the Orchard) and Mr. Strang "to be one and the same with respect to finances" Ms. Strang replied, "I just know that we at the Orchard started to pay back the loan and we started to pay what we thought we could afford which was \$10,000 per month." Ms. Strang agreed that when the \$49,900 (actually US \$49,988 on September 30, 2005) amount was repaid to Mr. Biehl it was paid by the Orchard. She understood that "the money was put into the Orchard to start the Orchard, and it was owed back to Eric. So that's why it was being paid back to him." She agreed that repayments to Mr. Biehl were made in US funds and that the funds he advanced were in US funds that went into the Orchard's US account and then said "they all ended up, I believe in the Canadian account."
- [252] Ms. Strang indicated that when Mr. Biehl loaned the funds to start the Orchard to "us," meaning Mr. Strang and herself, it was "within their marriage", but Ms. Strang said that she did not have any control over how the funds received from Mr. Biehl were spent, nor any input in the beginning. She said she was unaware of what conversations Mr. Biehl and Mr. Strang might have had regarding how the funds were spent and that Mr. Strang preferred her to leave it to him and Mr. Biehl.
- [253] Ms. Strang agreed that Mr. Biehl trusted her with his money and that she was aware of his addictions issues, which she described in some detail, including the following: that Mr. Biehl was an alcoholic, had been in treatment in the past for substance abuse, had periods of stability, and that Mr. Biehl and Mr. Strang did cocaine together.

B. Evidence of Ms. Strang on her own behalf

- [254] The in-court testimony of Ms. Strang set out in detail the history of this matter, including the development of the Orchard, and the business details of the Orchard and Snug Cove, which she became more involved in after Mr. Strang's absences increased. It is clear on her evidence that she was not a party to any agreement between Mr. Biehl and Mr. Strang with regards to the funds advanced. She said, "I never sat down with Gavin and Eric and hammered out the terms of any deals." She described in detail the improvements made to the Grafton Road property and Cates No. 1, as well as details relating to the purchase of the latter.

- [255] Ms. Strang wrote to Mr. Biehl, in a letter dated March 7, 2003, acknowledging that he had loaned funds to Mr. Strang and herself. Mr. Biehl had asked her for a list of the payments, which she provided. Ms. Strang said that she wrote the letter that way because she was married to Mr. Strang and he and Mr. Biehl were friends. She considered Mr. Biehl to be her friend too. She recalled that she became worried when she received the correspondence from the Sakai Iwanaga law firm enclosing the promissory note. She called Mr. Strang, who told her not to worry, that it was not a demand loan, and that he would work it out with Mr. Biehl.
- [256] As Ms. Strang knew the funds from Mr. Biehl had been expended on developing the recovery centre, she felt that the Orchard was obliged to repay Mr. Biehl. An initial payment of US \$50,000 was made in September 2005, and then she and others on the management team determined that the Orchard could afford payments of US \$10,000 per month, which were made for a time. After the lawsuit was filed in which Mr. Biehl claimed half the business, Ms. Strang said she made the decision to stop the payments because she no longer knew what she was paying. Ms. Strang said that "it was a really hard decision for me to make because I don't dispute that the money is owed to Eric, but obviously Eric and I have a difference of opinion " She said that in her communications with Mr. Biehl, prior to the lawsuit being commenced, he did not refer to sharing in the profits of the Orchard or having an ownership interest.
- [257] Ms. Strang recalled that during the matrimonial examinations for discovery Mr. Strang appeared very unstable, was very angry at her, and threatened to kill her. Ms. Strang recalled that in those discoveries Mr. Strang confirmed that no shares in the Orchard or Snug Cove had been issued to Mr. Biehl, and indicated that he did not regard Mr. Biehl to have any interest in Snug Cove.
- [258] Ms. Strang said that since the Orchard started operating in 2002 she has paid her personal expenses through the Orchard and what is personal "is put on our shareholder's loan account."

C. Evidence on behalf of the Corporate Defendants

1. Ms. Lorinda Strang

- [259] In her examination in chief on behalf of the corporate defendants, their counsel took Ms. Strang through long lists of expenses incurred to develop the Orchard. This resulted in proof that between May 22, 2001, through to September 20, 2002, the amount spent by 525718 B.C. Ltd. in renovations on the Grafton Road property and Cates No. 1 was \$574,651.90, and that the Orchard spent an additional \$1,059,231.40 on other related expenditures. This latter amount included six payments of the mortgage on the Strangs' personal residence, the Harding Road property, for a total amount of \$10,534.38. Presently, Ms. Strang indicated that these mortgage payments are attributed to "our shareholder loan account".

- [260] Counsel for the corporate defendants also established through a review of banking documents with Ms. Strang that no amount of US \$50,000 was advanced by Mr. Biehl on November 20, 2001.
- [261] Ms. Strang indicated that the payments to Mr. Biehl are now accounted for against Mr. Strang's shareholder's loan. She also confirmed that the funds from Mr. Biehl and those in repayment have been in US dollars.
- [262] In cross-examination, Ms. Strang gave the evidence about the signatures of "Susan Hughes" on the promissory note and release, dated May 1, 2003, referred to in the chronology. She agreed that initially she thought it was a coincidence, and prior to this lawsuit being commenced she did not know these documents existed. She said that she had not thought about notifying the North Shore Credit Union once she learned that Mr. Biehl claimed these documents to be forgeries. She indicated that she was not able to discuss such matters with Mr. Strang. Ms. Strang agreed that these documents are "most likely a sham".
- [263] Ms. Strang also indicated that her understanding of the shareholder's loan presently on the Orchard's books is that previously it showed that Mr. Strang loaned the Orchard approximately \$1.5 million and was a debt of the Orchard; whereas in the 2010 Financial Statements of the Orchard Mr. Strang owes the Orchard money. Ms. Strang explained:
- My understanding is that in the bookkeeping sense, that Gavin is the person who's loaned this money to the Orchard and he got it from Eric, and the payments that are being made to Eric are coming off that shareholder loan account, and also any personal payments of ours are coming off the shareholder loan account.
- [264] Ms. Strang agreed that the shareholder's loan account had a balance of \$1,140,104.24, as of September 25, 2007, and applied to that were payments to Mr. Biehl and other personal payments. Ms. Strang indicated that she knew Ms. Strang disagreed with some of what had occurred in this regard. Ms. Strang agreed that of the amount deemed to be repaid on the shareholder's loan by the Orchard, approximately \$300,000 represented payments to Mr. Biehl, and the balance of approximately \$850,000 related to payments received by or charged to the Strangs. She agreed that she did not declare on her income tax the money paid to her as repayment of the shareholder's loan.
- [265] Ms. Strang also recalled from reviewing the documents that she "saw somewhere in there a change" when the Orchard began owing the money to Mr. Strang instead of Mr. Biehl. Ms. Strang was then referred to the Orchard's financial statements, as referred to in the chronology, that show the change as to how Mr. Biehl's advances to the Orchard were characterized on the Orchard's books.

- [266] Ms. Strang said that she did not know what went on between Mr. Strang and Mr. Biehl with regards to the postponement of payment to Mr. Biehl in relation to the commercial mortgage granted by the North Shore Credit Union in 2003. She said that in the earlier years of her marriage when Mr. Strang was well, she trusted him. She disagreed strongly with the notion that either she or Mr. Strang had taken advantage of Mr. Biehl in terms of his addictions.
- [267] The Court was impressed with Ms. Strang's honesty and candidness. She answered the questions she was asked clearly and thoughtfully, and when she did not know or was unsure she said so. She came across as fair-minded and decent, albeit particularly in the early years, 2001 to 2004, as someone who was very naïve and overly trusting of the business acumen of Mr. Strang. This was particularly so when it came to incurring debt or engaging in business transactions where she was and continues to be exposed to considerable personal liability. During the trial she was able to manage the difficulties to her presented by Mr. Strang's past behaviour with equilibrium and a significant measure of compassion. Also, she does not appear to harbour any ill will towards Mr. Biehl.
- [268] I accept Ms. Strang's testimony as reflected above and in the chronology.

2. Mr. Martin McKenzie

- [269] Mr. McKenzie, a long-time friend of Mr. Strang, was called to testify about what he recalled of the dealings between Mr. Biehl and Mr. Strang in November 2001. Mr. McKenzie and Mr. Strang travelled together to Hawaii to meet with Mr. Biehl. Ms. Strang viewed Mr. McKenzie to be a steadying influence on the recently sober Mr. Strang, in terms of reducing the latter's risk of relapsing into substance abuse. Mr. McKenzie recalled that it was about a five-day trip.
- [270] Mr. McKenzie recalled that the purpose of the trip from Mr. Strang's point of view was to see if he could borrow more money from Mr. Biehl, with whom Mr. Strang had been friends for many years. Mr. Strang hoped to borrow enough money to get the Orchard up and running.
- [271] Mr. McKenzie recalled that Mr. Strang had prepared a business plan as he intended to approach Mr. Biehl to be either a silent partner in the Orchard or loan him the funds. Mr. McKenzie recalled two meetings.
- [272] During the first, Mr. McKenzie recalled that Mr. Biehl became very angry when he read the business plan, and threw it on the floor, commenting that it looked like it had been written by an elementary school student. Then Mr. Biehl asked questions, and as Mr. Strang tried to explain, Mr. Biehl went on a "tirade" about why certain things would not work. Mr. McKenzie recalled that Mr. Biehl said that he had no interest in being partners with someone who could not even write a business plan. Mr. McKenzie recalled feeling embarrassed listening to what was said, and the meeting ended. He recalled at that meeting the three of them were present, as well as a tall Asian woman.

- [273] The second meeting occurred at a restaurant and was friendlier. The three of them were present, and possibly the same woman was as well. Mr. McKenzie recalled that Mr. Biehl agreed to loan Mr. Strang the money as a friend. He also said that he was not party to any of the details regarding the loan.
- [274] It was Mr. McKenzie's impression when they first got to Hawaii that Mr. Biehl was not really keen on lending the money to Mr. Strang because they had difficulties finding Mr. Biehl and meeting with him.
- [275] During the development of the Orchard Mr. McKenzie provided a vehicle he had leased to Mr. Strang for use in transporting clients and staff for which he was reimbursed. Mr. McKenzie also made wooden furniture and lighting sconces for the Orchard.
- [276] In cross-examination Mr. McKenzie agreed that he had talked to Mr. Strang about six months before the trial and he understood that Mr. Biehl's law suit was holding up Mr. Strang's divorce because the Strangs could not divide their assets. He was taken through various accounting entries in the Orchard books and agreed that he had received about \$35,000 in payments for various things. He was shown a bill of sale for the leased vehicle that Mr. Strang eventually bought from him, which although it purported to be signed by Mr. McKenzie was not. It appeared to have been prepared by Ms. McKnight from the Orchard, who Mr. McKenzie did not think he had ever met, and he agreed that he did not think that he had ever signed the bill of sale to Mr. Strang's company transferring the vehicle, although he agreed to the sale.
- [277] With regards to the nature of an agreement reached between Mr. Biehl and Mr. Strang, Mr. McKenzie was clear that he heard what he had testified to. He also indicated that there were telephone conversations between Mr. Strang and Mr. Biehl during which he was only hearing what Mr. Strang said.
- [278] I find Mr. McKenzie to be a generally reliable and credible witness. However, I also find that his evidence adds virtually nothing to assist the Court in determining the nature of the agreement between Mr. Strang and Mr. Biehl. He did not hear all their discussions; when he testified in 2010 he was remembering conversations and events from nine year earlier, and there is absolutely no reason to think that Mr. Biehl and Mr. Strang did not agree to change the terms of their agreement later. The November 2001 advance of US \$250,000 made during the Hawaii trip, while the first sizable advance, was followed by others after Mr. Biehl visited Bowen Island.

