
CANADA / JUDGMENT

Moon v. Golden Bear Mining Ltd.

2012 BCSC 829

COURT

Supreme Court of British Columbia

DECIDED

5 June 2012

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2012 BCSC 829 Moon v. Golden Bear Mining Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moon v. Golden Bear Mining Ltd.,

2012 BCSC 829

Date: 20120605

Docket: S107260

Registry: Vancouver

Between:

Jung J. Moon and SMG Canada Gold Corp.

Plaintiffs

And:

Golden Bear Mining Ltd., Ernest McLean,

Golden Bear Exploration Inc., Frances

Grace McLean and Shawn McGroarty

Defendants

Before: The Honourable Mr. Justice Harris

Reasons for Judgment

Counsel for the Plaintiffs:

M.J. Hewitt

Defendant Shawn McGroarty:

Self-Represented

Defendant Ernest McLean:

Self-Represented and appearing for Golden Bear Mining Ltd., Golden Bear Exploration Inc. and Frances Grace McLean

Place and Date of Trial:

Vancouver, B.C.

March 12-16, 19-23 and

April 10-12, 2012

Place and Date of Judgment:

Vancouver, B.C.

June 5, 2012

Introduction

- [1] This case arises out of an agreement of December 12, 2009, between the plaintiffs, Mr. Moon and SMG Canada Gold Corp., and the defendants, Golden Bear Mining Ltd. and Mr. McLean. The agreement, referred to as the "funding agreement", involved the plaintiffs investing \$800,000 in Golden Bear Mining in return for a 30% shareholding in that company. The funding agreement stipulated the uses to which the money could be put, provided a right of first refusal for the plaintiffs to buy any additional shares issued by Golden Bear Mining, specified how certain mining claims would be held, and contemplated that Mr. Moon or his nominee would become a director of the company.
- [2] The plaintiffs allege that the money invested by them was not used in 2010 for the agreed purpose, namely, to finance mining for gold on claims staked in the Settea Valley in northern British Columbia. No mining or exploration occurred in the Settea Valley in 2010, although some preparatory work was done. Instead, the money was used primarily to fund cleanup operations at an old worksite at Davenport Creek, near Atlin, British Columbia. This worksite was not Golden Bear Mining's, but it was a worksite where another company (Four Crown Mining), associated with the principal shareholder of Golden Bear Mining, Mr. McLean, had conducted operations in years past.
- [3] The plaintiffs allege that they did not know, and it had not been disclosed to them by Golden Bear Mining or Mr. McLean, that the regulators had stipulated that before any permit would be issued to Golden Bear Mining or Mr. McLean to explore or mine in the Settea Valley, the worksite near Atlin would have to be cleaned up to their satisfaction. The plaintiffs say that this was a material (negligent or fraudulent) non-disclosure and they would not have invested their money in Golden Bear Mining if they had known of this condition.

Furthermore, Mr. McLean, knowing the scope and cost of work for the Atlin cleanup, negligently or fraudulently misrepresented what the investment would be used for.

- [4] The plaintiffs did receive their 30% shareholding in Golden Bear, but neither Mr. Moon nor his nominee has been made a director of the company, contrary to the funding agreement and contrary to an earlier court order that Mr. Moon be appointed a director. Moreover, the plaintiffs allege, they were not offered their right of first refusal to purchase shares in Golden Bear Mining when additional shares were issued to Mr. McLean, contrary to the terms of the funding agreement.
- [5] The plaintiffs argue that Mr. McLean failed in his duties as an officer and director of Golden Bear Mining. He must have known the size of the task of the Atlin cleanup and that neither he nor Golden Bear Mining had the funds available to pay for that job. He approved the use of funds dedicated to exploration and mining in Settea Valley for the cleanup at Atlin instead. He also employed the defendant Mr. McGroarty as Chief Executive Officer of Golden Bear Mining. Mr. McGroarty, it is alleged, is an unsuitable person to employ in that role and proved to be as he converted to himself substantial funds invested by the plaintiffs from Golden Bear Mining.
- [6] Finally, the plaintiffs argue that the pattern of wrongdoing that started in late 2009 with misrepresentations and non-disclosure before the funding agreement and which continued in 2010 has continued in 2011. In late 2010 and following, when this action started, a number of orders were made appointing an inspector and granting injunctions, including freezing the use of assets, staked claims and the disposition of shares. At the very least, the defendants have flirted with breaching these orders, most seriously by taking steps to prepare to explore or mine in the Settea Valley using a company, also a defendant, known as Golden Bear Exploration Inc. As well, orders have been made respecting document production that were not complied with and the order directing that Mr. Moon be made a director has been breached.
- [7] The plaintiffs pitch their case somewhat higher than my description of it might suggest. In their opening they say the defendants failed to disclose, before and after the investment was made, that they intended to use the investment for a variety of personal gains, and that the money would not be used for mining in the Settea Valley.
- [8] Indeed, it has become apparent through this litigation, they say, that the majority of those funds were diverted as part of a scheme intended to benefit only Mr. McLean and the defendant, Mr. McGroarty. That scheme was designed to enable them to pursue the Golden Bear Mining's claims in a separate company, Golden Bear Exploration Inc., controlled by Mr. McLean and Mr. McGroarty.
- [9] In summary, the particular acts in furthering this scheme the plaintiffs set out to prove include:

- (a) In soliciting the plaintiffs' investment in 2009, Mr. McLean failed to reveal his intention to use it for a variety of improper purposes;
 - (b) Having secured the plaintiffs' investment, in January 2010, Mr. McLean gave control of the corporation over to Mr. McGroarty, a man convicted of serious commercial crimes in the United States, and investigated for other commercial crimes in Canada, notwithstanding his commitments to the shareholders not to allow Mr. McGroarty to be involved in the corporation;
 - (c) Mr. McLean refused to honour his contractual obligation to appoint Mr. Moon as a director of Golden Bear Mining;
 - (d) In March 2010, Mr. McGroarty and Mr. McLean established Golden Bear Exploration Inc., in an effort to strip Golden Bear Mining Ltd. of its primary assets, its mining claims;
 - (e) In May 2010, Mr. McLean and Mr. McGroarty together unlawfully caused Golden Bear Mining to give Mr. McLean majority control of the corporation by issuing 549 shares to him for \$0.01 each, and without honouring the plaintiffs' right of first refusal when issuing those shares;
 - (f) Mr. McLean and Mr. McGroarty spent the summer of 2010 using the Plaintiffs' investment, not for the agreed purposes, but to clear Mr. McLean's name with the B.C. Ministry of Mines;
 - (g) Both Mr. McLean and Mr. McGroarty unlawfully removed and converted other funds, and attempted to convert and remove other assets, from Golden Bear Mining Ltd. for personal use;
 - (h) In the fall of 2010, Mr. McLean and Mr. McGroarty unlawfully conspired to defraud the plaintiffs of more than \$10 million by communicating a non-existent offer to purchase Mr. McLean's shares under the first right of refusal contained in the funding agreement; and
 - (i) Following the commencement of the action, Mr. McLean and Mr. McGroarty have carried on a further fraudulent attempt to harm the company by concocting a scheme by which they sought, and continue to seek, to strip the company of all but one of its mineral claims.
- [10] In the result, the plaintiffs seek a wide variety of relief. They seek damages for misrepresentation and breach of contract. As well, they seek orders to enforce the right of first refusal under the funding agreement; remedies to relieve the consequences of the oppressive exercise of powers over Golden Bear Mining by its only director and officer, Mr. McLean; and orders that will enable the company to carry on business without any further involvement in it by Mr. McLean or Mr. McGroarty. It should be noted here, that Golden Bear Mining is a defendant in these proceedings and not a plaintiff. There has been no application by the plaintiffs to bring a derivative action in the name of Golden Bear Mining for what might be wrongs, if proven, to it by the personal defendants.

- [11] Mr. McLean, for his part, denies that any misrepresentations induced the plaintiffs to invest in Golden Bear Mining. It was known and understood by all that before Golden Bear Mining could begin its work in Settea Valley, Mr. McLean would need to do work at Atlin and transfer equipment from there to a staging ground near the Settea Valley. Money was set aside in the funding agreement for this purpose, but by mistake Atlin was referred to in the agreement as Highland. Unfortunately, it took longer to do the work at Atlin than he anticipated and was much more expensive. Although he was committed to getting into the Settea Valley in 2010, events conspired against him, the cleanup took longer and was more expensive than expected, and this litigation disrupted his plans to get into the valley and start work. Money spent to cleanup Atlin, he argues, does not breach the funding agreement because it was for the benefit of the planned mining operation in Settea.
- [12] In broad terms, Mr. McLean says he acted throughout in good faith. He is first and foremost a miner, not an administrator. He believed he could "do the job" with the money he had, but understood that if more money was needed the plaintiffs would lend it to the company. Throughout 2010, he was bending all his efforts to get into the Settea Valley. He had little idea what was happening back in Vancouver, having delegated authority to administer and run the company to others.
- [13] He had little, if anything, to do with Golden Bear Mining's corporate affairs in 2010, leaving it to others to organise the share structure of the company to give the plaintiffs their 30% shareholding interest. He says he was always willing to have Mr. Moon or his nominee become a director, and gave the necessary instructions to bring that about. However, he thought that should only happen if a third director, familiar with the company, was appointed to avoid potential deadlock. His suggestion was that his wife should become a director at the same time as Mr. Moon. Neither appointment was ever made.
- [14] Mr. McLean repudiates the allegation that he and Mr. McGroarty embarked on a scheme to benefit themselves by stripping Golden Bear Mining of its assets, most particularly its mining claims. His position is that he had staked the claims in the Settea Valley in his own and his wife's name using his credit card to pay for them. The claims, then, did not belong to Golden Bear Mining. They were his property. Golden Bear Mining had a right to only one claim (claim 672403) that had been acquired after testing in late September 2009 and was staked on November, 20, 2009, as reflected by an agreement of about that date.
- [15] Mr. McLean denies bleeding the company of its funds for personal benefit.
- [16] Mr. McGroarty, for his part, says that any money he received from Golden Bear Mining was, with some minor inadvertent exceptions, for legitimate corporate purposes. He was not participating in a scheme to defraud Golden Bear Mining or the plaintiffs. Both he and Mr. McLean offer an explanation of the alleged conspiracy to defraud the plaintiffs of \$10 million that draws the sting of the allegation.

- [17] Mr. McLean says, in responding to the allegations about financial irregularities, that he was not handling the financial affairs of Golden Bear Mining when he was in Atlin throughout the summer of 2010. He is unable to comment directly or completely on the cost of the cleanup activities. Nor is he in a position to explain in detail what the plaintiffs' investment was used for. He had arranged that a Mr. Williams would administer the financial affairs of Golden Bear Mining when he was away and Mr. Williams was responsible for approving the expenditure. He too would like to know where the money went and he looks to Mr. Williams for answers.
- [18] Finally, Mr. McLean defends his and Golden Bear Mining's association with Mr. McGroarty, who, he says, brought useful skills to the company and provided important help in dealing with day-to-day operations and resolving issues with the regulators. Mr. McLean did not know of Mr. McGroarty's criminal convictions when he hired him, but says they are well in the past and no longer relevant. Evidently, Mr. McLean grew to trust Mr. McGroarty and only relieved him of his duties late in 2010 under pressure from his erstwhile associates in Golden Bear Mining.
- [19] It follows from all of this that there are a number of distinct questions to address. First, at the time of the funding agreement did Golden Bear Mining own the claims that had been staked by Mr. McLean in the Settea Valley? Secondly, what was disclosed or represented to the plaintiffs before they entered the funding agreement about the Atlin cleanup and the regulator's conditions for granting a permit to mine in the Settea Valley? Thirdly, has the funding agreement been breached and, if so, how? This last question raises a number of more specific questions since it is alleged that the funding agreement has been breached in a number of different ways. Fourthly, have the affairs of Golden Bear Mining been conducted in a manner that is unfairly prejudicial or oppressive to its shareholders, including the plaintiffs? Answering this question involves a factual analysis that overlaps to some considerable degree with the issues engaged by other questions. Finally, it will be necessary to analyse the remedies that should be granted, if any, to the plaintiffs.
- [20] Before embarking on answering these questions it is necessary to provide a little more background about Golden Bear Mining and the people associated with it to set the context out of which these issues arise. This background is essential to an analysis of the reasonable expectations of the participants in Golden Bear Mining, most of whom who are not parties to these proceedings. The analysis of those reasonable expectations is a necessary step in deciding whether the affairs of the company have been conducted in a manner that is unfairly prejudicial or oppressive to the interests of the plaintiffs.

