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CANADA / JUDGMENT

## Ficocelli v. Henderson

2016 BCSC 2295

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COURT

Supreme Court of British Columbia

DECIDED

7 December 2016

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2016 BCSC 2295 Ficocelli v. Henderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ficocelli v. Henderson,

2016 BCSC 2295

Date: 20161207

Docket: S140528

Registry: Vancouver

Between:

Michael Ficocelli

Plaintiff

And

Brian Blaine Henderson and Nancy Lynn Henderson

Defendants

Corrected Judgment: The text of the judgment was corrected at the front page on December 14, 2016

Before: The Honourable Madam Justice W.J. Harris

Reasons for Judgment

Counsel for Plaintiff:

L.T. Adriano

Counsel for Defendants:

J.S. Piamonte

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 4-8 and

February 5, 26 and March 30, 2016

Place and Date of Judgment:

Vancouver, B.C.

December 07, 2016

## Overview

- [1] In the October of 2012 the plaintiff, Michael Ficocelli, placed an advertisement on craigslist looking for a partner to develop a rural property. The defendants, Brian and Nancy Henderson, responded to the advertisement. They communicated through email and ultimately met one another. They decided that they wanted to go into partnership to generate revenue on the defendants' property, mainly through medical marihuana production.
- [2] When the intended partnership failed, the plaintiff sued the defendants for monies he paid on their mortgage and expenses incurred in improving the property. The defendants counterclaimed seeking damages for breach of the partnership agreement and breach of his fiduciary duty and duty of good faith.

## Background

- [3] Most of the facts surrounding the parties' interactions are not disputed and are reflected in their email correspondence. Where material facts are disputed, I will address them in the course of my reasons.
- [4] The plaintiff is a businessman in North Vancouver who owns an auto body shop and had a marihuana "dispensary". In light of the changes in the law related to possessing and growing medical marihuana, he was interested in pursuing opportunities in that business which were within the scope of what was legally permissible.
- [5] The craigslist advertisement in which the plaintiff expressed an interested in a partnership to develop a rural property stated as follows:

reno/investment/partnership wanted on acreage

Heres the low down you have the property or properties I re model re build the dwelling(s) at no cost to you and supply all the materials have contractors in everthing from cement, paint, large load lumber ect all under contract so we can make a profit i do all the work including meet with

govt officials for development/parcell sub\_divide into profits my family has bought developed and sold properties for over 40 yrs we usually buy one and develop for enough equity for two more the markets are going to change and Im picky about those people and properties I get into and yes you cart stay on it if needed as i own my home and will not re locate for this bottom line I (we) are after profits both in holding properties (rental) income on higher values or Roi on property sales this is not a get rich quick game yet it can be in the right times no brokers/lenders/3rd party mortgage companyies or realters please Im interested in properties here and florida for now as thats my profit territory regards and e mail for info with site plans geo maps ect to see if we can work together thks mike

[Text of advertisement as posted on craigslist]

- [6] Although the plaintiff did not refer in his advertisement to growing medical marihuana as a possible means of improving the value of the land, I find that this was the plaintiff's objective.
- [7] The defendants owned and resided on a 10 acre property at 28535 McTavish Road in Abbotsford (the "property"). Mr. Henderson was a truck driver and Ms. Henderson did not work outside of the home.
- [8] There were two houses and a barn on the property. The defendants had purchased the property from Ms. Henderson's mother. The property had been listed for sale at \$997,000 in July of 2012. There was an offer on the property by a Mr. Gill for \$900,000 which was accepted, but which was subject to the sale of Mr. Gill's home. The sale did not complete as Mr. Gill was unsuccessful in selling his home.
- [9] There was a \$525,000 mortgage on the property, with payment of \$4,311 per month, interest only. The mortgage term was to mature January 1, 2013. The property was on the market for \$997,000. It was a condition of the defendants' mortgage that their home would be listed for sale 5% below the appraised value.
- [10] Mr. Henderson answered the plaintiff's advertisement. He testified that he did so as he and his wife were in difficult financial circumstances, he could not manage the property which he knew needed work, his wife's health was not good, and he did not have enough funds for daily living given the amount of their mortgage payments. Ms. Henderson testified that they were interested in the plaintiff's advertisement as it could allow them to sell the property at a better price, as the condition of the property was "not good".
- [11] On November 4, 2012, Mr. Henderson emailed to the plaintiff stating they were looking for a partner to help them with their property.

We are looking 4 a partner to complete our home 2 put on the market. I am only one person and it's to[o] much 4 me to take on. We have been through hell in the last couple of years, I am not a business man We are looking 4 a partner to complete our home and get the highest value 4 it. I also believe there is enough profit 4 the both of us mike

- [12] The plaintiff looked at the defendants' property online and stated, in an email dated November 7, 2012, that he found their property "amazing" and if they were interested in working with him, he had years of experience developing property and dealing with city councils and would like to discuss some options. He asked Mr. Henderson, if they wanted to sell or stay on the property -- as the defendants could also make money by staying on the land.
- [13] After various communications with the defendants, the plaintiff proposed a business plan to the defendants on December 8, 2012 which he said would increase their cash flow and allow them to refinance at a much lower rate. It included the following:
- i. Selling the abandoned vehicles on the property as provided in the Warehouse Lien Act, R.S.B.C. 1996, c. 480;
  - ii. Selling their daughter's unused Honda motor vehicles;
  - iii. Cleaning out the barn, bringing it to Code, leasing out the barn to designated marihuana growers, and renting out the two houses on site;
  - iv. Surveying the rear section of the property to remedy the encroachment by their neighbour, Mr. Rak;
  - v. Cleaning up the property and improving the drainage and look of the property (e.g. gazebo, fire pit, pond and streams).
- [14] The plaintiff revised this plan in his email to the defendants on December 31, 2012. It contained the same elements as the first proposal, but clarified a number of matters, including that the defendants would move out of their home and that the property would be expected to generate \$5,000 per month for leasing barn and outbuildings, \$1,100 per month for the two bedroom house, and \$2,000-2,300 per month for the three bedroom house. The plaintiff stated that, for refinancing, the bank would want to see signed contracts between them, as well as a signed lease with the designated grower and a cheque issued to them from the grower.
- [15] Ms. Henderson responded to the plaintiff on January 4, 2013 that they shared the same outlook as to how the property and building rentals could be set up but had a few questions, including how the business account would be set up for the rentals, taxes, and write-offs, and time frame for the sale of the property. The defendants stated that they were willing to have to "go a long term but if so feel that we need some security starting out and prefer to buy a house rather than rent". Ms. Henderson said they also wanted to be at the same place in starting the partnership and wanted the security of owning their own home, with the rental money going to the investment account.
- [16] By this time, the defendants had received a final notice from the company holding the mortgage on their property, Cove Mortgage Ltd. ("Cove"), with a January 16, 2013 deadline to renew or pay back the mortgage in full.

- [17] The plaintiff contacted his bank, Toronto-Dominion Bank ("T-D"), about the possibility of the defendants' refinancing at a better rate. He also sought designated growers to lease the property. The plaintiff testified that Mr. Henderson told him that the defendants did not have money to pay their mortgage and asked the plaintiff to pay the mortgage arrears of \$10,000. The plaintiff testified that he agreed on the basis that he would be able to get back money from the lease of the barn.
- [18] On January 7, 2013, the plaintiff advised the defendants that the potential lease for the barn fell through and "I don't know where it puts our partnership as I really wanted to cut your bills in half if not completely out". He also referred to having "less options on your property as the "bank would like to see revenue coming in". The defendants did not respond until January 14, 2013. Ms. Henderson told the plaintiff that her husband has too much on his mind and that they were a "little reluctant to step into something" and trust again.
- [19] The defendants subsequently advised the plaintiff that they had an offer to buy their property for \$900,000. The plaintiff wrote to the defendants on January 20, 2013 that he would not stand in their way if the defendants wished to sell the property. He related the pros and cons of developing the property and running it as a business. I find that the plaintiff promoted the defendants "keeping the property and running it as a business" and represented that by leasing the property and renting the homes they could earn a profit of "roughly \$4700 per month" minus rent and living expenses.
- [20] The defendants informed the plaintiff on January 21, 2013 that they had discussed with one another whether to accept the offer to buy their property or proceed with the proposal of the plaintiff. They informed the plaintiff that they had decided, after weighing both sides, that "investing was the right decision and they were looking forward to getting started". The defendants reiterated they wanted a house with space to live in and wanted to use one half of the \$4,700 to pay a mortgage and one half for a loan or down payment.
- [21] On February 2, 2013, the defendants gave their mortgagor, Cove Mortgage Ltd., the authority to speak with the plaintiff regarding their mortgage and advised Ms. Sanders of Cove that they had decided to invest in their property rather than sell it. Ms. Sanders responded that, as it had been a condition of the mortgage that the property be listed and sold, if the defendants decide to keep the property, Cove would need proof that they can afford to make the payments and may need the new partner to sign on the mortgage as a guarantor.
- [22] Commencing in late January and early February of 2013, the plaintiff paid the \$10,696 in arrears the defendants owed on the mortgage to Cove; assisted in obtaining a three month extension on the Cove mortgage for the defendants to obtain refinancing; and began paying the defendants' monthly mortgage payments for the property. The plaintiff also proceeded, on behalf of the defendants, to investigate the encroachment by the defendants' neighbour, Mr. Rak; made contact with Lekker Enterprises Inc. which was prepared to enter into a five year lease of the barn area for \$5,000 a month for a legal marihuana grow operation; and continued discussions with T-D about the possibility of refinancing of the defendants'

property. The lease with Lekker was executed by the defendants. The plaintiff was not a party to the lease.

