

CANADA / JUDGMENT

McMillan v. Bergman

2021 BCSC 1360

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1360 McMillan v. Bergman

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McMillan v. Bergman,

2021 BCSC 1360

Date: 20210712

Docket: 18040

Registry: Salmon Arm

Between:

Donald McMillan and Cheryl Lattin

Plaintiffs

And

Donald Bergman, ACIC CJ Properties Ltd.,

All Canadian Investment Corporation and Pacific J Holdings Ltd.

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiffs via teleconference:

R. Chorneyko

The Defendant Donald Bergman appearing on his own behalf and on behalf of ACIC CJ Properties Ltd. and Pacific J. Holdings Ltd. via teleconference:

D. Bergman

Place and Date of Hearing:

Kamloops, B.C.

April 30, 2021

Place and Date of Judgment:

Salmon Arm, B.C.

July 12, 2021

Table of Contents

Introduction. 3

Background Facts. 4

Loan From Van Maren Financial Ltd. 6

CCCA Proceeding. 7

ACIC v. BDO Canada LLP action. 8

ACIC v. Bergman action. 9

British Columbia Commission Securities Citation. 10

Litigation History. 10

Position of Parties. 11

Position of the Plaintiffs. 11

Position of the Default Defendants. 12

Legal Principles. 12

Discussion. 14

Compensatory Damages. 14

Punitive and Exemplary Damages. 15

Legal Principles. 15

Analysis. 16

Disgorgement of Profits. 17

Legal Principles. 17

Analysis. 18

Declaration Pursuant to s. 178(1)(d) of the Bankruptcy and Insolvency Act. 20

Conclusion. 20

Introduction

- [1] The plaintiffs, Donald McMillan and Cheryl Lattin, seek damages for deceit, breach of trust, breach of fiduciary duty, and punitive and exemplary damages against the defendants, Donald Bergman, ACIC CJ Properties Ltd. ("CJ Properties") and Pacific J Holdings Ltd. ("Pacific J") (collectively the "Default Defendants") arising out of a \$200,000 investment made by the plaintiffs in June 2016.
- [2] The plaintiffs obtained a default judgment with damages to be assessed on September 4, 2020. The Default Defendants did not file a response to the notice of civil claim although duly served.
- [3] The Default Defendants did not file any materials responding to the application to assess damages although duly served. Although on February 18, 2021, a lawyer, Allison Jaquish, filed a notice of appointment on behalf of the Default Defendants, she did not appear at the hearing on April 30, 2021 (the "Hearing"). Mr. Bergman attended, advising that he wished to proceed without his lawyer since he could provide more information than the lawyer.
- [4] During the Hearing, Mr. Bergman attempted to give evidence about a number of different issues. The plaintiffs objected on the basis that there was no affidavit evidence filed and they had no notice of the evidence that Mr. Bergman was giving. I advised Mr. Bergman a number of times that it was not fair and not in accordance with proper procedure for him to simply "tell his story" without putting before the Court sworn evidence which was served on the plaintiffs. I note that a self-represented litigant should be given some leeway but they must still comply with the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules]. As our Court of Appeal has noted, "self-represented litigants do not have 'some kind of special status' that allows them to ignore rules of procedure": 0927613 B.C. Ltd. v. 0941187 B.C. Ltd., 2015 BCCA 457 at para. 64. The Statement of Principles on Self-Represented Litigants and Accused Persons, (Ottawa: Canadian Judicial Council, 2006) "imposes an obligation on self-represented parties to be respectful and familiarize themselves with the relevant practices and procedures of the court process": 0927613 B.C. Ltd. at para. 65.

- [5] I will first give an overview of the relevant facts and of the litigation. I will then turn to the issue of the assessment of damages for the various breaches claimed by the plaintiffs. I will consider the issue of whether the conduct of the Default Defendants in this case warrants an award of punitive and exemplary damages. Finally, I will assess the claim for disgorgement of profits.