Background

- [21] Mr. McLean is now in his late seventies. He is a well known figure in British Columbia through his longtime involvement in hockey. For the past 30 years he has been a placer miner, exploring and mining for gold. It appears that over the years he has worked through a number of different corporate vehicles, including Four Crown Mining, a company he used when mining at Davenport Creek near Atlin, British Columbia.
- [22] His participation in the mining industry has not been free from difficulty. At various times he has been charged with, and convicted of, environmental offences and has fallen foul of securities regulation leading to orders being made against him restricting his involvement for five years in issuing securities.
- [23] In 2003, Mr. McLean formed Golden Bear Mining. He was its president and sole director. Originally, he was also its only shareholder.
- [24] It seems to be acknowledged by Mr. McLean, and everyone associated with him, that his strength lies in the day-to-day activities of exploration and mining, not the niceties of corporate administration, governance, financial administration or record keeping. Hence, arrangements were made in 2008 to have individuals assist Mr. McLean with certain tasks and to put systems in place that would compensate for his weaknesses and allow him to concentrate on his strengths. Those individuals variously drew a salary from Golden Bear Mining and/or were given a shareholding position in the company. They were Mr. Williams, who committed to help with company administration and the management of its finances; Mr. Stuart Moir, who committed to assist in raising capital and provided some legal services; and Mr. Jonn Morrisonn, who had mining expertise and offered strategic advice. Each of these individuals received a shareholding interest in Golden Bear Mining. The extent and terms of those shareholdings is in issue in these proceedings, in particular whether each individual received five shares or 5% of the company and whether that shareholding interest could be diluted. At the time the shareholding was given or promised, Golden Bear Mining had either 100 or 101 shares issued and outstanding. The shares were not issued directly to the individuals (except for one share to Jeff Williams, it appears), but were (and are) held in trust by Mr. Stuart Moir.
- [25] Mr. Jeff Williams accepted the responsibility of managing some of the day-to-day operations of Golden Bear Mining, in particular monitoring and approving its use of money. Mr. Williams initiated, with Mr. McLean's concurrence, moving the company's bank account to Coast Capital. A principal advantage of doing so was that Golden Bear Mining could have a sub-account that Mr. McLean could access with a debit card, thereby ensuring that Mr. McLean could gain access to funds for corporate purposes as needed while simultaneously allowing the company to maintain a record of those transactions for accounting purposes. Mr. Williams arranged for Golden Bear Mining to have access to office space and the bookkeeping services of Ms. Coombs. In 2009, Mr. Williams also undertook the primary responsibility of managing a flow-through funding investment, put in place with the

assistance of Stuart Moir, with which Mr. Moon was involved. Mr. Williams was involved in managing the investment to ensure that funds were properly used for purposes which CRA would recognise as eligible expenses to support the tax benefits associated with the flow through funding.

- [26] In return for these services, in addition to direct financial remuneration to his company, Mr. Williams received a shareholding position in Golden Bear Mining. Mr. Williams says that he received a 5% interest, not to be diluted. Mr. McLean says he gave five shares to Mr. Williams, without any commitment that they would not be diluted.
- [27] Mr. Stuart Moir also holds shares in Golden Bear Mining. Mr. Moir is a lawyer and at times, it appears, acted as counsel to Golden Bear Mining. He also played a role in raising finance for the company. Mr. Moir introduced Mr. Moon to Golden Bear Mining and put in place the flow-through funding arrangement with Mr. Moon's spouse which funded Golden Bear Mining's operations in 2009. Mr. Moir was also instrumental in bringing the plaintiffs to the table to negotiate the funding agreement at the end of 2009.
- [28] Mr. Moir also says that he was promised and received 5% of Golden Bear, not to be diluted. In early 2010, in light both of his status as a shareholder and a "broker" involved in raising capital for Golden Bear Mining, Mr. Moir decided he ought not to continue to provide legal services to the company and recommended other counsel be retained. This indeed occurred.
- [29] In late 2009, Mr. David Moir, Stuart Moir's brother, also became involved with Golden Bear Mining. I will return to the circumstances surrounding David Moir's involvement shortly. Here, it is sufficient to record that Mr. David Moir is a certified general accountant and an experienced outdoorsman. In late 2009, as part of a collective decision among the interested parties, Mr. David Moir was asked to undertake several different tasks. First, to accompany Mr. McLean to the Settea Valley in late September to do some prospecting. Secondly, to examine the books and records of Golden Bear Mining. Thirdly, to become the company's accountant. These latter two tasks never came to fruition, although Mr. David Moir was involved, along with Mr. Williams, in the preparation of a budget for Golden Bear Mining setting out the anticipated costs of the 2010 operations.
- [30] Mr. David Moir again says he was offered 5% of Golden Bear Mining to undertake these activities, but is unclear whether he actually received that interest.
- [31] Several other individuals were also associated with the company. Mr. Norm Lobb also says he was promised 5% of Golden Bear Mining's shares in return for services to be provided. In 2010, Mr. Lobb was one of the individuals who went with Mr. McLean to Davenport Creek near Atlin and worked on the cleanup there. Mr. Lobb also knew Mr. McGroarty and introduced him to Mr. McLean in the fall of 2009. Mr. Lobb introduced Mr. McGroarty as someone who could help the company, both in an executive capacity and, either directly or indirectly, as a source of capital. Mr. Brent Koop is also said to have been offered 5% of the company for his work in September 2009 in exploring the claims in the Settea Valley with

Mr. McLean and Mr. David Moir.

- [32] The last person associated with Golden Bear Mining as a shareholder is Mr. Jonn Morrisonn. Mr. Morrisonn did not give evidence at trial. His role in Golden Bear Mining is unclear, but important, nonetheless. He is, it seems, an old friend of Mr. McLean's. It is not clear what specific role he played in Golden Bear Mining's affairs beyond offering strategic advice on the approach to take to exploration and mining. He may also have brought goodwill to the company. He is reported to have held the view that if business arrangements had to be written down, they were not worth entering; hence the paucity of documentation evidencing the relationships between the parties. He is also said to have taken against the involvement of Mr. McGroarty in Golden Bear Mining and joined with others in suggesting, requesting, or demanding that Mr. McGroarty be removed from any further involvement with the company. Mr. Morrisonn received five shares or 5% of the company, which he held in trust for his son, Shaone.
- [33] Finally, Mr. McGroarty was introduced to Golden Bear Mining by Mr. Lobb, likely sometime in October or early November 2009. By his own account, Mr. McGroarty had extensive involvement in working with and turning around companies. He says he was skilled in running companies, in managing their operations, and in developing ideas about how they might structure their affairs to achieve their goals. Although he had some success in raising capital for companies, he did not regard doing so as his forte.
- [34] Mr. McGroarty attended at least two significant meetings with the group of individuals associated with Golden Bear Mining before he was involved in any meetings with Mr. Moon and the investment the plaintiffs would ultimately make in the company. The witnesses disagree about the subject matter of those meetings. Several say that Mr. McGroarty held out that he was able to and was contemplating investing \$1.5 million in Golden Bear Mining, directly or perhaps indirectly. In return for that investment he expected to receive 30% of the company or a related company and some management role in it. There appears also to have been discussion of restructuring the business of Golden Bear Mining to spin off the mining activities from a holding company (Golden Bear Exploration). Mr. McGroarty suggests that he had not committed to providing funds so unequivocally as others suggest.
- [35] In any event, what is clear is that Mr. McGroarty did not come up with \$1.5 million himself, or investors who were willing to contribute that money. Nonetheless, he appears to have impressed Mr. McLean, and to a lesser extent Mr. Williams who believed Mr. McGroarty offered the company management experience. Despite the contrary view of the remaining shareholders, Mr. McGroarty remained involved with Golden Bear Mining in some capacity.
- [36] Mr. McGroarty regards himself as becoming the CEO of Golden Bear Mining before the funding agreement of December, 12, 2009, although whether that is accurate is unclear. Other evidence suggests he did not assume that role until January 2010.

- [37] What does not appear to have been known to anyone at that time was that Mr. McGroarty had been twice convicted in the United States of commercial crimes, including forgery, and had been incarcerated for those offences in the late 1980s. Moreover, Mr. McGroarty had been released from his position as CEO of a company called MagPower in 2008 amid allegations that he had misappropriated corporate funds; allegations that led to a criminal investigation. It is only fair to point out that Mr. McGroarty strenuously disputed the allegations about his conduct at MagPower. Furthermore, he made it clear that he thought he was unfairly blamed for problems elsewhere in that company and was prepared to defend his years there as marked by significant success.
- [38] These then, with the exception of Mr. Moon and his company, SMG, are the principal individuals associated with Golden Bear Mining. It is necessary to turn now to the events leading up to the funding agreement and Golden Bear Mining's need for funds.
- [39] In 2008, Mr. McLean came to learn of two geological reports that suggested it would be worthwhile to prospect for gold in the Settea Valley. The area had been explored and mined in earlier years. In 2008, Mr. McLean staked a number of claims in his own and his wife's name. I will return later to the question whether Mr. McLean owned the claims personally or in trust for Golden Bear Mining. At this stage it is sufficient to observe that Mr. McLean was able to hold a free miner's licence (at no cost) and could stake claims online.
- [40] Those claims were allowed to lapse in May 2009. They were then immediately re-staked. Apparently, it is cheaper to forfeit claims and immediately re-stake them than to do the work on them necessary to keep them in good standing.
- [41] In late 2008, Mr. Moon, through his spouse, made an investment in Golden Bear Mining through a flow-through funding arrangement which provides tax benefits to an investor for eligible expenses incurred in exploration and mining. The investment funding was for \$300,000, not all of which it seems, for various reasons, found its way to the company as money able to be spent on the ground in 2009. Nonetheless, it seems reasonably clear that the flow-through funding was substantially the only money Golden Bear Mining had to use for exploration in the Settea Valley.
- [42] Golden Bear Mining, through Mr. McLean, made one aborted effort to get into the Settea Valley in August 2009. This involved "walking an excavator" along an old, but existing road, over "Two Mile Mountain". Had it been successful, this route would have brought Mr. McLean and his workers into the north end of the Settea Valley and to a number of claims staked by him.
- [43] This first foray was not a success. The route in to the Settea Valley is rough and the going arduous. Whether by accident or design, the excavator left the old, existing road, and, as a result, destroyed forest, scarring the mountainside and causing environmental damage. Worse was yet to happen. Mr. McLean slipped and fell while hiking and flagging a route. He became disoriented. He lost his way. He could not find his way back to his co-workers. For five days he was lost in the bush without food, surviving on water and dodging bears. There

is no question that this must have been an exhausting, indeed a frightening, ordeal. But after five days, Mr. McLean was found by a helicopter searching for him and he was rescued.