3. Mr. Gordon Johnson

- [279] Mr. Johnson, a member of the B.C. bar and a partner at Borden Ladner Gervais, was called to testify about his dealings with Mr. Strang regarding the statement of defence that was filed in this matter, in light of Mr. Strang's denial during examinations for discovery that he had provided instructions.

[280] Mr. Johnson testified that he had a telephone conversation with Mr. Strang to review the draft statement of defence being prepared on Mr. Strang's behalf and on behalf of the Orchard and Snug Cove. This appears to have occurred on December 14, 2007, and the statement of defence was filed on December 17, 2007. Mr. Johnson did not recall every detail of their conversation but he did recall discussing with Mr. Strang the terms of the agreement under which the funds were paid by Mr. Biehl, and exactly how much had been repaid. He also wanted to make sure Mr. Strang received a copy of the statement of defence at his correct address once it was filed, which based on the documentation in his file, seems to have occurred. As a result of this review the only significant change to the statement of defence was the more fulsome second paragraph in which it is stated, "The defendant Gavin Michael Strang suggested that the plaintiff should invest in the capacity as an owner, but the plaintiff insisted that he would prefer to provide the funds in the form of a personal loan to the defendant Gavin Michael Strang. As a result the plaintiff and the defendant Gavin Michael Strang made a loan agreement."

[281] Regarding the loan agreement the statement of defence states:

3. The terms of the loan agreement were oral, although they were later confirmed in writing in a letter from the plaintiff dated March 7, 2003. Specifically, the terms of the loan agreement were as follows:
 - (a) the interest rate would be a reasonable rate to be agreed between the parties;
 - (b) the funds would be repayable over time based upon what was reasonable given the financial performance of the recovery centre Gavin Michael Strang intended to invest the funds in; and
 - (c) the loan would be unsecured.

[282] The statement of defence asserts that no interest rate or repayment schedule was ever agreed upon between Mr. Biehl and Mr. Strang. It states that the funds loaned by Mr. Biehl "are neither due nor overdue". It specifically denies that an interest rate of 10% was agreed to; that the Orchard and Snug Cove were ever parties to the loan agreement; and that the loan agreement "required payment of any profits" from the Orchard.

[283] Regarding the loan creating any equitable interest in any of the defendants' properties the statement of defence states:

10. It is specifically denied that payment of any of the loan amount by the plaintiff to any of the defendants created an equitable interest in any of the defendants' properties as alleged in paragraphs 17 through 32 of the Statement of Claim. The loaned funds were never subject to any trust or equitable obligation.

[284] In cross-examination by counsel for the plaintiff Mr. Johnson indicated that he did not receive any instructions from Ms. Strang regarding the statement of defence.

[285] When asked about Mr. Strang's state of mind at the time and whether he was aware of Mr. Strang having any mental health or addiction issues, Mr. Johnson indicated that his impression was that sometimes Mr. Strang "was quite in control of things... and sometimes he wouldn't be reliable." Mr. Johnson did not recall what other documents, if any, he had reviewed with Mr. Strang in the context of seeking his instructions and approved for the statement of defence.

4. Ms. Nicole Martin

[286] Ms. Martin worked at the Orchard from March 2002 to August 2004. She started as an office assistant and moved into the position of office manager/bookkeeper. She described working in a converted garage at Cates No. 1 until the Grafton property was completed in August 2002. She described how Mr. and Ms. Strang would purchase items for the Orchard on their personal credit cards and then how items to be charged to the Orchard would be accounted for on expense reports.

[287] Ms. Martin was also shown a letter that she had written to Ms. Payment at the accounting firm of Henshaw Kjellbotn McKinley, dated November 19, 2003, in which she enclosed information relevant to the preparation of the Orchard's year end, including:

-Please ensure that the loan from Eric Biehl shows as a personal loan to Gavin Strang and not a loan to the Orchard.

[288] Ms. Martin testified that this was a follow-up letter to the accountants with things that needed to be added or changed, and that "It was down as it needed to be a personal loan between Eric and Gavin and not against the Orchard...It was just something that I knew right from the very beginning." She said she heard this from Gavin Strang and also from Linda McKnight, the office administrator at the Orchard.

[289] In cross-examination by counsel for the plaintiff Ms. Martin was shown a draft agreement between Mr. Biehl, Mr. Strang, and the Orchard attached to a fax from Mr. Strang to Mr. Biehl dated January 18, 2003, which refers to Mr. Biehl's loan to Mr. Strang and the Orchard, and refers to the Orchard paying interest on the principal "equal to one-half of the ORC's annual net after-tax profits." She said that she did not see this document while she was working at the Orchard, nor was she aware that draft financial statements for the Orchard for August 31, 2002, were sent to Mr. Biehl (they show as "Due to investor \$1,497,788").

[290] Ms. Martin was also shown a letter, dated November 4, 2002, from Ms. McKnight to the same accounting firm in which Ms. McKnight refers to her "own preliminary notes re tracking the Eric Biehl loan ..." Ms. McKnight also refers to the Orchard's principal, Gavin Strang, immediately requiring "some form of financial statements to provide to investors" and seeking "a preliminary?/final? set of financial statements regarding the August 31st year end..." Ms. Martin agreed that apart from Mr. and Ms. Strang, Mr. Biehl was the only other person that she was aware of who could be considered an investor in the Orchard.

- [291] Ms. Martin also indicated that while she was employed at the Orchard she did not see a memo from Ms. McKnight to Mr. Gilbert at the accounting firm, dated March 4, 2002, that refers to "Investor's Loan; Chart of Accounts; Summary re 625656 [became the Orchard]" and "re tracing the Biehl loan". Nor was she aware of an earlier memo by Ms. McKnight regarding a call from Mr. Gilbert in which she refers to "Summarize cash flow, including USD \$605,000 from investor." Ms. Martin also had not seen an unsigned letter, dated "____, 2002" to 525718 B.C. Ltd. (a private company she knew to be owned by Mr. Strang) from Mr. Strang as President of the Orchard, which states that Eric Biehl agreed to loan the Orchard US \$605,000 (with "955,000?" handwritten in) and that the loan had been received by 525718 B.C. Ltd. "as agent for Orchard", in which "Orchard agrees that it is solely responsible for repayment to Eric of the Loan and agrees to indemnify and hold harmless 525718 in respect of any and all liabilities or obligations in respect of the Loan and the indebtedness of the Orchard to Eric."
- [292] Also, placed before Ms. Martin was an October 2002 application to the Royal Bank of Canada for refinancing by Mr. Strang on behalf of 525718 B.C. Ltd. that makes no mention of a debt owed to Mr. Biehl.
- [293] Finally, she was shown documentation from the North Shore Credit Union dated May 12, 2004, which she had initialled on May 26, 2002, as "Sent back signed form attached", that renewed Snug Cove's commercial mortgage in relation to the Grafton property and Cates No. 1 (with the Orchard, 525718 B.C. Ltd., and Bowen Island Fitness Centre Ltd. as guarantors, with Mr. Strang as their authorized signatory, and personal guarantees from Mr. Strang and Ms. Strang). Ms. Martin was unaware of the term listed under "Security":
- f) Postponement by Eric Biehl of his loan to Mr. Gavin Strang for \$1.5 mln, pending payout of the subject mortgage with the Credit Union in full.
- [294] She was also unaware of any documentation relating to the "postponement".
- [295] I find Ms. Martin to have testified truthfully and to the best of her recollection about matters she knew about while working at the Orchard, which included the fact that Mr. Strang and Ms. Strang purchased things for the Orchard or incurred Orchard-related expenses on their personal credit cards, which she then accounted for. It is also clear that there was much documentation extant at the Orchard or related to its financial dealings that Ms. Martin was not aware of. I do not find her testimony to shed any light on how it was that the debt owed by the Orchard to Mr. Biehl as the investor came to be a shareholder's loan to the Orchard by Mr. Strang for the same amount. She recalls that she understood this was so from Mr. Strang and Ms. McKnight (who was not called to testify), and not from any documented or more reliable source.
5. Mr. Michael Bowie's Report

- [296] Mr. Bowie is an expert in business valuations. He was asked to review and comment on Mr. Riback's report. He did not testify. His report was filed on behalf of the corporate defendants.
- [297] Mr. Bowie made the point that "while the proposed Treatment Center was a start-up, it would not appear to have been a typical venture capital type of investment undertaken by Angel Investors." While he agreed that the business plan was not a formal one or backed up by market research and detailed financial projections, Mr. Bowie's view was that it "contemplated a fairly modest undertaking of leasing, with an option to acquire, an existing hotel/guest house property on Bowen Island and converting it into a facility that would focus on treating people with substance abuse issues." Mr. Bowie noted that as the business plan was prepared in June 2001 "a number of issues would not have been fully resolved at that point." Further, during the time frame of Mr. Biehl's advances from November 2001 through May 2002 "many of the uncertainties perceived in the Business Plan could have been addressed."

- [298] Mr. Bowie noted the following on pp. 3-4 of his report:

Given the nature of the proposed operations, there would have been the potential for reasonable profitability and return on the investment. However, it would not appear to have been the type of high risk / high return investment referenced by Mr. Riback. It was not intellectual property or technology focused and therefore was not likely to have the significant upside potential contemplated by venture capitalists or Angel investors. Further, it did not appear to have had the risk profile associated with a typical high risk / high reward venture capital investment.

