

CANADA / JUDGMENT

Jasmur Holdings Ltd. v. Taynton Developments Inc.

2016 BCSC 1902

COURT

Supreme Court of British Columbia

DECIDED

17 October 2016

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2016 BCSC 1902 Jasmur Holdings Ltd. v. Taynton Developments Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jasmur Holdings Ltd. v. Taynton Developments Inc.,

2016 BCSC 1902

Date: 20161017

Docket: S89393

Registry: Kelowna

Between:

Jasmur Holdings Ltd., Robert Scott Edmunds and

0765647 B.C. Ltd. carrying on business as

OKM Development Joint Venture

Plaintiffs

And

Taynton Developments Inc., Gary Andrew Callaghan,

0814782 B.C. Ltd. doing business as Max Mechanical, Antrim Homes Ltd.,

Karl Ellwood doing business as Ellwood Excavation,

Thomas Schreider also known as Tom Schreider, and

Suzanne Callaghan also known as Suzanne Schreider

Defendants

Before: The Honourable Madam Justice Beames

Reasons for Judgment

Counsel for the Plaintiffs:

C.E. Hanert

K. Reilly

Counsel for the Defendants,

Taynton Developments, G.A. Callaghan,

Antrim Homes Ltd., and S. Callaghan also known as S. Schreider:

C.K. Wendell

No other appearances

Place and Dates of Trial/Hearing:

Kelowna, B.C.

January 6-9, January 12-14,

June 8-12, June 15-19,

September 25,

December 8 and 9, 2015

Dates of Written Submissions:

December 16, 22, 2015 and

January 4, 2016

Place and Date of Judgment:

Kelowna, B.C.

October 17, 2016

Introduction

[1] This action, commenced in 2010, arises from the construction of a multi-family townhome development in the Kettle Valley neighbourhood in the city of Kelowna. The development was called the Gardena project.

- [2] The plaintiffs advance various causes of action against the defendants. The defendants Taynton Developments Inc. and Gary Callaghan counterclaim against the corporate plaintiffs based on various causes of action.

Identification of the Parties and other Players

- [3] Jasmur Holdings Ltd. ("Jasmur") is a company incorporated in British Columbia in August 2006 as 075816 B.C. Ltd., which later changed its name to Jasmur. Its principal is Vince Murray. He is a certified financial analyst and a certified financial planner. Mr. Murray moved to Kelowna in August 2005 with his wife and children, after a career of 18 years in the financial industry, primarily in bond and money market trading. When he left his employment with BMO Nesbitt Burns in Toronto, he was a vice-president of capital markets. His plan, when he moved to the Okanagan, was to look for business or investment opportunities.
- [4] The plaintiff, Robert Scott Edmunds, is a chartered accountant and business person. He has had a variety of occupations, including running his own practice and being a contract controller and contract chief financial officer for different companies. He also has had some experience in lending money.
- [5] 0765647 B.C. Ltd. is a company incorporated in British Columbia in August 2006. It was incorporated to carry on business as OKM Development Joint Venture ("OKM" or "the Joint Venture") to pursue the development of the Gardena construction project. It was also the registered owner, as a bare trustee for the Joint Venture, of the land upon which the Gardena project was to be constructed.
- [6] Gary Andrew Callaghan is essentially a self-taught contractor and builder. He has a university degree in geology and geological engineering, but he has always worked in the construction and property development business. Mr. Callaghan has no formal training or certification in any aspect of construction or property development. He worked for his father's log-home building company and then for a cabinet manufacturing business in Ontario. He moved to British Columbia in 1996 and continued building log homes and working in cabinet making. He then obtained a job with Intrawest, working as a project manager, before moving on to a job with a home builder in the east Kootenays. He then obtained employment with Kettle Valley Developments in Kelowna, as a project manager.
- [7] Mr. Callaghan is the principal of Taynton Developments Inc. ("Taynton"), a company incorporated in British Columbia in 2005. He is also the principal of Antrim Homes Ltd. ("Antrim"), which was incorporated in British Columbia in January 2006.
- [8] Suzanne Callaghan is the wife of Mr. Callaghan. She is a teacher by profession. At most times relevant to this action, she was a stay-at-home mother and homemaker.

- [9] 0814782 B.C. Ltd. was incorporated in British Columbia in January 2008. Its sole director is Thomas Schreider, a resident of Ontario, who is the brother of Suzanne Callaghan. Mr. Callaghan was an officer of the company. The company carried on business as Max Mechanical.
- [10] In November 2006, Karl Ellwood registered a sole proprietorship in British Columbia in the name of Ellwood Excavation. He is an equipment operator who performed excavation work.

Facts

- [11] In 2005, Mr. Callaghan's employment with Kettle Valley Developments came to an end. As part of his severance package, he was given an option to purchase land that was designed for a multi-family development, with a municipal address of 328 Providence Avenue in Kelowna. The option to purchase the property was for \$612,000 and the option was open to be exercised until August 2006. It was a condition of the option to purchase the land that the development on the land be designed by Carl Scholl, who was responsible for design approval in the Kettle Valley neighbourhood. A preliminary design had been prepared for the land before Mr. Callaghan left the company.
- [12] Some pre-development work had already been performed by Kettle Valley Developments with respect to the land and after he left the company, with the option to purchase, Mr. Callaghan took further steps to investigate the possible development of the land. He worked with an architect, designers, and realtors, as well as working on numbers and costing, to see whether he could make the project work. He had a rough pro forma, which was a preliminary budget started by Kettle Valley Developments and modified by him. He found two investors, one of whom was named Grant Glowicki, a former neighbour of the Callaghans.
- [13] Sometime during the school year of 2005-2006, the Murray family became acquainted with the Callaghan family, as the result of each having a child in the same elementary school class. The two families spent time together during that school year and developed a friendship. Mr. Murray learned of the Gardena townhouse project Mr. Callaghan was working on and he indicated an interest in investing in the project. He was informed by Mr. Callaghan that Mr. Callaghan already had two investors for the project and was not looking for another.
- [14] In July 2006, one of the investors backed out of the project. Consequently, Mr. Callaghan contacted Mr. Murray to see if he was still interested in becoming an investor in the project. Mr. Callaghan and Mr. Murray had some meetings to discuss the project and Mr. Callaghan gave Mr. Murray a pro forma that he had prepared with respect to the project. The pro forma showed a construction start date of October 2006 and a construction completion date of June 2007; costs of just under \$7.3 million; and net sale proceeds of just under \$8.5 million. Mr. Callaghan also gave Mr. Murray a copy of a real estate appraisal, completed in February of 2006, which appraised the value of the land at over \$1,100,000.

[15] Mr. Murray agreed to invest in the project and on August 14, 2006, Mr. Glowicki's company (a numbered Alberta company), Taynton, Jasmur, and 0765647 B.C. Ltd. executed a co-owners agreement and a bare trust agreement creating the Joint Venture. Mr. Glowicki's company, Taynton, and Jasmur also signed an appointment of manager agreement, naming Taynton the manager pursuant to the co-owners agreement. The co-owners agreement spelled out the respective interests of the parties, with Mr. Glowicki's company holding 45% of the Joint Venture, Mr. Murray's company holding 45% of the Joint Venture, and Taynton holding 10% of the Joint Venture.

[16] Relevant provisions of the co-owners agreement include:

E. The Co-Owners wish to provide for the continued good management of the Joint Venture and believe that it is in their best interest to provide for continuity of ownership;

H. 0765647 has entered into a bare trust agreement (the "Bare Trust Agreement") dated for reference August 14, 2006 whereby 0765647 agreed that it will hold the Joint Venture as a going concern and the Assets of the Joint Venture (hereinafter defined) as agent for the Co-Owners in accordance with the Respective Interests (hereinafter defined);

3.1 The Co-Owners hereby declare themselves to be Co-Owners carrying on business as tenants in common each as to their undivided Respective Interest. The Co-Owners agree that this Agreement will govern and define their respective rights, interests, powers, liabilities and obligations with respect to the Joint Venture and the Assets of the Joint Venture, and this Agreement will continue in full force and effect until terminated in accordance with the terms of this Agreement.

3.3 Nothing herein contained will be construed as creating the relationship of partnership between any of the Co-Owners or between any of the Co-Owners and 0765647, nor will the Assets of the Joint Venture or any of them be deemed to be partnership property.

3.4 Except as provided herein, no Co-Owner will have any right or ability to bind any other Co-Owner, whether in relation to the Joint Venture, the Assets of the Joint Venture, or otherwise, and nothing contained herein will be construed as creating any agency between the Co-Owners.

3.8 Each Co-Owner will have the right to engage in other ventures, investments, businesses and activities, whether or not of the same nature as the Joint Venture, for its own individual gain. No Co-Owner will by reason of the Joint Venture have any interest or claim in any other property owned by the others or in any venture, investment, business or activity engaged in by the others.

4.1 A Co-Owners committee (the "Co-Owners Committee") is hereby established for the purposes hereinafter set forth. The Co-Owners Committee will consist of one representative of each of the Co-Owners.

4.2 The Co-Owners acting together will, through the Co-Owners Committee, have full and complete charge of the conduct of the business and affairs of the Joint Venture.

4.9 Any matter relating to the Joint Venture which, considered at a time that a decision is to be made or any action is to be taken in relation thereto, may reasonably be expected to have a material affect on the Joint Venture (a "Material Matter") will be duly approved only if:

- (a) approved by the affirmative votes, at a properly held meeting of the Co-Owners Committee, of the representatives of Co-Owners holding in the aggregate not less than 75% of the Aggregate Respective Interests; or
- (b) consented to in writing by each of the Co-Owners.

4.10 Without limiting the generality of Section 4.9 hereof, the Material Matters include in particular:

- (j) the payment of any salary or remuneration to any Co-Owner; and
- (k) the termination and appointment of the Manager (as defined herein).

4.15 The Co-Owners Committee may from time to time appoint a Manager (the "Manager") and may from time to time terminate such appointment. The Co-Owners Committee may delegate such power and authority to the Manager as the Co-Owners Committee deems advisable. In the absence of any restrictions or limitations as may be imposed or made from time to time by the Co-Owners Committee, or as may be provided for herein and in particular subject to Section 4.8 and Section 4.9 hereof, the Manager will have full and complete charge of the day to day operations, in the ordinary course of business, of the Joint Venture. The Manager will also have such further power and authority as the Co-Owners Committee may from time to time delegate to the Manager.

4.16 The Manager will observe and comply with any direction, restriction, or limitation given, made, or imposed by the Co-Owners Committee, and in particular, with any decision or policy of the Co-Owners Committee as to the Material Matters. The Manager will not take any action, expend any money, or incur any obligation in respect of any of the Material Matters unless such action, expenditure, or obligation has been approved by the Co-Owners Committee in accordance with this Agreement.