- [44] After recuperating in Vancouver, Mr. McLean set off again for the Settea Valley. This time, as the season was closing in, Mr. McLean and Golden Bear Mining were given a four day permit to explore. It was on this occasion that Mr. McLean was joined by Mr. David Moir. The decision to have Mr. Moir accompany Mr. McLean appears to have been a collective decision of the shareholders.
- [45] This second venture to the Settea Valley occurred in late September 2009. The group took a different route into the valley and entered a different part of it than would have been the case if the first effort had proved successful. Accordingly, their exploration was in different part of the valley to what would have been explored under the first plan.
- [46] The group took two samples when they were in the valley. At least one sample was taken in an area that was not staked at the time. The samples were returned to Vancouver, analysed at the Chemex labs, and returned results that were at the very least promising. Although not definitive, they suggested that it would be well worthwhile prospecting further and devoting resources to exploration and mining the next year.
- [47] On November 20, 2009, Mr. McLean staked the area that had not been previously staked. It bears the number 672403. In evidence is a "mining agreement" dated November 21, 2009, between Mr. McLean and Golden Bear Mining giving Golden Bear Mining the right to mine that claim. The authenticity and validity of that document is contentious.
- [48] There were, however, obstacles to the business plan for the next year. First, Golden Bear Mining was out of funds. Secondly, the intention had been to produce a so-called "43-101" report which could be used to assist in financing, but that report could not be produced and the company was forced to rely on the Chemex report. Thirdly, it appeared that the company needed to raise \$1.5 million, at least according to a budget prepared by Mr. David Moir and Mr. Williams, to achieve production in 2010, but there were no obvious sources of financing. Mr. McGroarty had not come up with the money or investors with the money, if he had ever held out the prospect that he would or could. At this stage, Mr. Moon re-enters the scene.
- [49] Mr. Stuart Moir's evidence was that he had asked Mr. McLean for a bottom line number of what he needed to get into production in the Settea Valley in 2010. Mr. McLean's answer was that he could do the job for \$650,000. Shortly thereafter, Mr. Stuart Moir reported back that he had the \$650,000. The source was Mr. Moon.
- [50] Around about December 9-12, 2009, Mr. Moon had some discussions with the group of shareholders and with Mr. McLean. The deal was finally struck, or at least confirmed, at a meeting in a restaurant on December 12, 2009, attended by the principal individuals interested in Golden Bear Mining. Some revisions needed to be made to the proposal presented by Mr. Moon. As a result, it was signed later that evening. As we know, the amount invested was \$800,000. The agreement was drafted by Mr. Moon. It was signed by

Mr. McLean, on his own behalf and for Golden Bear Mining. When the agreement was signed, Mr. Moon handed Mr. McLean \$60,000 in cash. The rest of the money came in instalments over the next several months. The material portions of the funding agreement provided as follows:

- The number (or %) of shares to be acquired: 30% of Golden Bear

...

- Consideration in exchange of the shares:

- o \$800,000 CAD cash - funding schedule as below:

...

- Other conditions and procedures:

- o For each \$100,000 received, Golden Bear will transfer 3.75% of its shares either to Jung (JJ) Moon (up to 5%) or to SMG (up to 25%).

...

- o Golden Bear shall have 2 or 3 directors of which one shall be the nominee of SMG. SMG shall have the right to nominate one signatory for the banking and for general signing authority and the banking and the general signing authority shall both require a minimum of two signatures.

- o SMG shall receive a right of first refusal from both Mr. McLean and Golden Bear for any subsequent share sale or issuance by either.

- o Golden Bear shall not borrow money in excess of \$25,000 per quarter without SMG's written consent.

- o All Seattea mineral claims will be transferred to a holding company or a lawyer to hold in trust on the behalf of a holding company. The holding company shall be held by the shareholders of Golden Bear in the same proportion as their shares in Golden Bear and the same directors and signing authority. The shareholders may choose to restructure the Golden Bear so that the holding company becomes the parent company of Golden Bear if they so choose by special resolution.

- o If the shareholders choose to so restructure Golden Bear, SMG and JJ Moon share receive the same equity ownership as held in Golden Bear.

- o Out of \$800,000 investment by SMG, a minimum of \$650,000 shall be allocated towards the Settea mining operation and up to \$150,000 may be allocated towards the Highland River Mining venture. Any monies that are advanced for the benefit of Golden Plateau Mining Inc. must be secured by a general security agreement with a first charge ... duly registered in accordance with the PPSA Act.

...

- [51] The agreement is written in the form of an offer directed to Ernie McLean and Golden Bear Mining. It is signed as accepted by Ernie McLean "on behalf of Golden Bear Mining Ltd. by Ernie McLean, President and for himself".
- [52] In my view, the funding agreement is a contract between the plaintiffs on the one hand and both Mr. McLean and Golden Bear Mining on the other. Mr. McLean, accordingly, assumed personal contractual obligations by entering the funding agreement. His conduct is, therefore, capable, in principle, of attracting personal liability if it amounts to a breach of the contract.

Did Golden Bear Mining own all of the claims staked in the Settea Valley?

- [53] The funding agreement expressly refers to "all Settea mineral claims" and stipulates that those claims will be:

... transferred to a holding company or lawyer to hold in trust on behalf of a holding company. The holding company shall be held by the shareholders of Golden Bear in the same proportion as their shares in Golden Bear

- [54] This term of the funding agreement was not complied with. In addition, the plaintiffs say that their investment was induced by representations made by Mr. McLean that Golden Bear Mining owned all of the claims that have been staked in the Settea Valley. If that had not been the case, they would not have invested their money. Moreover, there is evidence suggesting that in the spring of 2010 all but one of the Settea mineral claims was transferred to the defendant Golden Bear Exploration Inc., a company owned by Mr. McGroarty and Mr. McLean. Quite apart from being a breach of contract, this transfer, if it occurred, may have been a conversion of assets belonging to Golden Bear Mining and may constitute oppression.
- [55] It is necessary, therefore, to decide what mineral claims belong to Golden Bear Mining.
- [56] The defendants take the position that Golden Bear Mining only has a claim to one claim staked in the Settea Valley. This is claim number 672403. This is the claim that was staked in November 2009, after samples had been taken from it in September 2009 and after the results were received analysing the sample from the Chemex Laboratory.
- [57] In support of this position, the defendants say the following. First, each of the claims first staked in the Settea Valley in 2008 and then subsequently renewed in 2009 was staked personally online in the name of either Mr. or Mrs. McLean. Secondly, the claims were paid for using Mr. McLean's credit card. Mr. McLean says the claims were paid for by him and he was not reimbursed for them by Golden Bear Mining. Thirdly, it was standard mining practice to hold a claim personally until it had been tested and determined to have value. Only then would consideration be given to entering an agreement that it would be treated as an asset of a company. Fourthly, there are no written agreements evidencing that the Settea Valley mining claims were held by either Mr. or Mrs. McLean in trust for Golden Bear Mining. The only exception is the "mining agreement", dated November 21, 2009,

establishing Golden Bear Mining's right to claim the 672403. This demonstrates that the other claims were not beneficially owned by Golden Bear Mining. Finally, Mr. McLean denies ever representing to anyone that the Settea Valley mining claims were beneficially owned by the company.

- [58] The plaintiffs submit to the contrary that the evidence establishes that Golden Bear Mining beneficially owned all of the claims in the Settea Valley. The only reason that the claims were staked in the personal names of Mr. and Mrs. McLean was cost related. Mr. McLean was entitled to hold a free miner's licence at no cost. The plaintiffs' witnesses understood erroneously, but likely on information derived from Mr. McLean, that Golden Bear Mining could not hold such a licence. From 2008, when Mr. McLean first reviewed the geological reports suggesting that exploration in the Settea Valley would be worthwhile, it was understood by all stakeholders in Golden Bear Mining that any staking of the claims and all exploration of them would be for the benefit of Golden Bear Mining. Golden Bear Mining reimbursed Mr. McLean the cost of staking the claims online.
- [59] Indeed, Mr. McLean represented repeatedly in 2008 and 2009 that all of the claims belonged to Golden Bear Mining. That was the premise upon which efforts were made to raise capital to finance exploration in both 2009 and 2010. Each of Mr. Williams, Mr. Stuart Moir, Mr. David Moir and Mr. Moon gave evidence that Mr. McLean showed them maps of the claims that had been staked in the Settea Valley and identified them as belonging to the company. Mr. Moon, in particular, says that it was on the strength of those representations that he entered the agreement funding and wrote it so that it referred to "all Settea mineral claims" and provided that those claims would be transferred to a holding company or a lawyer to hold in trust for Golden Bear Mining.
- [60] I find as a fact that all of the claims staked personally by Mr. and Mrs. McLean in 2009 in the Settea Valley were held in trust for the benefit of Golden Bear Mining. I reach that conclusion for the following reasons.
- [61] First, I accept that there were administrative and cost advantages to having any claims that were staked, staked in the personal name of Mr. or Mrs. McLean. Claims could be staked online using a credit card, without the need to undertake work on the ground. Mr. McLean could hold a free miner's licence at no cost. Golden Bear Mining could have held a free miner's licence at a modest cost, although that does not appear to have been the understanding of the participants in Golden Bear Mining at the time. The source of this misunderstanding was, I find, information provided by Mr. McLean.
- [62] Secondly, I accept on a balance of probabilities that Golden Bear Mining reimbursed Mr. McLean for the cost of staking the claims. The financial records of Golden Bear Mining are incomplete and it is not always clear what Golden Bear Mining's funds were used for. It is clear, however, that Mr. McLean did receive funds from Golden Bear Mining at the material time and I am satisfied that they were to reimburse him for the use of his credit card. In May of 2009, Mr. McLean staked the first of the mineral claims that are the subject of this action

(603581, 603866, 603903, 604899 and 605209). According to Mr. Williams, whose evidence is supported by bank records, Golden Bear Mining provided funds to Mr. McLean for that purpose. Further, Golden Bear Mining cheques were paid directly to the government in 2010 to stake claims.

- [63] During the trial, Mr. McLean attempted to introduce some credit card accounts, presumably in an effort to show that this was the credit card used to pay for the claims and that he had not been reimbursed for those payments. I refused to permit Mr. McLean to introduce those documents. He has been subject to a variety of court orders requiring production of all relevant documents, both to the inspector and to the plaintiffs. He has not respected those orders. In any event, the account summary provided did not demonstrate that he had not been reimbursed for the payments.
- [64] The company banking records and government records show that payments were made to maintain the claims in 2010 using payments directly from the company's bank account to the Minister of Finance. In my view, the fact that the company paid for the claims directly in 2010 confirms that they were always understood to belong to the company.
- [65] Thirdly, I do not accept that all of the stakeholders would have been involved in Golden Bear Mining if Golden Bear Mining did not have the right to the benefit of the claims. Why would anyone invest their time, effort and money in a company if they did not have some assurance that the benefit of that time effort and money would accrue to the company? It makes no sense that it would be left to Mr. McLean's discretion to decide whether, having tested a particular claim using Golden Bear Mining's resources, he was prepared to fold it into the company.
- [66] Fourthly, it was clearly contemplated in 2009 and again in 2010 that exploration would take place in the Settea Valley. The only source of funds available to Mr. McLean was from Golden Bear Mining. The evidence is clear that Golden Bear Mining was paying for the costs associated with exploration on the claims. These costs included licence fees, advances on consulting contracts, letters of credit, transport, fuel and so forth. It does not make any sense that it would be paying for that exploration on claims that it did not own and would have no assurance of owning.
- [67] Fifthly, the 2009 plan was to go in to the northern part of the Settea Valley and explore the claims that have been staked in that area. The plan was to explore claims other than 627403, which had, in any event, not yet been staked. Golden Bear Mining money was being used for that purpose. It was only because of the difficulties getting in to the Settea Valley over Two Mile Mountain that the plans changed and in September Mr. McLean entered the valley from the south.