- [23] The plaintiff subsequently communicated with the defendants about a second lease with John Berryman which was ready to be signed by email of February 5, 2013.
- [24] In that communication, the plaintiff stated he needed to meet with the defendants "to sign an agreement between ourselves as partners on this thing".
- [25] When the plaintiff did not receive a response, he asked again for a response. He also dropped off a Self-Counsel Press form of a partnership agreement, which was partially filled out. It provided that the defendants would each have a 25% interest and he would have a 50% interest; each partner would contribute a total of \$525,000 "in cash"; and the partnership would begin "on completion of shared title". At the end of the draft, it contained a handwritten statement that: "contract to be amended and once credit is restored by Mina ect [sic] (Banking Specialist) all parties will be on joint ownership of property". The plaintiff also attached a partnership checklist which was partially completed.
- [26] The defendants did not sign the partnership agreement.
- [27] On March 11, 2013, the plaintiff expressed concern about the state of the property and the lessees being "scared" off by the defendants' belongings and other items remaining in the barn. He suggested to the defendants that, as a result of his discussions about refinancing with Mina, he considered the best alternative was "simply to buy out the property at a fare [sic] price and let you guys move on".
- [28] On March 22, 2013 Mr. Henderson responded that he had made progress with the clean-up and would be meeting with his lawyer on March 26, 2013 so that they could have everything complete for April 1, 2013.
- [29] Two offers for the plaintiff to purchase the property dated March 26, 2013, using the Remax/BC Real Estate Association contract of purchase and sale standard form, were signed by the defendants.
- [30] The first provided that the property would be sold to the plaintiff for \$997,000 with a \$525,000 deposit to be paid to the plaintiff within 48 hours. The completion date was stated to be June 26, 2013. It contained handwritten conditions in an addendum that there would be an agreement for sale registered on title; the defendants would reside on the property rent free; and the plaintiff would collect the rent from the second house and lease agreements from the barn "for fees paid up front by Mike Ficocelli"; and the plaintiff would pay any costs of the Cove mortgage.
- [31] The second offer provided for a purchase price of \$950,000 with a deposit of \$525,000 paid directly to Cove on behalf of the defendants. The completion date was also stated to be June 26, 2013. It also contained a number of conditions in an addendum. Notably, the plaintiff would be put on title along with the defendants, once the \$525,000 "had been paid to clear

title with Cove Mortgages. Once the title is clear, no party will be able to borrow against the property until completion date at which time Brian and Nancy Henderson will come off the title". The addendum also included a handwritten condition that "after deposit is paid, all three owners must sign all documents less leases, and rentals until completion" and that "if the contract of purchase and sale for 28535 McTavish Road is not fulfilled and does not complete at completion, M. Ficocelli will be removed from Title and the deposit forfeited". It further provided that if any money is gained from the claim against Mr. Rak, it would be split 50/50.

- [32] Ms. Henderson testified that the defendants got legal advice on these contracts from a notary public. She testified that they had made the offers because they had been told by the plaintiff at a March 23, 2013 meeting that their credit rating was "bad" and he could not arrange refinancing for them - that he had to get on title or buy the whole property. She said that he wrote out a number of conditions including a purchase price of \$900,000 for the property, with \$525,000 to be paid to Cove within three months. She said that her husband was not present at the time the plaintiff communicated these conditions and that none of the conditions were agreed to at the meeting as there was supposed to be something written up for them to consider.
- [33] The plaintiff testified that he wanted to buy the defendants' property at that time, which accounted for the defendants' offers. On March 29, 2013 the plaintiff emailed the defendants that he had had discussions with the defendants' realtor and he was making four changes to the offer which had been made by the defendants including, that Cove would be paid out including all fees associated with the release of the property, that any monies not being covered by the plaintiff's rentals and/or leases would form part of the purchase price; no forfeiture would be granted on the sale; no agreement would be entered into with Mr. Rak as any monies either paid out or lent ("extra \$50,000 on purchase price") would be paid back by these monies if gained; the property would be cleaned up and addendum would be subject to review by lawyers for the plaintiff.
- [34] In his testimony, the plaintiff said that he decided to use \$50,000 of the monies he had borrowed for the other project. Neither offer was signed by the plaintiff.
- [35] Subsequently, a handwritten document prepared by Ms. Henderson, dated April 1, 2013, was signed by the parties. It provided that the defendants had received independent legal advice as to the "pros and cons of their property sale and or joint venture with Mike Ficocelli" and had agreed to "a joint partnership on our land". It provided that:

### **Dated April 1, 2013**

Brian and Nancy Henderson have talked to an independent lawyer and have been advised as to the pros and cons of their property sale and or joint venture with Mike Ficocelli.

Brian and Nancy Henderson after discussing all matters have agreed to entering into a joint venture with Mike Ficocelli.

We have all agreed to a joint partnership on our land PID 013-331-655 for a price of \$525,000.00 plus conveyancing fees etc. The \$525,000 is for a 50% interest in the property - legal/conveyancing fees, etc. to be determined by Cove and lawyers will come back to Mike Ficocelli.

Michael upon fees paid to Cove will be put on title, so all three of us will be on title.

[signatures]

[36] By letter dated April 17, 2013, the plaintiff's notary, Mr. Sidhu, sent a land registry form to transfer a one-half interest in the defendants' property to the plaintiff which provided that the transfer would take effect "without the necessity of having any funds paid by the Transferee to the Transferor at this time". Mr. Sidhu stated that the document was to be signed in the presence of a solicitor or notary public. It was not signed by the defendants.

[37] Ms. Sanders from Cove, upon being advised of the proposal to add the plaintiff to title, questioned whether this is necessary if the plaintiff was going to pay \$365,000 and the remainder within the 3 month extended term of the mortgage. She advised on April 18, 2013 that Cove does not allow one-half interest mortgages and that "the only way we can authorize adding you to title is if you pay down the \$365,000 and then sign as guarantor for the remaining balance."

[38] The plaintiff and the defendants communicated about the defendants' arrangements to obtain independent legal advice.

[39] A second handwritten document containing the signatures of the plaintiff and the defendants is dated April 21, 2013. It provided a guarantee that the \$315,000 paid by the plaintiff to Cove would be paid back to the plaintiff or discounted from the purchase price:

We Brian & Nancy Henderson having sought legal independent council [sic] do hereby agree to Guarantee funds provided by Mike Ficocelli in the amount of 315,000.00 dollars plus interest & any fees paid by Mr. Mike Ficocelli in order to secure our land/property PID# 013-331-655 at the following legal address 28535 McTavish Rd Abbotsford BC V4X 2B7. Any monies/fees paid in interest of otherwise which are a direct fee on above listed property will be paid back to Mr. Mike Ficocelli or be discounted from a purchase price to be agreed & not to be more than 1 million dollars regardless of time passed & market values.

Dated April /21st/2013

As per agreed on Henderson's E Mail to Ficocelli.

[signatures]

- [40] The evidence of Ms. Henderson in direct was that all three of them were present at the time the April 21st document was signed and that the reference to the "Email" at the bottom of the document was in reference to the email she was writing to the plaintiff at that time. Subsequently, she testified she signed the document in blank, as the plaintiff was in a hurry to leave.
- [41] The plaintiff testified that he wanted the letter in place for security given the \$315,000 payment he was about to make on the defendants' mortgage. In an email dated April 22, 2013 the plaintiff wrote to the defendants that he needed "to get the draft in to Cove for \$365,000 so they will let me on title to complete the sale". The plaintiff paid \$315,000 to Cove on April 23, 2013.
- [42] On May 3, 2013, the plaintiff was advised by Mina Oloomi at T-D that the bank would not be able to process the mortgage application if the defendants were on title given the financial difficulties they had. The defendants owed two years of back taxes and had a poor credit rating.
- [43] On May 7, 2013 Ms. Sanders at Cove also advised the plaintiff that the deal to have him on title was declined and that only way the defendants could be removed from title is if he purchased the property from them. On May 15, 2013, Cove renewed the mortgage for three months, with the plaintiff as guarantor. The outstanding amount of the mortgage was stated to be \$217,507. The monthly payments were reduced from \$4311 to \$1946. The plaintiff continued to seek other financing.
- [44] As the defendants did not complete the work to prepare the property for growing medical marihuana, the plaintiff hired labourers to perform this work.
- [45] The plaintiff's realtor prepared two contracts to purchase the property for \$525,000 with a deposit of \$315,000 and subject to the buyer obtaining \$225,000 in financing. The first contract dated May 23, 2013 was for a one-half interest in the property and was unsigned. The second contract was dated May 28, 2012 and was to purchase the whole property, for \$525,000, with a deposit of \$315,000. One version of the second contract has a handwritten change, reducing the deposit to \$220,000. Although the May 28, 2013 contract was signed by the parties, the plaintiff informed the defendants on June 4, 2013 that they had signed the wrong documents with the wrong dates. This was acknowledged by Ms. Henderson in her evidence.
- [46] On June 22, 2013 Mr. Henderson wrote to the plaintiff requesting a meeting as it had been a long time since they met and there was "lots to go over and get done" and "all is important".

[47] Ms. Henderson gave evidence that she prepared an unsigned Joint Venture Agreement. She testified she believed that she initially got the form from the plaintiff. She said that they wanted reassurance in writing because of the impending sale of the property. It provided, among other things, that the partnership would begin on June 26, 2013 and was to carry on a joint venture on the property (50% for plaintiff and 50% for defendants) with each partner contributing \$525,000 in cash. Ms. Henderson included a handwritten note that:

This shall include recognition of the Henderson's gain, equity in property gained before agreement and the use of that gain held by Mike Ficocelli to finance the \$225,000 he needed to meet the contribution of both parties by in of \$525,000. He had \$315,00 and financed the \$225,00 out of our gain of property, total gain of \$525,00, lending another \$306,000 to be paid or agree . [remainder illegible].

[48] Ms. Henderson testified that the defendants did not discuss the terms of the Joint Venture Agreement with the plaintiff and cannot recall what the handwritten comment meant. She said that the plaintiff did not agree to it.

