

CANADA / JUDGMENT

Chancellor v. Maynes

2017 BCSC 554

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Supreme Court of British Columbia

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2017 BCSC 554 Chancellor v. Maynes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chancellor v. Maynes,

2017 BCSC 554

Date: 20170403

Docket: 15718

Registry: Salmon Arm

Between:

Victor Keith Chancellor

Plaintiff

And

Cori Dean Maynes

Defendant

Before: The Honourable Mr. Justice Meiklem

Reasons for Judgment

Counsel for the Plaintiff:

R.A. Chorneyko

Counsel for the Defendant:

G. Alfonso

Place and Date of Trial/Hearing:

Salmon Arm, B.C.

November 24 & 25, 2016

Place and Date of Judgment:

Salmon Arm, B.C.

April 3, 2017

The Claims

- [1] This summary trial dealt with the cross claims of two equal shareholders in a company called National Home Owner Marketing Ltd. ("NHOM Ltd." or the "Company") doing business as Century 21 Lifestyles ("Lifestyles") in Salmon Arm, British Columbia.
- [2] Mr. Chancellor seeks damages for breaches of a shareholder's agreement. The material provisions allegedly breached include non-competition provisions and an agreement to equally provide ongoing funding of NHOM Ltd.'s operating and capital requirements.
- [3] Mr. Maynes counterclaims for rescission of the purchase of his shares in Lifestyles, and the return of his initial investment and subsequent shareholder loans, based on misrepresentation. Alternatively, he seeks damages, including punitive and aggravated damages.
- [4] The defendant's pleading states the legal basis of the counterclaim generally as "Common law relating to the interpretation and enforcement of contracts", but the defendant's Notice of Application filed July 29, 2016 (the "NOA") advances a claim for damages for the tort of fraudulent misrepresentation or deceit. The NOA sets out the following in paragraph 5 of the "Legal Basis" portion of the application:
 - 5. In the time leading up to the purchase of the Plaintiff's shares, the Plaintiff made representations of fact to the Defendant regarding the financial affairs of the Company which were false. The Plaintiff must have known that the representations were false and he intended that the Defendant act on those statements. The Defendant was induced to enter into the SPA and deliver funds to the Plaintiff relying on those false statements. Accordingly the Plaintiff has committed the tort of fraudulent misrepresentation.
- [5] The only pre-purchase representations mentioned in the NOA are set out in paragraph 11 of the "Factual Basis" of Part 2, which states:
 - 11. The Plaintiff represented to the Defendant that the Prior Financial Statements were accurate and that the Company was profitable.

- [6] Mr. Maynes' Affidavit contains the same statement in paragraph 10, and he deposes that, together with his review of prior financial statements, and the representation in the Share Purchase Agreement, he was induced to complete the share purchase.
- [7] The plaintiff's Application Response deals with the new tort claim advanced in the NOA, and also tentatively advances a new claim for disgorgement of profits made by Mr. Maynes in respect of his breaches of the shareholder's agreement. I say "tentatively" because the response states that Mr. Maynes has refused to produce the necessary evidence to quantify the disgorgement claimed.
- [8] The parties agreed that the claims set out in the Counterclaim and the NOA should be adjudicated first, since the shareholder's agreement, which the plaintiff relies on, would fall with rescission if that claim succeeded.
- [9] Although I find it generally unsatisfactory to proceed to adjudicate summary trials on the basis of irregular and cobbled together pleadings, particularly with counsel representing both parties, the resolution of the dispute in this case turns readily on finding the facts and the parties agree that a summary trial determination is feasible.
- [10] The evidence on this summary trial included excerpts from the Examinations for Discovery of each party and one Affidavit from each of the parties. The examination of Mr. Chancellor was conducted on December 2, 2015 and Mr. Maynes was examined on April 20, 2016. Mr. Maynes' Affidavit was sworn on July 7, 2016, and Mr. Chancellor's was sworn on August 17, 2016. Mr. Chancellor's Affidavit directly addresses Mr. Maynes' Affidavit, but there is no responding Affidavit from Mr. Maynes.