4.18 The Manager will exercise its duties, powers and authorities in good faith to the best of its ability, in the best interests of the Co-Owners, and in a proper and business-like manner. So long as the Manager does so, then notwithstanding anything to the contrary herein contained the Manager will not be liable for any act or omission or any loss or damage resulting from any act or omission in respect of the performance by the Manager of its duties, powers and authorities hereunder.

7.1 Full, complete and accurate books of account and records of the Joint Venture with respect to the business, operation and financial affairs of the Joint Venture will be kept and maintained at the principal office of the Joint Venture.

7.2 All financial transactions of the Joint Venture will be recorded and accounted for in the books and records of the Joint Venture in accordance with sound accounting practices.

7.6 The Co-Owners confirm the appointment of Grant Thornton, Chartered Accountants, of Kelowna, British Columbia, as accountants for the Joint Venture.

[17] Relevant portions of the appointment of manager agreement provided:

1128911 Alberta Ltd., Taynton Developments Inc. and 0765816 B.C. Ltd. hereby appoint Taynton Developments Inc., of Kelowna, British Columbia as the Manager of the Joint Venture in accordance with the Co-Owners Agreement commencing the 14th day of August 2006 which appointment will remain in effect until such time as said appointment is terminated in accordance with the Co-Owners Agreement. It is agreed that Taynton Developments Inc. will be paid the sum of Ten Thousand Eight Hundred and Fifty Four Dollars (\$10,854.00) per month plus applicable G.S.T. as remuneration for its services as Manager. Said appointment may be terminated upon one month's notice to Taynton Developments Inc.

For value received, Taynton Developments Inc. acknowledges that it has received an executed copy of the Co-Owners Agreement and that it has reviewed the provisions thereof including in particular Article 4 thereof, hereby accepts said appointment, and hereby agrees to perform and discharge the duties, powers and authorities of Manager as provided for in the Co-Owners Agreement and to observe and comply with the provisions thereof pertaining to the Manager.

[18] In September 2006, Mr. Glowicki expressed some concern about his continued involvement in the project. Mr. Murray made some investigations and inquiries about the viability of the project. He spoke to Mr. Callaghan, who expressed confidence in the numbers set out in the pro forma.

[19] In early November 2006, Mr. Glowicki formally triggered the shotgun provisions in the co-owners agreement. At that time, pursuant to the agreement signed on August 14, 2006, Taynton had received payment on account of pre-development work and had been paid management fees for September and October. No actual construction work had begun on the project. Mr. Murray took the position that the management agreement with Taynton should be suspended until the issue with respect to the exercise of the shotgun clause had been resolved. Mr. Murray testified that Mr. Callaghan agreed, while Mr. Callaghan denied agreeing, to the suspension and said that if he agreed it was not voluntary.

[20] Mr. Murray analyzed the co-owners agreement and he developed a plan for how he and Mr. Callaghan could maintain control of the Joint Venture and minimize the amount that had to be paid to Mr. Glowicki's company for its interest in the Joint Venture. The strategy suggested by Mr. Murray and agreed to by Mr. Callaghan was for Mr. Callaghan to exercise an option that he had pursuant to the co-owners agreement to increase his stake in the Joint Venture from 10% to 33.33%. Employing that strategy, the amount of money that had to be paid to Mr. Glowicki's company for its interest in the Joint Venture was reduced significantly. Further, Mr. Murray suggested that the management fee be reinstated and charged to the

Joint Venture before Mr. Glowicki's company was bought out, so that Mr. Glowicki's company was required to pay its share of the management fees, with the reinstated management fees to be split between Mr. Murray and Mr. Callaghan. Both of those strategies were in fact employed in the course of buying Mr. Glowicki's company's interest in the Joint Venture.

- [21] After all of the transfers of interest had been completed, Mr. Murray and Mr. Callaghan signed an amending agreement dated January 12, 2007, setting out their respective ownership as 33.33% to Taynton and 66.66% to Jasmur. The day following all of the transactions, Mr. Murray and Mr. Callaghan signed a further document amending their respective interests such that Jasmur owned a 72% interest and Taynton owned a 28% interest. That same day the management agreement was again terminated by Mr. Murray, effective the day of the final transfer of Mr. Glowicki's company's interest in the Joint Venture.
- [22] Mr. Callaghan and Mr. Murray discussed the possibility of finding another investor or selling the land. In the end, they decided to proceed together with the Gardena project.
- [23] The issues with respect to Mr. Glowicki's company had been a distraction and had consumed significant energy and attention between September of 2006 and January of 2007. The Joint Venture needed money before any construction could commence. It became apparent, after a meeting between Mr. Murray and a banker in early 2007, that conventional lending would not be immediately available for the Gardena project, as Mr. Murray was told that a bank would require at least 50% of the townhouse units of the project to be presold before traditional bank financing would be provided.
- [24] In February 2007, Mr. Callaghan suggested approaching his friend Mr. Edmunds about obtaining bridge financing for the Gardena project. Mr. Murray agreed. Mr. Callaghan approached Mr. Edmunds and they had some discussions about the Gardena project. Mr. Callaghan advised Mr. Edmunds that the project had stalled because the Joint Venture needed presales in order to get bank financing. He said the Joint Venture was interested in obtaining bridge financing until such time as conventional financing could be obtained. In March 2007, Mr. Callaghan and Mr. Edmunds exchanged emails about the project and about financing. Information provided by Mr. Callaghan to Mr. Edmunds included an updated pro forma. Mr. Murray had been working on the numbers in the pro forma, together with Mr. Callaghan, and some of the numbers were different than those contained in the original version provided to Mr. Murray in the summer of 2006. Mr. Callaghan also provided a financing proposal summary for Mr. Edmunds' review. It proposed that the maximum term for the bridge financing would be 18 months, with a target for three to four months, dependent upon achieving 50% presales of the townhouse units.
- [25] After meeting with Mr. Callaghan and Mr. Murray, Mr. Edmunds advised that he was not interested in being an investor in the project, nor the lender for the whole of the project, but he did agree to provide bridge financing until the Joint Venture was able to get traditional

bank financing. At the same time, unbeknownst to Mr. Callaghan, Mr. Edmunds agreed to loan just under \$100,000 to Mr. Murray, which was calculated to be 10% of the value of Jasmur's investment in the Joint Venture, with the term that Mr. Edmunds would be paid back the principal of the loan plus 10% of whatever Jasmur made in the Joint Venture.

- [26] On June 27, 2007, the OKM Joint Venture (0765647 B.C. Ltd.) and Robert Edmunds entered into a secured loan agreement, a promissory note, a debenture, and a security agreement, all of which documents were prepared by Mr. Edmunds' lawyer. The secured loan agreement provided that Mr. Edmunds would loan, by way of draw down as a line of credit, up to \$2 million to OKM. The interest rate for the loan was set at 10%, calculated daily and payable quarterly. The secured loan agreement also provided an option, exercisable by Mr. Edmunds in his sole and absolute discretion, to advance a further \$1 million to OKM on the same terms and conditions. The loan was to be repaid in full not later than December 27, 2008. The secured loan was registered as a first charge against the land.
- [27] In July 2007, shortly after the agreements were executed, the first draw of funds from Mr. Edmunds was taken and site servicing began.
- [28] After the agreement for financing had been reached, but before the first draw, Mr. Murray agreed that the project management agreement would be reinstated. Mr. Murray drafted a reinstatement document, which provided that the maximum amount to be paid out for project management fees from that date forward was to be \$98,000 including all applicable taxes; that all project management fees were to be drawn from the project financing; and that the project management fee was reinstated retroactive to April 1, 2007, and presented it to Mr. Callaghan for signature. The cap on project management fees was based on the figures in the pro forma less amounts paid to date. The project management fees then owing were paid from the first draw.
- [29] Aside from site servicing, little if any work was done on the project in the early fall of 2007. Mr. Callaghan was actively attempting to get the architectural drawings that were required in order to obtain building permits from the City of Kelowna, and until the building permits were received, no work on the buildings themselves could commence. Mr. Murray testified that he and Mr. Callaghan had to effectively camp out at Mr. Scholl's office to get the drawings. Mr. Murray understood that those drawings were required before engineered drawings, truss drawings, and permits could be obtained. Mr. Callaghan also testified that there were delays encountered in getting the required drawings. He and Mr. Murray drove to Mr. Scholl's office to get the drawings, only to be told the draftsman had them. They drove to the draftsman's office and were told he had not done the drawings, as he had not been paid by Mr. Scholl. The problems with the drawings were finally resolved by OKM paying out Mr. Scholl and dealing directly with the draftsman to get the drawings, at which time the process of obtaining further drawings and building permits could continue.

- [30] At the same time, there were meetings taking place between Mr. Callaghan and a lawyer with respect to the preparation of the disclosure statement for the Gardena project, which was required before sales or presales could take place. Numerous other steps were being taken that fall, including meetings with designers and realtors.
- [31] During the fall of 2007, Mr. Murray worked on setting up a website for the project, assisting Mr. Callaghan with respect to obtaining the drawings, looking at marketing materials, preparing cash flow analyses, and trying to create schedules.
- [32] In the late fall of 2007, Mr. Callaghan hired Ellwood Excavation to provide excavation services for the project. Mr. Callaghan testified that he had intended to use, and previously had used, a full-service excavation contractor, but at the time he needed an excavation contractor for this project the construction industry was very, very busy and he was finding it very difficult to find trades who would bid on jobs let alone be available to work on jobs. He testified that there were many instances when trades would not even return his calls. When he contacted the excavation contractor he normally used, the excavation contractor gave him a square foot price but was not prepared to look at the drawings at that time and advised that it would be a while before they could ever get to working on the project. Mr. Callaghan testified that the buildings at the Gardena project were unique. They required excavation, compacting with specific engineered or structural fills, and then testing with an engineer.
- [33] When he was unable to find a full-service contractor, Mr. Callaghan decided to use Karl Ellwood, who ran Ellwood Excavation. Mr. Ellwood was an equipment operator with a small excavator that was not sufficient for the job. Consequently, Mr. Callaghan decided that he would in essence act as the foreman or superintendent for Ellwood Excavation. He hired additional machinery for the job, coordinated with the consultants and the civil engineer, and hired additional labour as necessary. He purchased material for the site and coordinated delivery of the material to the site. He measured grades and provided some of the fuel for the project.
- [34] It was Mr. Callaghan's view that the services he provided as part of the excavation contracting work were over and above his project management or site supervision roles with the Joint Venture. He testified that he effectively had no relationship with Mr. Murray at this point in time, who had previously unilaterally terminated his project management fees on two occasions and capped his project management fees to the amount set out in the pro forma. He was confident that Mr. Murray would not approve of him receiving extra compensation for the excavation work.
- [35] Consequently, without advising Mr. Murray he was doing so, he made special arrangements with Mr. Ellwood. In November and December 2007 he prepared, for Mr. Ellwood and in the name of Ellwood Excavation, two quotes for excavation work to be done on the Gardena project, addressed to OKM. Once the excavation work commenced, in December 2007, Mr. Callaghan acknowledged that he received invoices from Mr. Ellwood, which were

handwritten in a receipt book. He then created what he called "proper invoices", adding his time, materials and other costs to Mr. Ellwood's handwritten costs, and that is what he submitted to OKM for payment. Payments were then made by OKM to Ellwood Excavation for the full amount of the invoices prepared by Mr. Callaghan. Ellwood Excavation then turned around and made payments to Taynton, Max Mechanical or Antrim, as directed by Mr. Callaghan.