Background Facts

- [6] The plaintiffs, husband and wife, knew Mr. Bergman as an acquaintance. Mr. Bergman was the controlling mind of CJ Properties and Pacific J. In June 2016, Mr. McMillan approached Mr. Bergman and asked if he knew of any investment possibilities. Mr. Bergman told him that he was looking for a \$200,000 investment to continue construction on a property located at 13562 Lee Road, in Pender Harbour, BC (the "Property"). The plaintiffs met with Mr. Bergman, who explained the basic idea was that he would use the money to continue the construction and then the parties would split the profits after the Property was sold.
- [7] Mr. Bergman advised the plaintiffs that their investment would be used to complete the kitchen in the house on the Property and an access road. This would not finish the house but it would be in a more saleable condition. He advised that it was already listed for sale for a price in excess of \$800,000. The plan was to more actively market the Property once the kitchen and access road were completed.
- [8] At the meeting, Mr. Bergman provided the plaintiffs with a Landcor "value profiler" which shows a value of \$444,000 for the Property. He further provided a title search showing that the Property was owned by All Canadian Investment Corporation ("ACIC") with no mortgage.
- [9] The plaintiffs agreed to invest the \$200,000, with Mr. McMillan investing \$125,000 and Ms. Lattin investing \$75,000. They were to receive 40 percent of the sale proceeds.
- [10] Mr. Bergman said that title to the Property was owned by ACIC and that he was the President of the ACIC group of companies. He further represented that ACIC had assigned the Property to CJ Properties. Mr. Bergman provided a form of "trustee agreement" between the plaintiffs, as beneficiaries, and CJ Properties, as trustee. The parties signed the agreement on June 20, 2016 (the "Trustee Agreement"). The Trustee Agreement was amended by Mr. Bergman to reflect the contributions made by each of the plaintiffs. The Trustee Agreement states that CJ Properties holds in trust the beneficial interest in the Property as an undivided 12.5/50 interest for Mr. McMillan and a 7.5/50 for Ms. Lattin. The remaining undivided 30/50 was held by the trustee.
- [11] The plaintiffs later learned that no assignment of the Property was made to CJ Properties but that, by a general security agreement dated December 1, 2015, ACIC granted a security interest in all of its real property, including the Property, to Fisguard Capital Corporation.

- [12] The plaintiffs believe that most of the \$200,000 they invested was not used at the Property and that the Property never reached the saleable state that the \$200,000 was supposed to achieve.
- [13] On March 28, 2018, Mr. Bergman told Mr. McMillan that the Property had been sold but that there would be a delay of a couple of days before the money would be available.
- [14] On June 15, 2018, Mr. Bergman told Mr. McMillan that the money might take two weeks longer. He did not say what the sale price of the Property was but he told Mr. McMillan that their investment would earn a profit of 25 to 30 percent.
- [15] Mr. McMillan claims that every time he spoke to Mr. Bergman about receiving the money, Mr. Bergman would have some excuse or another. At some point, Mr. Bergman provided a summary of their investment which showed a return of 25.23 percent. This document shows the total return was \$250,458.33.
- [16] Mr. McMillan became aware of a Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA] proceeding involving ACIC (the "CCAA Proceeding") and determined that the Property was sold on or about January 26, 2018. The net proceeds were \$396,590.88 with the actual amount paid to ACIC being \$395,641.
- [17] After learning of the particulars of the sale, Mr. McMillan confronted Mr. Bergman, who assured him everything was under control and all of his investors would be paid in full. He stated that both of them would receive their investments and the 25.23 percent profit soon. He told them to be patient and it would take a little longer.
- [18] On August 28, 2019, Mr. Bergman provided a letter to Ms. Lattin confirming that CJ Properties owes her \$93,921.87, and a letter to Mr. McMillan confirming that CJ Properties owes him \$156,536.46.
- [19] The plaintiffs have conducted research into the past actions of ACIC and Mr. Bergman and have uncovered the following proceedings and documents.

Loan From Van Maren Financial Ltd.

- [20] On February 2, 2016, ACIC entered into a mortgage with Van Maren Financial Ltd., ("Van Maren") for a principal amount of \$3.5 million with an interest rate of 3 percent (the "Mortgage"). The Mortgage was registered against five properties. The Mortgage was registered on September 2, 2016. Mr. Bergman signed on behalf of ACIC. On the same date, CJ Properties also provided a mortgage to Van Maren and that mortgage was registered against two properties.