- [68] In considering Mr. McLean's theory that the only claim to which Golden Bear Mining had any entitlement was 672403, it is worth reiterating that this claim had not yet been staked in May 2009. Yet, several of the other claims in the valley had been staked by that time. Golden Bear Mining was funding all of the efforts by Mr. McLean and Golden Bear Mining's workers to get there and to explore those claims.
- [69] Sixthly, I accept the evidence that Mr. McLean did in fact show the maps to the various stakeholders and represent that the claims belonged to Golden Bear Mining. Doing so is consistent with a desire to raise funds to be able to go into the area to explore in 2009 and again in 2010.
- [70] Both Mr. McLean and Mr. McGroarty suggested that it makes commercial sense that only claim 627403 would belong to the company because it would take a number of years to mine it. The other claims in the Settea Valley were effectively worthless until they have been proven and there was no reason for Mr. McLean to consider agreeing that Golden Bear Mining had the right to explore or mine them. Exploration of those claims and any mining on them would be deferred many years until claim 627403 had been exhausted.
- [71] I do not find this reasoning compelling. If claim 627403 returned positive results, there was every reason to explore the other staked claims to determine whether they offered equal or better prospects for mining. The evidence did not satisfy me that any final decision had been made to limit mining to claim 627403, without any further exploration of the other claims having been made first. Even if claim 627403 was the best claim in the Settea Valley and Golden Bear Mining's activities would be limited to mining it, there was a clear incentive to explore the other claims and, possibly, enter agreements with other companies to mine those claims if they were worthwhile. All of the claims in the Settea Valley have a value to Golden Bear Mining and, I find, that the plan always was that Mr. McLean would explore those claims for the benefit of the company.
- [72] The fact that the claims were for Golden Bear Mining is the only rational inference to be drawn from the circumstances. The company was funding all of Mr. McLean's activities respecting the Settea Valley claims throughout 2009. He had staked a continuous chain of claims through the valley. There was no purpose for any of those activities except to enhance the ability of the company to extract gold from the valley on whatever mineral title it might be found.
- [73] Seventhly, I accept Mr. Moon's evidence that he was told by Mr. McLean that all of the claims belonged to Golden Bear Mining and that he would not have invested unless he believed that to be the case. The only assets Golden Bear Mining had that were capable of providing any return on investment were whatever claims it had the right to explore and mine in the Settea Valley. It would be of critical importance for Mr. Moon to understand what those assets were. It would make no sense for him to fund, without any restriction, exploration and mining in the Settea Valley if Mr. McLean and his wife owned the claims personally for their own benefit and if they controlled, in their discretion, whether to make them available to

Golden Bear Mining.

- [74] It is no accident, in my view, that the funding agreement was drafted to refer to "all Settea mineral claims". It would not have been written to capture "all Settea mineral claims" if Golden Bear Mining only had a right to mine one claim.
- [75] In asserting that Golden Bear Mining Ltd. has rights to only one claim, Mr. McLean at times relied on, and other at times denied knowledge of, the "mining agreement" dated November 21, 2009, that was drafted by Mr. McGroarty, but produced for the first time in this litigation. As noted, the "mining agreement" gave Golden Bear Mining the right to claim 672403.
- [76] There is no evidence from any witness that this mining agreement was seen by Mr. Moon or any of the other shareholders before this litigation. The only witness who claims unequivocally that it existed in 2009, before the funding agreement was entered, is Mr. McGroarty.
- [77] When shown the "mining agreement" in discovery, Mr. McLean insisted that he had not seen it before.
- [78] All of the witnesses that Mr. McGroarty swore saw the mining agreement testified that they did not.
- [79] To support his assertion that Golden Bear Mining is entitled to only one claim, Mr. McLean insisted in discovery that he personally had paid to stake and extend the claims in the Settea Valley. He maintained that position until presented with the banking and government records which show the payments directly from the company's bank account to the Minister of Finance for the claims during 2010.
- [80] The evidence of Mr. Moon, Jeff Williams and David and Stuart Moir was that Mr. McLean never indicated to any of the shareholders, as he does now, that claim 672403 was the only claim belonging to Golden Bear Mining Ltd. I accept that evidence.
- [81] Although I consider the appearance of the November 21, 2009, agreement during the litigation to be suspicious, I do not need to decide that it was a fabrication to conclude that it does not, by its terms, prove that claim 627403 is the only claim to which Golden Bear Mining is entitled. I am satisfied, and I so find, that Golden Bear Mining beneficially owned all of the claims staked in the Settea Valley in 2009/2010.
- [82] I will return to the relevance of the purported transfer of those claims to Golden Bear Exploration Inc. later in these reasons. What is clear, however, and I so find, is that it was not in either Mr. McLean's or Mr. McGroarty's power to transfer the beneficial interest in those claims from Golden Bear Mining to Golden Bear Exploration in spring 2010. Any such transfer would require the participation of Golden Bear Mining, which did not occur. The purported transfer is without any legal effect. I find and declare that none of Golden Bear Exploration, Mr. McLean or Mrs. McLean has any beneficial interest in any of the claims. Those claims are all beneficially owned by Golden Bear Mining. I am prepared to receive

submissions on the form of order necessary to transfer legal title to the claims to Golden Bear Mining.

Did any misrepresentations or material non-disclosures induce the plaintiffs to enter the funding agreement?

- [83] I have already concluded that Mr. McLean represented to the plaintiffs that Golden Bear Mining owned all of the mineral claims that had been staked in the Settea Valley. That representation was true.
- [84] I will return to the elements of a claim sounding in fraudulent and negligent misrepresentation after analysing the evidence and making certain findings of fact. Suffice to say here that a misrepresentation requires a false statement of existing fact. Statements of intention about future conduct (unless the statement about the intention is false) and estimates are not generally viewed as statements of fact. Equally, a failure to disclose a known fact is not generally treated as equivalent to a positive misstatement of fact. Although again this is subject to qualification. There are occasions where there is a duty to disclose a fact, if it is known. There are also occasions where the failure to disclose a known fact, when viewed in the context of statements of fact that are made whether expressly or by implication, is treated as if a positive representation had been made that the fact does not exist. Given the extent to which this case turns on failures to disclose certain facts in the context of discussion about what would happen and what money would be used for, it is important to keep these general principles in mind.
- [85] The plaintiffs plead misrepresentations, whether express or by implication, that Golden Bear Mining was in a position to conduct exploration in the Settea Valley in 2010, when impediments to being able to do so existed, but were not disclosed and a misrepresentation that the money to be invested would be used to explore and mine in the Settea Valley (except that money authorised to be used at Highland) when it was known as a fact that some of the money would be used for another purpose; the Atlin cleanup.
- [86] More specifically, first, Mr. McLean knew, but did not accurately disclose, that the regulators had imposed conditions on both him and Golden Bear Mining before they would issue permits for either to undertake work in the Settea Valley. Those conditions related to cleaning up the worksite at Davenport Creek near Atlin. Secondly, Mr. McLean knew or ought to have known the amount of work required to cleanup Davenport Creek (Atlin), and that it would be an expensive task. Accordingly, he knew or ought to have known that the money being invested in Golden Bear Mining by the plaintiff would not be used for the purpose stipulated in the funding agreement, but did not disclose that fact.
- [87] Depending on how they are analysed, the plaintiffs case can be cast as failures to disclose material facts or positive misrepresentations based on statements about what the money would be used for and the ability or intention of Golden Bear Mining to use the funds for a particular purpose.

- [88] I find the following facts for the reasons that follow. Before they entered the funding agreement with Mr. Moon or SMG, neither Mr. McLean nor Golden Bear Mining disclosed: (1) the existence of any regulatory conditions that would limit their ability to secure permits to conduct mining operations in the Settea Valley in 2010; (2) the fact that neither would be able to mine in the Settea Valley until Atlin had been cleaned up; (3) the cost or scale of cleaning up Atlin and the time it would take to do so; (4) the lack of any resources other than Golden Bear Mining's to complete any necessary work; and (5) the intention to divert resources from Golden Bear Mining to pay for the Atlin cleanup.
- [89] Whether these facts are sufficient to establish fraudulent or negligent misrepresentations will be separately analysed. I turn first to consider Mr. McLean's knowledge of the regulatory conditions imposed on him and Golden Bear Mining.

What did Mr. McLean know about regulatory conditions before the funding agreement?

- [90] There is no doubt that by the middle of September 2009, at the very latest, Mr. McLean knew, and I so find, that the position of the then Ministry of Energy, Mines and Petroleum Resources, was that no permit for placer mining activities in the Settea Valley would be issued until the disturbance existing at Davenport Creek had been addressed to the satisfaction of the district inspector. Moreover, before work could be done at Atlin, a plan for its cleanup had to be submitted to the district inspector for review and acceptance. These conditions were expressly set out in a permit issued September 10, 2009, addressed to Mr. McLean, approving work on two claims (613723 and 613744) in the Settea Valley to be conducted before the end of that calendar year. The contents of that permit, I note, only became known to the plaintiffs during the litigation as a result of an application for production of documents in the possession of a third party.
- [91] Mr. McLean had many problems with B.C. mining regulators over the years. The particular problems affecting this case started in 2009 when Mr. McLean attempted entry into the Settea Valley.
- [92] In March 2009, Mr. McLean applied to the government with a "Notice of Work" for two mineral claims in the Settea Valley. Problems arose during the spring and summer of 2009, when Mr. McLean engaged in efforts to gain entry to the Settea Valley, but could not obtain permits for that purpose. There were a series of ad hoc meetings between Mr. McLean and different government officials from the interested Ministries - Forests, Mines and Water. Those various officials explained to Mr. McLean the regulatory requirements for entry into and exploration at the Settea Valley.
- [93] In May 2009, faced with these regulatory challenges, Mr. McLean changed his intended route to the Settea Valley to a difficult but shorter route over "Two Mile Mountain". As will be seen, this choice would result in a great deal of wasted time and effort, no entry to the Settea Valley, and considerable environmental damage.