- [36] According to the accounting performed by the expert called on behalf of the plaintiffs, Ellwood Excavation received a total of \$336,642 from OKM, Taynton, Antrim, and Max Mechanical. Of that sum, \$193,652 was paid back out, with the result that Ellwood received a net sum of \$142,990 for the OKM work. However, the accountant has, in making those calculations, attributed \$33,715 worth of transactions in Mr. Ellwood's business bank account as "payments for the benefit of Gary Callaghan". There is no evidence before me that would satisfy me that those in fact were transactions for the benefit of Mr. Callaghan. Consequently, I am satisfied that Ellwood Excavation received \$176,705. It was Mr. Callaghan's evidence that OKM received good value for the amount paid to Ellwood Excavation over the course of the Gardena project.
- [37] Pursuant to the reinstatement of management agreement, the project management fees had been exhausted by the end of 2007. Mr. Callaghan proposed to Mr. Murray that he be the site supervisor and be paid, through Taynton, site supervision fees from the pro forma commencing in January 2008. Mr. Murray agreed. The budgeted amount of site supervision fees were divided by 12 and those fees were paid by OKM to Taynton from January to December, 2008.
- [38] On December 19, 2007, Mr. Murray emailed Mr. Callaghan stating that his company needed to be paid \$10,000 for the efforts Mr. Murray had expended in project planning, website design, and his regular tweaking to the pro forma document that had initially been prepared by Mr. Callaghan. He then invoiced OKM for that sum and the invoice was paid.
- [39] In January 2008, Max Mechanical was incorporated. Mr. Callaghan testified that he was unable to find a plumbing and mechanical contractor for the project. The project had to get going, and he decided to effectively do the plumbing and mechanical work the same way he was doing the excavating contract. He testified that he spoke to his brother-in-law, Mr. Schreider, about starting a plumbing and mechanical contracting business. He then arranged for the incorporation of the company, with Mr. Schreider as the sole director. Both Mr. Callaghan and Mr. Schreider had signing authority for the company's bank accounts.
- [40] Mr. Callaghan found a plumber, Danny Lafortune, who did not have his ticket for plumbing but who worked under his father's company when he needed to obtain permits. Mr. Callaghan hired him to do the plumbing and mechanical work for the Gardena project. Mr. Callaghan worked with Mr. Lafortune, on his evidence, and did much of the complicated plumbing work, particularly in the water entry room for the complex. He acted as the site foreman, ordered equipment and material, and hired casual labour as required, in addition

to his labour. Mr. Lafortune did not provide any invoices. He would tell Mr. Callaghan at the end of each week what he was owed, and request immediate payment. Mr. Callaghan then prepared invoices in the name of Max Mechanical and submitted them to OKM for payment.

- [41] Mr. Callaghan did not tell Mr. Murray of his involvement with Max Mechanical. His reason for not having done so was the same as his reason for not disclosing his involvement with Ellwood Excavation. Essentially, he testified he believed that Mr. Murray would have refused to compensate him for his efforts, and would have insisted that the job get done, whether trades could be found or not.
- [42] It was Mr. Callaghan's evidence that the amounts charged to OKM by Max Mechanical were not overinflated, and that OKM had been provided good value.
- [43] In February 2008, the first building permits were issued by the City of Kelowna. By that time, the holes for the buildings had been excavated and some of the building walls had been pre-framed.
- [44] Once the building permits were issued, construction started in earnest. The original plan, as proposed by Mr. Callaghan to Mr. Murray, and later to Mr. Edmunds, was that the focus of construction would be on three of the six buildings that comprised the Gardena project, one of which buildings would contain the unit to be developed into the show home.
- [45] Mr. Callaghan testified that he deviated from the plan. He said the deviation was driven by two main factors. The City of Kelowna announced that the development cost charges ("DCC") it levies on new construction would be increasing. Mr. Callaghan understood that if the buildings were not all commenced before the increase took effect, there would be an increase in the DCC per building of \$35,000 to \$40,000. Further, the real estate market was very hot, and he was finding it difficult to find trades. The framing contractor advised that he would be unable to commit to returning to the site if he framed only three buildings and that if he had to leave after three buildings and return at a later date, the price would increase. Consequently, Mr. Callaghan decided, and directed, that foundations be dug and framing done for all six buildings.
- [46] Mr. Murray testified that he was not aware of the change of plans until he attended the site in March of 2008 and saw what was being done. Mr. Callaghan testified that he recalled discussing the increased development cost charges with Mr. Murray and that the change to the plans was not unilateral.
- [47] In June 2008, Mr. Callaghan contacted Mr. Edmunds seeking to have Mr. Edmunds exercise his option to loan the Joint Venture a further \$1 million. Mr. Edmunds agreed that he would start the paperwork, but said he wanted to come out and see the Gardena project before any further funds were advanced.
- [48] Mr. Edmunds arrived at the site on June 16, 2008. At that time, there were six buildings, fully framed and fully roofed. Although Mr. Edmunds testified that he was not happy about the fact that the full project was being built out and that no show home was ready yet, he agreed

to advance the further \$1 million. Consequently, a first supplemental debenture, a first supplemental security agreement, a first amending agreement to the secured loan agreement, and a modification to the mortgage were prepared, signed and, in the case of the modification of the mortgage, registered.

- [49] Construction continued and by the fall of 2008 there was still no completed show home. Interest on the loan was a significant expense. Mr. Murray testified that it was clear to him that the joint venturers were having to use the loan capital for the purpose of paying the interest on the loan. Consequently, he suggested that the interest payments on the loan be capitalized. From October 4, 2008 onward the interest was capitalized. By that same date, the increased loan amount of \$3 million had been fully drawn. There were no presales and consequently no prospect of obtaining bank financing. Mr. Callaghan approached Mr. Murray about increasing the loan over the \$3 million already advanced.
- [50] All of Mr. Callaghan, Mr. Murray and Mr. Edmunds were well aware of what had happened to the world-wide economy in mid-2008. The housing market, including in Kelowna, had collapsed.
- [51] Mr. Edmunds travelled to Kelowna to meet with Mr. Murray and Mr. Callaghan and to view the project in late November 2008. As Mr. Edmunds described the situation, as of the fall of 2008 the loan was stalled at \$3 million, the joint venturers had no more money, there was a partially finished project, and there was a dismal economic climate. He wanted to see where the funds he had advanced had been spent and he asked to review the books of the Joint Venture. That review took place during his visit to Kelowna in November 2008.
- [52] Although the original pro forma had included a line item for bookkeeping, as a way to trim overhead Mr. Murray and Mr. Callaghan had agreed that Mr. Callaghan would essentially "keep the books", which he did, without any specific training in accounting or bookkeeping, by using Simply Accounting software.
- [53] When Mr. Edmunds and Mr. Callaghan met with respect to the books and financial records of the Joint Venture, Mr. Edmunds received the Simply Accounting records only, without backup documentation. He conducted a review of the documents and spoke to Mr. Callaghan about why Mr. Callaghan was issuing accounts to OKM which included Taynton's services as well as rebilled third-party costs, with the result that the money flowed from OKM to Taynton rather than directly to third parties who provided materials or services to the project. He expressed concern about that practice and on his request Mr. Callaghan agreed that he would not continue to bill in that fashion and thereafter he did not.

- [54] In December 2008, Mr. Edmunds agreed to increase the loan amount by a further \$2 million. As he described it in his evidence, he was not happy with how things had gone to that point in time, but the economy was melting down and the process of foreclosing and "picking up a flailing project in Kelowna" did not interest him. Once he agreed to loan the further funds, he had all necessary amending documents prepared and executed, and they were registered as necessary.
- [55] Mr. Murray had become concerned about the progress of the construction and began requesting financial information from Mr. Callaghan. He eventually attended at the Credit Union, where the Joint Venture banked, to obtain copies of the Joint Venture's bank statements. He noticed a deposit had been made into OKM's account for approximately \$104,000 in December 2008. When he queried Mr. Callaghan about the deposit, Mr. Callaghan told him that it was a refund for project materials that were not required and which had been returned to a supplier.
- [56] In December of 2008, the full amount of the site supervision fees, as envisioned in the pro forma and discussed when Mr. Callaghan took over site supervision duties, had been exhausted. Mr. Callaghan approached Mr. Murray about continuing to be paid for site supervision into 2009, but Mr. Murray refused.
- [57] Work continued on the project in 2009, although it was Mr. Murray's perception that the construction had slowed down dramatically.
- [58] In May 2009, Mr. Edmunds received a telephone call from an employee of AcuTruss, a supplier to the project, which had placed a lien on the land for non-payment of outstanding invoices of approximately \$32,000 plus interest. Mr. Edmunds paid out the lien and contacted Mr. Callaghan about it. Mr. Callaghan confessed to him that the Joint Venture had actually paid Taynton for the invoices in November of 2008, but that Taynton had not paid the liened amount to the supplier as he needed the money to live on. He explained to Mr. Edmunds that he was not receiving any pay for his work on the project. He did not disclose his arrangements with Ellwood Excavation or Max Mechanical. Mr. Edmunds again asked to review the books and records of the Joint Venture and indicated he would not advance any further funds until there was full financial production supplied by Mr. Callaghan. Mr. Edmunds did not inform Mr. Murray about the lien.
- [59] In June 2009, Mr. Callaghan, Mr. Murray and Mr. Edmunds met in Kelowna to discuss getting the project back on track. It was agreed that Mr. Callaghan would deliver the Joint Venture books and records to Mr. Murray, who would take over all bookkeeping and financial matters so that Mr. Callaghan could focus on construction. There was also discussion about finding a way to ensure Mr. Callaghan received some pay for his work, although the only proposals put forward by Mr. Edmunds and Mr. Murray involved Mr. Callaghan receiving, in effect, advances on his eventual profit from the project, or funds as a loan, with the exception of a small portion which would cover gas and communication. Mr. Callaghan did not respond to the proposals.