[49] In July of 2013 Mr. Henderson advised the plaintiff that he had decided on a career change, to which the plaintiff responded that it was getting harder for him to cover costs, as the lessees had left.

[50] The plaintiff posted an advertisement looking for medical marihuana designated growers and made arrangements to bring additional power to the property. The defendants signed government forms related to the production of medical marihuana on the property.

[51] On August 16, 2013, Cove offered to renew the mortgage for an additional year effective October 1, 2013 at 9.95%. On October 2, 2013, the plaintiff wrote to the defendants that Cove had agreed to an extension for him to sign as a guarantor. He said that he had an investor interested in financing but there was expressed concern about not being able to get insurance on the property because of their credit rating. He told the defendants he was unable to carry the costs by himself for another year and that he wanted them to look into buying another house but they had to first pay out Cove.

[52] Ms. Henderson responded to the plaintiff on October 5, 2013 asking the plaintiff to buy them out:

In your last email past Wed you asked if there is anything we need that you can help with and to please let you know. Yes Mike there is, you have said to Brian that we can bought out and what you can do for a buy out? This is what we would like to do and is the right decision for us to move forward and also we think, for you mike to move forward too. I wanted to let you know now giving you some time to think over and get back to us on this. I hope you understand how I feel Mike, I think you're a great guy, and wish nothing but the best for you and your family.

Talk to you soon

Nancy and Brian

- [53] The plaintiff responded that he is "working on that exact scenario as I think it is best for all parties".
- [54] On October 10, 2013 Cove notified the parties that the mortgage renewal had to be finalized by October 24, 2013.
- [55] The plaintiff in emails to the defendants of October 10, 2013 reiterated that it is time to move on and expressed concern about the \$315,000 he paid, the bills he paid, the outstanding property taxes and mounting bills, without being on title. He expressed concern about spending another \$5,000 for power poles - which would increase their property value when he was not even on title.
- [56] On October 28, 2013 the plaintiff wrote to the defendants stating that they needed to come to an agreement on the price, dates, schedule, appraisal, etc., as the Cove mortgage was being "bought out". He asked them to confirm what Ms. Henderson had said earlier that they wanted to move on. Mr. Henderson responded that Ms. Henderson had come to an understanding that their realtor would be getting in touch with the plaintiff.
- [57] The plaintiff reiterated to the defendants on November 9, 2013 that he wanted an agreement on the purchase price so they could go their separate ways. He stated that he may not use the property for medical marihuana and may resell but needed to fix up the property first. The plaintiff made reference to information he had received from Abbotsford City Hall, referring to the City's decision to ban all commercial marihuana grow operations (which was later overturned).
- [58] The plaintiff subsequently advised the defendants that his appraiser's highest estimate was \$950,000. He also advised the defendants that he had received a call from Cove that they would not renew for them and that he can't keep paying the mortgage arrears with no insurance and arrears of taxes. Ms. Henderson responded that she believed the property was worth more than that now that it had been fixed up.
- [59] On November 25, 2013, Cove wrote to the defendants stating that they had only carried on the mortgage for as long as they had as they understood the property was going to be sold and the plaintiff had agreed to sign on as a guarantor:

If the sale does not proceed I am quite sure Mike will not want to continue on as guarantor and your renewal will become null and void. You will need to find financing elsewhere to pay out your mortgage.

- [60] The plaintiff, through his real estate agent, offered to purchase the property for \$900,000 with a deposit of \$315,000. The offer was rejected on the basis that his agreed contribution to the partnership was \$525,000.

Our buyout amount pertains, to our written and signed agreement, we have and hold to, entering into a joint venture of property Brian and Nancy own, each of us contributing \$525,000.00, for a 50% interest in the property agreeing to a joint partnership on land of Brian and Nancy's. Your

contribution of owning 50% of property, \$525,000.00, was to pay off Cove mortgage, \$525,000.00, which was giving us a clean slate to start on equally. \$315,000.0 was paid to Cove from your bank, Td bank, and the remainder which was being paid separate date of which Cove was aware of, of \$219,000.00 to complete buy out transaction was not paid by TD bank, and you then had to make an agreement with Cove to finance the \$219,000.00, your remainder of what you owed as commitment to your contract. An interest in a partnership is not a security, an interest in a partnership is a financial asset if it is held in a securities account.

[61] The plaintiff responded that they had never entered into a partnership agreement:

There was never a wittness signiture the partnership agreement you were to sign & we were to have a lawyer or notary make valid you never did. In short there is no partnership or shares to a company you never alowed to exhist. Had we signed it it would be legally binding as stated & it is nothing more than a piece of paper with thoughts & dreams on it. It never got of the ground due to my never being able to be put on title as a partner. You then collapsed the deal by wanting a buy out.No bank will finance a deal or business that cannot take flight as it needs a business plan we could never finalize. I am now tired of continually hearing that I owe what is your dept all we achieved is that I became your lender just like Cove is your lender holding a mortgage on your dept. talk to any lawyer & see what they have been telling me the whole time. If you want to be bought out my offer is in writing & you have suffered no losses. If you would rather not sell I will go to my lawyer & call in my dept which you did gaurantee paying back you also signed for the electrical work to be performed on your behalf. I am unwilling to continue paying for something that never matured there is no start date of a business transaction I in essance lent you money to pay down your dept with no proffits only losses as I have every reciept payed by me none by you. Answer the phone as I am un willing to pay any more than your offer of 900,000.00 FIRM & FINAL.

[Quoted as written]

[62] The property was appraised at \$900,000 as of January 31, 2014.

[63] The defendants did not make any payments on the mortgage. As the mortgage was in default, Cove brought a petition seeking foreclosure. An Order Nisi was granted on March 15, 2014 with a six month redemption period.

[64] The plaintiff offered to purchase the property, through his counsel, from the defendants on March 5, 2015.

[65] The property was sold in court to Mr. Rak for \$1,053,888 on June 25, 2015. \$714,762 was paid into court pending this action, with a subsequent partial payment out by consent.

Position of the Parties

## The Plaintiff

- [66] The plaintiff's position is that he is owed the monies he paid on behalf of the defendants in anticipation of a business venture that never came to fruition. The plaintiff had proposed a business plan in which he and the defendants would enter into a joint venture to have licenced marihuana grown on their property. The property would be improved by cleaning it up and removing the unused vehicles. The defendants would move out of their home so that the houses and barn on the property would be leased to licenced medical marihuana growers. The plaintiff would pay the expenses for improving the property and share in the revenue.
- [67] The plaintiff submits that the proposed business plan changed when the defendants received notice that their property would be foreclosed, at which point the plaintiff made payments to Cove to pay down the mortgage and sought to refinance the property. The plaintiff was to be placed on title and the amount he paid on the mortgage was to be repaid or deducted from the purchase price.
- [68] The plaintiff asserts that the parties intended to have a formal agreement evincing their joint venture which was based upon their having received independent legal advice, but no such agreement was achieved as the parties could not agree on its essential terms. The defendants did not put the plaintiff on title as a joint tenant and the plaintiff could not obtain refinancing due to the defendants' poor credit rating and outstanding property taxes. Further, the defendants did not move out of their home and did not ready the property for lease -- which was to be a part of the agreement. As a result of the inability to conclude the partnership, the plaintiff submits he made an offer to purchase the property from the defendants at its appraised value, which the defendants rejected.
- [69] The plaintiff submits that the defendants' agreement to pay back the monies he paid in respect of their mortgage or to have the monies deducted from the purchase price of the property was set out in their handwritten agreement of April 21, 2013.
- [70] The plaintiff further submits that he is entitled to be repaid for what he paid on the defendants' behalf and to a remedy in unjust enrichment where the defendants received benefit from the plaintiff's payment of their mortgage obligation and the improvements to their property which he paid for.

## The Defendants

- [71] The defendants deny that they owe anything to the plaintiff. In their counterclaim, it is the defendants' position that the parties entered into a partnership agreement which the plaintiff breached. The defendants assert that a partnership was initially formed in late December 2012/early January 2013, whereby the defendants would offer leases to marihuana growers from which they would profit and the plaintiff would profit from his control of the marihuana grow operations. The defendants submit that the partnership changed on April 1, 2013 when the defendants agreed to pay out the Cove mortgage using his own credit and

the defendants agreed that he would own half the property at a price of \$525,000.

- [72] The defendants claim that the plaintiff breached the partnership agreement when he failed to clear off the mortgage and breached the fiduciary duty and duty of good faith he owed to the defendants by allowing the foreclosure to proceed and by attempting through the foreclosure to acquire title to the property. They contend that the plaintiff lost interest in the property when the City of Abbotsford City banned growing marihuana in November of 2013.
- [73] The defendants deny the existence of the April 21, 2013 guarantee to repay the plaintiff the \$315,000 paid under the mortgage. The defendants say that an agreement of this nature does not "fit" with other evidence, including the April 1, 2013 agreement that the plaintiff would acquire a one-half interest in the property for \$525,000 and the plaintiff's subsequent references in his emails to raising \$365,000 and additional \$210,000 to complete the purchase.
- [74] The defendants submit that they sustained damage as they would, but for the plaintiff's breach, have been half owners of a mortgage free property worth approximately \$1,053,888, which was the sale price received on the foreclosure, as well as the income stream from renting the main home and secondary home and medical marihuana leases.
- [75] The plaintiff responds that the defendants are estopped from claiming that there was a partnership given that they asked the plaintiff to buy them out. Further, and in any event, the plaintiff says that the defendants failed to mitigate their losses by making a counteroffer in response to the plaintiff's offer to purchase their property or by themselves selling the property or paying down the mortgage.