Factual Background

- [11] Mr. Chancellor was the sole shareholder, officer and director of NHOM Ltd. from 2004 until Mr. Maynes, who had been associated with Lifestyles as a licensed realtor since 2007, purchased 50% of the issued shares from him for the sum of \$60,000, effective January 1, 2014.
- [12] Lifestyles had grown rapidly from its inception and, by 2007, which Mr. Chancellor describes as its zenith, there were approximately 40 realtors working with the franchise. However, due to a combination of market forces in 2008 and personal legal difficulties Mr. Chancellor was coping with, Lifestyles' sales force had declined to approximately 10 realtors by 2013, when Mr. Chancellor approached Mr. Maynes with an offer to sell him one half of the Company. He deposes in his Affidavit #1 that he chose Mr. Maynes because he had been with the Company for about six years and he was impressed with his ability as a realtor and he thought that Mr. Maynes had the skill set to help him rebuild Lifestyles. He also hoped that in approximately five years Mr. Maynes would be in a position to purchase the rest of the shares and allow him to retire.

[13] The negotiations for the sale and purchase of 50% of the shares of Lifestyles' operating company commenced in late 2013 and culminated with a Share Purchase Agreement dated for reference January 1, 2014 (the "SPA"), and a shareholders agreement of the same date. Both of these agreements were prepared by a solicitor who was paid by Lifestyles, but did not independently represent either party to the transaction. Neither party sought independent legal advice. Mr. Chancellor had provided Mr. Maynes full access to Lifestyles' accounting records and its bookkeeper.

[14] Mr. Maynes' active participation in the Lifestyles franchise lasted until February 2015, when, after returning from a vacation, he met with Mr. Chancellor and told him that he was not interested in Lifestyles and asked him for a return of the purchase price of his shares. Lifestyles had suffered significant financial setbacks in the preceding months, after the franchise's long-time top producer (responsible for approximately 40% of the firm's sales in 2014) and several other realtors left the firm.

[15] On March 1, 2015, Mr. Maynes sent Mr. Chancellor an email (with a c.c. to Mr. Maynes' solicitor, which suggests legal advice had been sought), setting out "some of our main concerns" as follows:

- 1) Upon reconciliation of me buying into the company you were required to put monies into the company to clear up all previous debts ie: the Mastercard and BDO, instead you took the money and applied it to current accrued management and rent costs, which is against the purchase agreement.
- 2) The rent was immediately substantially increased upon me buying in which was never depicted in the previous 4 years of financial statements. By the rent not being accurately billed out and accrued the previous financial statements showed a false sense of financial profits, that now with the true rent costs are unattainable.
- 3) When paying incoming bills you placed a priority on your management fees and the rent to the Salmon Arm office and allowed other bills such as the Sicamous rent to fall behind putting the company in the position to where we were evicted.

The bottom line is that if the previous financial statements showed the true operating cost of the company there would have been no available profits and the company would have been deeply in debt and we would never have bought in. Therefore we feel that we were deceived by the information that was provided to us.

[16] On March 15, 2015, Mr. Maynes sent an email to Mr. Chancellor advising him that he was transferring his realtor's license to another Century 21 franchise, and asking Mr. Chancellor to "send in" his license. Considering this to be a breach of several clauses of the shareholders agreement, Mr. Chancellor immediately filed his NOC.

[17] Five other realtors left Lifestyles after Mr. Maynes' license was transferred.

[18] Mr. Maynes did not resign as a director or officer of NHOM Ltd., and still had not done so as of the date of this summary trial. His March 15, 2015 email confirming his move to a different Century 21 franchise included the following paragraph:

I placed all of accounts payable on your desk that need to be dealt with once there is some money in the account. I suggest that we concentrate paying all the overdue bills first and not pay management fees and rent at this time. Let me know if you need me to come in and sign any cheques.

[19] Mr. Maynes' Counterclaim is based primarily on allegedly false representations in the SPA, an alleged misappropriation of funds and manipulation of rental agreements between NHOM Ltd. and himself as owner of the leased business premises.

[20] Mr. Maynes' counterclaim pleads breaches of the following provisions in the SPA.