- [60] On the July long weekend in 2009, the show home for the project opened. Despite the opening of the show home, there continued to be no presales.
- [61] Through the summer months, it was the perception of Mr. Murray and Mr. Edmunds that there was little progress on the site. The process of transferring the books and records from Mr. Callaghan to Mr. Murray took some time, but the transition was complete as of September 2009. In early September Mr. Edmunds and Mr. Murray spent four days reviewing the books and records, and in particular looked for back-up documentation for various transactions. As a result of their efforts several questions arose, including with respect to particular suppliers. Mr. Edmunds asked Mr. Murray to track down and verify invoices and payments for some of the larger suppliers. Mr. Murray followed up and found two suppliers, Max Mechanical and Ellwood Excavation, were difficult to trace.
- [62] By October 2009, Mr. Edmunds had advanced \$4 million of the \$5 million he had agreed to loan. The project was not progressing as hoped and Mr. Callaghan requested another draw. Mr. Edmunds advised Mr. Murray and Mr. Callaghan that he was not prepared to advance any further funds until Mr. Callaghan provided details of how the funds advanced in June of 2009 had been spent. There was no response.
- [63] Mr. Edmunds suggested to Mr. Murray that he contact his friend, Rob Cote, about taking over supervision of the construction of the project. Mr. Cote is the principal of a company called Lone Wolf Homes Ltd. ("Lone Wolf"), which operates as a general contractor doing construction jobs ranging from renovations to custom homes to project management. Mr. Murray was initially reluctant to contact Mr. Cote, as he wanted Mr. Callaghan to finish the project, without further compensation for site supervision, as he believed Mr. Callaghan had promised to do.
- [64] A meeting was called between Mr. Edmunds, Mr. Callaghan and Mr. Murray for October 29, 2009. The day before the meeting, Mr. Callaghan sent a fax to Mr. Edmunds and Mr. Murray attaching invoices for site supervisor fees for the months of January through October of 2009 and advising that if he was not paid he would resign. When the meeting took place, Mr. Edmunds advised Mr. Callaghan that he and Mr. Murray had significant issues arising from the review of the books for OKM and he asked Mr. Callaghan to provide copies of Taynton's books and records. When Mr. Edmunds and Mr. Murray refused to pay the site supervision invoices, Mr. Callaghan left the meeting. Mr. Edmunds and Mr. Murray decided to speak to Mr. Cote and ask him to make a proposal to complete the project.
- [65] Mr. Cote made a detailed proposal, in writing, after doing a review of the site. Mr. Edmunds, Mr. Callaghan and Mr. Murray accepted the proposal and Mr. Cote started working on the site on approximately November 11, 2009. Mr. Cote had no responsibility for accounting or financial matters for the project.
- [66] On the recommendation of Mr. Cote, Mr. Murray and Mr. Edmunds decided to proceed with a formally phased project, for strata purposes, with buildings 1, 2 and 3 designated as phase 1, and 4, 5 and 6 as phase 2. Mr. Cote, in the Lone Wolf proposal, proposed that his work also

be divided into phases. The Lone Wolf quote was expressly provided to be for the completion of buildings 1 and 2, which were each four-plexes, and taking building 3, a duplex, as well as the buildings included in phase 2, buildings 4, 5 and 6, to lockup/weathertight stage. The quote provided target dates of December 30, 2009, for the completion of building 1; February 22, 2010, for completion of building 2; and February 26, 2010, for having building 3, as well as the phase 2 buildings to the lockup/weathertight stage. Mr. Cote estimated his potential start date as being November 2, 2009, with three weeks of pre-construction work followed by a resumption of construction on November 30, 2009, or sooner if possible. For the period up to and including the end of February 2010, the quoted project management fee was \$32,000 plus GST, based on a duration of four months. The proposal provided that if the project took longer, due to unforeseen circumstances and/or the approval to continue building, a revised schedule would be created and a monthly fee of \$8,000 plus GST would apply.

- [67] Mr. Cote wanted to have all of the trades who had worked on the project to that point in time return to the project to finish it. He was able to reach all of the trades except Max Mechanical. Eventually he hired a new contractor to finish the plumbing and mechanical work on the project.
- [68] With the departure of Mr. Callaghan from the site, and the retainer of Lone Wolf for site management, the project still required someone who could manage the finances of the project and make decisions with respect to the work to be performed on the project. Mr. Edmunds, who was concerned that the project complete so that he could recover the principal of the loan he had advanced to the project, asked Mr. Murray to stay on and to supervise the project through to completion. He was not prepared to put anything in writing, but he advised Mr. Murray that if he was able to get the principal of his loan amount back he would "take care" of Mr. Murray. Mr. Murray agreed and thereafter remained in essentially the role of project manager.
- [69] Lone Wolf remained on site and billed for 10 ½ months of project management to what I understand to have been the conclusion of Lone Wolf's phase 1, as it was described in the Lone Wolf quote, plus the finishing of building 3. Lone Wolf invoiced each month, billing project management at the rate of \$8,000 per month plus GST. In addition to the project management, Lone Wolf also invoiced for site labour of \$1,200 in November, the pre-construction phase, and between \$5,310 and \$14,371 for the months of December through August 2010. The total project management fees charged by Lone Wolf to the conclusion of phase 1, plus the finishing of building 3, in September 2010 was \$84,000, exclusive of taxes, and the total amount charged for site labour was \$84,115, again exclusive of taxes.
- [70] The work done by Lone Wolf had resulted in the completion of 10 residential units. OKM was able to sell two of those units in 2010 and the remaining eight units were sold in 2011.

- [71] Throughout the fall of 2009 and into 2010, Mr. Murray and Mr. Edmunds continued to review the books and records with respect to the project funds expended up to the time of Mr. Callaghan's departure. There were numerous items that raised concerns in their mind and most particularly they became focused on Max Mechanical and Ellwood Excavation.
- [72] Various investigations were undertaken by Mr. Murray with respect to Max Mechanical and with respect to Ellwood Excavation. The eventual result of the investigations was a determination that Max Mechanical was in fact a company associated with Mr. Callaghan. Mr. Murray was of the view that the invoices did not line up properly, specifically with respect to the work, the schedule, and the cost of work. Mr. Murray was also able to determine that although Max Mechanical was, according to the records of the Joint Venture, the mechanical contractor, the plumbing permits were issued to a company called DM&R and in the name of a person named Richard Lafortune. With continued investigation, Mr. Murray eventually spoke to somebody who identified himself as Danny Lafortune, who acknowledged that he had worked at the project. Mr. Callaghan's evidence confirms that Danny Lafortune did in fact do much of the plumbing work at the project while Mr. Callaghan was the site supervisor.
- [73] With respect to Ellwood Excavation, Mr. Murray questioned Mr. Callaghan about that company. As a result, he understood that Ellwood Excavation was the subcontractor who did excavation work at the project. Mr. Murray was unable to contact that company and Mr. Callaghan advised him that Mr. Ellwood had moved to Washington and was only sporadically in British Columbia. Given the suspicions that arose from the inquiries about Max Mechanical and Ellwood Excavation, a more in-depth forensic type of investigation was commenced by Mr. Murray and Mr. Edmunds.
- [74] In March 2010, Mr. Edmunds wrote to Mr. Murray and Mr. Callaghan with respect to the loan. There was less than \$100,000 left of the maximum principal sum of \$5 million that had been agreed to that point in time. Mr. Edmunds advised Mr. Murray and Mr. Callaghan that before he would consider providing any further financing to the Joint Venture, he required amendments to the co-owners agreement which would have the effect of allowing Mr. Murray to have complete control of the project, including being the sole signatory for any and all bank accounts of the Joint Venture. An emergency co-owners committee meeting was convened, by way of notice as required by the terms of the co-owners agreement, for March 24, 2010. Mr. Callaghan advised he could not attend on that date. The meeting was adjourned to April 1, 2010, and the documents required to make the changes demanded by Mr. Edmunds were provided to Mr. Callaghan, who indicated he was not prepared to sign them until he had spoken to his own counsel. There were various communications with Mr. Callaghan, initiated by Mr. Murray and by counsel for the Joint Venture, requesting that the documentation be filed so that the further loan from Mr. Edmunds would be granted, but it was not until May 24, 2010, when Mr. Callaghan signed both the amendment to the co-owners agreement and all of the documentation required to increase the loan facility to \$6 million with an option on the part of Mr. Edmunds to increase the loan facility to \$6.5

million.

- [75] In June 2010, it was determined that there would need to be amendments to the disclosure statement with respect to the project. Mr. Callaghan was asked to sign the amended disclosure statement prepared by the Joint Venture's counsel, which he did but not until Mr. Murray physically tracked him down.
- [76] In July 2010, Mr. Murray asked Mr. Callaghan to resign as a director of the numbered company, due to what Mr. Murray perceived were the difficulties in obtaining Mr. Callaghan's signature on corporate and other documents. Mr. Callaghan refused to sign the documents.
- [77] In October 2010, Mr. Murray requested a further loan of \$500,000 from Mr. Edmunds, and copied Mr. Callaghan in on the request. Mr. Edmunds took the position that he was unprepared to provide any further financing for the project until Mr. Callaghan was removed as a director. Mr. Callaghan did not ever respond to those requests for his resignation as the director.
- [78] In the course of their forensic-type investigation of the books and records of the Joint Venture, Mr. Edmunds decided he wanted the books and records for Mr. Callaghan's company, Taynton. He had made a loan to the Callaghans in the amount of \$130,000 at 5.5% interest, secured by a mortgage against property owned by the Callaghans in Invermere, B.C., in February 2007. That loan had been in default for approximately two years. Mr. Edmunds contacted Mr. Callaghan about the default and the possibility that he would commence foreclosure proceedings, but he offered to hold off taking any steps if Mr. Callaghan permitted him to review the Taynton books and records with respect to payments made to it by OKM. Mr. Callaghan agreed but then did not provide access. Mr. Edmunds commenced foreclosure proceedings in May of 2010, which were halted when the personal loan was repaid in full that same month.
- [79] In January 2012, phase 2 work commenced on the project. After the sale of all of the units in phase 1, Lone Wolf returned to the site and billed for site management fees at the rate of \$8,000 per month plus GST, for the months of January through June 2012, for total site management fees of \$48,000 plus tax. In addition, site labour fees were charged, both with respect to general site costs and with respect to specific units. The general site labour costs charged between January and June 2012 totalled \$37,710.
- [80] Six of the units in phase 2 were sold during 2012 and the remaining four units were sold in 2013.