It is not clear what the intents or objectives of the parties were when the advances were made and received. Mr. Riback appears to conclude that there are only two types of investors to consider, private equity and venture capital (entities or Angel Investors). In my experience, individuals advance funds to and/or make investments in small to mid-size private ventures/start-ups for a variety of reasons, with a variety of return expectations, influenced in part by their perception of the risks and opportunities of the venture in question. It is also my experience that when individuals advance funds to and/or make investments in small to mid-size private ventures/start-ups owned by friends or associates, they do so with potentially different objectives and return expectations. Accordingly, one would not necessarily characterize the advances from Mr. Biehl as a typical venture capital/Angel Investor investment, or one that would attract or require the attendant return expectations contemplated by Mr. Riback.

- [299] I find the report by Mr. Bowie to be of some general use in assessing the substance and scope of the report by Mr. Riback and his testimony. To some extent their different views may be attributed to the fact that Mr. Bowie is a business valuator who undoubtedly values all kinds of businesses with diverse financing, whereas Mr. Riback assesses new projects unlikely to attract conventional lenders, primarily in the technology or biotechnology sphere, for the investment of capital. Like Mr. Riback's report Mr. Bowie's report focuses to a considerable extent on the business plan initially put forward by Mr. Strang, which

revolved primarily around the acquisition of Cates No. 1, and made only passing reference to the Grafton Road property owned by the Strangs as a possible site for therapy, as opposed to the major centre of operations for the Orchard it became.

6. Dr. Paul Sobey's Report

[300] As this trial progressed counsel agreed that the report of Dr. Sobey was to be admitted into evidence and the Court could decide what weight to ascribe to it, after considering its contents, the law, and the prescription and drug treatment records of Mr. Biehl. The area of Dr. Sobey's expertise is "that of an Addiction Medicine Physician." I do not understand his qualifications to be at issue. The point of his report was to address the likely effect of certain prescription drugs on Mr. Biehl's memory of events relevant to his case.

[301] In the report Dr. Sobey indicated that he did not personally meet or assess Mr. Biehl. He reviewed Mr. Biehl's prescription records from Hawaii from 2004 through 2010 relating to benzodiazepines and Oxycontin, as well as the documents relating to Mr. Biehl's admission to the Orchard in August 2002, and to the B.C. Methadone program from August 20, 2002, to November 26, 2002 (Exhibit 5). These records were produced by an order of Punnett J., based on reasons in *Biehl v. Strang*, 2010 BCSC 1391.

[302] As result of his review Dr. Sobey notes:

The documents provided indicate that Mr. Biehl used large doses of high potency, short half life benzodiazepine Alprazolam between age 37 and 47 (Diazepam (Valium) equivalent of 40 to 60 mg per day.) Prescription receipts indicate that Mr. Biehl again began receiving Alprazolam in January 2006 and had continued to receive the drug up to July of this year. His use of this drug class is not documented between the end of September 2002 and 2006, when he left The Orchard Treatment Centre as per his testimony of June 9, 2010 [Examination for discovery]. The likelihood of successfully tapering and remaining abstinent from two to three milligrams of Alprazolam per day in one month would be low in my experience.

The documents indicate that Mr. Biehl was using intravenous heroin for five years with the longest period of abstinence of 73 days prior to been [sic] initiated on the British Columbia methadone program on August 20, 2002. He then began receiving regular prescriptions for Oxycontin 80 mg tablets in March 2004 that continued to August 2009. His use of this drug class is not documented between the end of September 2002 when he stated in testimony that he left The Orchard Treatment Centre and 2004.

The documents provided indicate that Mr. Biehl consumed a variable amount of alcohol...Dr. Fay's impression was that Mr. Biehl was "alcoholic prior to IVDU [intravenous drug use]" and that he continued to used [sic] small amounts regularly prior to his assessment on August 20, 2002.

[303] Dr. Sobey's opinion was:

Acute administration of benzodiazepines is well known to cause anterograde amnesia [footnotes omitted], that is memory loss occurring after the ingestion of the drug. The extent of the memory loss is based on the potency, half life and dose of benzodiazepine administered [footnotes omitted]

Based on the information provided, it is my opinion that an individual using the benzodiazepine, Alprazolam as described in the documents provided would be at significant risk of experiencing memory loss during the period of use.

Mr. Biehl is documented to have used other central nervous system depressants (alcohol and opiates including heroin, Oxycontin and methadone) in addition to large doses of benzodiazepines. The use of multiple sedating substances in combination is well documented to result in an increased sedation and risk of impairment. Sedation is one of the proposed mechanisms of anterograde memory loss. Thus, the ingestion of more than one sedating substance will result in an [sic] additive effect on memory loss.

Based on the information provided, it is my opinion that an individual using benzodiazepines, opiates and alcohol as described in the documents provided would be at an additional risk of experiencing memory loss during the period of use.

[304] Dr. Sobey then reviewed Mr. Biehl's prolonged history of substance abuse and concluded that "[t]his pattern of substance use would markedly increase the risk of consequences including memory loss."

[305] I have considered the written submissions of counsel that were more focused on admission of his report than the weight it ought to be given. I find Dr. Sobey's comments on the nature and extent of Mr. Biehl's consumption of certain prescribed medications as it may affect the reliability of his memory to be of very limited assistance to the Court as a form of specialized knowledge. It is of some relevance; Dr. Sobey is a properly qualified expert; and there is no exclusionary rule prohibiting the receipt of his evidence (Mohan).

[306] Given that Dr. Sobey has never assessed Mr. Biehl, and the records provided may only constitute part of Mr. Biehl's consumption of prescription drugs in circumstances where it is likely that Mr. Biehl also has consumed unknown quantities of non-prescribed drugs and other intoxicants, I find that I am unable to attach much weight to Dr. Sobey's opinions about the effect Mr. Biehl's consumption of prescription medication may have had on his memory of the events at issue in this trial.

[307] I also note that Mr. Biehl's ability to recall and accurately testify about events relevant to his dealings with Mr. Strang and the advances of funds is just one part of the equation. His overall credibility and reliability as a witness are solely for this Court to determine. These are matters in relation to which the trier of fact can form his or her own conclusions and the opinion of an expert is unnecessary (R. v. Abbey, [1982] 2 S.C.R. 24).

VIII. The Positions of the Parties

[308] I have reviewed the detailed written submissions and the authorities provided on behalf of the plaintiff, the corporate defendants, and the defendant Ms. Strang. There was nothing provided on behalf of Mr. Strang. To summarize these submissions in anything other than a summary way would unduly lengthen this judgment.

A. The Plaintiff, Mr. Biehl's Position

[309] The plaintiff advanced funds to the defendants Mr. Strang, Ms. Strang, and the Orchard to establish a treatment centre. There was no enforceable legal agreement in relation to the funds advanced; therefore, the defendants were unjustly enriched.

[310] Remedies for unjust enrichment are restitutionary: either a monetary or proprietary remedy. The Court has an equitable jurisdiction to fashion an appropriate remedy that recognizes the plaintiff's contribution to the business and to the properties acquired for that purpose. The appropriate approach to quantifying the remedy in this case is value received. The plaintiff was the only source of funding available to the defendants; therefore, the remedy should reflect the value they received from the advances. An award based on the value received model would follow the expert evidence of Mr. Riback - a return of principal with interest between 15-18% and a 30% warrant coverage entitling ownership.

[311] Alternatively, the Court may quantify the value of the contribution on the basis of the plaintiff's loss from the sale of his SAIC shares to raise funds for the advances, or on a value survived approach reflecting the understanding as between the parties that the plaintiff would receive a return of principal and an ownership interest in the business.

[312] The restitutionary award should be made against all defendants jointly and severally, and secured by an equitable lien. The individual defendants engaged in wrongdoing through the corporate defendants and intermingled their personal funds with that of the corporations. The Court has jurisdiction to grant an equitable lien against the defendants' properties to secure restitution. Alternatively, and in particular if the award is not joint and several or secured by an equitable lien, a constructive trust should be imposed against the properties held by the business and the profits of the business.

[313] The plaintiff also claims the personal defendants and the Orchard breached their fiduciary duties to the plaintiff. They were in a fiduciary relationship because the plaintiff was vulnerable, due to substance abuse issues and a propensity to be taken advantage of, and as trustees of the funds advanced. The Court may grant a wrong-based constructive trust as a remedy for the defendants' legal wrongs.

B. The Corporate Defendants' Position

- [314] The funds advanced by the plaintiff were a personal loan and not an equity investment. The communications led as evidence demonstrate a loan. The original writ filed in 2007 pleaded breach of contract for a loan as between the plaintiff and Mr. and Ms. Strang, but not the corporate defendants. There is no valid claim against Snug Cove; it was not alleged to be a party to the agreement and did not receive any funds from the plaintiff. The Court ought to conclude, upon carefully scrutinizing all the evidence in keeping with the principles articulated in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 (B.C.C.A.), that a loan is most consistent with the preponderance of probabilities a practical and informed person would recognize as reasonable in the circumstances.
- [315] Where there is a loan agreement but no due date for repayment or express interest rate, the Court can find an enforceable agreement and imply a payment date and interest rate. Where there is no payment date the common law treats the loan as payable on demand. Where there is a mutual intention of interest being charged but no specific rate s. 3 of the Interest Act, R.S.C. 1985, c. I-15, applies.
- [316] There is no basis for a claim of unjust enrichment as the loan agreement is a juristic reason for the enrichment of the defendants. If there is unjust enrichment, the change in position defence arises.
- [317] In relation to the quantification of damages, the expert evidence of Mr. Bowie is to be preferred over Mr. Riback. The latter's report is based on venture capital investment in the tech-sector, ignores the circumstances of the personal investment, and is based on faulty assumptions about the business at the time of the investment and the valuations of the corporate defendants.
- [318] The serious allegation of a misappropriation of funds, synonymous with fraud, is unsupported and inconsistent with the evidence. The allegation of a fiduciary duty is against Mr. and Ms. Strang and the Orchard, not Snug Cove. There is no fiduciary relationship as there is no duty of loyalty; the defendants were not obligated to only consider the plaintiff's interests and not their own interests.
- [319] In relation to equitable relief, the plaintiff does not come to court with clean hands. He lied to the U.S. Internal Revenue Service or to the Court in relation to the advance and surreptitiously recorded conversations with Mr. Strang. The plaintiff is not entitled to equity.
- [320] An award of damages should be calculated based on the Foreign Money Claims Act, R.S.B.C. 1996, c. 155. The award should measure the damages in U.S. dollars and then covert to the amount of Canadian dollars required to purchase the U.S. dollar amount as of the date of the judgment.