"The Vendor represents and warrants that as of the closing the liabilities of the Company will be nil..."

(the "Nil Liability Representation"); and:

"The Vendor represents and warrants that the Vendor has disclosed to the Purchaser all the information known to him which can fairly be considered to be material in order that the Purchaser can properly determine the value of the said shares [and] the nature of the representations and warranties made in this Agreement in connection with the Purchaser's purchase of such shares."

(the "Full Disclosure Representation")

The Nil Liability Representation

[21] The particulars of the alleged breach of the Nil Liability Representation are set out in paragraph 7 of the counterclaim as follows:

7. In particular, and in breach of the Nil Liability Representation, the Plaintiff did not discharge certain liabilities of the Company on the Closing Date. Particulars of the liabilities that the Plaintiff failed to discharge on the Closing Date include:
 - (a) The Company's balance sheet prepared by the Company's accountant indicates a net liability as at December 31, 2013 of \$18,557.43.
 - (b) As at December 31, 2013, there was an outstanding liability to BDO Dunwoody of \$11,996.25.
 - (c) The Balance on the Company MasterCard as at December 31, 2013 was \$24,289.56 and interest accrued following closing, during 2014, of \$4,807.93.

[22] Mr. Chancellor's Response to Counterclaim states the following:

2. Further to paragraph 7 of the counterclaim, the Plaintiff did not breach the Nil Liability Representation. After the closing on January 1, 2014 the Company retained BDO Dunwoody, chartered accountants, to determine the exact amount of the required equalization payment to bring the Company's net liabilities to zero. In March, 2014 BDO Dunwoody determined that the additional amount of \$18,557.43 was required to be paid by the Plaintiff. The Plaintiff did so on or about April 25, 2014. That amount reflected all sums owing to BDO Dunwoody and MasterCard as of December 31, 2013.
- [23] The Nil Liability Representation is obviously not a representation of existing fact, but rather a promise to achieve a nil balance "as of" the closing date. Mr. Maynes agreed on Examination for Discovery that January 1, 2014 was not intended to be the date that liabilities were paid, but to be the effective date to determine the amount of an equalization payment required from Mr. Chancellor to bring net liabilities existing as of that date to nil. That admission, together with Mr. Maynes' reference to this obligation in the first enumerated subparagraph of his March 1, 2015 email to Mr. Chancellor, effectively disproves his pleading which asserts an obligation to actually discharge the debts on January 1, 2014.
- [24] The evidence also includes an email dated December 12, 2013 from Mr. Chancellor to Mr. Maynes in the course of negotiations for the SPA in which Mr. Chancellor states that he did not think the bank account would be zero by the effective date of January 1, 2014, but "the accountant will look at it after 60 days and make an adjustment. If it turns out there was more debt than income, I will have to pay you an adjustment amount, or vice versa, but more likely the first scenario."
- [25] The Counterclaim lists two specific debts, BDO and MasterCard, as if they were independent of the net liability balance of \$18,557.43 mentioned in paragraph 7 (a) of the Counterclaim. Mr. Maynes' solicitor's demand letter to Mr. Chancellor also treated the BDO and MasterCard debts as independent of the net liability balance, but the evidence establishes that those two debts were included in the calculation by Lifestyles' accountant of net liabilities as \$18,557.43 as of December 31, 2013. The accountant prepared this calculation in late March or early April of 2014, and Mr. Chancellor paid \$18,557.43 into the Company on April 25, 2014.
- [26] The evidence establishes the facts set out in Mr. Chancellor's Response to Counterclaim.
- [27] Mr. Maynes' real concern, as expressed in his March 1, 2015 email, was that after the adjusting payment in, the Company did not apply the funds to the outstanding MasterCard or BDO debts. By the time that the Company received the funds, other current obligations had accrued and were overdue, namely rent and management fees due to Mr. Chancellor. According to Mr. Chancellor's uncontroverted evidence (paragraph 57 of his Affidavit #1), Mr. Maynes eventually agreed that the payment of rent and management fees was a priority, and acting on that agreement, Mr. Chancellor caused Lifestyles to pay those debts, rather than the credit card and accounting debts.