- [81] With the sale of the last townhomes, the full principal of the outstanding loan owed by the Joint Venture to Mr. Edmunds was paid in full. A further \$690,000 was available to be paid to him for interest. In keeping with his assurance to Mr. Murray that if Mr. Murray stayed on as the project manager and Mr. Edmunds was repaid the principal of his loan he would take care of Mr. Murray, Mr. Edmunds directed the Joint Venture to pay the \$690,000 to Mr. Murray.
- [82] According to the evidence of Mr. Edmunds, who has essentially done the accounting for the Joint Venture since he became involved in the detailed review of the books in 2009, the Joint Venture lost \$28,122 on townhome sales, specifically the difference between the cost of building and the revenue from sales, excluding capitalized interest paid. Over and above the \$690,000 in capitalized loan interest that was paid, and turned over to Mr. Murray, the Joint Venture still owed interest in excess of \$1.5 million to the end of 2013. The Joint Venture has paid over \$300,000 in legal fees associated with this action. Although Mr. Murray received \$690,000 from Mr. Edmunds, he has not received back his initial investment into the Joint Venture, which was in excess of \$700,000. That sum has been lost. Similarly, Mr. Callaghan's investment in the Joint Venture which is recorded in the Joint Venture's books as having been approximately \$220,000 has not been paid back and has been lost.

History of the Litigation

- [83] On November 17, 2010, Jasmur and Mr. Edmunds, as plaintiffs, commenced this action naming Taynton and Mr. Callaghan as defendants. On November 22, 2010, on a without notice application by the plaintiffs, an order was made restraining Mr. Callaghan and Taynton from disposing of their assets, including certain enumerated bank accounts; requiring that the defendants file affidavits of assets within 14 days; requiring the defendants to produce the accounting, financial and business records of Taynton and "Max Mechanical"; requiring named financial institutions to deliver information and supporting documentation with respect to certain enumerated accounts; and removing Mr. Callaghan as the director of the Joint Venture.
- [84] In December 2010, the plaintiffs filed an application seeking, among other things, an order finding Mr. Callaghan in contempt. A warrant for his arrest was issued on January 24, 2011. On February 14, 2011, Mr. Callaghan was before the court and special costs were awarded to the plaintiffs with respect to the attendance. Mr. Callaghan was ordered to provide documentation, complete with providing full explanation of any documents that could not be provided, before February 21, 2011.
- [85] On February 21, 2011, Mr. Callaghan and Taynton were found to be in contempt of the court, and were ordered to pay a fine in the amount of \$5,000 on March 8, 2011. The fine was to be fully excused if the defendants complied with the terms of the November 22, 2010 order, by March 7, 2011. Then counsel for the plaintiffs certified non-compliance and filed the certification with the court by way of requisition on March 8, 2011.

- [86] On May 25, 2011, the plaintiffs amended the notice of civil claim, adding the OKM Joint Venture company as a plaintiff and adding the balance of the defendants now named in the action.
- [87] On a further without notice application coming before the court on May 30, 2011, an order in substantially the same terms as the November 22, 2010 order was made restraining the additional defendants from disposing of their assets, and requiring production of books and records from the additional defendants as well as a variety of financial institutions.
- [88] On August 17, 2011, the plaintiffs took default judgment against Taynton, Mr. Callaghan, Max Mechanical, Antrim, Karl Ellwood, and Thomas Schreider. On August 19, 2011, a response to civil claim was filed on behalf of Ms. Callaghan.
- [89] In January 2012, the plaintiffs filed a notice of application seeking judgment against all of the named defendants, except Suzanne Callaghan, in the amount of \$1,428,768.59 plus punitive and aggravated damages. The plaintiffs also sought various contempt orders, including orders for committal, against all of the individual defendants, including Ms. Callaghan.
- [90] On February 16, 2012, the court ordered that Mr. Callaghan, Taynton and Antrim had until April 19, 2012, to comply with the previous orders requiring disclosure of financial information. The matter was then adjourned.
- [91] On July 4, 2012, Mr. Callaghan was found in contempt of court and sentenced to a period of incarceration of 25 days. Mr. Callaghan, Taynton, and Antrim were also ordered to pay special costs.
- [92] On May 1, 2013, the plaintiffs filed an amended amended notice of civil claim. On May 29, 2013, counsel for Ms. Callaghan filed a response to the amended civil claim. Mr. Callaghan, Taynton, and Antrim, all represented by Mr. Callaghan personally, filed a response on May 30, 2013. On June 11, 2013, the plaintiffs took default judgment, with the amount to be assessed, against Max Mechanical and Mr. Schreider. On August 6, 2013, the plaintiffs took default judgment against Mr. Ellwood.
- [93] On September 11, 2013, the plaintiffs filed another notice of application seeking findings of contempt against Mr. Callaghan, Ms. Callaghan, Taynton and Antrim. On September 30, 2013, with counsel appearing for Mr. Callaghan, Taynton and Antrim for the first time, the court found that Mr. Callaghan, Taynton and Antrim were in contempt of court. Mr. Callaghan was sentenced to a period of incarceration in contempt for four months, which sentence was to be suspended until November 29, 2013, on a number of terms, requiring Mr. Callaghan to provide summaries of documents he had produced to date, and documents produced between the date of the order and November 26 of 2013. Mr. Callaghan was ordered to appear in person on November 29, 2013. A further order was made after the attendance on November 29, 2013, further suspending the sentence of incarceration until February 14, 2014, again on a number of terms. Thereafter, no further steps were taken to deal with the application or the finding that Mr. Callaghan was in contempt.

- [94] Although no formal order was entered, it appears that at the trial management conference on November 18, 2014, Mr. Callaghan and Ms. Callaghan were ordered to provide their undertaking responses from examinations for discovery by November 28, 2014.
- [95] Shortly before trial, the Callaghans became aware that Jasmur was paid \$690,000 from the Joint Venture account. On the first day of trial, counsel for the Callaghan defendants applied for leave to file a counterclaim, which was granted. As a result, Taynton and Mr. Callaghan filed a counterclaim alleging that the amount paid to Jasmur amounted to an unjust enrichment to Jasmur and was paid in breach of the co-owner's agreement, and claiming damages for the site supervision services provided by Mr. Callaghan from January to October 2009, without compensation.

Credibility of Witnesses

- [96] The plaintiffs urge me to find that neither Mr. Callaghan nor Ms. Callaghan were credible witnesses. In every case, a judge must carefully assess the credibility and reliability of each witness.
- [97] In this case, it is clear that Mr. Callaghan has conducted himself in a manner that cannot be viewed positively. Most importantly, he has been found in contempt of court orders made in this case. His disclosure of documents has been slow and incomplete. There were some inconsistencies between his evidence at trial and his evidence given at examinations for discovery, although the inconsistencies, for the most part, I find, were relatively minor and explainable in the context of this litigation. I do not accept, as the plaintiffs urge, that Mr. Callaghan set out to mastermind a fraud against both of them and took steps essentially from 2006 or early 2007 to and including the trial to enrich himself at their expense. That theory makes no sense, particularly in the time frame of 2006 up to the real estate crash in 2008, during which time frame the parties could reasonably expect that the joint venture would be profitable. In fact, I accept much of Mr. Callaghan's evidence, particularly with respect to the construction of the Gardena project, and his involvement with it, including the work he performed for and during the excavation and plumbing and mechanical contracts. I also accept his evidence about the change in the construction industry between 2006 and 2008, in terms of the difficulties he says he encountered in finding trades, both with respect to the availability and cost of various trades, and the delays encountered in obtaining drawings and permits.
- [98] With respect to Ms. Callaghan, I found her to be a credible witness. She was a homemaker for most of the duration of the Gardena project. During the course of their long marriage, she had experience with Mr. Callaghan's income fluctuating greatly. He had always used her credit card for business expenditures, and although she may have managed household expenditures, I find she knew little if anything about the details of Mr. Callaghan's business dealings or business finances. I find that she had no reason, over the course of the Gardena project, to question him about business or financial matters, given the past history. Any inconsistencies between her evidence on discovery and her evidence at trial, and they were

minor, are in my view a reflection of knowledge she gained during the litigation process.

[99] Some of Mr. Murray's evidence was very self-serving and not credible. Given his sophistication, it is not possible to accept that he was a vulnerable pawn of Mr. Callaghan, as he paints himself. He made many hard-nosed decisions, including to terminate the project management fees payable to Mr. Callaghan on two separate occasions, which I find were not by agreement. He masterminded the plan to minimize the amount that had to be paid to acquire the interest of Mr. Glowicki's company in the Joint Venture. His sophistication, which he minimized, extended to drafting documents such as the confidentiality agreement, and he cannot have been unaware of matters such as the impact of increases in borrowing rates on the overall cost of construction for the Gardena project.

[100] I generally accept the evidence of Mr. Edmunds.

The Plaintiffs' Claims

[101] The plaintiffs' claims against the defendants are for fraudulent misrepresentation/deceit; constructive fraud/breach of fiduciary duty; knowing assistance; knowing receipt; negligent misrepresentation; unjust enrichment; conspiracy; breach of contract; and breach of the duty of honesty in the performance of contractual obligations. They seek awards of damages, including punitive damages; the imposition of a constructive trust; declaratory relief; accounting for profits; and tracing orders.

[102] Other than the misrepresentation claims, the foundation for claims relate to the Ellwood Excavation and Max Mechanical arrangement, tool rentals by Mr. Callaghan or Taynton to the Joint Venture, and certain expenses the plaintiffs' forensic accountant concluded were billed by Taynton to OKM without supporting invoices.

[103] The only claim advanced by Mr. Edmunds is based on fraudulent misrepresentation and deceit. Consequently, I will deal with that claim first.

[104] The material representations alleged to have been made by Mr. Callaghan to Mr. Edmunds, as set out in the plaintiffs' closing submissions, are as follows:

- (a) Callaghan was providing all the material information about the Project to Edmunds through the pro forma and appraisal;
- (b) the information contained in the pro forma, including the costs and time lines, was accurate and reliable;
- (c) OKM only needed short-term or mezzanine financing to be able to build a product (show home) to obtain presales;
- (d) he had done all necessary pre-development work for the Project and accordingly the Project would be ready to commence construction shortly after funding was obtained;

- (e) the true value of land was approximately \$1.5 million and the OKM investors had purchased it for about \$960,000;
- (f) the target construction commencement date would be May 1, 2007;
- (g) pre-sales would begin in April 2007;
- (h) construction on Block 1 would commence once site servicing was complete, but construction on other blocks would reflect pre-sales activity (OKM would not keep building until they had pre-sales);
- (i) bank financing would be provided by August 2007;
- (j) OKM needed 10 pre-sales to obtain bank financing;
- (k) Callaghan would monitor the budget to make sure that OKM was not drawing down funds ahead of time;
- (l) that pro forma reflected Callaghan's reasonable estimation of what the Project would cost, including a contingency, based upon his experience in the industry; and
- (m) it would be a managed build, and the only building that would be finished was the show home.

[105] It is also alleged that in June 2008, to convince Mr. Edmunds to exercise his option to lend a further \$1 million to OKM, Mr. Callaghan represented to Mr. Edmunds that unit 16 of the project would be completed as the first show home for the project, to get the project to a state so that showings and advertising could commence, that Mr. Callaghan represented to Mr. Edmunds in November of 2008 that the show home would be completed by May 2009, and in June 2009 that Mr. Callaghan represented to Mr. Edmunds that the show home would be complete by July 3, 2009, and then furnished and ready for viewing during the first week of August 2009.