C. The Defendant Ms. Strang's Position

- [321] The plaintiff advanced funds as a loan. The plaintiff is owed repayment of his loan, but Ms. Strang is not liable for repayment. The agreement was between the plaintiff and Mr. Strang. There is no valid claim of unjust enrichment because the loan is a juristic reason for the enrichment.
- [322] In relation to the claim of unjust enrichment, the plaintiff did not confer a direct benefit on Ms. Strang. The plaintiff has not established that the funds were used for personal expenses. Any benefit received through wages or compensation is incidental or collateral and insufficient. Her interest in the corporate defendants as a result of the family litigation is not a benefit conferred by the plaintiff. If there is unjust enrichment, the change of position defence arises in relation to the corporate defendants' repayment of Mr. Strang's shareholder's loan as repayment for the plaintiff's loan.
- [323] If unjust enrichment is established, a monetary remedy, always considered first, is appropriate; a proprietary remedy is not appropriate because the plaintiff has not established that the funds were directly applied to acquire the property. With respect to quantum, the upper limit of a monetary remedy ought to be the 10% interest sought by the plaintiff through the Sakai Iwanaga promissory note. There is no authority to support joint and several liability against Ms. Strang as the wife of a shareholder.
- [324] There was no fiduciary relationship between the plaintiff and Ms. Strang. There was no trustee relationship or relationship of vulnerability abused by Ms. Strang.

IX. Findings and Analysis

A. Was there a Loan Agreement?

- [325] The plaintiff advanced funds between May 2001 and September 2002 to Mr. Strang and the Orchard to establish a recovery centre on Bowen Island. The plaintiff submits that the advances were not pursuant to a loan agreement, and that on the evidence no enforceable agreement may be found. The available evidence regarding Mr. Strang's position is that he considers their agreement to have included a 50 percent interest in the Orchard, and perhaps a 50 percent interest in Snug Cove, but more likely not. At times he thought interest was owed to Mr. Biehl and at other times he considered Mr. Biehl to be entitled to an equity interest in the Orchard. The corporate defendants argue that the plaintiff's advances were as a result of an enforceable loan agreement, and to the extent that terms of the agreement are lacking regarding when repayment of principal was to occur or the rate of interest, the Court may determine those terms. They submit the agreement, as the Court ought to find it, was simply a loan and never included an interest in the Orchard or Snug Cove. Ms. Strang argues that she was not party to any such agreement with Mr. Biehl, either in her personal capacity, or through the corporate defendants, in which she is not an officer, director, or shareholder.

[326] In G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada, 2006) the general nature of a contract as an agreement is discussed, beginning at 5:

Contract is a jural relation that is founded upon agreement, that is, upon the manifestation of a mutual concordance between the parties as to the existence, nature and scope of their rights and duties.

[327] At 6, the author continues:

There may not be contract without agreement (however that agreement is reached or defined); but there can be agreement without contract. A contract is a species of agreement. It is a legal relationship that is a variety of agreement.

[328] A loan is a specific type of contract. Several recent cases of this Court deal with loans. In *Curzon v. Curzon*, 2003 BCSC 1715, Rogers J. discussed the "essential elements of a loan transaction":

26 There is no juristic reason for Mr. Terry Curzon's enrichment. I find that the \$1,500 was a gift from him and his wife. They made that gift to help their son and daughter-in-law buy a house. The \$1,500 was no loan for there was never a discussion about repayment terms, interest, or consequence of default. These are all essential elements of a loan transaction. The \$1,500 was no investment for [were it] intended to be an investment Terry Curzon's interest on title would have reflected the proportion the \$1,500 bore to the cash Mr. and Mrs. Curzon put up. They had only \$1,000 and if their title were to reflect initial investment they would have had something less than a 50% interest. Finally, it would be manifestly unfair for the court to permit Mr. Terry Curzon to have 1/3 of the house's value when he made no contribution to payment of interest or principal on the mortgage debt.

[329] In *Lee v. 1137434 Alberta Ltd.*, 2009 BCSC 284 [Lee], Satanove J., referred to the definition of a loan as discussed in *Black's Law Dictionary*, 4th ed.:

[9] The appellant submitted that the learned trial judge could not identify the terms of the loan, because they did not exist with any certainty. The appellant relied on *Black's Law Dictionary*, 4th ed., and the decision of *McLendon v. Johnson*, 71 GA. App. 424 (1944), for the principle that the four elements of a loan include a principal sum, a placing of the sum with a safe borrower, an agreement that interest has to be paid, and a recognition by the receiver of money of his liability for return of the principal amount with accrued interest.

[10] The excerpt from *Black's Law Dictionary* also refers to *Parsons v. Fox*, 179 Ga. 605 (1934), wherein the court defined a loan as delivery by one party and receipt by another party of money on agreement, express or implied, to repay the money with our [sic] without interest.

[330] On either conception of the elements of a loan set out in *Lee*, I cannot find in the present case that there was, as stated by Fridman, a "mutual concordance between the parties as to the existence, nature and scope of their rights and duties." There cannot be a contract without agreement, but there may be agreement without contract. The evidence suggests

that there was an agreement between Mr. Biehl and Mr. Strang that the funds would be advanced for a particular purpose, namely to develop a recovery centre on Bowen Island and that they were not a gift, but that is its full known extent. Both conceptions of a loan require an agreement as to, at the very least, some terms of repayment. However, the corporate defendants submit that absent a date for repayment, the Court may still find an enforceable agreement, as an advance of funds without terms as to repayment is, it is argued, presumptively a debt due and owing, and payable on demand. They refer to *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corp.*, 2007 BCSC 286, where Wedge J., in the context of a dispute as to whether an advance of funds constituted a shareholder's loan or capital investment, stated:

- [58] As noted by the court in *Marsuba*, funds advanced to a company by its shareholder may be in the nature of a demand loan even though there is no expectation of repayment until the company is profitable. The fact that an advancement of funds does not contain terms as to time for repayment does not render the advancement something other than a loan. To the contrary, it is presumptively a debt due and owing and payable on demand.
- [59] I take from both *Laronge* and *Marsuba* that whether an advancement of funds by a shareholder to his or her company is a loan or an investment of capital is a question of fact to be determined by reference to all of the surrounding circumstances.
- [331] I do not take the above passages to stand for the immutable proposition that an advance of funds without a repayment date constitutes a demand loan; as reflected in para. 59, whether an advance is a loan, or an advance of capital is a question of fact to be determined by the circumstances.
- [332] The corporate defendants also refer to s. 3 of the *Interest Act* as providing for a default interest rate where none is provided. That provision states:

Interest rate when none provided

3. Whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by the agreement or by law, the rate of interest shall be five per cent per annum.
- [333] I accept that Mr. Strang and Mr. Biehl agreed that the amount of funds Mr. Biehl would contribute to develop and open the recovery centre was up to US \$1 million; however, I am unable to make any findings as to what else Mr. Biehl was to receive other than the repayment of his principal. Interest was discussed at various times, but it is unclear if interest was to be paid, or if he was to receive a portion of the annual net proceeds of the Orchard, and/or an equity position in the Orchard, and potentially Snug Cove. Whatever agreement beyond the amount and purpose that Mr. Biehl and Mr. Strang had, if there was one, became ever more elusive as time passed, and each of them engaged in substance abuse, other people got involved, and the Orchard prospered on the improved lands owned by Snug Cove. As stated, beyond the principal amount advanced and the purpose for the advances, I am unable to find certainty as to terms. To do otherwise would be to engage in

judicial speculation.

- [334] Therefore, I do not find any agreement as between Mr. Biehl and Mr. Strang that interest was payable on the funds advanced. Section 3 of the Interest Act requires interest "payable by the agreement of the parties". Interest payable by law does not apply.
- [335] Further, on the evidence there was clearly no agreement of any sort between Mr. Biehl and Ms. Strang. She knew of her husband's obligation, knew the funds had gone to develop the Orchard and the properties upon which it operated, and felt duty bound to attempt to honour Mr. Biehl's "loan", without a full appreciation of their deal.
- [336] The more recent comments of Mr. Strang generously offering Mr. Biehl a 50 percent interest in the Orchard was something the parties appear to have considered earlier, but its revival now is equally likely to be an effort to diminish the share of Mr. Strang so there is less to then divide with Ms. Strang in the pending matrimonial proceedings.
- [337] Therefore, I find there is no enforceable contract as to the terms upon which those funds were advanced by Mr. Biehl to Mr. Strang and the Orchard. It is then necessary to consider unjust enrichment.

B. Unjust enrichment

1. General Principles

- [338] Unjust enrichment requires an enrichment of the defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. The benefit must be tangible, and it can be positive or negative. The deprivation must correspond to the enrichment. The absence of a juristic reason requires there to be no reason in law or justice for the enrichment, making it unjust.
- [339] While many leading authorities on unjust enrichment concern domestic relationships, the basic principles concerning the rights and remedies for unjust enrichment are the same for all cases.
- [340] The remedies for unjust enrichment are restitutionary in nature; the object of the remedy is to repay or reverse the unjustified enrichment. The remedy may be monetary or proprietary.
- [341] The first remedy to consider is always a monetary award. The monetary award may be quantified on a value received or quantum meruit basis, calculating the monetary value of unpaid services, or on a value survived basis, the proportionate contribution of the party to an asset in relation to a comparable share in its value.
- [342] Where the plaintiff establishes that a monetary award is inappropriate or insufficient, including on the basis of the probability of recovery or a reason for the additional property rights, a proprietary remedy may be required. Where the plaintiff can demonstrate a "sufficiently substantial and direct" link, causal connection, or nexus between the

contribution and the acquisition, preservation, maintenance, or improvement of the asset at issue, the party can be granted a constructive trust in relation to a share of the asset proportionate to the unjust enrichment.

2. Kerr v. Baranow

[343] In relation to the principles of unjust enrichment generally, the parties relied upon *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 [Peel]; *Peter v. Beblow*, [1993] 1 S.C.R. 980; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 [Garland cited to S.C.R.]; and *Wilson v. Fotsch*, 2010 BCCA 226 [Wilson]. The following paragraphs from *Kerr v. Baranow*, 2011 SCC 10 [Kerr], summarize the law of unjust enrichment, largely subsuming the above authorities, and are particularly relevant to this case:

[31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 788. For recovery, something must have been given by the plaintiff and received and retained by the defendant without juristic reason. ...

...

(1) Enrichment and Corresponding Deprivation

[36] The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.

...

(2) Absence of Juristic Reason

[40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

[41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (*Peter*, at pp. 990-91; *Garland*, at para. 44; *Rathwell*, at p. 455). ... However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract" (*Peel*, at p. 803).

...

[43] In *Garland*, the Court set out a two-step analysis for the absence of juristic reason. It is important to remember that what prompted this development was to ensure that the juristic reason analysis was not "purely subjective", thereby building into the unjust enrichment analysis an unacceptable "immeasurable judicial discretion" that would permit "case by case 'palm tree' justice": *Garland*, at para. 40. The first step of the juristic reason analysis applies the established categories of juristic reasons; in their absence, the second step permits consideration of the reasonable expectations of the parties and public policy considerations to assess whether recovery should be denied:

First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. . . . The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. [paras. 44-46]

[44] Thus, at the juristic reason stage of the analysis, if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties (*Pettkus*, at p. 849) and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). ... Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).