- [94] On May 21, 2009, Golden Bear Mining Ltd., provided a \$10,000 letter of credit from its credit union to the Minister of Finance, the necessary deposit in relation to the Settea Valley Notice of Work tendered by Mr. McLean.
- [95] Mr. McLean's regulatory challenges, associated with his efforts to reach the Settea Valley, escalated in about July 2009. At that time, Inspector Flynn from the Ministry of Mines spoke with Mr. McLean about the substantial mess left behind at the mining location at Davenport Creek, near Atlin. That location was the site of many years of past mining efforts by Mr. McLean through a different company, Four Crown Mining. There was no historical connection between Mr. McLean's work near Atlin and the efforts of Golden Bear Mining in the Settea Valley. However, the link made by the government was to prevent Mr. McLean himself from obtaining a work permit for the Settea Valley until cleanup efforts were satisfactorily completed at Atlin.
- [96] Mr. McLean met with a Conservation Officer on July 8, 2009, and told him that he was going into the Settea Valley about a week later and that all of his permits were approved.
- [97] Later that same month, sometime between July 17th and 26th, Mr. McLean caused substantial environmental damage during his attempts to reach the Settea Valley over Two Mile Mountain. The damage was witnessed by a local outfitter and reported to the government on or around July 20, 2009, further impairing Mr. McLean's ability to obtain any work permits.
- [98] Mr. McLean continued staking Settea Valley mineral claims (613723 and 613744) during that same summer of 2009, still with Golden Bear Mining's corporate funds, and, I find, for a corporate purpose.
- [99] On August 12, 2009, Mr. McLean's associate, Chris Haight, contacted the Ministry of Mines about the Settea work permit application. At that time, the Ministry's Inspector responded to Mr. Haight saying that he was prepared to issue a permit for the Settea Valley on two conditions, one of which was that "no further Notices of Work will be approved until Davenport is reclaimed".
- [100] Further e-mail communications continued between Mr. Haight and Inspector Flynn on August 13th. Mr. Haight was then in the company of Mr. McLean at a location near Settea Valley where Mr. Haight had access to e-mail. I find that Mr. Haight was the conduit through which Mr. McLean was in contact with ministry officials and that Mr. McLean was aware of anything communicated to Mr. Haight.
- [101] On August 25, 2009, the Inspector of Mines communicated to Mr. Haight that, as a result of the disturbances to the environment near Two Mile Mountain, he was ordering Mr. McLean and any other member of his group to remain off the placer titles, that no equipment was to be moved or disturbed until further notice and that no attempt was to be made to access Settea Creek.

[102] On September 4, 2009, Inspector Flynn wrote to Mr. McLean and rejected his July 31st Notice of Work. He indicated a requirement that Mr. McLean engage the services of a suitably qualified professional to review and determine the extent of damage to the environment at Two Mile Mountain. However, on September 10, 2009, the Chief Inspector of Mines issued an "Approval of Work System and Permit Approving Reclamation Program" document to Mr. McLean in respect of claim numbers 613723 and 613744 in the Settea Valley. Those are not the same claims where Mr. McLean would conduct testing later that month, and not the claim that would be staked as 627403.

[103] The permit issued contained important conditions including the following:

No further permits for placer mining activities would be issued until the disturbance at Davenport Creek had been addressed to the satisfaction of the district inspector. A plan for the clean-up of Davenport Creek should be submitted to the Chief Inspector of Mines for review and acceptance prior to any work being conducted.

[104] I am satisfied, and I find, that the regulators' concerns about the environmental damage at Davenport Creek and at Two Mile Mountain, and the need to resolve those issues, were known to Mr. McLean in the summer of 2009. Mr. McLean also knew at that time that those concerns were an obstacle to the granting of a permit to him and Golden Bear Mining to conduct work in the Settea Valley in 2010.

Did Mr. McLean appreciate the cost and time involved in complying with the regulatory requirements for a permit before the funding agreement?

[105] I find, also, that Mr. McLean knew the condition of the site at Davenport Creek. He had been involved in working there. He knew what equipment was there. He must have known in what condition the site had been left. He also knew about access to the site (a 75 mile drive into the bush on an old mining road) and any difficulties involved in gaining access or removing material or equipment.

[106] By this time, Mr. McLean knew, for reasons I will return to, that substantial capital investment and time would be needed to repair the damage he had caused in Atlin and near Settea if he was to receive a permit to be able to mine in the Settea Valley. Moreover, there is no evidence that he had any resources available to him to conduct this work, except any money that might be accessed from Golden Bear Mining.

[107] Moreover, I am satisfied, and I find as a fact, that Mr. McLean did not disclose these critical facts to anybody. Depending on who he spoke to, he either concealed the entire problem, or insisted that the Atlin problem was a small thing to resolve. He was the only one who knew the extent of the damage because he had caused it. He never disclosed to anyone the magnitude of the mess left to be cleaned up at Atlin, or the damage caused in the Settea Valley, all of which would stymie his efforts to mine in the Settea Valley.

- [108] Mr. David Moir was made aware of the need to cleanup Atlin because he was with Mr. McLean in Settea when the conditions were imposed. As no geological report had been generated from all of the money spent during 2009, in September 2009 the shareholders insisted that David Moir travel with Mr. McLean back to the Settea Valley in order to perform some testing. The purpose of that trip was to ensure that the year's work was not a complete waste, and to have Mr. Moir present as an objective observer. While in the Settea Valley at that time, Mr. McLean told David Moir that the Atlin cleanup was no big deal and there was just some equipment to move to Settea and Highland River.
- [109] Mr. McLean did tell Mr. Williams about the cleanup obligation, but he told him it was a small thing and no barrier to proceeding with work at Settea. He said it was necessary to "start some cleanup work".
- [110] Mr. McLean did not explain the need to cleanup at Atlin to Mr. Moon or Mr. McGroarty when they were being brought into the project in late 2009.
- [111] What is not clear is what Mr. McLean subjectively understood or believed would be involved in the cleanup at Atlin to satisfy the condition of a permit being granted to enter and work at Settea Valley. Mr. McLean said in his discovery that he thought it would be a "small job". When in April 2010 he invited Mr. Lobb to join the cleanup crew and work with him at Davenport Creek, he told him that the work would take about three weeks, and it would start and finish in June 2010.
- [112] It is apparent, however, that at a minimum Mr. McLean grossly under estimated how long it would take to do the work and what would be involved in cleaning up the mine site. Mr. Lobb gave evidence that when he arrived at Davenport Creek in June 2010, it was obvious that the cleanup job would take a lot more than three weeks to complete. There was a massive amount of equipment, junk and garbage to be cleaned out. The road in and out of the site was difficult.
- [113] Equipment littered the site, including several excavators, a mine truck, two trailers, a big Caterpillar tractor, pipes, unloaders, pumps, a silver truck, hydraulic oil, a broken down engine, hoses, pipe and tires. Much of the equipment needed to be cut up so that they could be transported out of the site on a flatbed truck. Dismantling or taking apart certain items took several days each. In addition to the visible items, other equipment, junk and garbage were found buried or hidden in the bush. Altogether, a crew of about four people appear to have worked on the cleanup almost full-time.
- [114] The work on cleaning up the mine site took three months and was likely not fully complete even at the end of that time. The photographs of the cleanup site corroborate Mr. Lobb's conclusion that the job was a major one that would take much longer than three weeks to complete.

- [115] Mr. McLean accepts that he under estimated the amount of work involved in cleaning up at Davenport Creek. He expresses his frustration that the work took so long. To some extent he blames the inadequacy of his work crew, but does acknowledge that it turned out to be a bigger job than he anticipated.
- [116] Objectively, it must have been obvious that cleaning up the old mine site at Davenport Creek was a major undertaking that would require significant time, and consume significant resources both in terms of equipment and manpower. Objectively, the costs of the cleanup would require Mr. McLean to devote significant resources to the task. Mr. McLean agreed to pay the cleanup crew \$5,000 a month each. The crew included one or two cooks. The monthly cost of labour alone is \$30,000.
- [117] In late 2009 when Mr. McLean was negotiating with Mr. Moon for the investment into Golden Bear Mining, he knew that no mining could occur until the regulators were satisfied with the cleanup at Atlin. He knew that he had no other resources available to him to conduct that cleanup except for any money invested in Golden Bear Mining.
- [118] I am not prepared to find, however, that Mr. McLean was knowingly, deliberately or subjectively dishonest in not disclosing the size or cost of the undertaking in cleaning up the mine site at Davenport Creek. I accept his evidence that he did underestimate what was involved. In discovery, he suggested that he thought it would cost \$50,000 to do the work. But, nonetheless, at the very least Mr. McLean ought to have known that the cleanup would take a significant time and be expensive. He certainly knew that it would take time and money. He also knew that the only source of money to conduct the cleanup was Golden Bear Mining using funds provided by the plaintiffs and that the plaintiffs' offer of funding was to support mining in the Settea Valley and Highland, nothing else.
- [119] Mr. McLean was an experienced miner. He knew what conditions he had left behind at Davenport Creek. Had he turned his mind with any focus to the size of the task that would confront him at Davenport Creek, he would have immediately realized that it was not a "small job" and could not be completed in a few weeks. He would also immediately have recognised that the cost of remediating Davenport Creek would be considerable and would require a very significant proportion of all of the funds Mr. Moon was willing to invest in Golden Bear Mining and, correspondingly, reduce any funds available to mine in Settea Valley.
- [120] Mr. McLean submits that, although he underestimated the Atlin cleanup, he did not deliberately conceal the need to conduct the cleanup. He suggests that the fact of a cleanup at Atlin must have been discussed because the funding agreement reflects the fact that \$150,000 was earmarked for that purpose. He points to the following language:
- o Out of \$800,000 investment by SMG, a minimum of \$650,000 shall be allocated towards the Settea mining operation and up to \$150,000 may be allocated towards the Highland River mining venture. ...

- [121] Mr. McLean says the reference to Highland River is a mistake. It was agreed at the restaurant meeting that the funding agreement would be corrected to replace the reference to Highland River with Atlin, but, presumably through oversight, that did not occur.
- [122] I reject Mr. McLean's evidence on this point. There is no persuasive evidence that the need to cleanup Atlin was discussed at the restaurant meeting when the terms of the agreement were settled. Mr. McGroarty confirmed that the subject was not discussed; there were no "red flags" about the need to deal with Atlin. Mr. Moon's evidence is that he knew nothing about Atlin or the need to spend money there. He denies that the reference of Highland was a mistake that was not corrected. Mr. McLean admits that in the December 2009 meetings there was no discussion about what needed to be done at Atlin. The evidence of the other witnesses supports the view that Atlin was not discussed.
- [123] It is also clear in the evidence that Mr. McLean had an interest in Golden Plateau Mining which was connected to a venture in Highland River. Other individuals were aware of the venture and its relationship to and possible synergy with Golden Bear Mining. When David Moir was challenged on cross-examination about the allocation of moneys under the funding agreement, he disagreed with Mr. McLean's characterization of it. He was, in fact, told that the agreement was that \$650,000 was to be spent in Settea and \$150,000 was to be used to move equipment from Atlin to Highland and "do some quick sluicing" at that location. Mr. David Moir explained that Highland River had claims staked by Golden Plateau Mining and was easy to access. I accept that evidence.
- [124] Mr. Moon is explicit in rejecting the suggestion that the reference to Highland was a mistaken reference that should have been to Atlin. He says in one affidavit:
11. The Funding Agreement provided that \$150,000 could be allocated towards the Highland River mining venture and that any monies advanced for the benefit of Golden Plateau Mining Inc., must be secured by a general security agreement. This term resulted from discussions between myself, Stuart Moir and Mr. McLean. It was included in order to facilitate a potential future target acquisition of Golden Plateau Mining Inc., a company that Mr. McLean had explained to me had operated the mine at the Highland River location.
 12. The Highland (or Hyland) River venture is in the Yukon and, as far as I am aware, not related in any way to Mr. McLean's Atlin venture.
 13. I understand that Mr. McLean now says that the reference to Highland River in the Funding Agreement was an error. It was not an error. It was the result of my detailed discussions of Golden Plateau Mining Inc. with Ernest McLean. He told me that the Golden Plateau company might also be able to produce gold, and he provided reasons for that belief. I certainly never agreed to change that reference to Atlin or to fund any work at Atlin. I never discussed Atlin with Mr. McLean until long after I funded Golden Bear Mining Ltd.
- [125] I note that the sentence in the funding agreement immediately following that quoted above reads:

Any monies that are advanced for the benefit of Golden Plateau Mining Inc. must be secured by a general security agreement with a first charge which general security agreement is duly registered in accordance with the PPSA Act.