## Issues

[76] I consider that the following issues arise in this case:

1. Was there a partnership in effect between the parties? If there was a partnership did the defendants repudiate the agreement?
2. Did the plaintiff owe a fiduciary duty or duty of good faith to the defendants? If so, did the plaintiff breach this duty? Did the defendants fail to mitigate any loss?
3. Is the plaintiff entitled to recover monies paid on the mortgage (i.e. the \$315,000 and monthly mortgage payments)? Is the plaintiff entitled to recover monies paid to improve the defendants' property?

## Credibility

[77] I have assessed the evidence of the plaintiff and the defendants, Mr. Henderson and Ms. Henderson, in light of their evidence at trial and the extensive email communications between them and other documentary evidence. The importance of assessing credibility in this way was articulated many years ago by O'Halloran J.A. in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at para. 11:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried the conviction of truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...

[78] I have also considered the reliability of their evidence. The events at issue took place in 2012 and 2013 and the plaintiff and defendants' ability to recollect the sequence of events and conversations was hampered by the effluxion of time. Neither the plaintiff nor the defendants could recall what was said at meetings between them with any degree of specificity. Mr. Henderson was particularly unable to recall events. He stated that he generally left the paperwork to Ms. Henderson.

[79] In considering the relative credibility of the witnesses, I found the evidence of Ms. Henderson to be lacking in credibility at times. For example, she couldn't explain her handwritten notes on the draft joint venture agreement which she gave to the plaintiff and couldn't adequately explain why she had a copy of the April 21, 2013 agreement which the defendants had previously pled they had never seen. She also suggested that T-D offered the defendants at mortgage at 3%, which I find to be inconsistent with the correspondence with the T-D.

[80] I generally preferred the evidence of the plaintiff over the defendants, although I discounted his evidence as to why he decided to put \$50,000 into another project.

## Law

[81] The parties both refer to decisions of the court which set out the principles to be applied in determining when a partnership is formed and/or repudiated.

## Partnerships

[82] In *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277, Mr. Justice Smith described the nature of a partnership at common law and under the Partnership Act:

(a) A partnership at common law

- [21] At common law a partnership is formed if parties to a venture go into business together with a view to sharing the venture's profits. The partnership exists even in the absence of an express agreement and even where there is an agreement but all of the terms of the agreement have not been completed: see *Pitrie v. Racey* (1963), 37 D.L.R. (2d) 495 (B.C.S.C.); *Mathews v. Maurice* (1923), 54 O.L.R. 64 (H.C.); and, *Khan v. Miah*, [2001] 1 All E.R. 20 (U.K.H.L.).
- (b) A partnership as defined by the Partnership Act
- [26] Section 2 of the Partnership Act, R.S.B.C. 1996, c. 348, (the "Act") defines a partnership as "the relation which subsists between persons carrying on business in common with a view of profit." This language appears to codify the ingredients of a partnership as identified by the common law.
- [27] In *Continental Bank of Canada v. R.*, [1998] 2 S.C.R. 298, the court discussed the essential elements of a partnership in the context of s. 2 of Ontario's then Partnership Act, which employed the same language as s. 2 of the Act. At ¶22, the court listed the three ingredients as: (i) carrying on a business; (ii) in common; (iii) with a view to profit. It stated further at ¶23 that, "[t]he existence of a partnership is dependent on the facts and circumstances of each particular case. It is also determined by what the parties actually intended.
- [28] The indicia of a partnership were set out at ¶24. They include "the contribution of money, property, effort, knowledge, skill or other assets to a common undertaking, a joint property interest in the subject-matter of the adventure, the sharing of profits and losses, a mutual right of control or management of the enterprise, the filing of income tax returns as a partnership and joint bank accounts."
- [83] The law requires cogent evidence establishing the presence of the prerequisites of partnership before imposing the fiduciary duties on partners that flow from partnership. A partnership only exists if there is a valid contract of partnership and the members of the partnership are carrying on business; in common; and with a view to profit, *Blue Line Hockey Acquisition Co. Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, *aff'd* 2009 BCCA 34.

## Valid contract

- [84] In the trial decision in *Blue Line Hockey*, Madam Justice Wedge considered the contractual requirement for a partnership. She noted that there must be a completed agreement before a partnership will be found to exist and referred, at para. 40, to the prerequisites underlying a contract:
- a) An offer containing all of the essential terms, and an acceptance of the offer (that is, a meeting of the minds or *consensus ad idem*);
- b) Certainty of the agreed terms;

- c) Consideration; and
- d) The intention to create legal relations.

[85] In *Surerus Construction and Development Ltd. v. Rudiger*, 2000 BCSC 1746, Mr. Justice Wilson emphasized the importance of the contractual underpinnings of a partnership at para. 14:

As "partnership arises from contract", it is necessary that there be certainty of the essential terms for there to be a binding contract.

[86] While the contract need not be in writing, there must be consensus as to the contract's essential terms. Even though parties may have considered themselves to be partners and held themselves out as partners, Justice Wilson concluded, at para. 33, that the alleged contract of partnership in that case failed for lack of certainty:

In conclusion, notwithstanding the fact that both Mr. Surerus and Mr. Rudiger considered themselves to be partners, held themselves out as such, and acted accordingly, there is not sufficient certainty in the terms of any agreement to enable a determination of the basis upon which a partnership was to be established, or conducted. The court may imply terms in order to give an agreement business efficacy. However, before the court can do so, there must be agreement on the essential terms of the contract.

[87] Further, in *Cullen v. M.N.R.*, [1985] 2 C.T.C. 2059 at 2064, the Court said that there must be evidence of an intention to be bound as partners:

A tacit agreement may be found in the conduct, the daily behaviour and actions of the parties. However, as was stipulated by Mr. Justice Lamer in *Beaudoin v. Daigneault*, [1984] 1 S.C.R. 2, the Courts must be careful not to attribute to the parties intentions which they never had and which are not supported by the evidence

The fact that the Appellant and his wife describe themselves as partners is not conclusive, nor is the fact that the farm was owned by them as joint tenants. In cases such as the case at bar where no written partnership agreement exists the intention of the parties may be ascertained from their conduct, the mode in which they have dealt each other, and the mode in which each has, with the knowledge of the other, dealt with other people. This can be shown by books of account, by the testimony of clerks, agents, and other persons, by letters and admissions, and, in short by any of the modes by which facts can be established

## Carrying on Business

[88] With respect to the requirement of a partnership that the "business" be "carried out", the parties must do more than simply agree to carry out a business. They must actually commence carrying on the business. In *Scragg v. Lotzkar*, 2005 BCCA 596, Madam Justice Ryan stated at para. 34:

The real question is whether it can be said that the partnership's enterprise had commenced. That is, had the parties done enough to be found to have commenced the joint enterprise in which they had agreed to engage.

[89] Madam Justice Dickson, in *Jacobs v. Yehia*, 2014 BCSC 845, referred to the bright line courts have traditionally drawn between "intended" partnerships and those that actually commenced carrying on business, referring to the decision of the Court of Appeal in *Blue Line Hockey*, wherein the Court referenced the general principle from *Lindley on Partnership* in 1995:

An agreement between two or more persons to carry on business at a future time cannot render them partners before they actually start to carry on that business. It is the carrying on a business, not a mere agreement to carry it on, which is the test of partnership, hence the importance of distinguishing between actual and contemplated partnership. As Lord Lindley put it:

"Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners before the arrival of the time agreed upon."

So long as an agreement to form a partnership remains executory, no partnership will be created. Subject to the point noted in the previous paragraph, intending partners will retain that status if the chosen commencement date has not yet arrived or if some act still remains to be done before the business can be commenced "

[90] Justice Dickson noted that the Court of Appeal went on to discuss the developments in the law since 1995 and that cases such as *Khan* had broadened the meaning of "carrying on business" (i.e. whether the parties had done enough to be found to have commenced the agreed joint enterprise) but emphasized that contractual underpinnings remain an essential element of partnership -- in particular the "subjective intention to carry on business in common with a view to profit.

### Carried out in Common

[91] In determining whether the business has been carried out "in common", the common purpose of the partnership will usually be found in the partnership agreement setting out the respective rights and obligations of the partners. Relevant evidence includes whether a partner has the authority to bind the partnership; whether the parties held themselves out to third parties as being partners; the contribution of skill, knowledge or assets to a common undertaking, a joint property interest in the subject matter of the venture, the sharing of profit and losses, the filing of income tax returns as a partnership, and joint bank accounts, *Backman v. Canada*, [2001] 1 S.C.R. 367 at pp. 379-380.

## A View to Profit

[92] Whether the business is being carried on with an expectation of profit requires an inquiry into the intentions of the parties and the nature of the enterprise itself. Profit need not be the overriding intention, Jacobs at para. 219, Backman at para. 22.

## Joint Venture

[93] The distinction between a partnership and a joint venture was described by Justice Wedge in Blue Line Hockey. She set out the essential ingredients of a joint venture:

[57] The ingredients of a joint venture are the following:

- a) As is the case with partnerships, the joint venture must have a contractual basis; and
- b) There must be:
  - (i) a contribution of money, property, effort, knowledge or other asset to a common undertaking;
  - (ii) a joint property interest in the subject matter of the venture, which is usually a single or ad hoc undertaking;
  - (iii) a right of mutual control or management of the venture;
  - (iv) an expectation of profit and the right to participate in the profits.

[94] She observed, at para. 67, that "while the constituent ingredients of a partnership differ slightly from that of a joint venture, both require as their foundation a binding contract among the partners or joint venturers which contains all of the essential terms of the agreement between the parties.

## Proof of Partnership

[95] In Jacobs, Justice Dickson underscored the need for cogent evidence to establish the existence of a partnership:

224 Cogent evidence is required to establish the existence of a partnership. Although a formal partnership agreement is unnecessary, the underlying contract must meet all the pre-requisites of a valid contract. These include: an offer containing all essential terms and acceptance of the offer (i.e., a meeting of the minds or consensus ad idem); certainty of terms; consideration; and an intention to create legal relations: Red Burrito Ltd. at para. 25-27; Sangha v. Reliance Investment Group Ltd., 2011 BCSC 1324 at para 526; Blue Line Hockey (BCSC) at paras. 36, 40.