[21] The plaintiffs claim that CJ Properties drew approximately \$365,000 on its running account starting in June 2018. In support, the plaintiffs reference a loan statement from Van Maren. The loan statement appears to refer to a loan of \$450,000 to CJ Properties with a funding date of March 29, 2018, for a six-month term. The security was a mortgage and assignment of rents. On the face of the document it shows the following advances:

- March 29, 2018 - \$100,000
- April 18, 2018 - \$157,586.20
- February 22, 2019 - \$100,000

[22] In addition to the advances, funds were paid to Waterstone Law. The total advanced as of July 22, 2020, was \$365,496.05.

CCCA Proceeding

[23] On November 8, 2017, ACIC filed a petition seeking protection in the CCAA Proceeding. Paragraphs 17, 18, 19, and 33 state:

17. As an equity lender, the Petitioner accrues and capitalizes interest payment from Borrowers until their particular development project has been completed and sold out. The Petitioner's cash flow planning is dependent on the Borrowers completing their projects in a timely manner. The majority of the Borrowers' development activity has been in the Lower Mainland. Although the real estate market in British Columbia has been robust, the high level of development activity in the Lower Mainland has led to excessive delays in construction and development, particularly with respect to obtaining permits from the municipalities. For example, while it would have previously taken one to two years to obtain a permit, it now takes three to four years.
 18. Unfortunately, the delays described above have resulted in delays on timely interest payments and payouts of the Loans. This has negatively affected the Petitioner's cash flow and its ability to meet its obligations to its creditors, including to its preferred shareholders.
 19. Due to the decrease in cash flow from the Loans, the Petitioner turned to raising additional funds from investors to meet its cash flow requirements. Unfortunately, the Petitioner has been unsuccessful in that regard due to the decline in investor interest in mortgage investment corporations. Due to the strength of the real estate market in the Lower Mainland, more investors are investing in ownership where they might see higher returns than in mortgages.
 30. The Petitioner's primary asset is the Loan Portfolio. The total amount of outstanding debt owed to the Petitioner in the Loan Portfolio is approximately \$37.8 million.
- [24] The petition specifically refers to the Property at paras. 41 to 44. It states that the Property is owned by ACIC and is currently listed for a price of \$629,000. There is no reference in the petition to the plaintiffs' beneficial interest in the Property.

- [25] On November 7, 2017, Mr. Bergman swore an affidavit in support of the petition. Mr. Bergman says that ACIC owns five properties in its name, one of which includes the Property. Mr. Bergman does not make any reference to any beneficial interest that the plaintiffs have in the Property.
- [26] On November 10, 2017, Justice Adair granted an order which included permitting the petitioner to file a plan of compromise or arrangement and appointing Boale, Wood & Company Ltd. as monitor (the "Monitor").
- [27] On January 8, 2020, CJ Properties filed a proof of claim, claiming the amount of \$72,495.94 against ACIC for amounts paid to Green Vista Contracting Ltd. for Lot 184 Daniel Point. The plaintiffs claim that this related to the Property. In the proof of claim, Mr. Bergman did not reference that the plaintiffs were also creditors.
- [28] The Property was sold as part of the CCAA Proceeding. The sale proceeds of \$395,641 were paid to ACIC.
- [29] In December 2019, the plaintiffs presented proofs of claim to the Monitor, asserting that their money could be traced to the sale proceeds of the Property. The Monitor disputed that these circumstances rendered them creditors of ACIC for the purpose of the CCAA Proceeding.
- [30] On January 23, 2020, Mr. Bergman, on behalf of CJ Properties, signed an Assignment of Debt and Direction to Pay, stating that ACIC is indebted to CJ Properties for the amount of \$96,495.94. Mr. Bergman assigned this debt to the plaintiffs.
- [31] The plaintiffs have received a dividend of \$43,209.28. The Monitor has advised the plaintiffs that it is anticipated that a further \$50,000 will be paid to them eventually.