[106] Mr. Edmunds, I find, is a sophisticated business person. He was approached by Mr. Callaghan to see if he had any interest in advancing a loan to the Joint Venture. He asked for information about the project, as any prudent lender would, and received a copy of the pro forma, as it then was, and he received verbal and written communications from Mr. Callaghan with respect to the proposed project. He also received an appraisal of the land. He understood that he was being asked to provide financing until traditional bank financing could be obtained, which would require pre-sales of half of the units in the project.

[107] After a meeting with both Mr. Callaghan and Mr. Murray, Mr. Edmunds agreed to provide financing and, using his own lawyer, had documentation prepared with respect to the loan. He made the loan to OKM. He did not require either of the directors of the Joint Venture, Mr. Callaghan, or Mr. Murray to be named as borrowers or as personal guarantors. His loan documentation contained no terms or conditions with respect to the timing or order of

construction. By his own choice, he extended the term of the loan and made further loans to the Joint Venture, and on each occasion he had documentation prepared by his own lawyer. Each time loan modifications were made, or the loan amount was increased, OKM was the only borrower. Mr. Edmunds did not request any personal guarantees, nor include specific terms or conditions concerning the timing or the manner of construction.

- [108] This was not a handshake deal; it was a well-documented, arms-length commercial transaction.
- [109] In the course of closing submissions, I asked counsel for the plaintiffs to provide me with any case law to support a finding that Mr. Callaghan is personally liable to Mr. Edmunds with respect to the loan advanced. Counsel provided two cases involving fraudulently obtained loans. Those two cases, *Stewart v. Heinrichs*, [2001] M.J. No. 11 (Man. Q.B.) and *Century Services Inc. v. New World Engineering Corp.*, 2013 ONSC 2140, are clearly distinguishable.
- [110] In *Stewart*, the defendant was the chief financial officer of a company which the court appears to have concluded had no net equity. No formal loan documentation was prepared, but at the time that the loan was made the lender was given a financial statement that showed the company had total capital and equity exceeding \$900,000. The defendant prepared in his hand a receipt for the amount of the loan, describing himself as chief financial officer. The court found that the defendant's conduct amounted to fraud and found him liable for the amount of the loan.
- [111] In *Century Services Inc.*, the plaintiffs made loans based on a series of fraudulent misrepresentations concerning the nature of the corporate defendant's business, the reason for seeking the loans, and the security features to be attached to the security to be given for the loans. Virtually immediately after the loan proceeds were received, there was improper use of the loan proceeds in violation of the strict security arrangements which the defendants had assured the plaintiff were in place.
- [112] Neither of the fact situations in those two cases even closely approximates the facts of this case, even if I accepted that all of the representations said to have been made by Mr. Callaghan were in fact representations, as opposed to forecasts, and even if I accept that all of them were false.
- [113] There is absolutely no doubt that the purpose put forward by Mr. Callaghan to Mr. Edmunds for the loan, namely building the Gardena project, was in fact the purpose for which the money was borrowed. Similarly, there is no doubt that Mr. Callaghan, when he requested the loan for the Gardena project, intended to build the project, whereas in *Stewart* there was an expression of an intention to repurchase a business, and the court there found that the representor in fact had no such intention at the time the representation was made.

- [114] I find that Mr. Edmunds' only sustainable claim is against OKM for any interest unpaid. He has not made a claim against OKM. His claim against any and all of the defendants in this action is dismissed.
- [115] I turn now to the alleged representations said to have been made by Mr. Callaghan to Mr. Murray. The plaintiffs claim Mr. Callaghan made representations to Mr. Murray which were fraudulent or, alternatively, negligent. Those representations were said to have been made in what I will refer to as three distinct time periods. The first was before Mr. Murray made the decision to invest in the project; the second time period is late 2006 and early 2007, in and around the time of the exercise by Mr. Glowicki of the shotgun clause and the eventual acquisition of his shares; and the third time period is what I will refer to as during construction itself.
- [116] The tort of fraudulent misrepresentation has four elements. They were recently summarized by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, at paragraph 21:
- [21] From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.
- [117] With respect to negligent misrepresentation, the elements were described in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110:
- (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.
- [118] As Kirkpatrick J. said in *PD Management Ltd. v. Chemposite Inc.*, 2006 BCCA 489, at paragraph 14:
- [14] It is settled law that an alleged misrepresentation must pertain to a matter of fact. In *MacMillan v. Kaiser Equipment Ltd.*, 2003 BCSC 672, aff'd 2004 BCCA 470, this Court dismissed the claims for damages for misrepresentation because "it is clear that each of the alleged representations relate to a future occurrence, and not to an existing state of events. A future offer is not an actionable representation" (para. 85).
- [119] The representations said to have been made in the first period are based on the pro forma Mr. Callaghan gave to Mr. Murray in July 2006, and on the discussions Mr. Murray and Mr. Callaghan had about the pro forma.

- [120] The pro forma prepared by Mr. Callaghan and provided to Mr. Murray and then discussed with Mr. Murray in July and August 2006, was clearly a future forecast. On its face, it was an estimate. It set out anticipated revenue and anticipated expenses. On the revenue side, the average selling price of each unit was said to be \$420,000. The document provided an estimated date for when the last residential unit would be sold, on the assumption that all of the units would be sold before construction completed. Virtually all of the figures in the pro forma were rounded. Interest and other finance charges, as just one example, were estimated to be \$525,000. Another example is marketing, which was estimated to be \$50,000. The construction cost for all of the work to be done in building a 20-unit multi-family development was estimated to be \$4,080,000. No one could reasonably have believed, before the land for the development had even been purchased, that there were firm contracts in place and arranged for every trade or supplier or for all of the required material. The document contained a specific section entitled "Significant Assumptions", which set out an estimated construction cost per square foot, a borrowing interest rate of prime plus one, and a contingency. There is no doubt that the pro forma was an estimate and a forecast of future events. Indeed that is the very meaning, in a business sense, of the term pro forma. Mr. Murray is a person who had worked in the bond and money market trading industry on Bay Street for 18 years and had to have, I conclude, understood that.
- [121] With respect to the timing of the project, and specifically Mr. Murray's evidence that Mr. Callaghan told him the project would take 10 to 12 months, to as long as 18 months, that again could be nothing more than an estimate. It was clear on the face of the documents provided to Mr. Murray, including the pro forma and the summary of investor equity which he was provided, that there were many steps that needed to be taken between the time the land was purchased and the time the project was completed and units sold. Not all of those steps, the timing of those steps, nor the costs for those steps were solely in the control of Mr. Callaghan or, for that matter, the joint venturers. Building permits had to be obtained. Professionals, including architects and lawyers, had work to perform. Perhaps most importantly, the joint venturers had to obtain financing. I am satisfied that the time frames were estimates or forecasts, just as the costs were.
- [122] One need look no further than the proposal provided by Lone Wolf, including the projected timeframe for phase 1, to know that a difference between an estimated time for completion of a project or a phase of project is not a guarantee, and a failure to meet the timelines is not proof in and of itself of a fraudulent misrepresentation.
- [123] Further, several different versions of the pro forma were created, some with the participation of Mr. Murray. There is a second pro forma dated November 22, 2006, showing different figures, including an increased cost of construction per square foot, an increased selling price per unit, reduced consulting fees, and reduced interest, and other finance charges. Yet another one was provided to Mr. Edmunds, containing other differences, including an even higher average selling price per unit, and a further significant reduction in interest and finance charges as well as a reduction in the overhead.

- [124] Even if I accepted that the time frames and costs contained in the pro forma were representations, there is simply no evidence that Mr. Callaghan made those representations knowing they were false, or being reckless about whether they were true or false, or even that Mr. Callaghan made them negligently.
- [125] As events transpired, within a couple of months of the acquisition of the land, rather than focusing on the project after the land transaction closed, Mr. Callaghan and Mr. Murray had to deal with the withdrawal of Mr. Glowicki from the Joint Venture.
- [126] Further, when they made efforts to obtain financing through conventional sources, they determined that conventional financing was not available. Neither Mr. Callaghan nor Mr. Murray were in a position to finance the construction themselves, with the result that Mr. Edmunds was approached. The approach to Mr. Edmunds was made promptly after the withdrawal of Mr. Glowicki from the Joint Venture, but money did not actually flow or become available for use during construction until the end of June 2007, over 10 months after the co-owners agreement had been signed and the land acquired.
- [127] The evidence at trial, which I accept, is that by that date the real estate market was heating up. Construction was booming. There were delays experienced in obtaining building permits. In that sort of climate, I accept and I find that there must have been an impact of the availability of contractors and construction personnel, and on the cost of the same. The plaintiffs have offered no evidence, aside from pointing to the timeframe involved in the actual construction, which commenced almost a year later than expected, that the costs and timeframe set out in the pro forma were untrue, inaccurate or misleading.
- [128] Dealing with the alleged representations in December 2006 and January 2007, at which time Mr. Callaghan and Mr. Murray were proceeding with the buyout of Mr. Glowicki's company, and contemplating whether to bring in a third investor, continue the project with just the two of them, or sell the land, the representations alleged again relate to Mr. Callaghan's estimated costs and estimated timeframe. By the time of those discussions, Mr. Murray was actively involved in fine tuning the pro forma and working with the figures contained in the pro forma. As noted, the pro forma figures changed over time and the cost per square foot for building had been increased. No adjustments had been made as of the November 22, 2006 pro forma to the construction start or end dates, but by the time Mr. Murray and Mr. Callaghan were meeting with Mr. Edmunds to discuss financing of the project, the March 2, 2007 pro forma had been prepared indicating a construction start date of May 2007 with a construction end date of June 2008, a period of 14 months.
- [129] While Mr. Murray was considering his options, he dealt with a person named Glen Ross, and asked for his views. Mr. Murray prepared, and signed on behalf of OKM, a confidentiality agreement with Mr. Ross on December 20, 2006, so that Mr. Ross could evaluate the project. In that confidentiality agreement, drafted by Mr. Murray, the following paragraph is found:

It is agreed that the Evaluation Material consists of a draft pro-forma that has not been finalized, renderings and various drawings that are also not finalized.

[130] In terms of the reasonableness of the figures in the pro forma, Mr. Murray also ran the numbers past Craig Marshall, a contractor in Oshawa, who was the boss of Mr. Murray's brother. Mr. Marshall provided Mr. Murray with some costing. Mr. Murray forwarded Mr. Marshall's email to Mr. Callaghan, saying:

Here is the email I received back from Craig along with the soft costs for his latest project. I printed it out and made some adjustments to conform closer to our project and the figures look to be pretty close.

[131] I am unable to find that any fraudulent or negligent misrepresentations were made by Mr. Callaghan during the second period.