[28] I am not persuaded that the Nil Liability Representation was a misrepresentation. It was certainly not a representation of an existing or past fact. It was intended and understood as a representation or promise of achieving a nil balance sheet as of the closing date, by adjustment if necessary. Mr. Chancellor fulfilled the promise, even though, by subsequent agreement, the specific pre-closing date liabilities intended to be paid in full or in part, were deferred in order to pay current liabilities.

The Full Disclosure Representation

[29] Although the defendant's manner of describing the plaintiff's alleged breaches of this representation has evolved somewhat since he first articulated them after his departure from Lifestyles, there are now three main breaches of this representation alleged:

1. Misrepresentation of leasehold rights and failure to disclose an intention to increase the business premises rent payable to himself by NHOM Ltd. from substantially below market rent to a rate approximating market rate;
2. The failure to disclose an intention to pay himself a managing broker salary;
3. Causing NHOM Ltd. to remit payments directly to Mr. Chancellor's mortgagee and in payment of monthly property tax payments.

[30] There was no pre-existing lease between Lifestyles and Mr. Chancellor as the owner of the business premises. Mr. Maynes' claim of misrepresentation is based on the argument that the rent expenses of \$21,340.47 or \$1,778.37 per month recorded for the fiscal year ending September 30, 2013 (which included rental of an office in Sicamous) and the rent recorded in the amount of \$2,952.38 or \$984.13 per month in an internal profit and loss statement for the period October 1, 2013 to December 31, 2013 provided to Mr. Maynes amounted to implicit representations regarding the Company's rental obligations.

[31] Mr. Maynes deposed that:

27. Immediately upon the Date of Closing, the Plaintiff began to charge rent to the Company for the Salmon Arm office at a much higher rate without my knowledge. The monthly rent that the Plaintiff charged to the Company for the Salmon Arm office increased from slightly less than \$1,000.00 per month (inclusive of base rent and operating costs) during the last quarter of 2013 to \$5,075.00 per month commencing January 1, 2014.
28. In his examination for discovery the Plaintiff admitted that the fivefold increase in rent payments for the Salmon Arm office by the Company represented a personal benefit to him as landlord.
29. This change in the Company's rent arrangements was subject to the Management Limitations set forth in the [shareholders agreement]; however, I did not approve this change as required by the [shareholders agreement].

30. The change in the Company's rent arrangements with respect to the Salmon Arm office was information that I considered to be material in determining the value of the shares and ought to have been disclosed by the Plaintiff. If the Plaintiff had disclosed his intention to me to increase the rent payable by the Company for the Company's Salmon Arm office from \$1000.00 per month to \$5,075.00 per month I would not have agreed to purchase his shares in the Company.
- [32] Mr. Chancellor was the sole owner of the rented Salmon Arm office premises (4500 sq. ft.) and, while he was the sole shareholder of NHOM Ltd., he was paying rent well below market rates. Those rents were accurately recorded in the financial information provided to Mr. Maynes.
- [33] I find that the assertion in paragraph 27 that the increased rent was charged without Mr. Maynes' knowledge, and the assertions of non-disclosure and reliance in paragraph 30, are untrue. Mr. Chancellor sent Mr. Maynes an email dated December 12, 2013 in the course of negotiations over the SPA in which he wrote: "I've roughly worked out the lease and it will be substantial cost of doing business. I will show you what that looks like."
- [34] Mr. Chancellor had a formal five-year term lease prepared reflecting a rental rate of \$10 per square foot, plus operating costs of \$4.50 per square foot for the first year, effective January 1, 2014. The parties to the lease were Mr. Chancellor as Lessor, and "Century 21 Lifestyles per Cori Maynes" as Lessee, and Mr. Maynes signed the lease on behalf of Lifestyles. The assertion in Mr. Maynes' paragraph 29 that he did not approve the rental changes is patently false. The preparation of a formal lease actually fulfilled the representation that as of closing, the assets would include leasehold rights to the Salmon Arm office.
- [35] Mr. Maynes agreed during his Examination for Discovery that he was content for the Company to pay a fair market rent for the premises and that \$10 per square foot was a fair market rent.
- [36] Turning to the alleged failure by Mr. Chancellor to "disclose an intention to pay himself" a managing broker salary, this is clearly disproved by an exchange of emails in December 2013. On December 4, 2013, Mr. Maynes sent an email which included the following as enumerated paragraph 3:
3. As far as your brokers wage of \$2500 per month, this should be paid to you as a salary when you are actively acting as the broker (6 months per year). It could be done as a draw from the company as long as I receive the same compensation when I am the acting broker.
- [37] Mr. Chancellor's response to Mr. Maynes of the same date included the comment:
- I need to talk to you rather than reply, too much to digest but yes to everything you've said.
- [38] Then, the December 12, 2013 email, previously referred to, included the comment:

We both go 90/10, the company pays our fees - C21, OMREB etc. \$2500 per month for the Managing Broker, I'd like to be able to make the call on that but I won't ever do less than 6 months, more probably 9 months.

- [39] Further reference to the management fees or salary payable to Mr. Chancellor as the managing broker is made in a March 24, 2014 email exchange between Lifestyles' accountant and Mr. Maynes' wife, Robin Maynes (who is a bookkeeper by training and was assisting Mr. Maynes) which refers to "the wages owed to Keith".
- [40] As Mr. Chancellor's written submission states, the further complaint of the management salary being unauthorized and a breach of the Management Limitations provisions of the shareholder's agreement was first made in Mr. Maynes' summary trial application. The initial complaint in his March 1, 2015 email (quoted in para. 13 above) was merely that Mr. Chancellor placed a priority on paying his management fees. The April 13, 2015 demand letter from Mr. Maynes' solicitor makes no mention of management fees being unauthorized, despite the detailed nature of that letter.
- [41] During his Examination for Discovery, Mr. Maynes acknowledged at one point that that there was an informal agreement in discussions prior to the closing date to pay a managing broker fee of \$2,500 per month, then resiled from that to say that it was discussed, but not agreed. His first response is corroborated by the email exchanges in December 2013.
- [42] In his Affidavit #1, Mr. Maynes states the fact that there was no history of paying management fees prior to his purchase of shares. That fact is irrelevant to the question of whether there was agreement on a management wage when Mr. Chancellor ceased to be the sole shareholder. Mr. Chancellor's additional contribution as the managing broker in what was effectively a partnership obviously was the rationale for the wage.
- [43] The management provisions of the shareholder's agreement do require unanimous approval of the directors before any contract between the Company and any shareholder is undertaken. Mr. Maynes asserts that he did not formally approve the payment of management fees to Mr. Chancellor "in my capacity as a director". The distinction Mr. Maynes draws here is not compelling or persuasive. There is no evidence that he informed Mr. Chancellor at any time, before or after the closing date of the SPA that his personal agreement should not be taken as his approval as a director to a managing broker's salary being payable. Mr. Maynes deposes that he objected to Mr. Chancellor regarding the payment of the salary several times during 2014, but it is apparent to me on the whole of the evidence that his objections were related directly to the Company's ongoing profitability and cash flow difficulties, not to initial authorization of the management salary. In this regard, I find that the following paragraph from Mr. Chancellor's Affidavit #1 probably describes the dispute about the management salary accurately:
79. I always believed that Maynes trusted me to manage Lifestyles in a prudent and even-handed manner. I believe that I always did so. In the end it is clear to me that we came to a different conclusion about what this meant. In the beginning, Maynes agreed with me that

payments of the amounts owed to me from Lifestyles for the broker managing fee and rent were just as important as any other expenses, indeed, Maynes told me that payment of the rent was a priority. However, as time went on Lifestyles was not earning enough revenue to pay all of its bills. Maynes was unwilling to inject additional cash into Lifestyles (I would have to inject additional cash as well) and expressed a new view that, if times are tough we owners must be paid last. By that, he meant that I should be paid last, because I was the only owner that Lifestyles owed money to. And by "last", I believe he meant "never", because payment of these debts would almost certainly require us to pay additional funds into Lifestyles, something that Maynes told me he was unwilling to do.