ACIC v. BDO Canada LLP action

- [32] On March 1, 2018, ACIC sued BDO Canada LLP ("BDO") alleging that on December 1, 2009, ACIC and BDO entered into a contract whereby BDO agreed to act as an independent auditor for ACIC. BDO conducted audits of the financial statements of ACIC for years ending September 30, 2009 to 2014. BDO was engaged to perform the independent audit of the 2015 financial statements. On March 26, 2016, BDO resigned from its role as auditor and advised ACIC it would not fulfill its obligation to complete the audit.
- [33] ACIC asserts in the notice of civil claim that, as a result of the lack of audited financial statements in the period between July 2015 and December 2017, investors sought to withdraw some \$19,367,000 from ACIC.
- [34] In the response to civil claim, BDO alleges it withdrew as the auditor for ACIC's 2015 financial statements because of a total loss of trust in the management of the audit client, caused by a failure of the company's directing mind to deal honestly and in good faith with BDO. BDO alleges that Mr. Bergman made a series of false representations to BDO. The

allegations of false representations were set out in the affidavits of Angela Spencer affirmed on July 17, 2018, and filed in this action on July 20, 2018, and of Jeffrey Johnson, affirmed on July 17, 2018, and filed on July 20, 2018.

- [35] Mr. Bergman swore an affidavit on August 8, 2018, filed on August 13, 2018, claiming that ACIC's impecuniosity was due to the conduct and actions of BDO.

ACIC v. Bergman action

- [36] On November 18, 2019, ACIC commenced an action against ACIC Financial Development Inc. and Mr. Bergman, claiming that Mr. Bergman, as the director of ACIC, breached his fiduciary duty and was negligent regarding a number of transactions that ACIC entered into.
- [37] On June 15, 2020, Mr. Bergman filed a response to civil claim in which he claimed that, as a result of ACIC's inability to raise capital, it had no choice but to borrow from third party financiers in order to advance loans and fulfill loan commitment obligations.

British Columbia Commission Securities Citation

- [38] On January 20, 2020, a citation was issued pursuant to s. 161 of the Securities Act, R.S.B.C. 1996, c. 418, against ACIC and Mr. Bergman by the British Columbia Securities Commission. The notice of hearing sets out allegations that, since as early as February 2014, Mr. Bergman may have misled investors as to the existence of, or priority of, actual mortgages. The hearing was adjourned to March 2021. I do not know the status of the hearing.

Litigation History

- [39] The notice of civil claim was filed on January 16, 2020. It advanced claims for breach of trust and deceit.
- [40] The notice of civil claim was served on the Default Defendants. On June 15, 2020, Mr. Bergman requested an extension of time until July 10, 2020, to retain legal counsel and file a response to civil claim. The extension was granted by the plaintiffs. Mr. Bergman did not advise the plaintiffs of any legal counsel he had retained and no response to civil claim was filed.
- [41] On September 4, 2020, the plaintiffs obtained a default judgment, with damages to be assessed, against the Default Defendants for their failure to file and serve a response to civil claim within the time allowed.
- [42] On September 10, 2020, the plaintiffs filed a certificate of judgment against two properties owned by the defendant CJ Properties, located:
- a. in Salmon Arm, legally described as: PID 017-914-990, Lot 1, Section 14, Township 20, Range 10, W6M, KDYD Plan KAP48068 (the "Salmon Arm Property"); and

- b. in Vernon, legally described as: PID 029-970-776, Lot 27, Section 2, Township 13, Osoyoos District Yale Division Plan EPP63108 (the "Vernon Property").
- [43] On December 23, 2020, the plaintiffs filed an application to assess damages, returnable on February 2, 2021.
- [44] On January 27, 2021, the plaintiffs discontinued the proceeding against the defendant, ACIC.
- [45] On February 2, 2021, Mr. Bergman attended and sought an adjournment of the hearing so that he could retain legal counsel. Justice Marchand ordered the application adjourned and gave Mr. Bergman until February 19, 2021, to have a lawyer file a notice of appointment of solicitor. If no notice was filed, the plaintiffs were at liberty to reschedule the application at the earliest dates in either Salmon Arm or Kamloops chambers. If a notice was filed, then the application would be rescheduled on dates agreeable with counsel for Mr. Bergman and plaintiffs' counsel. The plaintiffs were granted costs thrown away in any event of the cause.
- [46] On February 18, 2021, Ms. Jaquish filed the notice of appointment of lawyer on behalf of the Default Defendants.
- [47] This hearing was reset for the Kamloops court assize commencing April 26, 2021, and heard on April 30, 2021.