225 The test for determining the intention to create legal relations is objective. It depends on how the promisor's conduct would strike a reasonable person in the promisee's position, not on the promisor's state of mind: Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc., 2009 BCSC 1303, para. 324-325.

226 Courts strive to uphold contractual obligations solemnly and freely undertaken. The parties must express themselves with a reasonable degree of certainty, however, for a contract to be enforceable. If the essential terms of an agreement are vague, ambiguous or incomplete it cannot be said the parties came to a meeting of the minds. On the other hand, if, on close analysis, definite meaning can be discerned from the words used courts adopt a fair and broad approach to construing contracts: *Le Soleil*, paras. 321 & 339-341.

227 Partnership agreements typically contemplate a long-term business relationship between the partners. That being so, it may be impossible for the parties to anticipate and agree upon all future decisions to be made. In these circumstances, the underlying contract will not fail for uncertainty so long as an effective mechanism for their determination has been established. In addition, the law occasionally permits terms to be implied to give business efficacy to a bargain. If, however, essential terms are missing "...it is not for the court to make a contract for the parties that they did not make for themselves": *Le Soleil*, para. 332, 340; *Pacific Hunter Resources Inc. v. Moss Management Ltd.*, 2008 BCSC 960, paras. 105-106; *Dirom v. Perera*, [2004] A.J. No 990. para. 183.

228 Parties may reach agreement and intend to be bound before formal documents are executed. Whether they have done so is a matter of construction of the contract: *Le Soleil*, para. 330-331; *Pacific Hunter Resources Inc. v. Moss Management Ltd.*, 2008 BCSC 960, paras. 105-106.

229 A valid contract of partnership may be evidenced orally, in writing, by conduct, or by a combination thereof. Each case will turn on its own unique facts. The key question is always whether an agreement has been reached on all essential terms, regardless of its form: *Le Soleil*, para. 323; *Porter v. Armstrong* [1926] S.C.R. 328, at 329.

## Unjust Enrichment

[96] The doctrine of unjust enrichment is an equitable doctrine. When applied it restores a benefit to the plaintiff which justice does not permit the defendant to retain: *Goriske v. Aeckerle*, 2011 BCSC 624; *Blue Line Hockey* at para. 338.

[97] In *Goriske*, Mr. Justice Pearlman summarized the essential elements of a claim for unjust enrichment:

99 In order to obtain a remedy for unjust enrichment, the plaintiff must establish: (a) an enrichment of or benefit to the defendant, (b) a corresponding deprivation to the plaintiff, and (c) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at paras. 31, 32. See also: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Garland v. Consumer's Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629.

100 The benefit provided and the detriment suffered by the plaintiff must be substantial before a claim of unjust enrichment will be allowed: *Kiyon v. Lanegraff*, 2007 BCSC 1299 at para. 75, citing *Strudwick v. Strudwick Estate*, [1996] B.C.J. No. 776 at para. 16 (B.C.S.C.).

101 An enrichment can be a tangible benefit, or "relief from the 'negative', such as saving the defendant from an expense that he or she would otherwise have been required to make": *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75, [2004] 3 S.C.R. 575 at para. 15.

102 With respect to the third element, juristic reasons to deny recovery include the intention to make a gift, a contract, or a disposition of law: *Kerr* at para. 41. In *Garland*, the Court formulated a two-step process for the analysis of the absence of juristic reason: at para. 44. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. If there is no juristic reason from an established category, the plaintiff has made out a prima face case under the juristic reason component of the analysis.

103 The onus then shifts to the defendant to show that there is another reason to deny recovery. At this second stage of the analysis, the court will consider the reasonable expectations of the parties and any public policy considerations that provide a juristic reason for the retention of the benefit by the defendant: *Garland* at para. 46. As the Court stated in *Kerr*: "[t]he question is whether the parties' expectations show that retention of the benefits is just": at para. 124.

[98] The object of the remedy of unjust enrichment is to provide restitution by requiring the defendant to repay or reverse the unjustified enrichment. The remedy can be a monetary or proprietary.

[99] The existence of a contract may amount to a juristic reasons to deny recovery for unjust enrichment, *Sucher v. Immediate Images Inc.*, 2009 BCSC 1361, *Kosaka v. Chan*, 2009 BCCA 467.

## Discussion

Was there a partnership between the parties?

[100] A central issue in this case is whether a partnership existed between the parties. The defendants submit that a partnership was created between the parties when they accepted the plaintiff's December 31, 2012 business plan, which plan they assert was subsequently varied by the parties. The defendants suggest that the evidence is clear that the plaintiff's initial business plan was "put into motion forthwith" and that they affirmed their wish to proceed with the plan in their January 4, 2013 email to the plaintiff.

## Partnership Proposal

[101] In considering the indicia of a partnership in this case, I accept that there is evidence that the parties contemplated entering into a partnership: there was discussion about entering into a business plan; a "partnership business plan" was proposed; and the parties conducted themselves, in certain respects, in a manner consistent with the plan, with a view to making a profit.

- [102] I find that the plaintiff drafted a business plan and sent it to the defendants on December 8, 2012. It was revised on December 31, 2012. The proposal involved improving the property; cleaning and removing unused and abandoned vehicles and other items; obtaining compensation for encroachment on the defendants' property by Mr. Rak; and renting out the two houses and barn on the property. The plaintiff proposed that he would pay for the cost of improvements to the property and would assist them in finding refinancing for their property at a lower rate.
- [103] The proposal did not expressly refer to using the property for growing medical marihuana, although this was clearly the primary objective of the plaintiff's proposal.
- [104] After receiving the plaintiff's proposal, the defendants did not immediately agree to move forward with it. It was not put into motion "forthwith" as the defendants contend. While the defendants communicated to the plaintiff their interest in what the plaintiff proposed, they also expressed reservation. I find that this was due to their hesitancy in trusting the plaintiff; their having received an offer to purchase the property; and their having to renew or buy out the Cove mortgage by January 16, 2013. The defendants also had a number of questions regarding the proposed partnership which they raised with the plaintiff, such as how they would set up business accounts for rental income, pay off the mortgage, pay taxes, share available write offs, and when the property would ultimately be sold. I do not agree, therefore, that the defendants affirmed their wish to proceed with the partnership on January 4, 2013.
- [105] It was not until January 21, 2013 that the defendants advised the plaintiff that they had decided to "invest" in their property rather than sell it. Yet, even at this point, I find that the terms of the proposed partnership were uncertain. There was no evidence that the parties addressed the questions which the defendants had raised in their prior email. There was also nothing in their email as to what specifically the defendants were agreeing to. They did not expressly accept the terms for the joint venture or partnership which had been previously proposed by the plaintiff on December 31, 2012. While I accept that the defendants expressed their agreement with the concept of using their property to generate revenue, there was nothing specified between them on the business terms which would need to be settled including, for example, how the revenue from the partnership would be shared.
- [106] Although the defendants seek to rely on Ms. Henderson's evidence at trial that the defendants would receive the growers' lease payments and the plaintiff's profits would come from the management and control of the marihuana production itself, I note that this evidence was denied by the plaintiff in his evidence and Ms. Henderson's evidence is contradicted by the plaintiff's initial business plan, which provided that the defendants would receive revenue from the two homes and the barn, which he estimated would generate roughly \$4,700 per month. There was no suggestion in their communications that the defendants would receive all of the growers' lease payments, which the plaintiff testified could be as much as \$38,000 per month. The defendants' suggestion that the plaintiff would

receive profits from the management and control of "marihuana production" does not explain how he would share in the profits of the venture. I find that the parties had not determined how the partnership would operate and, specifically, how they would share profits and losses at the time the defendants decided to "invest" in the property rather than sell it.

### Written Partnership Agreement

- [107] While a partnership agreement need not be in writing, I find that the parties intended from an early point in their relationship that there would be a written contract between them.
- [108] Shortly after the defendants' January 21, 2013 email, the plaintiff told the defendants that the bank would want to see signed contracts between them and that this needed to be done. The plaintiff then sent to the defendants a draft "partnership agreement" which was filled out and signed by the plaintiff. He proposed that the partnership operate under the name Chelli's Properties Corporation. The plaintiff testified that he expected that there would be further discussion of the terms, but this did not occur.
- [109] Subsequently, Ms. Henderson spoke to the bank about a partnership agreement and sent an unsigned draft "joint venture agreement" to the plaintiff. It provided that the plaintiff and each of the defendants would be joint venture partners. In her evidence she said that she afraid that they would be off the property and nothing was in place.
- [110] I note that the draft partnership agreement, which I find that the plaintiff proposed in February of 2013, provided that the partnership would begin on "the completion of shared title". The joint venture agreement which I find the defendants proposed in June of 2013, provided that the partnership would begin on "June 26, 2013". I find that by proposing written forms of partnership and joint venture agreement, the parties exhibited an intention to enter into a written agreement which specified the terms of the partnership. The fact that they were unable to conclude either a written partnership or joint venture agreement is indicative of the parties not having agreed on the underlying contractual terms of their partnership or joint venture.

### Initial Dealings

- [111] That said, I will nevertheless consider whether the evidence supports the conclusion that a partnership between the parties can be found to have been established by an oral agreement or by their conduct or a combination thereof. As noted above, it is evident that certain initial steps were taken in furtherance of the proposed joint venture. The plaintiff contacted T-D regarding refinancing of the defendants' property to obtain a lower interest rate. He also sought out and arranged two leases for growing marihuana on the property which were ultimately signed by the defendants. The plaintiff also proceeded to obtain legal advice as to what could be done to address Mr. Rak's encroachment on the property.