[44] Mr. Maynes deposed in paragraph 40 of his Affidavit #1:

40. Payment of management fees during my first year of ownership in the Company was information that I considered to be material in determining the value of the shares and ought to have been disclosed by the Plaintiff. If the Plaintiff had disclosed his intention to cause the Company to pay \$20,500.00 in management fees to him, I would not have agreed to purchase his shares in the Company.

[45] In light of the evidence I have reviewed above, this assertion is patently false.

[46] The defendant has failed to prove a failure by Mr. Chancellor to disclose an intention to pay himself a managing broker salary. Not only was his intention communicated, but entitlement to the salary was agreed to prior to the share purchase, and ratified by conduct thereafter.

[47] The third alleged breach of the Full Disclosure Representation was causing NHOM Ltd. to remit payments directly to Mr. Chancellor's mortgagee and in payment of monthly property tax payments. The mortgage payments in question were monthly payments of \$1,875 to Tekamar Mortgage in payment of Mr. Chancellor's mortgage on the business premises leased to Lifestyles. A total of \$22,500 was paid to the mortgage company in that way during 2014.

[48] Mr. Maynes deposes that Mr. Chancellor never disclosed the arrangement to him, that he never approved the arrangement as required by the shareholder's agreement and that it was information that he considered to be material within the terms of the Full Disclosure Representation, and if disclosed, he would not have agreed to purchase his shares. The payments were certainly not covert and were specifically mentioned in a March 24, 2014 email from Lifestyles' bookkeeper, Ms. Freed to Robin Maynes, as credited to rents due. They were accounted for on the books of Lifestyles and credited to the rent due to Mr. Chancellor.

[49] Mr. Chancellor testified on Examination for Discovery that:

It was the arrangement that was made in that particular instance prior to Mr. Maynes being a shareholder. There were 12 postdated cheques written from the company to Tekamar and with Mr. Maynes' agreement we allowed them to go through and then offset them against any rental payments.

- [50] It is not clear to me whether there is a direct conflict between Mr. Maynes' assertions of no disclosure by Mr. Chancellor to him and Mr. Chancellor's reference to Mr. Maynes' agreement, or whether one or both parties are exploiting the fact that the only compelling real evidence of communication on this point is the March 24, 2014 email between the Company bookkeeper, Ms. Freed, and Robin Maynes. I infer that Robin Maynes shared her knowledge with Mr. Maynes, so he would have been aware of the arrangement on or about March 24, 2014.
- [51] I do not find it necessary to resolve the evidentiary conflict question, because I am satisfied that the post-dated cheque arrangement could not fairly be considered to be material in determining the value of the shares and the nature of the representations and warranties made in the SPA.
- [52] This arrangement was first challenged as a misappropriation of company funds by Mr. Maynes' counsel in a demand letter of April 13, 2015, ostensibly on the basis of a review of the general ledger activity report by counsel. That challenge is without merit, considering that the remittances were properly credited to Lifestyles' rent obligations to Mr. Chancellor.

Oral Representations Regarding Prior Financial Statements and Profitability

- [53] Mr. Maynes' Affidavit #1 provides no particulars of Mr. Chancellor's alleged representations that the financial information provided to him was accurate and that the Company was profitable. Mr. Chancellor denies making either representation. There is no evidence that any of the information provided was inaccurate, in any event. Mr. Maynes was given free access to the Company's bookkeeper. The financial statements provided showed that the Company was profitable in its last fiscal year ending September 30, 2013, and in the October to December 2013 quarter, and showed it had been unprofitable in three of the four years prior to the 2013 year end.
- [54] Mr. Maynes' closing submissions did not pursue these alleged oral representations, but it appears that Mr. Maynes feels he was misled because the previous profitability depended upon the very favourable low rent that Ms. Chancellor charged the Company while he was the sole shareholder, together with the absence of management salaries for himself.
- [55] Mr. Maynes suggests that Mr. Chancellor had undisclosed plans to "pillage, strip or otherwise empty the Company" once Mr. Maynes paid for his shares by increasing rents, having the Company pay for his mortgage debts and paying himself management fees and "simply taking funds". His argument seems to be that this rendered the prior financial statements inaccurate.