Position of Parties

Position of the Plaintiffs

- [48] The plaintiffs submit that the evidence supports that there was never an assignment from ACIC to CJ Properties of the Property and, as such, the Trustee Agreement was a "mere sham" used to induce the plaintiffs to part with their money without the security that they were promised.
- [49] The plaintiffs further argue that Mr. Bergman did not use the \$200,000 for the purpose intended, but diverted most of the funds elsewhere. The plaintiffs are not sure where their money went. They claim that Mr. Bergman used their money for his own purpose in contempt of the Trustee Agreement.
- [50] At the time of the Trustee Agreement, Mr. Bergman knew that ACIC was financially stressed and, in fact, insolvent, and was unable to pay its creditors. These facts were not disclosed to the plaintiffs. Mr. Bergman knew, as early as March 2016, of ACIC's impecuniosity and did not advise the plaintiffs of this.
- [51] The plaintiffs seek that an inference be drawn that Mr. Bergman used their money to avoid having to draw down on the mortgage ACIC had obtained from Van Maren for \$3.5 million at a three percent interest rate. In support, the plaintiffs rely on a loan account showing that the first advance was not until March 29, 2018, which supports that, for a year and a half after the mortgage was granted, Mr. Bergman did not have to draw on it. The plaintiffs' theory is that he instead used their \$200,000 so he did not have to pay the three percent

interest. This forms the basis of the plaintiffs' claim for disgorgement from the Default Defendants.

- [52] The plaintiffs claim that the representations to the plaintiffs that their money was on the way were not true. The money from the sale of the Property was not available since it was part of the restructuring proceedings and available only for the creditors of ACIC.

Position of the Default Defendants

- [53] Mr. Bergman agreed that the plaintiffs were owed money. He agreed that the plaintiffs should be paid the amount of \$250,000 since that is what he promised to pay them. He is having a tough financial time right now and hopes to raise some money by refinancing a property so he can repay them. His position is that there is no profit to disgorge and any such claim is a "total fabrication". He seeks to have the matter resolved in a fair manner.

Legal Principles

- [54] The plaintiffs obtained a default judgment which awarded damages to be assessed in accordance with R. 3-8 of the Rules. Rule 3-8(5) provides:

Claim for damages to be assessed

- (5) If the plaintiff's action against a defendant includes a claim for damages in an amount that is neither specified nor ascertainable, the plaintiff may
- (a) on that claim, obtain judgment in Form 8 against that defendant for damages to be assessed and costs, and
 - (b) proceed against one or more of the defendants, including the defendant against whom judgment was obtained, on any other claims brought in the action that are not barred as a result of the judgment referred to in paragraph (a).
- [55] To assess damages, the Rules provide the following methods of assessment of claims for damages in R. 3-8(12) and (13):

Method of assessment

- (12) Subject to subrule (13), if a plaintiff has obtained judgment for damages to be assessed or value to be assessed,
- (a) the plaintiff may set the assessment down for trial, and
 - (b) if the assessment is set for trial, unless the court otherwise orders, the assessment must be tried at the same time as the trial of the action or issues against any other defendant.

Alternative methods of assessment

- (13) If a plaintiff has obtained judgment under subrule (5) or (6), the plaintiff may, instead of proceeding to trial to assess the damages or the value of the goods, apply to the court, and, on that application, the court may
- (a) assess the damages or value of the goods summarily on affidavit or other evidence,
 - (b) order an assessment, an inquiry or an accounting,
 - (c) give directions as to the trial or hearing of the assessment or determination of value, or
 - (d) make any other order the court considers will further the object of these Supreme Court Civil Rules.
- [56] The plaintiffs also seek an assessment with respect to the non-damages relief under R. 3-8(9) and (10). Rule 3-8(9) provides that if the plaintiff's claim is not one referred to in subrule (3) [claim for specified or ascertainable amount], (5) [claim for damages to be assessed] and (6) [claim for detention of goods], the plaintiff may apply for judgment against the defendant under subrule (10) which provides:

Application for judgment

- (10) The following apply to an application under subrule (9):
- (a) the application may be brought under Rule 8-4;
 - (b) the application must be supported by an affidavit setting out the facts that verify the claim and stating that the person swearing the affidavit knows of no fact that would constitute a defence to the claim except as to amount;
 - (c) if the action in which the application is made is brought against several defendants, the court may
 - (i) impose terms on any judgment for the plaintiff, including a stay of execution of the judgment until the trial of the action against the other defendants, or
 - (ii) adjourn the application until the trial of the action against the other defendants.

- [57] On assessing damages, the judge is permitted to make a reasonable inquiry into the nature and basis of the claim: *Trustees of the Healthcare Benefit Trust v. Pearce*, 2012 BCSC 1235 at para. 15.

Discussion

Compensatory Damages

- [58] The plaintiffs are pursuing damages for deceit, breach of breach, and breach of fiduciary duty. They claim compensatory damages in the amount of \$200,000, representing the \$200,000 that was misappropriated from them.

- [59] It is clear that the plaintiffs paid the money for a specific purpose and that the monies were not fully used for that purpose. Mr. Bergman does not dispute that the \$200,000 plus the profit of \$50,458.33 should be paid to the plaintiffs after deducting the recovery that they have or will receive from the assignment in the CCAA Proceeding.
- [60] The plaintiffs' claim that it is not possible to determine what profits would have been made if the investment monies had been used in accordance with the agreement reached.
- [61] The plaintiffs seek an order that the Default Defendants, jointly and severally, pay to the plaintiffs the sum of \$156,790.72, being the initial investment of \$200,000 minus the recovery made to date of \$43,209.28. They further agree that should any further monies be received it will be accounted for.
- [62] I agree that the plaintiffs are entitled to the return of the \$200,000 less the monies received as at the date of the Hearing.

Punitive and Exemplary Damages

Legal Principles

- [63] The Supreme Court of Canada in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, set out the purposes of punitive damages at para. 36:

36 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

- [64] In *Whiten*, the Supreme Court of Canada set out the factors to be used to assess the blameworthiness of a defendant's conduct at para. 113:
- (a) whether the conduct was planned and deliberate;
 - (b) the intent and motive of the defendant;
 - (c) whether the defendant persisted in the outrageous conduct over a lengthy period of time;
 - (d) whether the defendant concealed or attempted to cover up its misconduct;
 - (e) the defendant's awareness that what he or she was doing was wrong;
 - (f) whether the defendant profited from its misconduct; and
 - (g) whether the interest violated by the misconduct was known to be deeply personal or irreplaceable.

- [65] The objective of such damages was described as for retribution, deterrence, and denunciation: *McKnight v. Hutchison*, 2019 BCSC 944 at para. 174.
- [66] Courts should only resort to an award of punitive damages in exceptional circumstances where the conduct is deserving of full condemnation and punishment: *West Bros. Frame & Chair Ltd. v. Yazbek*, 2019 BCSC 1844 at para. 224; *Whiten* at para. 94.
- [67] The quantum of the damages must be proportionate to the blameworthiness of the defendant's conduct, the degree of vulnerability of the plaintiff, the potential harm directed specifically at the plaintiff, and the need for deterrence: *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2009 BCSC 400 at para. 79.