[132] The plaintiffs also allege that Mr. Callaghan continued to make representations throughout the course of the project. Those representations are alleged to have been primarily about the order in which construction would take place, and specifically when unit 16 in building 1, which was planned to be the show home for the project, would be completed. With respect to those alleged representations, I will start by saying I accept that Mr. Callaghan did make various statements, at various times, about when the show home would be completed. However, such statements, I find, were in the nature of future forecasts. Further, although Mr. Murray may have believed the statements made or at least hoped that they were true, there is no evidence that he relied upon them, in the legal sense of that word. There is no suggestion that he took steps to his detriment as a result of these statements. The plaintiffs have led no evidence that would satisfy me that any loss accrued to Mr. Murray that could be causally linked to any action or inaction he took, were as a result of believing the statements made by Mr. Callaghan with respect to the completion of the show home.

[133] In summary, with respect to the claims based upon misrepresentation, I am not satisfied that the plaintiffs have established the elements of misrepresentation, on a balance of probabilities.

[134] The plaintiffs allege that Taynton and Mr. Callaghan owed fiduciary duties to Jasmur and OKM. They also allege that there was a constructive fraud committed by Taynton and/or Mr. Callaghan.

[135] With respect to the fiduciary relationship, the Supreme Court of Canada has set out the test for determining whether one exists in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 at 599 as follows:

Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:

(1) The fiduciary has scope for the exercise of some discretion or power.

- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[136] The Supreme Court of Canada in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 408-410 addressed fiduciary relationships again and held:

This conceptual approach to fiduciary duties was given analytical structure in the dissenting reasons of Wilson J. in *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 136, who there proposed a three-step analysis to guide the courts in identifying new fiduciary relationships. She stated that relationships in which a fiduciary obligation has been imposed are marked by the following three characteristics: (1) scope for the exercise of some discretion or power; (2) that power or discretion can be exercised unilaterally so as to effect the beneficiary's legal or practical interests; and, (3) a peculiar vulnerability to the exercise of that discretion or power. Although the majority held on the facts that there was no fiduciary obligation, Wilson J.'s mode of analysis has been followed as a "rough and ready guide" in identifying new categories of fiduciary relationships; see *Lac Minerals*, *supra*, per Sopinka J., at p. 599, and per La Forest J., at p. 646; *Canson*, *supra*, at p. 543; and *M. (K.) v. M. (H.)*, *supra*, at pp. 63-64. Wilson J.'s guidelines constitute indicia that help recognize a fiduciary relationship rather than ingredients that define it.

As I noted in *Lac Minerals*, however, the three-step analysis proposed by Wilson J. encounters difficulties in identifying relationships described by a slightly different use of the term "fiduciary", viz., situations in which fiduciary obligations, though not innate to a given relationship, arise as a matter of fact out of the specific circumstances of that particular relationship; see at p. 648. In these cases, the question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former's best interests with respect to the subject matter at issue. Discretion, influence, vulnerability and trust were mentioned as non-exhaustive examples of evidential factors to be considered in making this determination.

Thus, outside the established categories, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.

[137] The plaintiffs rely on D. Debenham, *The Law of Fraud and the Forensic Investigator*, 3rd ed. (Toronto: Carswell, 2012) at page 14 with respect to their claim of constructive fraud:

Constructive fraud does not require a proof of design to mislead or deceive another, but of some failure to perform an obligation in good faith, or in accordance with the intention of the parties, often out of self-interest. It is not simply bad judgment or negligence, but it is more - a failure to properly respect the rights of one who is vulnerable to the power of another. That vulnerability may be as a result of a preceding contractual obligation which has left one person at the mercy of another, or it may be as a result of the facts and circumstances of the particular case.

Constructive fraud does not imply fault, in the sense of intentional misconduct, like actual fraud does. The standard for constructive fraud is objective, while actual fraud (also known as "fraud at law") requires a subjective dishonest intention. Thus, in cases like *Boardman v. Fhips and Regal (Hastings) Ltd. v. Gulliver*, the courts have found constructive fraud where the defendants thought they were acting entirely properly, because the court found that their conduct did not comport the legal standard required of someone who had power over the affairs of another.

[138] With respect to each of these two claims, the plaintiffs rely on the provisions of the co-owners agreement, Taynton's (and through piercing the corporate veil, Mr. Callaghan's) position as manager of the Joint Venture, and Mr. Callaghan's position as a director of OKM.

[139] Mr. Callaghan, as a director of OKM, owed a fiduciary duty to OKM. That is one of the recognized categories of fiduciary relationships.

[140] With respect to the plaintiffs' claim that a fiduciary duty was owed to Jasmur and that Jasmur was the victim of constructive fraud, I do not accept that Jasmur or Mr. Murray were in a vulnerable position of the sort required to found a fiduciary duty. While Mr. Callaghan was experienced in construction matters, Mr. Murray was a sophisticated businessman with a tight hold on the purse strings of the Joint Venture and a majority interest that allowed him to act unilaterally, for example by terminating the management agreement on two occasions so as to interrupt the payment of project management fees, and by deciding when and how much to invoice the Joint Venture for his services.

[141] Further, with respect to a trust-like relationship, I find that none existed here. It is not enough for Mr. Murray to say Mr. Callaghan was his friend and he trusted him. If that were sufficient to create a fiduciary relationship, it would cast a very wide net. The co-owners agreement expressly provides that the co-owners did not become partners and could not act as agents for each other.

[142] It is clear that the existence of a joint venture does not necessarily give rise to fiduciary duties. As Wedge J. said in *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27:

[71] The reasons of Sopinka J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 continue to be regarded as the touchstone on the limited role of fiduciary duties in relationships between arm's length commercial parties. Mr. Justice Sopinka said the following at p. 595:

The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. ...

... In my opinion, equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

[76] On appeal, the court [in *Visagie v. TVX Gold Inc.* (2000), 187 D.L.R. (4th) 193] unanimously concluded the trial judge erred in holding that the joint venture gave rise to fiduciary duties and that those duties survived the termination of the joint venture. Charron J.A. (as she then was) observed that any duties owed by parties to one another during the life of a joint venture agreement, and following its termination, arose from the terms of the agreement itself and not from any fiduciary obligation imposed by law. Charron J.A. in *Visagie* said the following at para. 25:

The Supreme Court of Canada in *Cadbury Schweppes*, *supra*, makes it clear that fiduciary obligations are seldom present in a commercial context between parties acting at arm's length. Binnie J., in writing for the Court, quoted at pp. 163-164 the following from *Frame v. Smith*, [1987] 2 S.C.R. 99:

Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

[143] I do not accept the plaintiffs' submission that clause 4.10(j) assists Jasmur in establishing the existence of a fiduciary relationship between Jasmur and Taynton, or by piercing the corporate veil, Mr. Callaghan. That clause required, practically, that Jasmur and Taynton approve the payment, by OKM, of salary or remuneration paid to either company. I find that the clause does not apply to funds paid to either of the joint venturers by third parties, or in and of itself impose disclosure obligations with respect to such funds.

[144] The only fiduciary relationship that existed here was that between Mr. Callaghan and OKM. As I said earlier, Mr. Callaghan had a fiduciary duty to OKM, as a director of OKM. He was required to act in good faith and honestly and to act in the best interests of OKM. I find that his obligations included a requirement that he disclose his interest in the Ellwood Excavation contract and in the Max Mechanical contract. It is admitted that he did not. However, there is no evidence before me which would enable me to conclude that the failure to disclose caused OKM to suffer damages or losses, for reasons I will address shortly.

[145] With respect to the allegation that Mr. Callaghan breached his duties as a director of OKM as a result of failing to act in OKM's best interests, such a finding would require some evidence that Mr. Callaghan's arrangements, or Taynton's arrangements, with Ellwood Excavation and with Max Mechanical were not in OKM's best interests.

- [146] The plaintiffs rely on the manner in which Mr. Callaghan conducted himself as proof that the contracts were not in OKM's best interest. In addition to the Ellwood Excavating contract and the Max Mechanical contract, they point to the fact that Mr. Callaghan, through Taynton, rented equipment to OKM, again without disclosing that he was the owner of that equipment. They ask me to draw an inference that non-disclosure of the arrangements proves that the arrangements were not in OKM's best interests.
- [147] It would have been a simple matter for the plaintiffs to provide some evidence with respect to the value of the excavation work, the value of the plumbing and mechanical work, and going rates for third-party equipment rental, against which the costs charged to OKM could have been measured. No such evidence was tendered, with the exception of some hearsay evidence from Mr. Murray about telephone calls he made to equipment rental companies after he began investigating the books of the Gardena project. That evidence is not admissible as truth of the proof of its contents.
- [148] Against that dearth of evidence, which is inexplicable to me, Mr. Callaghan provided an explanation for why he did not disclose to Mr. Murray, the only other director of OKM, his involvement in the Ellwood Excavation and Max Mechanical arrangements. He testified in some detail about the work that he personally performed as part of the excavation, plumbing and mechanical work that was done on the project site, and he testified that the excavation, plumbing and mechanical work performed was good value for OKM. He also gave evidence about the rental of his or Taynton's equipment to OKM for use on site. I recognize that Mr. Callaghan's evidence is self-serving, but there is no evidence, save from inferences that might be drawn from Mr. Callaghan's conduct, to contradict his evidence. Consequently, despite finding that Mr. Callaghan breached his duty of disclosure to OKM, I find the plaintiffs have not proved damages arising from that breach and I find no other breach of Mr. Callaghan's fiduciary duties associated with the Ellwood Excavation, Max Mechanical, or equipment rental arrangements.
- [149] I do find that Mr. Callaghan breached his fiduciary duties to OKM, causing OKM damages, with respect to certain instances in which he had Taynton invoice OKM for third-party expenses, and then either failed to remit the amount paid by OKM to the supplier or failed to provide invoices to substantiate the third-party expense that was invoiced.
- [150] The total amount calculated by the plaintiffs' accounting expert as having been charged by Taynton to OKM as third-party costs, for which there are no supporting invoices, including instances of Taynton billing OKM twice, or billing and receiving payment from OKM but not remitting the funds to the third-party supplier, is \$89,196. That sum is comprised of two large invoices and multiple smaller ones.
- [151] The two large invoices both relate to AcuTruss. As set out earlier, Taynton rendered invoices to OKM which often included third-party billings. Taynton invoiced OKM, and was paid by OKM, for invoices it had received from AcuTruss. A portion of the money Taynton received associated with the AcuTruss invoices was not paid to AcuTruss. As a result, AcuTruss liened

the property. Mr. Murray paid out the amount of the lien and added that amount to the principal sum owing by OKM. Mr. Callaghan admitted to Mr. Murray that he had kept that money for his own use and not paid it to AcuTruss. The amount that was added to the principal of the loan advanced to OKM by Mr. Edmunds was \$32,242.11.