...

[46] Remedies for unjust enrichment are restitutionary in nature; that is, the object of the remedy is to require the defendant to repay or reverse the unjustified enrichment. A successful claim for unjust enrichment may attract either a "personal restitutionary award" or a "restitutionary proprietary award". In other words, the plaintiff may be entitled to a monetary or a proprietary remedy (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 669, per La Forest J.).

(a) Monetary Award

[47] The first remedy to consider is always a monetary award (Peter, at pp. 987 and 999). In most cases, it will be sufficient to remedy the unjust enrichment. However, calculation of such an award is far from straightforward. ...

...

[49] A second difficulty arises from the fact that some courts and commentators have read Peter as holding that when a monetary award is appropriate, it must invariably be calculated on the basis of the monetary value of the unpaid services. This is often referred to as the quantum meruit, or "value received" or "fee-for-services" approach. This was followed in *Bell v. Bailey* (2001), 203 D.L.R. (4th) 589 (Ont. C.A.). Other appellate courts have held that monetary relief may be assessed more flexibly -- in effect, on a value survived basis -- by reference, for example, to the overall increase in the couple's wealth during the relationship: *Wilson v. Fotsch*, 2010 BCCA 226, 319 D.L.R. (4th) 26, at para. 50; *Pickelein v. Gillmore* (1997), 30 B.C.L.R. (3d) 44 (C.A.); *Harrison v. Kalinocha* (1994), 90 B.C.L.R. (2d) 273 (C.A.); *MacFarlane v. Smith*, 2003 NBCA 6, 256 N.B.R. (2d) 108, at paras. 31-34 and 41-43; *Shannon v. Gidden*, 1999 BCCA 539, 71 B.C.L.R. (3d) 40, at para. 37. ...

(b) Proprietary Award

[50] The Court has recognized that, in some cases, when a monetary award is inappropriate or insufficient, a proprietary remedy may be required. *Pettkus* is responsible for an important remedial feature of the Canadian law of unjust enrichment: the development of the remedial constructive trust. Imposed without reference to intention to create a trust, the constructive trust is a broad and flexible equitable tool used to determine beneficial entitlement to property (*Pettkus*, at pp. 843-44 and 847-48). Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour (*Pettkus*, at pp. 852-53; *Sorochan*, at p. 50). ...

[51] As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (Peter, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, at p. 454). A minor or indirect contribution will not suffice (Peter, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith* (1984), 42 R.F.L. (2d) 154, at p. 156). ...

[Emphasis added except as to headings.]

[344] In Peel, McLachlin J., as she then was, in majority reasons, discussed the nature of the benefit required to support a claim of unjust enrichment. The benefit must be direct and specific to the party against whom recovery is sought; incident and collateral benefits are insufficient. It was held, at 797:

While not much discussed by common law authorities to date, it appears that a further feature which the benefit must possess if it is to support a claim for unjust enrichment, is that it be more than an incidental blow-by. A secondary collateral benefit will not suffice. To permit recovery for incidental collateral benefits would be to admit of the possibility that a plaintiff could recover twice -- once from the person who is the immediate beneficiary of the payment or benefit (the parents of the juveniles placed in group homes in this case), and again from the person who reaped an incidental benefit. See, for example, Fridman and McLeod, *supra*, at p. 361; Maddaugh and McCamus, *supra*, at p. 717; and, Gautreau, *supra*, at pp. 265 et seq.

[345] In Wilson, Huddart J.A., for the majority, distinguished between the value received and value survived approaches to quantifying a monetary remedy:

Value Received Approach

[59] When an award is made on a value received basis, it should be equal to the benefit received by the defendant. "In order to determine the value of the services rendered ... it is necessary first to determine which of the services provided ... are compensable": Clarkson at para. 69. To this inquiry, any agreement of the parties will be relevant, as will be the Walsh factors. If the parties had a *de facto* agreement on the amount of their individual contributions to their relationship, or about which services each was to provide for the benefit of both or to the property of one, the court should be careful not to compensate out of proportion to their agreed roles. This factor is not intended to wipe out an award, where unjust enrichment has been found, but to ensure that the amount of the award is congruent with the parties' circumstances and expectations. Although there may be additional discounts to factor in (such as equitable set-off, discussed below), there is no assessment of a plaintiff's proportionate share in an asset, or of the increase in value of an asset. Those issues are specific to awards assessed on the value survived approach.

Value Survived Approach

[60] On the valued survived approach, there is no requirement to determine the precise value of the services and other benefits received by the defendant. As a general rule, a party's proportionate contribution to the value of an asset will entitle that party to a comparable share in its value. A ten percent contribution will yield a value equivalent to 10% of the asset; likewise a 50% contribution will yield a half-share

3. Is there an Enrichment?

- [346] It is clear in the present case that Mr. Strang, and the Orchard and Snug Cove were all enriched directly by the US \$980,000 advanced by Mr. Biehl. The funds Mr. Biehl advanced were the "seed monies" to what became a very successful business over time. In 2001/2002 when the funds were advanced, Mr. Biehl was the only source of financing available to Mr. Strang and then to what became the Orchard. The funds provided by Mr. Biehl gave life to Mr. Strang's plan for developing a recovery centre on Bowen Island and those funds sustained the early forward momentum of the Orchard.
- [347] The transfer of funds from Mr. Biehl directly to Mr. Strang, the Orchard, and Snug Cove via 525718 B.C. Ltd., clearly constitutes an enrichment to them, and likewise conferred a benefit: Garland at para. 36.
- [348] Given the proven pathway and uses of the funds advanced by Mr. Biehl it cannot be said that the Orchard and Snug Cove did not directly benefit from them. The first three of Mr. Biehl's advances to Legacy Tax & Trust came to be deposited first to the US funds account, and then the Canadian funds account of 625656 B.C. Ltd., which then became the Orchard. Subsequent advances were made by Mr. Biehl to the Orchard's US bank account, and then moved to the Orchard's Canadian accounts and expended on matters pertaining directly to the development of the recovery centre, or transferred to 525718 B.C. Ltd. and expended on renovations and improvements to both the Grafton Road property and Cates No. 1, owned by Snug Cove. The earlier advances of funds made by Mr. Biehl substantially paid the mortgages on the Grafton Road property and the Strangs' residence on the Harding Road property in late 2001 and into 2002 when the Strangs were in dire financial straits.
- [349] It must be remembered that until the Orchard opened and started having clients in April 2002 Mr. Biehl was the only substantial source of funds to develop the premises and the business. His funds, along with the revenue generated by early clients, carried the Orchard and the further development of Snug Cove during the first several lean years. Without the development of the business and funds to pay rent and maintain the option to purchase Cates No. 1, it is very unlikely that the North Shore Credit Union would have granted the large commercial mortgage it did in the spring of 2003, albeit with the likely forged documents that permitted the credit union priority for its mortgage over the funds advanced by Mr. Biehl. Indeed, a condition of it doing so was priority over Mr. Biehl's substantial investment of funds, referred to on the Orchard books during that time as "due to investor".
- [350] Further indicia over time of the benefit conferred by Mr. Biehl's funds are the Orchard's significant gross income and net profits, its ability to pay increasingly valuable salaries to Mr. and Ms. Strang (even though the former has been prevented from contributing to the success of the Orchard and Snug Cove since March 2007 by court order), and its ability to expand its business.

- [351] As the business of the Orchard grew and became profitable it provided an assured source of rent to Snug Cove for the Grafton Road property and Cates No. 1, and the impetus to purchase Cates No. 2 in 2006. Snug Cove uses the rental income to pay the substantial commercial mortgage, expanded to cover all three properties, granted by the North Shore Credit Union.
- [352] In terms of enrichment of the Strangs and the Orchard, Mr. Biehl's funds indirectly facilitated their purchase and sale of the property in New Westminster at a profit, the net proceeds of which were paid to the Orchard, the payment of their residential mortgage for six months in 2001/2002, the mortgage over the Grafton Road property at a time when there was little or no income to 625656 B.C. Ltd., and the payment of significant legal fees (in excess of \$44,000) in relation to a dispute between Snug Cove and a former tenant at the Grafton Road property.
- [353] No one can dispute that both Mr. and Ms. Strang worked very hard to start the Orchard. Ms. Strang continues to work hard to run it. While it was and is appropriate for the Strangs to receive competitive salaries for their efforts, Mr. Strang has continued to receive a salary of \$15,000 per month since March 2007 paid by the Orchard (and other related benefits) although he is not permitted to be involved in its operations. Their respective residential mortgages have been paid by the Orchard since separation, as have their vehicle leases for a time. I assume that some or all of these benefits have been recorded against Mr. Strang's shareholder's loan. Regardless, the Strangs and their children enjoy a significant measure of financial security. The Orchard and Snug Cove are legally owned by Mr. Strang. The Strangs, marriage-breakdown issues aside, are entitled to benefits from the Orchard and Snug Cove. However the genesis of the corporate defendants' present financial success is due in significant measure to the funds advanced in 2001/2002 by Mr. Biehl. As such I find an unequivocal and direct benefit to Mr. Strang, the Orchard and Snug Cove from the funds advanced by Mr. Biehl.
- [354] I have considered whether Ms. Strang has received a direct benefit specific to Mr. Biehl and have concluded that any benefits she has received are what are called in the jurisprudence "incidental" and "blow by". The most obvious benefit to her, the payment of the mortgage on the Harding Road property for six months for a total of \$10,534.38 (of which only half is really attributable to her), is more than cancelled out by the fact that the Strangs have used their matrimonial property, the Harding Road property, as security for various mortgages received by the Orchard and Snug Cove. The wages and salary Ms. Strang has received have been earned by her, and while the amount she is paid currently may seem excessive to some, it is entirely within the legal authority of the Orchard and Snug Cove to pay the salaries they consider appropriate. Employment for the Strang children is incidental. Lastly, while the Orchard has been generous, perhaps overly generous, in terms of expenses claimed as business expenses, in the main Ms. Strang has been aware of the need to distinguish between personal and business expenses, and has done so.

[355] Therefore, while Mr. Strang, the Orchard, and Snug Cove have received direct benefit from Mr. Biehl's funds, I find that Ms. Strang has not.

4. Is there a Corresponding Deprivation?

[356] Mr. Biehl was deprived of US \$980,000 from September 2002 onwards with only limited repayment commencing in September 2005.