- [112] However, these actions were not taken in common. They were actions taken by the plaintiff alone. In any event, I find that the proposed partnership/joint venture did not materialize. The plaintiff was unable to obtain better refinancing for the defendants through T-D due to the defendants' poor credit rating. The defendants' mortgage was renewed with Cove at the same rate.
- [113] There were leases signed with growers, however these leases were between the lessees and the defendants. There was no reference in the leases to a partnership and, as noted above, no agreement as to how the income from the leases would be utilized and/or shared. Further, the leases were ultimately abandoned as the property was not, in the view of the lessees, sufficiently well prepared for the lessee to begin growing marihuana. Accordingly, despite some work done by the plaintiff and, to a lesser extent, by Mr. Henderson to prepare the property for growing marihuana, I find that the parties did not commence that business.
- [114] In that regard, I find that the defendants did not follow the partnership plan which had been proposed by the plaintiff to generate revenue from the property. Although it had been proposed that the defendants would move out of the home and that their home and the other house on the property would be rented out, this did not occur. I find that the defendants took no meaningful steps to find alternate accommodation during 2013. I also find that, although the plan had provided that the defendants would pay the mortgage payments with the benefit of income from the property and better financing, they stopped paying their mortgage. Further, although the defendants were to clean out the barn to prepare the marihuana production, they did not complete this work.

## Change in Direction

- [115] After the initial failed attempt to refinance the property, I find that the proposed partnership between the parties changed direction. In order to prevent the defendants' property from being foreclosed and to maintain the land on which the proposed partnership was to operate, the plaintiff agreed to pay off the arrears of the defendants' mortgage. I accept the plaintiff's evidence that he began paying the defendants' monthly mortgage payments at the request of Mr. Henderson, who said he could not afford to make the payments. The plaintiff also arranged for the defendants to obtain a three month renewal of their mortgage with Cove in February of 2013, while he continued to search for refinancing at a better rate.
- [116] When the defendants advised Cove that they wanted to keep the property, Ms. Sanders advised that Cove wanted the plaintiff to be a guarantor for the mortgage to be renewed. This led to discussions between the parties about the plaintiff being put on title and becoming an owner or joint owner of the property. This is reflected in the plaintiff's proposal to purchase the property in mid-March of 2013, the defendants offers to sell the property to the plaintiff in late March of 2013, and, ultimately, the April 1, 2013 agreement.

- [117] Although the defendants contend that this change was simply a variation of the existing partnership agreement, I am not satisfied that the evidence supports the conclusion that there was clarity as to terms of the proposed partnership prior to or with this change of direction. In particular, the parties had not agreed on even basic terms as to how they would operate as partners and how partnership income would be shared. Further, while the plaintiff, at the request of the defendants, began making payments towards the defendants' mortgage, there is no evidence that these payments would be accounted for through the partnership.
- [118] Once it became apparent that the defendants would not be able to get refinancing through T-D and the plaintiff paid the mortgage arrears and began to pay the monthly mortgage payments through his bank account, the plaintiff focussed on becoming an owner or joint owner of the property. While I find that the plaintiff was still interested in working with the defendants to use the property to generate revenue, he wanted to ensure that his investment in the property would be secured through an interest in the property. With respect to the defendants, I find that they wanted to continue to work with the plaintiff to generate revenue as they were in financial difficulty and could not afford the Cove mortgage payments. They were, therefore, amenable to having discussions with the plaintiff about selling the property and made offers to sell an interest in the property to the plaintiff in late March of 2013.
- [119] The defendants submit that the April 1, 2013 agreement supports the conclusion that the original partnership was expressly varied to include the plaintiff buying 50% interest in the property. As noted above, the April 1st handwritten document prepared by Ms. Henderson provided that the defendants "have agreed to entering into a joint venture", with the plaintiff and that "we have all agreed to a joint partnership on our land" for a price of "\$525,000 plus conveyancing fees etc." The \$525,000 was stated "for a 50% interest in the property - legal/conveyancing fees etc. to be determined by Cove and lawyers will come back to Mike Ficocelli. Michael upon fees paid to Cove will be put on title, so all three of us will be on title." Ms. Henderson testified that the effect of the April 1, 2013 agreement was that it made the plaintiff a joint owner of the property.
- [120] Interpreting the agreement as a whole, I find that it is executory in nature in that it provides that the parties have agreed to "entering into a joint venture" and does not delineate any terms for the joint venture except for the price. Further, although the parties purported to agree to a "joint partnership on the land", there are no terms of the partnership defined or referenced. There is no clarity as to the respective role and responsibilities of the parties to provide the underlying contractual basis for the joint venture or joint partnership. It does not express what was to happen after the parties are all on title.
- [121] In my view, the April 1, 2013 document is more consistent with an agreement in principle to sell an interest in the defendants' property than a joint venture or partnership agreement. It is significant that the document was prepared at the same time that the parties were exchanging contracts of purchase and sale of the property. Ms. Henderson testified that

their offer to sell the property had a number of subjects and that the plaintiff responded with other subjects. The April 1, 2013 document cannot be considered in isolation from the contemporaneous negotiations between the parties on the terms of the plaintiff acquiring an interest in the property and paying off the Cove mortgage, which was about to expire.

- [122] I find that, at most, the April 1, 2013 document reflected an agreement as to what would be the sale price for an interest in the defendants' property and confirmed the parties' interest in pursuing a joint venture. However, significantly, the parties did not proceed with the April 1, 2013 agreement. The plaintiff did not pay the defendants \$525,000 and the defendants did not place the plaintiff on title. The defendants continued to have title and sole control over their property.
- [123] The defendants submit that the reason that the parties did not proceed to place the plaintiff on title was that the plaintiff could not raise the funds necessary to complete. There is evidence that the plaintiff decided to use \$50,000 for another project. However, I am not persuaded that this was the impediment to the April 1, 2013 agreement. I conclude that the reason that the parties did not proceed with the April 1, 2013 agreement was that they were not able to reach agreement on the terms of the contract of purchase and sale of the property and, more importantly, Cove, and later T-D, would not agree that the plaintiff could be placed on title along with the defendants. According to the evidence, Cove required that the plaintiff become a guarantor and the defendants' mortgage paid down before they would consider allowing the plaintiff to be on title. T-D would not approve a mortgage for the plaintiff if the defendants were also on title.
- [124] Without other financing available and Cove demanding a renewal of the mortgage which expired April 1, 2013, with the plaintiff as guarantor, instead of proceeding with sale of a one-half interest of the property to the plaintiff, I find that the parties entered into an agreement which secured the plaintiff's payment of \$315,000 on the defendants' mortgage.
- [125] The April 21, 2013 agreement was a handwritten document prepared by the plaintiff. As noted above, it provided that the plaintiff would be "paid back" the \$315,000 plus interest and any fees paid or the amount would "be discounted from a purchase price to be agreed and not be more than one million dollars regardless of time passed and market values". I find that, based upon a plain reading of the agreement, the parties intended to provide for two alternative contingencies: where an interest in the property was sold to the plaintiff and where no such sale was concluded. In either case, the plaintiff's financial contribution to the defendants' mortgage was to be accounted for -- the defendants would pay back the amount paid to the plaintiff on account of their mortgage or they would reduce the amount payable by the plaintiff to purchase an interest in the property.
- [126] In respect to the obligation to repay the \$315,000, I interpret the reference in the agreement to the defendants agreeing the monies paid by the plaintiff on account of the mortgage would be "paid back" coupled with the reference to the defendants agreeing to "guarantee funds" paid by the plaintiff to mean that the obligation to repay the plaintiff operated

independently, such that if the parties did not proceed with selling an interest in their property to the plaintiff, he would nonetheless be entitled to the monies he paid on their mortgage.

- [127] In the event that the defendants' sold an interest in their land to the plaintiff, I interpret the reference in the agreement to the property being sold at "purchase price to be agreed" to mean that the parties had not agreed on the price of the property and the reference to "not to be more than one million regardless of time passed and market values" to mean that the parties intended to leave open the possibility that the plaintiff would buy the property outright, as opposed to his buying a one-half interest. This is consistent with the previous offers of purchase and sale.
- [128] Although the defendants have denied the existence of April 21, 2013 document, when Ms. Henderson was asked about the document in direct examination her evidence was initially that the defendants and the plaintiff were all present when the April 21st document was signed and that the handwritten reference to the email at the end of the document was to the email she was writing at the time. She did not on her own dispute the existence or content of the document. Counsel for the defendants then suggested to Ms. Henderson that when the defendants had signed it, the balance of the document was blank. Although counsel question was objected to, Ms. Henderson proceeded to change her evidence to say that she signed the document in blank because the plaintiff was in a hurry to leave. She did not clarify what part of the document was blank.
- [129] I do not accept Ms. Henderson's evidence in relation to this document. Not only did she alter her account in direct examination after a leading question, in cross examination her account of the document was not credible. When asked in cross examination why she did not initially disclose the document in the litigation given that she had retained a copy of the document, she said that it was because she had not read it. She said it was not given to her "personally" because it was among other papers given to her. She then sought to suggest that the version she had was different than the copy shown to her as one part of the date was partially cut off.
- [130] I find that the April 21st agreement was executed by all of the parties and reflects their agreement to give security to the plaintiff in exchange for his paying down the mortgage. I accept the plaintiff's evidence that he wanted some security for his impending payment of \$315,000 on the defendants' mortgage. His initiating an agreement of this nature was, I find, also consistent with his concern that he was not on title to the property and his agreement to be a guarantor. While I accept that the parties originally contemplated that he would make a \$365,000 payment to Cove, the defendants accepted the payment of \$315,000 towards the mortgage on the terms outlined in the April 21st agreement.
- [131] After this agreement was signed, the plaintiff became a guarantor on the mortgage and he had his realtor prepare an offer to buy an interest in the property. That offer did not proceed as it contained an error in the description of the interest being sold.