- [56] This rather florid description of pillage is unfair to Mr. Chancellor and completely unfounded on the evidence, which I have reviewed. The new and increased expenses regarding rent and managing broker wages were clearly discussed and agreed to, and surely Mr. Maynes knew these would necessarily affect the profitability of the Company, unless revenue increased commensurately.

Misappropriation Allegations

- [57] The Company's cash flow and profitability difficulties continued in 2014 to the point that by September 2014 unpaid rent due to Mr. Chancellor had accrued to about \$24,000. With the fiscal year end being September 30, 2014, Mr. Chancellor pressed for payment in order to avoid the financial statements reflecting unpaid rent. Mr. Chancellor's uncontroverted evidence (paragraphs 59 and 70-71 of his Affidavit #1) is that Mr. Maynes agreed with him that they should each contribute \$10,000 to the Company which would be paid to Mr. Chancellor for unpaid rent.
- [58] Mr. Maynes' Affidavit #1 (paragraphs 35-36) simply states the fact of the September 2014 contributions and refers to Mr. Chancellor's representations that the Company was experiencing cash flow problems, then states the fact of a same day payment of \$20,000 to Mr. Chancellor and characterizes it as a misappropriation of funds. As pointed out in the plaintiff's written submissions, this allegation was not pleaded in the Counterclaim, but emerged for the first time in the defendant's NOA for a summary trial. It is an allegation that was not mentioned in previous complaints received by Mr. Chancellor directly from Mr. Maynes or through his counsel. As Mr. Chancellor points out in his Affidavit #1, Mr. Maynes did not depose in his Affidavit #1 that he did not know the specific purpose of the contribution or that he did not agree to the payment of overdue rent.
- [59] The absence of any response from Mr. Maynes to the challenge set out in Mr. Chancellor's Affidavit supports a finding that Mr. Maynes' characterization of that payment of overdue rent as a misappropriation of funds is wholly without merit.
- [60] I accept Mr. Chancellor's evidence that Mr. Maynes knew and approved of the purpose of his additional \$10,000 loan to the Company in September 2014.

Summary of Conclusions on the Counterclaim and Notice of Application

- [61] The defendant has not succeeded in establishing either a fraudulent misrepresentation or a negligent misrepresentation and is not entitled to any of the remedies sought. The Counterclaim is dismissed.

Mr. Chancellor's Claims Against Mr. Maynes

- [62] My conclusion in respect of the Counterclaim means that the SPA stands, along with the shareholders agreement. As I mentioned previously, Mr. Maynes remains a shareholder and a director of NHOM Ltd. Mr. Chancellor's claims arise from alleged breaches by Mr. Maynes of non-competition and restrictive covenants provisions of the shareholders agreement, as well as a provision requiring contribution of funds to operating and capital requirements.
- [63] Although the Notice of Civil Claim pleads only paraphrased portions of the pertinent provisions of the shareholders agreement, the full text of the relevant provisions is the following:

1.5 Best Efforts and Non-Competition

The shareholders shall use their best efforts, skills and abilities to promote the Company's interests and shall not engage in any other employment or business activity of a nature which is competing with that of the Company. The shareholders shall not communicate to any outside person any trade secret or other information which is acquired through their association with the Company.

1.6 Restrictive Covenant

The parties hereto shall not, during the term of this Agreement and for a period of three (3) years following their ceasing to be directors, officers, employees or shareholders of the Company, directly or indirectly carry on or engage in or be concerned with the trade or business that the company has or is then conducting as its business within twenty (20) miles of any geographical areas in which the Company has conducted or is then conducting its business except as herein provided.

The parties acknowledge that both are licensed real estate brokers. A party leaving the Company shall not be prohibited from carrying on as a broker within the prohibited time and area but shall not in so doing actively solicit either agents or clients from the Company. A party leaving the Company will not himself or by means of any other person do or cause to be done any wilful act or thing to the prejudice of the Company and will at all times use his best efforts to promote the Company and secure to it the connection and custom of the business as it has been heretofore carried on provided only that [party] leaving the Company shall not be put to any expense in or about the performance of this covenant.