Analysis

- [68] The plaintiffs seek an award of \$150,000 in punitive damages. This was the award made in *McKnight* in which the Chief Justice found that the conduct of the personal defendant before and after the dissolution of the partnership was reprehensible, took advantage of another partner, withheld a secret profit, withheld information, and dragged out the litigation to lengths that could not be condoned: para. 177. The Chief Justice relied on the upper range that had been awarded in *Huff v. Price* 1988, 25 B.C.L.R. (2d) 364 (S.C.), *aff'd* 1993, 76 D.L.R. (4th) 138 (B.C.C.A.) where Justice Taylor awarded to one plaintiff \$150,000 and the other \$100,000 in punitive damages for the "gross breaches of trust in his frauds against the plaintiffs": at 367-69.
- [69] I am not convinced that the actions of Mr. Bergman and his companies command the level of punitive damages sought by the plaintiffs. I am convinced that Mr. Bergman and his companies in essence defrauded the plaintiffs of their investment funds, failed to disclose the financial distress that ACIC was under, and misrepresented that the Property was assigned to CJ Properties. All of this was undertaken for the direct purpose of securing the investment funds, which were not used for the purpose for which they were provided. In my view, the conduct of the Default Defendants was opportunistic and designed to extract the investment funds from the plaintiffs in a planned and deliberate fashion. I accept the Trustee Agreement was a "sham" and CJ Properties was never assigned the Property by ACIC. The plaintiffs were told a story to convince them to invest.
- [70] The plaintiffs have been deprived of the investment funds for almost five years and have been "strung" along by false promises of payment by Mr. Bergman.
- [71] In my view, the award of compensatory damages is not sufficient to punish and deter Mr. Bergman and his companies for their actions.
- [72] Given the principles of punishment, deterrence, and denunciation, and acknowledging that an award of these types of damages is exceptional, I find that a fair award to the plaintiffs for punitive damages would be \$65,000.

Disgorgement of Profits

Legal Principles

- [73] The law recognizes that a fiduciary is required to disgorge any benefits derived from a breach of trust. Disgorgement focuses on the actual gains made by the fiduciary and is independent from any losses incurred by the person to whom the fiduciary duty is owed: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 595, 618. The Court of Appeal in *Clifford Associates Consulting Ltd. v. Clifford* (1996), 83 B.C.A.C. 261 at para. 21 found that if the profits made by the business that obtained them in breach of the fiduciary duty are greater than the loss suffered by the plaintiff, then disgorgement is an appropriate remedy.
- [74] Equitable remedies are always subject to the discretion of the court: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 74. Disgorgement of profit is intended to either, or both, preclude a fiduciary from being swayed by personal interest or restore to a beneficiary the profit which has been wrongfully appropriated by a fiduciary, but which properly belongs to that beneficiary: *Strother* at paras. 75-76. Writing for the majority in *Strother*, Justice Binnie reiterated that a causal relationship between a breach of fiduciary duty and the profits must be established in order for an accounting to be ordered: para. 79. The link required between a breach of fiduciary duty and the award ordered must be based "on a common sense view of causation": *Imperial Parking Canada Corporation v. Anderson*, 2015 BCSC 2221 at para. 276. "The law is clear that a fiduciary who has breached a duty must account only for what it acquired in consequence of the breach": *Genesis Fertility Centre Inc. v. Yuzpe*, 2019 BCSC 233 at para. 315. "The stringent rule requiring a fiduciary to account for profits should not be carried to extremes and should not be transformed into a vehicle for the unjust enrichment of the plaintiff": *Genesis Fertility Centre Inc.* at para. 335.

Analysis

- [75] The plaintiffs are seeking disgorgement in the sum of \$374,119 on the theory that the Default Defendants were able to avoid drawing down on the Mortgage from September 2016 to March 29, 2018, when the first \$100,000 was drawn. The plaintiffs argue that Mr. Bergman decided to use the plaintiffs' money instead of taking a draw on the Mortgage and incurring the interest at three percent a month. In essence, Mr. Bergman used the plaintiffs' "free money" instead of the "expensive money". As a result, Mr. Bergman obtained the benefit of saving himself the interest payment each month. This is the benefit that the plaintiffs say should be disgorged to them.

- [76] The benefit was calculated on the following basis:

We submit that the amount of the benefit subject to disgorgement as of February 2, 2021 is \$374,119 calculated as follows:

Date

Principal and Interest

Interest

Interest Owing

September 2, 2016

127,504.06

September 2, 2017

173,405.52

45,901.46

45,901.46

September 2, 2018

235,831.51

62,425.99

108,327.45

September 2, 2019

320,730.85

84,899.34

193,226.80

September 2, 2020

436,193.97

115,463.11

308,689.91

February 2, 2021

501,626.06

65,429.09

374,119.00

[77] I am not convinced that the plaintiffs are entitled to the remedy of disgorgement in the circumstances of this case. In order for such a remedy to be advanced, there has to be evidence that establishes a link between the breach of fiduciary duty and the profits

allegedly made, or in this case, the avoidance of paying interest on borrowed funds. In my view, the plaintiffs have made a speculative leap that the reason there was a delay by Mr. Bergman in seeking any advances from the Mortgage related to the specific investment they provided in June 2016. There has to be some evidentiary foundation for the claim of disgorgement and I am not persuaded on the evidence before me that such foundation exists.