5. An Absence of Juristic Reason?

[357] Mr. Biehl's advancement of funds was clearly not a gift to any of the defendants. I have found there is no enforceable contract of loan between the plaintiff and any defendants. I find there is no juristic reason for the enrichment of the defendants to his detriment.

[358] A similar result has been reached in other cases bearing a certain similarity on their facts. In *Manderson v. Foster*, 2000 BCSC 787 [Manderson], the defendant was enriched by the plaintiff's payments and labour in relation to a property; however, there was no enforceable contract, and no juristic reason, because there was uncertainty as to the interest each party was to have in the property. In *Miller v. Miller*, 2002 BCSC 93, the purported contract between the defendant son and the plaintiff father in relation to working in the family business toward a future interest was too vague to be enforceable; there was no juristic reason. In *Kreeft v. Kreeft*, 2001 BCSC 893, an agreement between a father and his sons, verbal and general in nature, that their labour would result in an interest in the family auto body shop, was not an enforceable contract and did not constitute a juristic reason. In *Fraser Valley Credit Union v. Siba*, 2001 BCSC 744, the Court cited the principle from *Manderson* that an agreement "not enforceable as a contract does not constitute a juristic reason."

[359] Further, it is not difficult in the present case to find that Mr. Biehl had a reasonable expectation of a return on the funds he advanced in the unique circumstances of his investment and Mr. Strang, and the corporate defendants at the material time under his sole control, were aware of that expectation. Their many efforts at setting out their agreement show at least that much. The present case is also quite similar to *Palethorpe v. Bogner*, [1995] B.C.J. No. 2311, 1995 CarswellBC 2747 (B.C.C.A.) [Palethorpe], in which the Court of Appeal agreed with the trial judge that the document before the Court was unenforceable as a contract, the evidence at trial as to it being "quite literally all over the place." In *Palethorpe* at para. 23 Hollindrake J.A. for the Court concluded:

I do not see any alternative here but to refer the matter back to the Supreme Court so the judge may assess what is owing to the appellant either in quantum meruit or for unjust enrichment or, as the judge put it, "to calculate a loss in the amount of the value of his services to the defendants."

[360] A similar result on somewhat different facts was reached in *Foreman v. Chambers*, 2007 BCCA 409.

[361] Therefore, I find Mr. Biehl has made out a prima facie case under the juristic reason component of the analysis.

[362] The steps of the analysis are set out in Garland (paras. 44-46) as quoted above in Kerr. A prima facie case is rebuttable "where the defendant can show that there is another reason why the enrichment should be retained." This "category of residual defence" permits the Court to "look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery."

[363] At this point in the analysis the change of position defence has advanced on behalf of the corporate defendants arises. Absent a successful advancement of this defence, I do not find that there is any reason to deny Mr. Biehl recovery. There are no reasons why Mr. Strang and the corporate defendants should retain the enrichment. The reasonable expectations of the parties included repayment of the principal amount advanced by Mr. Biehl with a rate of return that was at least reasonable, if not generous, given the risks associated with starting a private recovery centre on Bowen Island with the Strangs as inexperienced management.

6. The Change of Position Defence on behalf of the Corporate Defendants

[364] If unjust enrichment is established, restitution may be denied if the defendant can demonstrate that it has materially changed its position as the result of an enrichment, and that it would be inequitable, or constitute an injustice, to disgorge the benefit. This is referred to as the change of position defence. In Garland, Iacobucci J., for the Court, set out the principles of the change of position defence as follows:

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (Storchoaks, supra). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G.H.L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of

the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (Restitution (2nd ed. 1992), at p. 458). In the leading British case on the defence, *Lipkin Gorman v. Karpnale Ltd.*, [1992] 4 All E.R. 512 (H.L.), Lord Goff stated (at p. 533):

[I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. [Emphasis added.]

[365] Recently, in *Kerr* at para. 112, Cromwell J., for the Court, reiterated the change of position defence as expressed in *Garland*:

...The Court held that the company was in fact asserting the "change of position" defence (that is, the defence that is available when "an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned": para. 63). This defence is considered only after the three elements of an unjust enrichment claim have been established: para. 37. ...

[366] In the present case it cannot reasonably be said that Mr. Strang, the Orchard or Snug Cove are innocent defendants. Their collective financial viability hinged on the funds advanced by Mr. Biehl. The conduct of Mr. Strang, who it must be remembered is the sole shareholder, officer, and director of both the corporate defendants, has been dishonest in a number of regards. What was initially recognized as a loan to the Orchard from Mr. Biehl in March 2003 was mysteriously transformed into a shareholder's loan for exactly the same amount by Mr. Strang to the Orchard at a time when it was clearly advantageous to the Orchard (and to Snug Cove, given their entwined business relationship) to have the debt disappear from its books. This occurred when Mr. Strang was the sole signing authority for both the corporate defendants and was authorized to carry on their business. This transformation, as indicated earlier, involved Mr. Strang asserting his version of the agreement with Mr. Biehl that is at issue in this trial to his own advantage and to the advantage of the corporate defendants. It has conferred tax benefits upon the Strangs and served to further complicate matters for Mr. Biehl.

[367] I also note there is no written shareholder's loan agreement in evidence between Mr. Strang and the Orchard. There is no evidence that one ever existed. Mr. Strang has declined to testify on his own behalf and has not been called on behalf of the corporate defendants.

- [368] A preponderance of evidence indicates that Mr. Strang likely forged or had forged the documentation purporting to have been signed by Mr. Biehl and witnessed by "Susan Hughes" that was necessary to give the North Shore Credit Union priority for its commercial mortgage in 2003. That mortgage permitted Snug Cove to purchase Cates No. 1, which was an integral part of the Orchard's overall operations. Without the ability to follow through on the purchase of Cates No. 1, already significantly renovated with funds advanced by Mr. Biehl, there was a significant risk of failure for the Orchard.
- [369] Mr. Strang also instructed Mr. Johnson in December 2007 with regards to the statement of defence filed on behalf of himself and the corporate defendants at a time when the court order of Preston J. in the matrimonial action, dated March 15, 2007, gave Ms. Strang the authority to do such things on behalf of the corporate defendants and required him to "authorize, cooperate with and permit" Ms. Strang in such matters. He then indicated in examination for discovery that he had not provided the instructions to Mr. Johnson regarding the statement of defence, which is simply untrue, given the testimony of Mr. Johnson.
- [370] The taped conversations reveal that Mr. Strang was, at least at that time, willing to do or say anything he could to jeopardize Ms. Strang's claims to family and business assets in the matrimonial proceeding, including inviting Mr. Biehl to assist him to the same end.
- [371] I conclude that Mr. Strang and the corporate defendants may not be characterized as innocent defendants. While they received the benefit of the funds from Mr. Biehl and spent them in the development of the recovery centre as agreed, their conduct over the years in terms of jeopardizing Mr. Biehl's interests has been dishonest and deceitful.
- [372] Finally, I find that while Mr. Biehl may have had his own reasons for characterizing his agreement with Mr. Strang and the Orchard in different ways over the years, I do not find anything in his conduct that jeopardizes his claim based on unjust enrichment. His dealings with the IRS are irrelevant to the present case except as they reflect on his credibility and reliability as a witness. His surreptitious recording of telephone calls with Mr. Strang, while clearly not a practice to be encouraged, does not disentitle him to equitable relief in the circumstances of this case. Ultimately this case does not turn on the content of the recorded telephone calls. "If equitable relief can be established without reliance on the misconduct then equitable recovery generally is not barred": DeJesus v. Sharif, 2010 BCCA 121 [DeJesus], at para. 84. What Mr. Biehl did in either instance does not have such "an immediate and necessary relation to the equity sued for": DeJesus at para. 85.

7. The Appropriate Remedy

- [373] I have concluded that an appropriate remedy in this case is both a monetary one and a proprietary one. I do not regard the value survived approach to be of assistance because Mr. Biehl contributed funds and Mr. and Ms. Strang contributed their time and effort, which is virtually impossible to place a value on, given that neither had a history of employment, experience, or particular expertise in setting up a recovery centre.
- [374] Value received can value the benefit to the defendants or the detriment to the plaintiff. In *Dyrnaes v. Mooney*, 2008 BCSC 687, the plaintiff advanced funds to the defendant, without certainty as to the terms, so that the latter could meet financial obligations in relation to real property; the monetary remedy was a sum equal to the difference between the amount of interest paid to the plaintiff and the amount that the defendant would have paid had he negotiated a conventional mortgage. In *Conzatti v. MacDonald*, [1998] B.C.J. No. 1924 (S.C.), the plaintiff advanced funds to the defendant with an expectation of repayment but without specific terms; restitution was ordered at an interest rate of 7.75%, which reflected the amount of interest that would have been payable on the defendant's line of credit, against which the funds were applied. In *Smith v. Landstar Properties Inc.*, 2010 BCSC 843, the plaintiff made out a claim for misrepresentation. The plaintiff advanced funds to the defendant, which were to be secured against real property but were not; restitution was based on "the difference between the interest actually paid to the plaintiff and the price a reasonable person would have paid for an unsecured loan" using the market interest rate (para. 30).
- [375] In this case, because Mr. Biehl and Mr. Strang had such different ideas about what their agreement was, it is not possible to look to "a de facto agreement" as to what their respective contributions to the recovery centre were to be. In the present case an award made on a value received basis should be, as best as may be determined, equal to the benefit received by the defendants. However, I am mindful of the general caution that the remedy ought not to compensate the plaintiff beyond the bounds of what was initially considered. It is important that the award be as congruent as possible with the circumstances and expectations of Mr. Biehl and Mr. Strang when the funds were advanced.
- [376] In the alternative, counsel for the plaintiff suggested to the Court that a remedy based on valuing the detriment to Mr. Biehl from the sale of his SAIC shares (to obtain the funds advanced to Mr. Strang and the Orchard) would be an appropriate approach. Had Mr. Biehl not sold those shares I am advised that their present value as of the date of the trial would have been US \$2,933,881.55. He sold them on October 26, 2001, for a total of US \$1,980,732.60. I find that any one of a number of factors other than Mr. Biehl selling some shares to raise money to invest in the recovery centre, could have influenced whether Mr. Biehl kept the SAIC shares long enough to capitalize on their present value. I reject this approach as too hypothetical and speculative.