[126] In my view, this language is inconsistent with Mr. McLean's position that the reference to Highland is a mistake. The clause as a whole is an explicit recognition of another mining venture that Golden Bear Mining could support, provided proper security was given, with funds invested by the plaintiff. The sentence refers to Golden Plateau which did have claims staked at Highland River. There is no evidence Golden Plateau was connected to Atlin. I conclude that the reference to the right to spend up to \$150,000 on the Highland River mining venture was not a mistaken reference to Atlin.

[127] The funding agreement does not lend any support to the suggestion that the cleanup at Atlin must have been discussed and the use of funds for it authorized before the agreement was entered. Moreover, it is a telling example that raises serious doubts about whether Mr. McLean made any serious effort to attempt to give honest evidence in respect of this and other matters. I find that Mr. McLean could never have been under any doubt that the reference to Highland River was not a mistaken reference to Atlin. His attempt to suggest that it was, is at best, an after the fact effort to reconstruct the facts in a way that mitigates his conduct.

[128] Against this background of Mr. McLean's knowledge or beliefs that I now turn to consider what was discussed with Mr. Moon in the negotiations over his proposed investment.

What was said to Mr. Moon about mining in the Settea Valley in 2010?

[129] It is clear that the premise of Mr. McLean's discussions with Mr. Moon was that mining would take place in the Settea Valley in 2010. Quite apart from the failure to disclose any impediment to doing so, Mr. Moon's evidence, which I accept, was that in their discussions Mr. McLean indicated that he intended to start mining exploration, and operations for Golden Bear Mining as soon as possible. This clearly contemplated mining in 2010. Mr. McLean may well have intended to begin mining in 2010, but it is clear that doing so was never realistic given the impediments he and Golden Bear Mining faced to his knowledge.

[130] The meetings to discuss the funding agreement also canvassed how much money was needed. Mr. David Moir recalled Mr. McLean quoting to Mr. Moon a \$600,000 cost for the Settea operation. Mr. Moon testified that Mr. McLean gave him an estimate in the \$600,000 range "to get gold". When asked by Mr. Williams why he had not negotiated for \$1.5m, Mr. McLean told him "I can do it with \$800,000". The context of all of these discussions was that the mining for gold would occur in 2010.

[131] I find that Mr. McLean and Golden Bear Mining stated expressly or by implication that they would be able to explore and mine in the Settea Valley during the 2010 season and that Mr. McLean intended to use of the plaintiffs' investment for that particular purpose. Mr. McLean also stated that \$650,000 would be sufficient to get gold in 2010. Mr. Moon was not

told anything about any regulatory impediments to mining or exploration, the need to cleanup Atlin, or the intention to use Golden Bear Mining's funds (that is, the proposed investment) to fund the cleanup.

Summary

- [132] I find that Mr. McLean did not disclose to Mr. Moon the fact that neither he nor Golden Bear Mining would be able to get a permit to work in the Settea Valley unless a cleanup was conducted at Davenport Creek to the satisfaction of the regulators. I find further that Mr. McLean did not disclose to Mr. Moon that a cleanup of Davenport Creek was a significant task that would require a very substantial commitment of time, effort and money or that the only resources available to complete that task would be the resources of Golden Bear Mining. I find that Mr. McLean asserted, at least by implication, that he and Golden Bear Mining would be able to conduct mining operations in the Settea Valley in 2010 and estimated that about \$600,000 to \$650,000 would be sufficient for the task. For reasons I will canvass in the section dealing with the oppression claim, I find also that Mr. McLean represented to Mr. Moon a shareholding structure in Golden Bear Mining the effect of which was that, as a consequence of the investment, he would be a minority shareholder in the corporation. All of this was material to Mr. Moon in deciding whether to invest.
- [133] I am satisfied that Mr. Moon relied on what he was told when he and SMG agreed to invest \$800,000 in Golden Bear Mining. I am satisfied and I so find that what Mr. Moon was not told would have been material to his decision to invest and if the plaintiffs had known the true state of affairs they would not have invested their funds.
- [134] I turn now to consider whether these facts are actionable as either fraudulent or negligent misrepresentations.

Fraudulent and Negligent Misrepresentation

- [135] Both fraudulent and negligent misrepresentation require a false statement of existing fact. As a general rule, statements of opinion, estimates, advice or promises are not statements of existing fact and are not, therefore, actionable as misrepresentations.
- [136] A false statement which the speaker knows is false, made with the intent and having the effect of inducing the listener to enter into a contract, amounts to fraudulent misrepresentation: *Derry v. Peek* (1889), LR 14 App. Cas. 337 (H.L. (Eng.)); see also *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12 at 74-75. As those cases make clear, knowledge may exist if the speaker has actual knowledge, is without belief in the statement's truth, or if the speaker is reckless about their falsity: *Derry*, at 374. I will return to the question whether any representations were made with the requisite knowledge to reach the level of fraud.

[137] The requirements for a successful claim for the tort of negligent misrepresentation, as laid out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110 [Cognos], are well-known:

- 1) there must be a duty of care based on a "special relationship" between the representor and the representee;
- 2) the representation of fact in question must be untrue, inaccurate, or misleading;
- 3) the representor must have acted negligently in making the misrepresentation;
- 4) the representee must have relied, in a reasonable manner, on the negligent misrepresentation; and
- 5) the reliance must have been detrimental to the representee in the sense that damages resulted.

[138] A duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said that:

- a) the defendant ought reasonably to have foreseen that the plaintiff would rely on his or her representation; and
- b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable.

(*Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 24.)

[139] In *Hercules*, La Forest J. sets out five general indicia of reasonable reliance by the plaintiff at para. 43 :

- 1) The defendant had a direct or indirect financial interest in the transaction in respect of which his representation was made.
- 2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.
- 3) The advice or information was provided in the course of the defendant's business.
- 4) The information or advice was given deliberately, and not on a social occasion.
- 5) The information or advice was given in response to a specific enquiry or request.

[140] In this case, it is clear that if there were misrepresentations, reliance on them was reasonable and to the detriment of the plaintiffs. Moreover, in the context of the discussions a duty of care not to misrepresent facts clearly existed.

- [141] The next question to be answered is then: Was the representation of fact in question untrue, inaccurate, or misleading? In this case, the representations of fact in question were not a positive representation, but, as mentioned above at para. 156, a non-disclosure of the fact that neither Mr. McLean nor Golden Bear Mining would be able to get a permit to work in the Settea Valley unless a cleanup was conducted at Davenport Creek to the satisfaction of the regulators and that some part of the investment would be used to fund that cleanup.
- [142] Viewed properly, expressly or by implication, Mr. McLean represented that there were no existing impediments to prevent him or Golden Bear Mining from mining or exploring in the Settea Valley in 2010 and that it was, as a matter of existing fact, his intention to use moneys invested either for operations in the Settea Valley or Highland. Neither of these facts was true.
- [143] A "failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made": Cognos, at 123. Non-disclosure amounts to a misrepresentation when, considering all the relevant circumstances, there is failure to divulge material information: at 124.
- [144] Here it is clear to me that the information that was not disclosed was material. It was clearly highly relevant information bearing on the ability of Golden Bear Mining to carry out the obligations it was undertaking through the funding agreement.
- [145] There is no doubt in my view that Mr. McLean was at least negligent in misrepresenting facts on his own and Golden Bear Mining's behalf to the plaintiffs. He knew about the conditions for receiving a permit to mine in the Settea Valley. More importantly he knew what would need to be done to satisfy those conditions. He knew what the conditions were at Davenport Creek and how much needed to be cleaned up. He was experienced in conducting mining operations. Any reasonable miner, with his knowledge and experience, knowing what needed to be done, would have known that the job could not be done in a few weeks and would require a very large expenditure of time and money to accomplish. He knew that the only source of funds available to conduct any cleanup were those the plaintiffs' were proposing to invest in Golden Bear Mining. Mr. McLean breached the standard of care to be expected of a reasonable person in his situation with the skills, knowledge and experience to be expected of a miner with 30 years experience in the business.
- [146] There is no doubt that Mr. McLean said what he said (or failed to say) with the intent of inducing the plaintiffs to make an investment in Golden Bear Mining. That was the whole purpose of his discussions and negotiations with Mr. Moon. Similarly, Mr. Moon was exploring whether he wanted to continue his involvement with Golden Bear Mining in 2010. To say that Mr. McLean ought to have reasonably foreseen that Mr. Moon would rely on his representations is an understatement.

- [147] It is also clear that the plaintiffs relied on the representations made by Mr. McLean on his own and Golden Bear Mining's behalf. The information was provided in the context of negotiations, it was material and it was reasonable for the plaintiffs to rely on it. Had the misrepresentations (and non-disclosures) not been made, the plaintiffs would not have made their investment. I will return to the question of remedies at the conclusion of these reasons.
- [148] I am satisfied that the plaintiffs have made out a case in negligent misrepresentation. The next question is whether they have also made out an action in fraudulent misrepresentation.
- [149] As is well known, the knowledge component sufficient to make out a case in fraud, in addition to actual knowledge, encompasses reckless, carelessly made statements and statements made without belief in their truth: Derry, at 374.
- [150] I have already concluded that Mr. McLean grossly underestimated the time and cost of the Atlin cleanup, but I accept that he did not knowingly and dishonestly do so. He may also have believed he could talk his way past those conditions to get a permit without fully complying with them. He did, however, have actual knowledge of the stipulated conditions for receiving a permit, the fact that cleanup was required, the lack of resources from any source other than Golden Bear Mining to pay for that cleanup (however much it might cost) and the need, therefore, to divert Golden Bear Mining's resources to the cleanup, contrary to the intended purposes of the investment.
- [151] The question is, therefore, whether this state of knowledge is sufficient to make out a case in deceit or fraud. Answering this question requires some analysis of the law relating to the mental element in the proof of fraud.
- [152] The portion of Derry most often quoted in relation to the test for the mental element for deceit is at 374 where Lord Herschell states:

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[153] Lord Herschell makes it clear that while an unreasonably held belief is evidence of fraud, on its own it does not amount to fraud at 369:

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable ground for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges. If the learned Lord intended to go further, as apparently he did, and to say that though the belief was really entertained, yet if there were no reasonable grounds for it, the person making the statement was guilty of fraud in the same way as if he had known what he stated to be false, I say, with all respect, that the previous authorities afford no warrant for the view that an action of deceit would lie under such circumstances. A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he makes a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which that word was used in all the cases from *Pasley v. Freeman* down to that with which I am now dealing. ...

[154] However, I note that Lord Herschell does say later in the judgment at 375-376:

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. ...

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell*, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

[Emphasis added.]

[155] Here, I am satisfied that Mr. McLean's knowledge does take him beyond negligence, even if it falls short of actual knowledge. Mr. McLean was not merely careless about what he said or failed to say. I have already referred to Mr. McLean's knowledge of the circumstances existing at Davenport Creek and his involvement in creating them. I have described those conditions in some detail. It was immediately apparent to Mr. Lobb on arriving at Davenport Creek that the cleanup was going to be a major undertaking. In my view, that must also have been apparent to Mr. McLean who arranged a crew of about five people,

complete with a cook, each of whom he had agreed to pay \$5,000 per month for their work.