- [132] By June of 2013, the plaintiff increasingly expressed concern to the defendants about paying expenses associated with improving the property without being on title. For their part, the defendants expressed concerns about the uncertainty of their situation. Henderson presented a form of joint venture agreement to the plaintiff, which the plaintiff did not agree to. When Ms. Henderson was asked at trial whether there was any discussion with the plaintiff on this form of joint venture agreement or on the terms of what one might be expected to be included in a partnership agreement, she testified that there were no such discussions with the plaintiff.
- [133] During the summer and early fall of 2013, there was some work in furtherance of the proposed partnership, but there continued to be a lack of clarity as to terms of their relationship. I find that the plaintiff, although he had no authority to bind the defendants, operated largely independently in attempting to secure sources of revenue for the property. This was a source of frustration to the defendants, as reflected in Mr. Henderson's email to plaintiff on July 1, 2013, in which he expressed concern about "the changes and different approaches that u take in business adventures to get ahead and making it work moneywise..." I find that both the plaintiff and defendants were frustrated by the relationship with one another and their financial situation. In that regard, Mr. Henderson had left his employment as a truck driver.
- [134] On October 2, 2013 Ms. Henderson sent an email to the plaintiff requesting him to buy them out. She said that she had discussed the matter of a buy out with Mr. Henderson and that this is "what we would like to do and is the right decision for us to move forward and also we think, for you mike to move forward too." The plaintiff told her that he accepted that his was the right course of action.
- [135] At trial Ms. Henderson suggested that she was not asking the plaintiff to buy them out in the email but was simply referring to their moving to Campbell River for a job opportunity which would free up the house for rent and that they were going to continue to be partners. When asked, if that was the case, what did she mean by her reference to a "buy out" she said she meant that we could be bought out by an "investor" paying us \$525,000 for their share of the property. I find her suggestion that the defendants did not intend to bring an end to their relationship with the plaintiff to be inconsistent with the plain language of the email and with the subsequent emails between the parties which concerned the plaintiff making an offer to purchase the property. There is no indication from the defendants in the communications that they wanted to maintain a relationship with the plaintiff until December 22, 2013 when the defendants rejected the plaintiff's offer to buy the property and wanted a "final buyout" of the partnership, which I find was an attempt by the defendants to secure a higher price than the plaintiff had offered.

## Conclusion

- [136] I have considered the authorities referred to me by the defendants as to the principles governing the existence of a partnership in this case.
- [137] In *Red Burrito Ltd.* the Court found that a partnership had been formed. However, in that case, the parties had entered into a Letter of Understanding to convert a grocery store into a restaurant business that would be owned and operated by the new company, in which they would be equal shareholders. Although the company was never incorporated and the lease was not assigned, the restaurant opened and operated from 2006 to 2008. In my view, those circumstances are distinguishable from the instant case, where there was a failed attempt to negotiate a partnership or joint venture agreement, the parties had not agreed on the business terms, and the intended business did not commence.
- [138] I note that in *Jacobs*, the Court concluded that the parties had not proceeded beyond the "intended partners" stage in their business relationship despite their having evinced an intention to carry on in common for profit and having been in business together for over seven years. The Court found the uncertainty as to ownership interests, such as how and when profits would be divided, to be fatal to the underlying partnership contract.
- [139] The Court in *Surerus* also found that the parties had not concluded an agreement to form a partnership notwithstanding that they both understood there would be a partnership, acted as if there was a partnership, and referred to one another as partners. Mr. Justice Wilson noted that while a court may imply terms in order to give an agreement business efficacy, before a court may do so, there must be agreement on the essential terms of the contract. In that case, he said at para. 33 that "there is not sufficient certainty in the terms of any agreement to enable a determination of the basis upon which a partnership was to be established, or conducted."
- [140] In the instant case, I found similar deficiencies in the contractual foundations of the partnership between the parties. Although the parties intended to have a written agreement between them, they could not agree on the terms of a written partnership or joint venture agreement. Further, I am unable to find from their oral communications and conduct, considered separately or together, that there was sufficient clarity as to the essential terms of a partnership: its commencement date; their respective roles and responsibilities; how revenue and expenses would be accounted for; and how they would share profits and losses. They had not agreed on the business terms that would need to be settled. Using the language in *Khan v. Miah*, [2000] U.K.H.L 55, the parties had not "done enough to be found to have commenced the joint enterprise", as cited by the Court of Appeal in *Blue Line Hockey* at para. 46.

[141] Although there was discussion about being partners, the steps taken towards becoming partners were taken almost exclusively by the plaintiff and were marked by changes of direction that underscored their inability to achieve a partnership. The proposed joint venture to generate revenue on the property through the production of marihuana did not materialize.

[142] I, therefore, conclude that a valid partnership was not established between the parties.

### **Alleged Repudiation of April 1, 2013 Agreement**

[143] The defendants assert that the April 1, 2013 agreement was a valid and enforceable agreement which provided that the parties had a half interest in the property and a one-half interest in the partnership. The defendants suggest that plaintiff repudiated the agreement and/or partnership when he stated that he would no longer pay the Cove mortgage after the City of Abbotsford decided to allow legal marihuana production and again when he stopped paying the mortgage payments and allowed the foreclosure to proceed.

[144] As noted above, I am not satisfied that a partnership was established between the parties. Further, I am not satisfied that the parties intended to proceed with the April 1st agreement: the parties were aware that the mortgagor would not support the three of them being placed on title; they did not seek to implement the terms of the agreement; the defendants did not put the plaintiff on title; the plaintiff did not pay \$525,000 to the defendants; the defendants did not seek to enforce the terms of the agreement; and, shortly thereafter, the parties entered into the subsequent April 21st agreement in which the defendants agreed to a \$315,000 payment by the plaintiff and to a sale price of the property which was "to be agreed" between the parties. The parties continued discussing the purchase and sale of the property. I find that the defendants did not act in a manner which demonstrated that they intended to proceed with the April 1st agreement. The April 21st agreement effectively overtook the April 1st agreement.

[145] In any event, I do not accept the defendants' contention that the plaintiff repudiated the April 1st agreement by failing to continue to pay the monthly mortgage payments. According to the uncontradicted evidence of the plaintiff, Mr. Henderson asked the plaintiff to pay the mortgage payments as they could not afford to do so. There is no agreement which required the plaintiff to pay the defendants' monthly mortgage payments. The obligation for the monthly mortgage payments under the renewal agreement executed May 15, 2013 was on the defendants, with the plaintiff only in the position of a guarantor of the defendants' obligation. Despite the concerns expressed by the plaintiff about mounting expenses, the warnings from Cove, and the foreclosure proceedings, I find that the defendants took no steps to pay the mortgage themselves.

[146] I also do not accept the defendants' contention that the reason the plaintiff stopped paying the mortgage payments was because he lost interest in the project after the City of Abbotsford decided not to allow lawful marihuana production. The plaintiff maintained his interest in the property after the City's decision and offered to buy the property from the defendants after the City announced this decision.

### **Alleged Breach of Fiduciary Duty**

[147] The defendants also assert that the plaintiff breached the fiduciary duty owed to them, causing damage to the defendants. The defendants submit that even if there is found to be no partnership between the parties, the plaintiff assumed a fiduciary duty to the defendants by inveigling himself into their lives with "grand plans", appointing himself as their business and financial advisor, and telling the defendants they could trust him.

[148] The two most recent leading cases concerning the circumstances in which a fiduciary duty will be found to exist outside the established categories are *Galambos v. Perez*, 2009 SCC 48 and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24. In the latter case, Chief Justice McLachlin stated for the Court at paras. 29-34:

[29] As useful as the three "hallmarks" ... are in explaining the source fiduciary duties, they are not a complete code for identifying fiduciary duties. It is now clear from the foundational principles ... that the elements outlined in the paragraphs that follow are those which identify the existence of a fiduciary duty in cases not covered by an existing category in which fiduciary duties have been recognized.

[30] First, the evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary ... As Cromwell J. wrote in *Galambos*, at para. 75: "what is required in all cases is an undertaking by the fiduciary, express or implied, to act in accordance with the duty of loyalty reposed on him or her."

[31] The existence and character of the undertaking is informed by the norms relating to the particular relationship: *Galambos*, at para. 77. The party asserting the duty must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake.

[32] The undertaking may be found in the relationship between the parties, in an imposition of responsibility by statute, or under an express agreement to act as trustee of the beneficiary's interests. ...

...

[33] Second, the duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them. Fiduciary duties do not exist at large; they are confined to specific relationships between particular parties. Per se, historically recognized, fiduciary relationships exist as a matter of course within the traditional categories of trustee-cestui que trust, executor-

beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child. By contrast, ad hoc fiduciary relationships must be established on a case-by-case basis.

[34] Finally, to establish a fiduciary duty, the claimant must show that the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary: *Frame*, per Wilson J., at p. 142.

[Emphasis added.]

[149] In considering whether the plaintiff owed a fiduciary duty to the defendants, I note the defendants' submission that a fiduciary duty arises in this case without reference to the specific evidence supporting it. The defendants simply refer to the plaintiff asking that the defendants "trust him" and his acting on their behalf. The defendants have not pointed to "a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interests at stake".

[150] Further, the defendants have not pointed to a "discretionary power" which the plaintiff had to affect their legal and practical interests. While the plaintiff undertook various actions in furtherance of a business plan to generate revenue on the defendants' property, the plaintiff was not given authority to bind the defendants and the defendants retained sole control over their property interests.