- [377] In terms of quantifying the remedy I find the best evidence of the value received in this case to be that of Mr. Riback: that an angel investor like Mr. Biehl who provided the funds to the defendants "should be entitled to a fixed, secured, term debt instrument with interest in the range of 15 - 18% per annum together with 30% warrant coverage entitling the investor to own 30% of the enterprise."
- [378] With regards to an appropriate interest rate on the funds advanced by Mr. Biehl, I find that 15 percent is in the range of what the defendants had paid to secured lenders in the past: the 15.25 percent interest charged by Reliant Capital Corp. in 2005, interest at one percent per month charged by Reliant Capital Corp. in 2003, and the 14.45 percent interest charged by Mahogany Capital Corp. when Snug Cove borrowed money in 1999. Mr. Riback suggested that a debenture with interest of 15 percent per annum, with security as a first charge on all the assets of the Orchard and a mortgage on real property subordinate to existing mortgages, would be a likely scenario.
- [379] In the circumstances of this case I find that the interest rate to be paid on the principal amount advanced by Mr. Biehl ought to be and is 15 percent, to be calculated annually. This is in keeping with what the defendants had paid in the past when the borrowed funds were secured, and in line with Mr. Riback's opinion, although he suggested that the interest compound monthly, which I regard as excessive. I do not regard the 10 percent interest rate referred to in the Sakai Iwanaga promissory note (which was to be secured) to be anything other than part of a negotiating strategy.
- [380] Further, I also accept the aspect of Mr. Riback's opinion that Mr. Biehl is entitled to an award of equity equivalent to warrant coverage. Plaintiff's counsel has translated this aspect of Mr. Riback's opinion into Mr. Biehl seeking 30 percent of "past net profits after taxes of the Orchard, and a declaration that he is entitled to a constructive trust with respect to 30% of the future net profits after taxes of the Orchard." Setting aside the matter of the exact percentage for a moment, I find this approach somewhat problematic without expert accounting evidence. I can envisage scenarios going forward where the Orchard's net profits may be deliberately reduced by increasing salaries or by the recovery business of the Orchard being directed into a new corporate vehicle, so as to reduce or eliminate future profits. Alternatively, Snug Cove could decide to raise the rent it charges the Orchard so as to reduce or eliminate all profits to the Orchard.
- [381] Mr. Riback's scenario contemplates "[a] warrant entitling the Angel to acquire 30% of the equity in the Treatment Center for nominal consideration." It is also clear in the scenario reviewed by Mr. Riback that he contemplated that real property was to be acquired and developed as part of the business of the Orchard. That was also the reasonable expectation of Mr. Biehl. As described in the chronology, Mr. Strang and the books of the Orchard considered Mr. Biehl to be an "investor" prior to April 2003. Mr. Biehl was given an Orchard business card that described him as "Principal" when it opened in April 2002. He witnessed the funds he was advancing being expended on the Grafton Road property and Cates No. 1. At times Mr. Strang and Mr. Biehl discussed Mr. Biehl sharing in the profits of the recovery

centre, which Mr. Biehl interpreted to include the real estate upon which it operated.

- [382] In the present case I find that Mr. Biehl is entitled to a proprietary remedy in the Orchard and Snug Cove comprised of an equity position in both, or a payment in lieu of the same. The evidence demonstrates a clear link and a causal connection between his contribution of funds to develop the recovery centre and its successful operation on the real property owned or acquired by Snug Cove and developed to serve the Orchard's business. Mr. Biehl's "seed monies" were directed to both corporate defendants to their considerable financial advantage. In this regard I rely on Kerr (at paras. 50-51) as previously quoted.
- [383] As to the amount of the percentage of the warrant recommended by Mr. Riback, I am of the view that 30 percent is too high for the reason that Mr. Riback's opinion fails to sufficiently take into account the value and importance of the Grafton Road property to the Orchard and its operations. Because the business plan prepared by Mr. Strang in 2001, as considered both by Mr. Riback and Mr. Bowie, had as its main focus the purchase and development of Cates No. 1, and made only passing reference to the Grafton Road property (previously purchased by Snug Cove in which there was a modest equity, and which had been improved by \$400,000 loaned to Mr. Strang from his father), Snug Cove contributed more to successful development of the Orchard than either Mr. Riback or Mr. Bowie gave credit for.
- [384] Therefore, relying on the structure of the investment Mr. Riback described to the Court I find that, in addition to repayment of the principal and interest, Mr. Biehl is also entitled to a 20 percent equity interest in both the Orchard and Snug Cove or a payment in lieu of the same. However, I invite the parties to make further submissions in this regard. I find this to be the preferred approach as compared to a proportionate share of the Orchard's past and future net profits after tax.

8. Joint and Several Liability

- [385] The plaintiff submits that the Court should find the defendants jointly and severally liable. The plaintiff argues that the individual defendants engaged in wrongdoing through the corporate defendants, referring to *Tracy v. Instalogs Financial Solution Centres (B.C.) Ltd.*, 2009 BCCA 110 [Tracy], and that the individual defendants intermingled personal and corporate funds, referring to *Cancedar Log Homes Ltd. v. Hodson*, 2009 BCSC 222 [Cancedar], as grounds for piercing the corporate veil and finding for joint and several liability.
- [386] Counsel on behalf of the corporate defendants and counsel for Ms. Strang submit that ought not to be the case.
- [387] In *Tracy*, at para. 18, Lowry J.A. stated:

[I]t has long been recognized that if a company is formed for the purpose of doing a wrongful act, or when formed is directed by those in control to do something that is wrong, the individuals as well as the company are responsible for the consequences: *Rainham Chemical Works, Ltd. (In Liquidation) v. Belvedere Fish Guano Co.*, [1921] 2 A.C. 465 at 476 (H.L.).

[Emphasis added.]

[388] In *Cancedar*, on the basis of the intermingling of funds between the sole director, shareholder, and principal and the corporations, Allan J. held:

[9] I dismissed Mr. Kuhn's initial application to add Mr. Ronner as a defendant by counterclaim but stated that he could renew his application at the end of the trial if there was any evidence that Mr. Ronner personally received or appropriated any of the funds in question. Mr. Kuhn renewed his application at the end of the trial. Mr. Cuddeford takes the position that there is no evidence which would entitle Mr. Hodson "to pierce the corporate veil". He submits that such evidence "must be unequivocal and it generally must amount to active fraud." When Mr. Ronner testified, he was initially unable to say whether the payments from Mr. Tahmazian went into his *Cancedar* bank account or his *Cancedar BC* account. It appears that the first payment went into the *Cancedar BC* overdrawn account and the second into *Cancedar's* overdrawn account. Mr. Ronner agreed that he takes whatever he needs for his living expenses from both accounts. He said that he does an accounting at the end of the year to assess how much money he has taken out for personal expenses.

[10] In his affidavit of February 22, 2007, Mr. Ronner deposed that he was prepared to sign an undertaking on behalf of *Cancedar* to be responsible for damages and stated that "when this dispute is settled in full, and all of the accounting is complete, I will refund to the defendant what is owed to him".

[11] In my view, the affairs of *Cancedar*, *Cancedar BC*, and Mr. Ronner are so intermingled that they are all properly defendants by counterclaim. Accordingly, *Cancedar BC* and Mr. Ronner are jointly and severally liable with *Cancedar* for any damages owing to Mr. Hodson. I have not distinguished between *Cancedar* and *Cancedar BC* in this judgment.

[389] In considering the above cases I accept that the present case is factually different, but find that the basic principles apply. In my view the evidence and the remedy awarded requires joint and several liability to be found as between Mr. Strang, the Orchard, and Snug Cove; Mr. Strang being the sole officer, director, and shareholder of both the corporate defendants.

[390] The facts show that the funds advanced by Mr. Biehl were intermingled as between Mr. Strang, the Orchard to whom the majority of the funds were paid, and to Snug Cove, who received the benefit of improvements to the Grafton Road property and Cates No. 1. It must be remembered that the majority of Mr. Biehl's advances were received by the Orchard and a significant portion was then diverted to Snug Cove via 525718 B.C. Ltd. There was no effort made to keep separate records for the funds advanced by Mr. Biehl that tracked how

they were spent.

- [391] Further, I find that Mr. Strang set up his relationships with the corporate defendants and 525718 B.C. Ltd. such that he (and by virtue of her marriage Ms. Strang) would benefit directly from whatever gains were made, justly or unjustly. An example of this is the treatment of Mr. Biehl's "loan" to the Orchard, as the same funds became a shareholder's loan owed by the Orchard to Mr. Strang. Another is the misrepresentation to the North Shore Credit Union as to the priority of repayment to Mr. Biehl. Further examples include: the Orchard's payment of Snug Cove's legal bills (approximately \$44,000) with regards to a prior tenant at the Grafton Road property between September 2001 and March 2002; the payment of the Strangs' personal mortgage on the Harding Road property and the mortgage on the Grafton Road property during approximately the same period; and the use of significant funds from Mr. Biehl to renovate, rent, and assist in the purchase of Cates No. 1.
- [392] As previously set out, the funds advanced by Mr. Biehl as "seed monies" went directly to these defendants in one way or another and facilitated the growth and financial success of the corporate defendants. Mr. Strang and the corporate defendants have all been unjustly enriched. Mr. Strang is likely to have also received a personal tax benefit in terms of repayment of the shareholder's loan although I appreciate he disputes some of the payments. In my view Mr. Strang's dishonest conduct with regards to the likely forged signatures of Mr. Biehl and Ms. Hughes on the release and promissory note that facilitated the North Shore Credit Union's grant of the commercial mortgage to Snug Cove in 2003 is, in and of itself, sufficient grounds to "pierce the corporate veil" as between Mr. Strang and Snug Cove.
- [393] I find that it is not appropriate to include Ms. Strang as a defendant who is jointly and severally liable. There is no legal basis upon which to do so simply because she is the wife of Mr. Strang. In the unjust enrichment analysis I have addressed the issue of benefits to her being incidental and in the nature of "a blow by". She is neither a director, officer, or shareholder of the corporate defendants.
- [394] For these reasons I find that the defendants Mr. Strang, the Orchard, and Snug Cove are jointly and severally liable in relation to the award made to the plaintiff, whereas Ms. Strang is not.

9. Is an Equitable Lien an Appropriate Remedy?

- [395] An equitable lien is a somewhat elusive concept. In *Transwest Helicopters v. Int. Aviation Services et al.*, 2002 BCSC 1244, Gill J. referred to authorities that indicate the difficulty in identifying statements of principle concerning the application of an equitable lien. At para. 11, it was held:
- [11] However, the authorities dealing with equitable liens are sparse in terms of guiding principles. In *Halsbury's Laws of England*, 4th ed., reissue (1998), Vol. 28, para 754, the meaning of "equitable lien" is discussed and it is stated:

Although lien is a word which is sometimes used in practice to describe a right which arises by agreement of parties, the word is more commonly, and correctly, used to refer to a right arising by operation of law. It is not possible to state a general principle which will account for the diversity of situations in which an equitable lien arises and there is lack of agreement as to the theoretical basis of the most common equitable liens, those of the vendor and purchaser under a contract of sale, let alone equitable liens generally.