[156] If Mr. McLean believed that Atlin was a "small job" that could be done in a few weeks or that it was only necessary to start work there before securing the permits to go into the Settea Valley, he was at a minimum reckless to what was really involved. It appears most likely that Mr. McLean had, "shut his eyes to the facts, or purposely abstained from inquiring into them". In my view, Mr. McLean's overriding concern was to get money, any money, into the company and hope that things would work out alright in the end, either because he could talk his way into the Settea Valley over the objections of the regulators or that he could turn once again to Mr. Moon if Golden Bear Mining ran out of funds before it got there. To that end, he was prepared to suggest he could get the job done in Settea for less than had been budgeted, even without taking into account the cleanup costs. He was prepared not to reveal, or recklessly closed his mind to, any impediments that might make mining in the Settea Valley an unrealistic prospect in 2010. At a minimum, given his knowledge, Mr. McLean was reckless to the facts in failing to disclose material information not only to the plaintiffs, but also to the other stakeholders in Golden Bear Mining. I am satisfied that Mr. McLean lacked an honest belief in facts such that his failures to disclose amounts to fraudulent misrepresentations that materially mislead the plaintiffs.

[157] In reaching this conclusion, I wish to emphasize that I accept that Mr. McLean's estimates of anticipated costs, including for the Atlin cleanup, are not themselves actionable misrepresentations. The relevant facts constituting the misrepresentations are (1) the absence of specific regulatory impediments to starting work, (2) an existing obligation to undertake cleanup at Atlin (whatever that might involv(1e), and (3) an existing intention to use invested funds to discharge the Atlin cleanup obligation (whatever that might cost).

[158] I conclude that the plaintiffs have made out their case in both fraudulent and negligent misrepresentation.

Did Golden Bear Mining and Mr. McLean breach the funding agreement?

[159] In sum, the plaintiffs allege the following breaches of the funding agreement:

- a) Mr. McLean and Golden Bear Mining failed to allocate a minimum of \$650,000 toward the Settea mining operation;
- b) Mr. McLean and Golden Bear Mining failed to transfer all of the Settea mining claims to a holding company owned proportionately by the shareholders of Golden Bear Mining;
- c) Mr. McLean and Golden Bear Mining failed, and continue to fail, to appoint Mr. Moon as a director of Golden Bear Mining Ltd;
- d) Mr. McLean and Golden Bear Mining failed to honour the right of first refusal, to which the plaintiffs were entitled, in respect of the issuance of shares of Golden Bear Mining; and
- e) Golden Bear Mining borrowed in excess of \$25,000 without SMG's written consent.

[160] There is no practical dispute on the evidence that most of these breaches occurred. Briefly, the admissions are as follows:

- a) the failure to allocate \$650,000 toward the Settea mining operation is admitted. Mr. McLean admitted in discovery that more than \$400,000 out of the \$800,000 investment was spent cleaning up the Atlin mining site. The evidence with respect to expenditures over the spring and summer of 2010, along with evidence of use of funds to pay for 2009 operations, and improper "expense" payments to Mr. McLean and Mr. McGroarty, established that little of the investment went toward the Settea mining operation. Indeed it is admitted that there was no actual Settea mining operation, merely some preparation for one;
- b) it is admitted that the Settea mining claims were never transferred to a holding company. In fact, within this action, Mr. McLean claims that only one of them (claim 672403) is available for that purpose in any event; and
- c) neither Mr. Moon nor his nominee has ever been appointed a director, despite the funding agreement and, more recently, this Court's order.

[161] The alleged breach of the right of first refusal will need to be examined in the context of the expectations of the parties and the claims to oppression. As will be seen, I am not satisfied that this term of the funding agreement was breached. Finally, the breach of the prohibition of borrowing is clearly established, but is of little independent relevance in this litigation and I will consider it no further.

Did Golden Bear and Mr. McLean breach the funding agreement conditions on the allocation of funds?

[162] The plaintiff invested \$800,000 in Golden Bear Mining as required by the funding agreement. These moneys represented substantially all the funds available to Golden Bear Mining in 2010, although some additional modest funds were received from an unrelated party.

[163] By late summer 2010 all of the funds were spent. It is apparent that some of Golden Bear Mining's money was used for purposes contemplated by the funding agreement. Some equipment was bought for use ultimately in Settea and some equipment was salvaged from Davenport Creek and taken to a staging area near the Settea Valley; no actual work was done on the Settea claims. Items purchased by Golden Bear Mining using the plaintiffs' investment, although intended ultimately for use in the Settea Valley, in fact were in Atlin and were used to work there. These purchases included, for example, an excavator, a camper, a CAT, a trailer, a truck, a low bed truck and a Terex truck.

[164] It does not appear possible to quantify with any precision how much of the \$800,000 was used for the "Settea mining operation". What is clear is that most of the money was used to cleanup Atlin. Other money is unaccounted for or was used by Mr. McGroarty in suspicious circumstances (to which I will return).

- [165] This Court appointed an inspector to investigate the financial affairs of Golden Bear Mining in an effort to identify the uses to which the plaintiffs' investment was put.
- [166] On January 14, 2011, the inspector issued a detailed and lengthy report confirming many of the plaintiff's allegations of the misuse of funds by Mr. McLean and Mr. McGroarty. In particular, the inspector found:
- (1) the plaintiffs met their \$800,000 financial obligations under the funding agreement;
 - (2) Golden Bear Mining accounting records were maintained in a shoddy and haphazard manner with no management oversight of the use of funds;
 - (3) Mr. McLean is unable to explain his use of the \$60,000 cash deposit provided to him by the plaintiff at the outset of the funding agreement;
 - (4) Mr. McLean and Mr. McGroarty had not provided documentation to support \$109,254.42 in unsupported disbursements;
 - (5) Mr. McLean understated his family's income from Golden Bear Mining in an affidavit in these proceedings;
 - (6) Mr. McGroarty received \$122,786.30 from Golden Bear Mining, much of which is unexplained. He supplied expense reports for \$11,600.43 in personal and other activities not related to Golden Bear Mining's business;
 - (7) Mr. McGroarty claimed legal fees for Golden Bear Exploration Inc. on his Golden Bear Mining Ltd. expense report;
 - (8) Mr. McGroarty supported one claimed expense with a "basic internet scam" document; and
 - (9) in January 2010, the first thing Mr. McLean did was use some of the plaintiffs' 2010 investment to pay off bills totaling at least \$25,224.48 from 2009.
- [167] Mr. McLean admits that he put personal charges through the company bank accounts during 2010. As noted earlier, Mr. McLean takes the position that he neither knows nor can explain where the money went. He says that authority over handling the money was delegated to Mr. Williams, who approved company expenditures. Mr. McLean says he would like answers too, and looks to Mr. Williams to provide them. He presents himself as another innocent victim in an operation gone wrong.
- [168] I do not agree with Mr. McLean's characterization of these events. First, he knew that the funding agreement required the investment funds to be spent in the mining operation in Settea, not to cleanup Atlin, or he ought to have known as much. Secondly, much of the money was spent by him or under his direction using his debit card accessing Golden Bear Mining money directly. In any event, he knew that Golden Bear Mining's activities were devoted to the Atlin cleanup and that cost money. Thirdly, most of the money that was spent on Atlin was spent after Mr. Williams had left the company near the end of June.

- [169] Mr. Moon understood that in June 2010 Mr. McLean left for the north of British Columbia to mine. In fact, at the start of June Mr. McLean headed to Atlin with a crew to start the Atlin cleanup. There is no dispute that Mr. McLean was in the Atlin area and incurring expenses for the Atlin cleanup throughout June, July, August and September 2010, i.e. the entire 2010 work season, although he did make some trips to the Settea area to take equipment in that period.
- [170] Mr. McLean's work at Atlin involved hauling everything out, some of which was destined for Settea Valley. Golden Bear Mining's crew removed old junk that was there since 1995, broken pieces, scrap iron, old repair parts. Almost all of them went to Atlin. The workers removed about 12 truckloads of miscellaneous items, in addition to the major equipment. The workers were paid for by Golden Bear Mining. Mr. McLean did not explain that to the plaintiffs.
- [171] The vast majority of the materials removed from Atlin, representing more than 90% of the work, consisted of unusable items that were taken away and stored at another location near Atlin. Very few of those materials were transported to Settea.
- [172] It is admitted by Mr. McLean that the Atlin cleanup used up more than \$400,000 of the plaintiffs' investment and the entire 2010 mining season.
- [173] To place an exact number on the cost of the cleanup would be impossible. There is no doubt, however, that the vast majority of the plaintiffs' investment was put to uses not contemplated by the funding agreement. That agreement requires a minimum allocation of \$650,000 to the "Settea mining operation". Whatever room for argument might exist at the margins about whether an expenditure properly was made in relation to the "Settea mining operation", it is apparent that spending money to cleanup Davenport Creek is not an allocation of funds for the Settea mining operation.
- [174] Accordingly, it is clear that Golden Bear Mining breached its contractual obligation to use funds designated for a particular purpose by using them for an unapproved purpose. Mr. McLean is, in my view, also personally liable for this breach of the funding agreement. He is party to the contract. The funds were used to cleanup Davenport Creek at his direction. Much of the money was spent by him using his debit card access to Golden Bear Mining's bank account. He was the directing mind spending the money contrary to the terms of the funding agreement, even if the expenditure of some of that money was administered in Vancouver and approved by others. It was done to facilitate the completion of the cleanup project he was orchestrating.

[175] It should be recalled that I have rejected the suggestion that the funding agreement contemplated the use of money at Atlin by mistakenly referring to spending up to \$150,000 for the Highland River mining venture. I also reject any argument that spending money to cleanup Atlin falls within the Settea mining operation because it was a necessary step to make it possible for Mr. McLean and Golden Bear Mining to acquire permits to work in the Settea Valley.

[176] I conclude, therefore, that both Golden Bear Mining and Mr. McLean were in breach of their contractual obligations under the funding agreement. I will return to remedies later.

Was there a failure to transfer the mining claims to a holding company or have them held in trust?

[177] The obligation to transfer all the "Settea mineral claims" was breached. I have already held both that the phrase "all Settea mineral claims" captures all of the claims staked by Mr. McLean and held personally by him and his wife and that any purported transfer of them to Golden Bear Exploration is invalid.

[178] As Mr. McLean was the sole director and officer of Golden Bear Mining and its principal shareholder, he had the authority or capacity to effect or initiate the steps necessary to transfer the Settea mineral claims. In my view, he was obliged, under the funding agreement, to set the machinery in operation to fulfill his and Golden Bear Mining's obligations. Instead he did nothing. Both Golden Bear Mining and Mr. McLean are in breach of the agreement.

Did Mr. McLean fail to appoint Mr. Moon or his nominee a director of Golden Bear Mining?

[179] I am satisfied, and so find, that quite apart from the commitment made in the funding agreement, Mr. McLean agreed, in discussions with Mr. Moon, to appoint Mr. David Moir, a director of Golden Bear Mining as SMG's nominee. That did not occur.

[180] Later, in July 2010, Mr. Moon went to Atlin with the necessary resolutions to have himself appointed as a director. He says that again Mr. McLean agreed to honour the funding agreement and return to Vancouver to make it happen. Once again, the appointment was not made. Mr. McLean says he was not refusing to make Mr. Moon a director, but thought that if he did so there should be a third director familiar with the company to avoid possible deadlock. He, therefore, arranged for Mr. Moon to be provided with documents that would simultaneously make both Mr. Moon and Mrs. McLean directors. Mr. Moon refused to sign the documents, taking the position that the appointment of Mrs. McLean required the agreement of other shareholders.

[181] There matters stood until I ordered that Mr. Moon be appointed a director. That did not occur either, in breach of an express order of this Court.

[182] I find that Mr. McLean is in breach of the funding agreement in failing to take the steps necessary to appoint a nominee of SMG as a director of Golden Bear Mining. Although the agreement contemplates that Golden Bear Mining shall have "2 or 3" directors, nothing gives Mr. McLean the right unilaterally to appoint the third director or to make the appointment of SMG's nominee conditional on the appointment of a third director, let alone one nominated by him.