[151] Nevertheless, in considering the existence of a fiduciary relationship I have also considered the following in respect of the relationship between the parties:

- a. Neither party was sophisticated in business. I find that the plaintiff was more knowledgeable than the defendants about business matters, but the relative lack of sophistication of both the plaintiff and the defendants is evident from the nature of their communications, their initial connection through a craigslist advertisement; the vaguely formulated proposed business plan; both parties preparing and signing poorly drafted handwritten agreements; and their half-completed forms for a partnership and joint venture;
- b. I find that both parties were not altogether candid about their backgrounds: the plaintiff about the extent of his experience in property development and the defendants about the extent of their debt and financial situation;
- c. The defendants allowed the plaintiff to take steps to clean and prepare the property for use in marihuana production; to seek out leases with designated growers; and to investigate the encroachment on the defendants' property. The plaintiff paid the expenses associated with this work in anticipation of a partnership or interest in the property which did not materialize;

- d. The defendants retained ownership of their property interests. They signed all agreements which pertained to their interest in the property. The defendants communicated directly with their mortgagor and their potential mortgagor regarding their position regarding refinancing;
- e. I find that the defendants were advised by the plaintiff they should obtain independent legal advice and did obtain legal advice. Ms. Henderson acknowledged their obtaining legal advice prior to signing the April 1, 2013 agreement with the plaintiff. The defendants retained their own realtor regarding offers to sell the property;

[152] In consideration of all of the circumstances, I am not satisfied that the defendants have established that a fiduciary relationship should be imposed on the plaintiff, particularly where the required elements of an ad hoc fiduciary relationship have not been proven.

[153] That said, if the plaintiff did owe a fiduciary relationship to the defendants, I find that he plaintiff did not act in a manner which was in breach of his fiduciary duty. The evidence does not support the conclusion that the plaintiff was disloyal or acted in a manner which was adverse to the interests of the defendants. I find that the plaintiff, in good faith and with the knowledge of the defendants, took steps to generate revenue from the defendants' property. While the joint venture ultimately failed, through his actions he reduced the defendants' monthly mortgage payments by paying down the mortgage and paying the monthly payments and arrears with his own funds; he found individuals who entered into lease agreements with the defendants for growing medical marihuana; he paid expenses associated with cleaning up the property and upgrading the electrical power needed for the production of medical marihuana; he assisted in moving forward the matter of Mr. Rak's encroachment of the defendants' property; and he sought to buy out the defendants' interest in the property when the mortgagor would not allow the plaintiff to be on title with the defendants, given their poor credit and unpaid taxes.

[154] I find that the actions of the plaintiff likely improved the value of the defendants' property. I note that the defendants accepted an offer, which did not proceed, before they met the plaintiff at \$990,000 and the property was sold to Mr. Rak in foreclosure for \$1,053,888.

### **Alleged Breach of Duty of Good Faith**

[155] The defendants also claim that the plaintiff breached his duty to act in good faith and to be honest "in relationship to the partnership duties and the contractual duties he assumed." The defendants contend that the plaintiff misrepresented his experience in property development and his credit worthiness. The defendants assert that the plaintiff agreed to pay off the Cove mortgage but when he could not raise the funds, he attempted to convince the defendants to transfer the property to him and, when he was unable to force them to transfer the funds, he allowed the property to go into foreclosure.

[156] In asserting that the plaintiff owed a duty of good faith the defendants rely on *Bhasin v. Hrynew*, 2014 SCC 71. In that case the Court established a general duty of honest contractual performance. The principles were summarized by the Court at para. 93:

[93] A summary of the principles is in order:

- (1) There is a general organizing principle of good faith that underlies many facets of contract law.
- (2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.
- (3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[157] I observe that in that case the trial judge had found dishonesty on the part of the company which was directly and intimately connected with the performance of the contract.

[158] In this case, while, as noted above, the plaintiff exaggerated his previous experience with property development in the craigslist advertisement, I do not find that he was dishonest. In my assessment, the plaintiff is an enthusiast who believes in his success in business and his ability to get things done. I do not consider that his exaggeration of his prior experience rises to the level of dishonesty. There is no evidence to contradict the plaintiff's evidence that he and his family had redeveloped a number of properties and he has previously been involved with medical marihuana operations.

[159] With respect to the contention that the plaintiff was dishonest about his creditworthiness and that it was this dishonesty which ultimately led to the foreclosure of the defendants' property, in my view, this is not supported by consideration of the evidence as a whole. In my view, it was the precarious financial situation of the defendants that led them to ask the plaintiff to make their mortgage payments. They were already in arrears in February of 2013. It was not part of the original business plan and there was subsequent agreement between the parties that obliged the plaintiff to pay the defendants' arrears or monthly mortgage payments. Had the plaintiff not agreed to do so, the defendants would have had to sell the property under the terms of the mortgage with Cove or be foreclosed early in 2013.

[160] I find that the only reason that Cove was prepared to renew their mortgage was if the plaintiff agreed to become a guarantor of the mortgage. Ms. Sanders at Cove reflected this in her November 25, 2013 email to the defendants: Cove "only agreed to carry on the mortgage for so long as we have because the property was going to be sold several months ago and Mike agreed to sign on as guarantor in the meantime".

- [161] I also accept that the parties' plan, reflected in the April 1, 2013 agreement, that they would all be placed on title, was not accepted by Cove or by T-D. Ms. Oloomi confirmed on May 3, 2013 that T-D would not process the mortgage application with the defendants on title due to their financial difficulties. Ms. Sanders, on May 7, 2013, also declined the proposed "deal" in which the plaintiffs and defendants would all be on title.
- [162] There may well have been other means to achieve what the parties originally intended, but what occurred was that the parties agreed to the plaintiff paying down the mortgage and thereby reducing the monthly payments, which amount would be repaid or paid towards the agreed upon purchase price for the property.
- [163] While there were undoubtedly limitations on the plaintiff's ability to raise funds, I am not persuaded that the plaintiff misrepresented his creditworthiness. I find that the plaintiff's concern was not financing per se, but financing at a reasonable rate of interest. In any event, the plaintiff did make an offer to purchase the entire property, which is inconsistent with the suggestion that he was dishonest about his creditworthiness.
- [164] Accordingly, I conclude that the defendants have not established that the plaintiff was dishonest or breached the duty of good faith in his dealing with the defendants.

### **Plaintiff's Claim Under April 21, 2013 Agreement**

- [165] Although there was no partnership agreement, I must determine if there is any legal basis upon which the plaintiff is entitled to monies expended by him, *Pineda v. Lai*, 2014 BCCA 46. The plaintiff submits that the defendants breached the April 21, 2013 agreement when they failed to pay back the amounts he paid to Cove in relation to the defendants' mortgage.
- [166] The April 21st agreement, as noted above, provided that the plaintiff would be "paid back" the "\$315,000 plus interest and any fees" or this amount would be discounted from the purchase price for the property. Although the defendants in their pleadings denied that they ever saw or authorized the document and that it surfaced at the commencement of the dispute, as noted above, I am satisfied that the agreement was in the possession of the defendants and was signed by them. I am also satisfied that the April 21st agreement is valid and binding. It was entered into in consideration of the plaintiff paying down the defendants' mortgage by \$315,000, which he did.
- [167] I conclude that the defendants breached their obligation under the agreement when they failed to repay the plaintiff the \$315,000 plus interest and fees when the parties did not proceed with the sale of an interest in the property to the plaintiff. Accordingly, the plaintiff is entitled to \$315,000 plus interest and fees which the defendants promised to repay. The interest owed to the plaintiff would include interest paid by the plaintiff to T-D on account of the defendants' mortgage.

## Plaintiff's Claim of Unjust Enrichment

- [168] The plaintiff seeks repayment of the monthly mortgage and arrears payments in respect of the Cove mortgage, to the extent that he has not already received payment through revenue from the property. He also seeks to be reimbursed for the costs of all improvements the plaintiff made to the subject property, including the installation of hydro poles, electrical box, fencing, and labour costs for cleaning the property. In addition, he seeks to be reimbursed for gas expenses, travelling to and from the property and for cost of appraisals on the property and his residence.
- [169] The plaintiff relies on the doctrine of unjust enrichment. As noted above, to succeed in a claim of unjust enrichment, a plaintiff must establish an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment, *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 838.
- [170] I am satisfied that monthly mortgage payments and arrears paid by the plaintiff on account of the defendants' monthly mortgage conferred a benefit on the defendants as it reduced the defendants' obligation under the mortgage -- from which I exclude the \$315,000 plus interest and fees which were the subject of the April 21, 2013 agreement. The defendants have failed to show a reason why it would be just for them to retain monies used to defray their financial obligations under the mortgage. The plaintiff acknowledges that amount owing to him should be reduced by any monies received by him through the lease payments.
- [171] However, I am not persuaded that it was unjust for the plaintiff to pay for the cost of the hydro pole, electrical, fencing, gas expenses, and labour costs. I am not able to infer from the evidence that these costs improved the value of the defendants' property or that the defendants were otherwise enriched by these expenditures. The expenses were incurred by the plaintiff in anticipation of the marihuana production venture which did not proceed.
- [172] Similarly, I am not able to infer it would be unjust for the plaintiff to pay for the expenses associated with obtaining the appraisals obtained by the plaintiff for the purpose of making an offer to purchase the property.

## Summary

In summary:

1. The plaintiff is entitled to judgement for the breach of the April 21, 2013 agreement, in the amount of \$315,000 plus interest and fees;
2. The plaintiff is entitled to compensation arising from the unjust enrichment of the defendants, including expenses incurred by the plaintiff for mortgage payments and arrears made by the plaintiff in relation to the defendants' mortgage;

3. The plaintiff's claim for expenses associated with cleaning the property and preparing it for growing marihuana are dismissed;
4. The amount to which the plaintiff is entitled above is to be reduced by payments already received by the plaintiff through revenue from the property and through the payout of funds paid into court in this action;
5. The defendants' counterclaim is dismissed.

[173] The parties may make submissions through Supreme Court trial scheduling if they cannot agree on costs.

"Madam Justice W.J. Harris"

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