An equitable lien differs from a common law lien in that a common law lien is founded on possession and, except as modified by statute, merely confers a right to detain the property until payment, whereas an equitable lien, which exists quite irrespective of possession, confers on the holder the right to a judicial sale.

[12] The difficulty in stating general principles is echoed by others: See, for example, Phillips "Equitable Liens - A Search for a Unifying Principle", in Palmer and McKendrick, eds. *Interests in Goods*, 2nd ed., (1998) 975. Mr. Phillips states, at 977:

It has been correctly said that the list of equitable liens is "something of a themeless rag bag" and within this "rag bag" it is not easy to discern any coherent statements of principle.

[396] The plaintiff relies on the principles of an equitable lien expressed in 574095 *Alberta Ltd. v. Brendanco Investments Inc.*, 2002 ABQB 277, a case concerning a claim of unjust enrichment and an equitable lien in relation to oil and gas assets. It was held:

67 It is noted that the Court has an inherent equitable jurisdiction to declare that properties or assets encumbered by an equitable lien are charged and encumbered with that lien. This declaration will occur where the relationship between the parties is such that one party is entitled to charge the property of another so as to fulfill the objects of a relationship. Equitable liens generally arise in any circumstances where the imposition of that lien performs equity between the parties.

[397] In the present case I am of the view that it is appropriate to impose an equitable lien in favour of the plaintiff to secure the award made, including an award to the plaintiff of a 20 percent equity interest in the Orchard and a 20 percent equity interest in Snug Cove.

[398] It is perhaps the "elusive" and "themeless rag bag" nature of an equitable lien that makes it such an effective remedy in cases such as this, in order to achieve equity in the context of proven unjust enrichment. Therefore, the assets of Mr. Strang, the Orchard, and Snug Cove are so encumbered.

C. A Remedial Constructive Trust

[399] Given that I have made a restitutionary award based on unjust enrichment, found Mr. Strang and the corporate defendants jointly and severally liable, and determined that the award should be secured by an equitable lien, I decline to impose a remedial constructive trust.

D. Breach of Fiduciary Duty and Misappropriation of Funds

- [400] The plaintiff alleges that Mr. Strang, Ms. Strang, and the Orchard breached their fiduciary duties to him. Mr. Biehl claims that they were in a fiduciary relationship because he was vulnerable, due to substance abuse issues and his propensity to be taken advantage of, and that the Strangs and the Orchard were trustees of the funds he advanced.
- [401] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 [Hodgkinson], at paras. 29-30 the Supreme Court of Canada set out indicia of assistance in recognizing the existence of a fiduciary relationship. While vulnerability is not the distinct feature of fiduciary relationships "it is an important indicium of its existence": Hodgkinson at para. 25. Even if one was inclined to accept that Mr. Biehl, by advancing the funds to Mr. Strang, conferred upon Mr. Strang a power or discretion that he was able to exercise unilaterally in his own interests, I am unable to accept that Mr. Biehl was vulnerable to the extent that he was taken advantage of by Mr. Strang.
- [402] There is no factual basis upon which to allege that Ms. Strang owed a fiduciary duty to Mr. Biehl. To the contrary, the Strangs had Mr. Biehl stay in their home while he received treatment for his addictions by a doctor associated with the Orchard. During that time he advanced the last payment of US \$25,000, which at no time did he say he was pressured or felt obliged to provide.
- [403] I also note that at no point in his testimony did Mr. Biehl describe his substance abuse and addictions as being significantly worse in 2001/2002 than when he testified in 2010. In fact, substance abuse is a vulnerability that both he and Mr. Strang shared then and share now, except that Mr. Strang was in a relatively brief period of sobriety when he was motivated to start the recovery centre. Mr. Biehl could have insisted before he advanced the first large amount of US \$250,000 in November 2001, or on any one of a number of later occasions, on measures to safeguard his interests and he did not. He is an educated man of some means. There is no evidence before the Court that during the time he was advancing the funds he was incapacitated. To the contrary, his diary notes, the steps he took to sell his SAIC shares, and the repeated transfer of funds to Mr. Strang and then to the Orchard over a period of more than a year all indicate a person of no particular vulnerability. There is insufficient information about Mr. Biehl's involvement in the unrelated lawsuit in Hawaii to provide any additional evidence about his purported vulnerability.
- [404] Further, it cannot be said that Mr. Biehl had the right to expect that Mr. Strang or the Orchard would act to further Mr. Biehl's interests over his own: Hodgkinson (at para. 28).

- [405] To the extent the plaintiff alleges that the defendants misappropriated funds from those advanced, that allegation falls short of the mark. The accounting practices of the Orchard, particularly in the early days, were undoubtedly questionable. The conversion of the debt owed by the Orchard to Mr. Biehl as an investor that was switched to a shareholder's loan to the Orchard from Mr. Strang is beyond questionable, as previously discussed. However, I have taken that into account in the unjust enrichment analysis.
- [406] I accept that the Strangs did treat the funds of the Orchard as their own, including those advanced by Mr. Biehl, both in terms of how they spent them and how they failed at times to properly separate personal expenses from business expenses. However, despite the lack of a full accounting I conclude that an amount roughly comparable to the total amount of the funds advanced by Mr. Biehl converted to Canadian funds made its way, one way or another, into either the Orchard or the improvements to real property owned by Snug Cove (the Grafton Road property and Cates No. 1) and the purchase by Snug Cove of Cates No. 1.
- [407] Therefore, I do not find the allegations of breach of fiduciary duty or misappropriation of funds to be proven.

E. A "Wrong-based Constructive Trust (the Soulos Constructive Trust)"

- [408] Given the preceding finding of unjust enrichment and the remedies awarded I regard this to arise only in the alternative, and therefore decline to address it.

X. The Answers to Factual Questions including Foreign Funds and Conversion

- [409] I find the total amount of funds or principal amount advanced by Mr. Biehl to be US \$980,000.
- [410] I find Mr. Biehl to have been repaid by the Orchard in the amount of US \$444,290.81, leaving an unpaid balance of US \$535,709.19 outstanding.
- [411] Given that I have found that the parties never agreed that interest was to be paid, the US amounts repaid to Mr. Biehl to date by the Orchard are to be considered repayments on the principal amount as advanced by Mr. Biehl.
- [412] I have found that Mr. Biehl is entitled to 15 percent interest on the principal amount to be calculated annually. Interest is to be paid in US funds, and runs from the date of the first advance.
- [413] With regards to how the matter of conversion between Canadian and US funds is to be treated I am of the view that throughout this matter funds were advanced by Mr. Biehl and repaid by the Orchard in US funds. The majority of the correspondence generated by Mr. Biehl, Mr. Strang and others refers to the transactions being in US funds. What the exchange rate was at any given time appears to have been immaterial to the considerations of Mr. Biehl and Mr. Strang at the time the funds were advanced. Mr. Strang and the corporate defendants used the amounts received in US dollars to purchase whatever they needed once converted to Canadian funds. At no point in the dealings of the parties were

the amounts advanced adjusted to take into account the exchange rate as between the US and the CDN dollar, either upwards or downwards.

[414] Therefore, although Mr. Riback's calculation as to the exchange rate as of the date of each advance of funds by Mr. Biehl to Mr. Strang shows the total amount advanced in US funds of \$980,000 to be equivalent on the various dates received to \$1,547,141.50 in Canadian funds, I am of the view that this matter was conducted as between parties solely in US funds and the conversion from Canadian funds to US funds is to occur at the time of the judgment and paid on the basis set out below.

[415] I have reviewed the authorities provided and agree with the submissions on behalf of the corporate defendants in this regard. I find that this case is similar to the recently decided case of *Luu v. Wang*, 2011 BCSC 1078, in which Pearlman J. applied the Foreign Money Claims Act, R.S.B.C. 1996, c. 155, in relation to a debt claim arising out of the acquisition of several Chinese corporations. All of the transactions were in U.S. funds. Pearlman J. held:

[289] All of the debts in issue in this litigation were denominated in U.S. dollars.

...

[291] Because all of the loans made by the plaintiff to the defendants were denominated in United States currency, I find that the plaintiff will be most truly and exactly compensated if all of the money payable under the Court's order is measured in U.S. dollars.

[416] Section 1 of the Foreign Money Claims Act provides:

- (1) If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the other currency at a chartered bank located in British Columbia at the close of business on the conversion date.
- (2) The conversion date is the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

[417] Accordingly, the plaintiff is entitled to judgment against the defendants Mr. Strang, the Orchard, and Snug Cove jointly and severally in the amount of Canadian currency that is necessary to purchase the amount awarded with regards to US \$535,709.19, plus interest at a rate of 15 percent per annum calculated annually, at a chartered bank located in British Columbia at the close of business on the conversion date, as the conversion date is defined in s. 1(2) of the Foreign Money Claims Act, namely, on the last day before the date on which a payment of this judgment is made.

[418] The plaintiff is also entitled to court ordered interest pursuant to s. 2 of the Foreign Money Claims Act payable under the Court Order Interest Act, R.S.B.C. 1996, c. 79. For the purposes of calculating court ordered interest I stipulate that the cause of action arose August 1, 2005, the approximate time of receipt by Mr. Strang and the Orchard of the Sakai Iwanaga correspondence demanding payment and enclosing the draft promissory note.

[419] With regards to the award to the plaintiff of a 20 percent equity interest in both the Orchard and Snug Cove no foreign currency issues arise.

XI. Conclusion

[420] Accordingly, the plaintiff, Eric Eugene Biehl, is entitled to judgment against Gavin Michael Strang, Orchard Recovery Center Ltd., and Snug Cove Enterprises Ltd., jointly and severally, as follows:

1. Judgment in the amount of US \$535,709.19 plus interest on that amount at 15 percent calculated annually, and with prior repayments being considered repayment on principal as opposed to interest, and to be paid under the Foreign Money Claims Act as set out above.
2. Court ordered interest from August 1, 2005, to be paid as set out above.
3. A declaration that the plaintiff is entitled to a twenty (20) percent equity interest in Orchard Recovery Center Ltd. and Snug Cove Enterprises Ltd., or a payment in lieu of same, with all parties at liberty to make further submissions.
4. An equitable lien against Gavin Michael Strang, Orchard Recovery Center Ltd. and Snug Cove Enterprises Ltd. to secure the above-ordered relief.
5. All other claims are dismissed, including all claims against the defendant Lorinda Gayle Strang.

XII. Costs

[421] The parties requested liberty to make submissions on costs following delivery of these Reasons for Judgment. After counsel have consulted with each other to determine the time required they may set a date for hearing. Notice of the date and time of the hearing must also be provided to the defendant, Mr. Gavin Strang.

"The Honourable Madam Justice E.A. Arnold-Bailey"

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