- [152] Taynton also billed OKM for \$24,948.20 more for AcuTruss than the total of the actual AcuTruss invoices the accountant was able to locate in the OKM financial records.
- [153] The balance of the \$89,196 is with respect to small transactions recorded in the OKM financial records, each identified specifically by date, payee and amount.
- [154] Mr. Callaghan is the only person who could have explained or accounted for those sums invoiced. He was the person performing the bookkeeping for OKM at the time of the transactions. He created the Taynton invoices which purported to include amounts paid or owing to third-party suppliers. He was the only person who had control of the books and records of Taynton, and of Antrim, which company appears to have paid some of the third-party invoices. He was ordered, on several occasions, to produce documents with respect to Taynton and Antrim. He failed to do so. In the circumstances, I draw an adverse inference against him, and his company Taynton, with respect to the unsupported Taynton invoices.
- [155] I find Mr. Callaghan, as the sole director and operating mind of Taynton, as well as Taynton, jointly and severally liable to OKM for the amount of \$89,196, inclusive of the AcuTruss amounts.
- [156] I turn now to the plaintiffs' claim for unjust enrichment. That claim must fail, since it is based on the Ellwood Excavation, Max Mechanical, and equipment rental arrangements, and the plaintiffs have failed to prove any damages related to those arrangements.
- [157] With respect to the plaintiffs' claim for breach of contract and breach of the duty of honesty in the performance of contractual obligations, I find that Taynton, through the actions of Mr. Callaghan, did breach the co-owners agreement and the duty to perform contractual obligations honestly, by failing to pay third-party suppliers funds that had been billed to and paid by OKM, and by billing OKM for alleged third-party costs but providing no invoices to substantiate the same. However, the measure of damages is based on a calculation of what the plaintiffs' position would have been if the defendants had fulfilled their duty (*Bhasin v. Hrynew*, 2014 SCC 71 at para. 108). The damages mirror those awarded to OKM for breach of fiduciary duty, and no further award is warranted.
- [158] With respect to the plaintiffs' claim for conspiracy, again related to the Ellwood Excavation and Max Mechanical arrangements, I find that the plaintiffs have not proved the facts to support either path to a finding of conspiracy, and further they have not proved damages.

- [159] I turn to the claims against Ms. Callaghan. Although she was alleged, in the pleadings, to have been a conspirator, that claim was abandoned during closing submissions. However, the plaintiffs maintain that she is liable to them for any damages assessed against Mr. Callaghan or his companies, on the basis of knowing assistance or knowing receipt.
- [160] Liability for knowing assistance is only established when a plaintiff proves that the defendant had actual knowledge of a breach of trust or fraud, or had been reckless or willfully blind to it (*Citadel General Assurance Co. v. Lloyds Bank of Canada*, [1997] 3 S.C.R. 805 at 819-820).
- [161] As I indicated earlier, I find that Ms. Callaghan was a credible witness. She maintained that she had no involvement in, or knowledge of, Mr. Callaghan's business, including any accounting or financial matters. Mr. Callaghan had worked for many years as a self-employed person, and he had always used their bank accounts and the credit cards of which she was the primary holder for various business transactions. There was a long marital history of ebbs and flows in Mr. Callaghan's income, and in money into and out of their accounts. Mr. Callaghan was contractually entitled to be paid project management fees and site supervision fees, and he was entitled to seek reimbursement for project material paid for on Ms. Callaghan's credit card. I find that Ms. Callaghan had no obligation to make any inquiries concerning the money paid into, and out of, their bank accounts during the period in question.
- [162] Further, with respect to knowing receipt, it is established if the recipient has constructive knowledge that the property transferred to her was in breach of trust or through fraud. Constructive knowledge is established where the recipient had knowledge of facts which would put a reasonable person on inquiry (*Citadel General Assurance Co.* at pages 837-838).
- [163] For the same reasons that I find the plaintiffs have not made out their claim of knowing assistance against Ms. Callaghan, I find they have not made out their claim for knowing receipt.
- [164] Given my conclusions with respect to the claims made by the plaintiffs, it follows that I have not found the sort of egregious conduct on the part of the defendants that would warrant punitive damages against any of the defendants.
- [165] It also follows from my conclusions with respect to the Ellwood Excavation and Max Mechanical arrangements that there will be no award of damages, in favour of any of the plaintiffs, against the defendants who did not participate in the trial and against whom default judgments were taken.
- [166] Lastly, with respect to the plaintiffs' claims, they seek the imposition of a constructive trust over properties held in Ms. Callaghan's name, and over any other assets for which the money wrongfully received by Mr. Callaghan or Taynton, and a tracing order.

- [167] In *Peter v. Beblow*, [1993] 1 S.C.R. 980, McLachlin J. (as she then was), speaking for the majority, said (at page 982), "A direct link between the contribution and the property is essential for a constructive trust to arise, whether the situation be commercial or family."
- [168] In *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357, the Court of Appeal addressed the circumstances in which constructive trust is appropriate:
- [25] On appeal [*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217], the Supreme Court of Canada took the opportunity to broaden the law as to when a constructive trust is appropriate, agreeing with the Ontario Court of Appeal that the remedy was not limited to cases of unjust enrichment. After reviewing some of the academic literature and some Commonwealth cases, the Court, per McLachlin J., as she then was, observed that "good conscience is a theme underlying constructive trust from its earliest times."
- [26] McLachlin J. noted that whereas in *Pettkus v. Becker* the Court had explored the prerequisites for a constructive trust based on unjust enrichment, *Soulos* required the Court to explore the prerequisites for a constructive trust based on wrongful conduct. She identified four conditions which should generally be satisfied in the latter category:
- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
 - (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
 - (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
 - (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. [At para. 45.]

...

- [169] With respect to tracing, in that same case, the Court said:
- [41] Although tracing is available both at law and in Equity (see Maddaugh and McCamus, *supra*, at chapters 6 and 7), the right which the plaintiffs are entitled to trace in this case is the constructive trust, an equitable property right. I agree with Professor Lionel Smith (*The Law of Tracing* (1997)) that the establishment of this proprietary right, which he refers to as the "proprietary base", is sufficient to establish an entitlement to trace. It is not necessary, as was once argued, to demonstrate a pre-existing fiduciary relationship: see *Citadel General Assurance Co. v. Lloyds Bank Canada* [1997] 3 S.C.R. 805 at para. 57.

[42] Of course, it may be difficult to identify the funds or other property into which the claimed Charges have been transformed or with which they have been mingled; and the process will come to a halt in certain conditions, including where the balance in an account has fallen below the amount being traced. (See generally Maddaugh and McCamus, *supra*, at Chapter 7, and Smith, *supra*, at Chapter 8.) As the Court stated in *McTaggart v. Boffo* (1975) 64 D.L.R. (3d) 441 (Ont. H.C.J.):

Tracing is only possible so long as the funds can be followed in a true sense, i.e., so long as, whether mixed or unmixed, it can be located and identified. It presupposes the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by the means of such a fund. Simply put, two things will absolutely prevent the tracing of trust monies:

- a. If, on the fact of any individual case, such continued existence of the identifiable trust fund is not established, equity is helpless to trace it;
- b. the chain for tracing is also broken where the trust fund either in its initial form or a converted form has found its way into the hands of a third person purchaser for value without notice. [At 458.]

[170] In this case, the plaintiffs have not identified a link between the money received as a result of the breaches of fiduciary duty and any assets in the hands of Mr. Callaghan or Taynton, or any assets that resulted. Only a small portion of the money that flowed to Mr. Callaghan, directly or through one of his companies, was as a result of the breaches of fiduciary duty. Based on the plaintiffs' expert's analysis of bank accounts, it is impossible to determine anything other than that money, both legitimately obtained or received and resulting from the breaches, flowed into the accounts of the Callaghan-related defendants, and then flowed out. Some of the sums that comprise the \$89,196 are as small as \$60.00, and the transactions in question occurred between the summer of 2007 and November 2008. I cannot conclude, on the evidence before me, that any of the money received as a result of the breaches, were used to make mortgage payments on the properties registered in Ms. Callaghan's name.

[171] I will not impose a constructive trust.

[172] With respect to tracing, it is only available if a constructive trust is imposed, based upon the establishment of a proprietary right. Even if a constructive trust had been imposed, there is no evidence of any continued existence of the money, which is a necessary precondition to a tracing order.

[173] In summary, Mr. Edmunds' claims against the defendants are dismissed. Mr. Murray's claims against the defendants are dismissed. OKM is entitled to judgment against Mr. Callaghan in the amount of \$89,196, plus interest paid or payable on that sum at the rate payable on the loan from Mr. Edmunds to OKM. If the parties are unable to agree with respect to the interest calculation, they have liberty to make submissions to me in writing

within 60 days, failing which interest will be calculated in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

The Counterclaim

- [174] Mr. Callaghan and Taynton advance two bases for the counterclaim. The first is with respect to the money paid by Mr. Edmunds through an assignment of interest owed to him by OKM to Mr. Murray in the amount of \$690,000.
- [175] For the same reasons that I have concluded that Mr. Callaghan and Taynton are not liable to OKM or Jasmur for compensation received from the Ellwood Excavation and Max Mechanical contracts, I find that although Mr. Murray and Jasmur should have disclosed that Mr. Murray was, in effect, managing the project on behalf of the lender, Mr. Edmunds, for compensation, no damages have been proved with respect to the failure to do so. OKM owed interest to Mr. Edmunds. Mr. Edmunds was entitled to pay some or all of that interest to Mr. Murray or his company.
- [176] With respect to the claim that Taynton, and/or Mr. Callaghan, should be paid site supervision fees for the months of January through October 2009, that aspect of the counterclaim must be dismissed as well. I find that Mr. Callaghan agreed, in advance, to a cap on the site supervision fees payable, and he took those fees in 12 monthly payments. That the project did not complete in those 12 months, did not affect the validity of the agreement. Further, it was readily apparent to Mr. Callaghan, as of January 2009, if not before, that any further work he did as a site supervisor would not be compensated, yet he continued to work. He has not demonstrated the elements of unjust enrichment and that claim fails. The counterclaim is dismissed in its entirety.

Costs

- [177] There has been divided success in this case. All three plaintiffs were represented by common counsel, and judgment has been awarded in favour of only one plaintiff, in a much lesser amount and on a more limited basis than claimed. The defendants who participated in the trial were also represented by the same counsel. Serious unfounded allegations were advanced against Ms. Callaghan, while Mr. Callaghan's conduct has resulted in awards against him and Taynton.
- [178] Consequently, unless there are matters of which I am not aware, each party will pay his or her own costs. If any party wishes to make submissions in support of a different order with respect to costs, the party wishing to do so must make submissions in writing within 45 days, and the opposing party or parties will have 15 days thereafter to make submissions in writing.

"A.J. Beames J."

The Honourable Madam Justice Beames

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