If a dispute should arise in relation to the application or interpretation of this restrictive provision the parties specifically agree that the resolution of such dispute shall be referred to a single arbitrator agreeable to both whose decision shall be final.

2.2 Company Borrowing

Funds required from time to time by the Company will be obtained, to the greatest extent possible, by borrowing from a chartered bank or other lender acceptable to a majority of the Directors. Failing the ability of the Company to obtain funds as aforesaid the shareholders agree

to equally make available to the Company sufficient funds to enable the Company to meet its operating and capital requirements and to pay when due interest and principal obligations on all of its indebtedness and to pay when due all expenses and other amounts whatsoever owing by the Company.

Clauses 1.5 and 1.6

- [64] Mr. Chancellor's position in respect of the non-competition and restrictive covenant clauses is that they still apply to Mr. Maynes because he remains a shareholder and director of the Company. In respect of the second paragraph of Clause 1.6, Mr. Chancellor argues that it does not free Mr. Maynes from the restriction in Clause 1.6 because Mr. Maynes has not left the Company, and it does not apply to limit Clause 1.5 in any event.
- [65] Mr. Maynes' argument is that his actions in advising Mr. Chancellor that he was relocating to another franchisee and transferring his license constituted leaving the Company and he is, therefore, not prohibited from carrying on as a broker within the prohibited area, and he is free to engage in his profession where he pleases.
- [66] I would interpret Clause 1.5 as applying during the term of the parties' engagement in the business activity of the Company. To interpret it in any other way is equivalent to giving it the effect of a perpetual restrictive covenant, which would of course be unenforceable.
- [67] In interpreting the phrase "leaving the Company" as it appears in the second paragraph of Clause 1.6, I do not think "leaving" was intended to be synonymous with "ceasing to be directors, officers, employees or shareholders" as argued by Mr. Chancellor. The first sentence in the second paragraph is an acknowledgement that as licensed real estate brokers, the parties are also something distinct from those descriptors. That sentence in effect states a rationale for the exclusionary provision. I interpret the exception as applying to a party who is leaving the activities of the Company to carry on as a broker. That party is relieved of the restrictive covenant with the proviso that he shall not actively solicit either agents or clients from the company and will not do or cause to be done any wilful act or thing to the prejudice of the Company.
- [68] On these interpretations, Mr. Maynes has not contravened either Clause 1.5 or 1.6.

Clause 2.2

- [69] Mr. Chancellor has provided evidence of requests for contributions totalling \$66,799.13 from Mr. Maynes as of April 30, 2016 and seeks judgment for that amount under this clause. Mr. Maynes' submission is that there is no evidence in the Affidavit material that the Company was unable to obtain operating capital by borrowing it, and furthermore that any claim under this clause would be the Company's claim and not Mr. Chancellor's. There is no other defence to Mr. Chancellor's claim under this clause.

- [70] There is evidence in the material that Mr. Chancellor advised Mr. Maynes through counsel that the Company did not have a credit facility to obtain the necessary funds. If that is proven correct, that prerequisite has been satisfied.
- [71] The Company is a party to the shareholders agreement and, in my view, the defendant is correct in arguing that the claim under Clause 2.2 belongs to the Company. That precludes me from granting judgment in Mr. Chancellor's favour at this time, but given that an application to bring a derivative action on the Company's behalf is likely to succeed and the costs of that application would only add to the financial burden eventually to be borne equally, the defendant would be well advised to make suitable arrangements to discharge his obligations under Clause 2.2 without delay.

Costs

- [72] Mr. Chorneyko asked for leave to make further submissions on special costs in the event that the Counterclaim alleging fraud was found to be false and groundless, as it has been, so I will grant liberty for the parties to make written submissions on costs. Mr. Chorneyko shall provide his submissions by April 30, 2017 and Mr. Alfonso by May 26, 2017.

"I.C. Meiklem J."

MEIKLEM J.

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