- [78] I am not persuaded that the Default Defendants have received any profits from the use of the plaintiffs' money. This is not a difficulty in estimating what the profit is, it is a case in which the plaintiffs have not established the evidence in support of a disgorgement claim.
- [79] The plaintiffs seek to have the court to assume that, but for the investment of \$200,000 being advanced in June of 2016, the Default Defendants would have had to draw down \$100,000 from the Mortgage in September 2016 and would have incurred the interest on those funds for over four years. This is only speculation on which there is no evidence. There may be all sorts of reasons why Mr. Bergman delayed requesting an advance on the Mortgage, unrelated to the plaintiffs' investment funds.
- [80] The loan schedule that the plaintiffs rely upon refers to the use of the advance to Meridian Modular for working capital. I have no information about what project or projects Meridian Modular was involved in and how this relates to Mr. Bergman.
- [81] In the notice of application, the plaintiffs sought a declaration of an equitable trust against the Salmon Arm and Vernon Properties. The plaintiffs concede that no evidence has been found that any of their investment funds were used to purchase the Salmon Arm Property and the Vernon Property so no relief is being sought against those properties.

Declaration Pursuant to s. 178(1)(d) of the Bankruptcy and Insolvency Act

- [82] Section 178(1)(d) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 provides:

Debts not released by order of discharge

178 (1) An order of discharge does not release the bankrupt from

- (d) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;
- [83] I have concluded that Mr. Bergman and his companies were fraudulent in the manner in which they obtained the investment funds from the plaintiffs and misappropriated them for a use other than the authorized one. Further, I have concluded that CJ Properties and Mr. Bergman, as the controlling mind of this company, were acting as fiduciaries. I am satisfied that the declaration pursuant to s. 178 should be granted against Mr. Bergman and CJ Properties.

Conclusion

[84] In summary, I order that:

- a. The defendants, Donald Bergman, ACIC CJ Properties Ltd., and Pacific J Holdings Ltd., jointly and severally pay to the plaintiffs the sum of \$156,790.72 being damages for deceit, breach of trust, and breach of fiduciary duty.
- b. The defendants, Donald Bergman, ACIC CJ Properties Ltd., and Pacific J Holdings Ltd., jointly and severally pay to the plaintiffs the sum of \$65,000, being punitive damages.
- c. The plaintiffs claim for disgorgement of profits from the defendants, Donald Bergman, ACIC CJ Properties Ltd., and Pacific J Holdings Ltd. is dismissed.
- d. The defendants, Donald Bergman, ACIC CJ Properties Ltd., and Pacific J Holdings Ltd., jointly and severally pay pre-judgement interest to the plaintiffs on the sum of \$200,000 pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79 commencing on June 20, 2016 to the date that the sum of \$43,209.28 was paid to them. After that date the plaintiffs are entitled to pre-judgment interest on the sum of \$156,790.72 to the date of this order.
- e. The plaintiffs are also entitled to pre-judgement interest on the award of punitive damages from June 20, 2016.
- f. The defendants, Donald Bergman, ACIC CJ Properties Ltd., and Pacific J Holdings Ltd., jointly and severally pay to the plaintiffs the cost of this application and the action on scale B.
- g. Pursuant to s. 178(1)(d) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, the damages assessed herein for deceit, breach of trust, and breach of fiduciary duty are a debt or liability arising out of fraud, embezzlement, misappropriation, or defalcation, while the defendants, Donald Bergman and ACIC CJ Properties Ltd., were acting in a fiduciary capacity.
- h. The signature of Donald Bergman on the form of the order is dispensed with.

[85] Counsel for the plaintiffs shall serve a filed copy of the order on Mr. Bergman.

"Forth J."

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