Did Mr. McLean and Golden Bear Mining breach the right of first refusal when 549 additional shares were issued to Mr. McLean?

[183] Mr. McLean remains in control of the company, the plaintiffs say, as a result of an unlawful issuance of shares to himself, as well as the breach of this Court's order regarding Mr. Moon's directorship.

[184] Soon after the plaintiffs' investment moneys arrived, Golden Bear Mining issued 549 shares to Mr. McLean for \$0.01 per share or \$5.49, without offering those shares to the plaintiff, SMG. That issuance occurred either in February or May 2010, depending on which of two versions of the share register is correct.

[185] The plaintiffs submit that this transaction breaches the following term of the funding agreement:

o SMG shall receive a right of first refusal from both Mr. McLean and Golden Bear for any subsequent share sale or issuance by either.

[186] Before the shares were issued, it appears that 101 Golden Bear Mining shares were issued and outstanding. The exact shareholdings are unclear, but, as discussed above, Mr. Stuart Moir, Mr. Williams, Mr. Morrisson (or his son), Mr. Koop and Mr. David Moir each held or had been promised 5% of the company. Mr. Lobb would later also be promised 5% for his assistance in the Atlin cleanup.

[187] Mr. Stuart Moir held 49 shares in trust for himself, certain of those individuals and some of Mr. McLean's family. Mr. Williams held one of his shares personally, hence 101 shares rather than 100.

[188] Based on what had been given or promised before any shares were issued to the plaintiffs, 25% of the company was held by persons other than Mr. McLean or in trust for his family. That is 75% of the company was held by Mr. McLean or his family. The effect of providing 30% of the shares in the company to the plaintiffs is, if there is no proportional dilution of all existing shareholders, that Mr. McLean's direct or indirect interest would fall to 45%. This is clearly the end point that most participants expected to come about. It appears to have been agreed to in discussions with Mr. McLean both at the December 12, 2009, restaurant meeting, when the plaintiffs' offer was discussed and approved, and at the early January 2010 meeting at the same restaurant.

[189] After the 549 shares were issued to Mr. McLean, the share register suggests the following shareholdings:

- (1) Ernest McLean - 600 shares.
- (2) JJ Moon - 50 shares.
- (3) SMG Canada Gold Corp. - 250 shares.
- (4) Jeff Williams - 1 share.
- (5) Stuart Moir, in Trust, - 49 shares.
- (6) Shaone Morrisonn - 50 shares.

[190] The effect, therefore, of the issuance of the shares is that Mr. McLean owns 60% of the shares of Golden Bear Mining and controls the company.

[191] The directors' resolution for the issuance of 549 shares to Mr. McLean is signed by Mr. McLean and Mr. McGroarty. Mr. McGroarty is not and was not a director of Golden Bear Mining.

[192] By virtue of the issuance of 549 shares to Mr. McLean, the shares of Stuart Moir and Jeff Williams were diluted tenfold. The shareholding interest of Mr. David Moir and Mr. Koop is not recognised. Only Shaone Morrisonn retained an undiluted interest.

[193] While this share issuance granted Mr. McLean control of the company that he had arguably just previously given away for consideration, he claims to have no idea as to how or why the 549 shares were issued to him. I find that I cannot accept that evidence. In my view, Mr. McLean must have participated in the share issuance, either directly or indirectly. It could not have occurred without his concurrence and most likely it required his instructions. In any event, he signed the director's resolution authorizing the transaction and must have known what was happening.

[194] Mr. McLean went further, initially denying any knowledge that the share issuance diluted the shareholdings of the other shareholders. He acknowledged in discovery that the dilution that occurred was not intended and does not seem fair to him.

[195] Only days before the shares were issued, the plaintiffs were recorded by Golden Bear Mining as acquiring their identical shares for \$2,666.66 per share, as compared to \$0.01 per share price paid by Mr. McLean.

[196] Mr. McLean did not inform the plaintiffs of the 549 shares issued to him. They learned of the share issuance only as a result of an examination of the Golden Bear Mining records by another shareholder.

- [197] I am unable to conclude, however, that in issuing shares to Mr. McLean, Golden Bear Mining breached the right of first refusal. Indeed, I have reservations that the clause set out above sets out an enforceable right. It is vague and uncertain. It does not set out any of the provisions normally included in a right of first refusal dealing clearly with when it is triggered, how notice is to be provided and when and on what terms it is to be exercised.
- [198] To the extent that the clause can be given a commercially certain meaning, as one ought to do if possible, it seems to me that the clause would be triggered typically in circumstances where Golden Bear Mining was seeking to raise capital in return for a shareholding position or if Mr. McLean was proposing to sell his own shares, thereby affecting the ownership structure of the company.
- [199] Here I am satisfied the shares were issued as part and parcel of the process of giving the plaintiffs their 30% interest in Golden Bear Mining. The funding agreement is silent on how they were to receive their shareholding interest or from whom. Nothing indicates whether the shares were to be issued from treasury or transferred from Mr. McLean. There is evidence, even before the funding agreement was signed, that there was a discussion that the plaintiffs' shares would come from Mr. McLean, but that did not find its way into the funding agreement. I am not persuaded that it would be permissible to read into the contract a term requiring the shares to be transferred from Mr. McLean's shareholding based on the evidence of pre-contractual discussions.
- [200] The plaintiffs did receive shares in return for their investment. They did end up with 30% of the shares of the company as a result of the shares issued to them and those issued to Mr. McLean. The losers were the individuals who each held five shares (out of 100 or 101) and who saw their proportionate interest diluted many times by the combined effect of the shares issued to the plaintiffs and to Mr. McLean.
- [201] I accept, however, that some reorganization of the share structure was a permissible means of providing 30% of the shares of Golden Bear Mining to the plaintiffs and of recognizing the interest of Mr. David Moir and Mr. Koop. Issuing additional shares to accomplish that object does not defeat the reasonable expectations of any of the participants as long as no dilution of the 5% shareholders occurred. There is nothing in the evidence that establishes that the expectation of the participants limited the absolute number of shares issued and outstanding.
- [202] When set in this matrix of facts and interpreting the language of the funding agreement objectively to give it commercial efficacy, I cannot conclude that the issuance of 549 shares to Mr. McLean triggered the right of first refusal found in the funding agreement. These transactions were a permissible way of giving the plaintiffs their 30% interest and did not engage the right of first refusal that exists to allow the plaintiffs to protect their position subsequently, if new investors are found or if Mr. McLean looked to sell his interest in the company. If these circumstances triggered the right of first refusal a commercially absurd result would occur. The plaintiffs would have acquired majority control of the company by

acquiring an additional 549 shares for \$5.49 as a result of shares being issued to accommodate their purchase of 30% of the company for \$800,000.

[203] Accordingly, I reject the plaintiffs claim that their right of first refusal was breached and refuse to grant a remedy of specific performance.

Summary on breach of the funding agreement

[204] In conclusion, Mr. McLean and Golden Bear Mining breached the following terms of the funding agreement: the obligation to spend a minimum of \$650,000 on mining operations in the Settea Valley; the obligation to transfer all Settea mineral claims to a holding company or into a trust; and the obligation to make a nominee of SMG a director. They did not breach the right of first refusal.

Other legal claims arising out of the breach of the funding agreement

[205] The plaintiffs do not limit their claim to breach of contract. They argue that the misuse of the plaintiffs' investment and other breaches sounds also as a breach of fiduciary duty, a breach of trust, constitutes conspiracy, led to unjust enrichment, amounts to conversion and supports the oppression claim. I will deal with each of these claims briefly, except for the oppression claim which I will deal with at greater length.

Fiduciary Duty

[206] The plaintiffs allege that, as a consequence of the relationship of trust and vulnerability established under the funding agreement, Mr. McLean and Golden Bear Mining owed fiduciary duties to the plaintiffs with respect to the funding agreement proceeds and their use. Accordingly, the diversion of virtually all of the plaintiffs' investment to a cleanup project in Atlin constituted a breach of the fiduciary duties of both Mr. McLean and the company. Moreover, in breach of their fiduciary duties, these defendants allowed or enabled Mr. McGroarty to unlawfully divert assets to himself. Finally, Mr. McLean and Golden Bear Mining breached their fiduciary duty to the plaintiffs by failing or refusing to issue shares according to earlier promises and failing to appoint Mr. Moon as a director of the company, matters that were solely within their control.

[207] I accept that a fiduciary duty may arise in a commercial context and, on the right facts, may be owed by a director to a shareholder. A fiduciary duty does not arise between a director and a shareholder by virtue of the directorship alone however, but there are exceptions to the rule: *Dusik v. Newton et al.* (1985), 62 B.C.L.R. 1 at 20-23 (C.A.).

[208] The issue whether fiduciary obligations are owed will depend upon the facts of the particular case and will not be dependent solely upon the formal classification of the parties as majority and minority shareholders, or director and shareholder. In the context of a privately closely held company, a fiduciary duty owed to the corporation may be extended to shareholders when the director has been dishonest with or misled the

shareholder: *Vladi Private Islands Ltd. v. Haase et al.* (1990), 96 N.S.R. (2d) 323 (S.C. (A.D.)); see also Dr. Ronald Davis, *Directors' Liability in Canada*, loose-leaf ed. North Vancouver: Specialty Technical Publishers (updated 2010, rel. 161) at 1-13 to 1-16.

[209] In *Goldex Mines Ltd. v. Revill et al.* (1974), 54 D.L.R. (3d) 672, an Ontario Court of Appeal case dealing with the duties owed by directors, personally, to shareholders, the Court held that it is not necessary to strain to fit the facts into a well-established category of fiduciary obligations to find the existence of a fiduciary relationship; it is permissible to look at a relationship which has developed as a matter of business exigency and determine whether it is appropriate that fiduciary obligations attach given the attendant factual circumstances.

[210] The British Columbia Court of Appeal endorsed this approach in *Dusik*: at 22.

[211] A fiduciary duty can be found to exist where "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": *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409. That is, the Court should consider the relationship of the parties with particular attention to the parties' expectations: at 412.

[212] The Supreme Court of Canada in *Hodgkinson* defined the term fiduciary at 409:

I there identified three uses of the term fiduciary, only two of which I thought were truly fiduciary. The first is in describing certain relationships that have as their essence discretion, influence over interests, and an inherent vulnerability. In these types of relationships, there is a rebuttable presumption, arising out of the inherent purpose of the relationship, that one party has a duty to act in the best interests of the other party. ...

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.

[Emphasis in original.]

The Court also noted that the legal incidents of many contracts may give rise to a fiduciary duty: at 407.

- [213] The Supreme Court of Canada recently articulated the basis for finding a fiduciary relationship in a commercial context. In *Galambos v. Perez*, 2009 SCC 48, Cromwell J., writing for the Court, explained that it is fundamental to all fiduciary duties that there be an undertaking by the fiduciary, which may be either express or implied, that the fiduciary will act in the best interests of the other party in accordance with the duty of loyalty reposed on him or her: at paras. 66, 75, 77.
- [214] Cromwell J. went on to outline the following features of fiduciary relationships at paras. 77, 79, 83:
- (1) The fiduciary's undertaking may be the result of the exercise of statutory powers, the express or implied terms of an agreement or, perhaps, simply an undertaking to act in this way;
 - (2) The critical point is that in fiduciary relationships there will be some undertaking on the part of the fiduciary to act with loyalty;
 - (3) Relevant to the enquiry of whether there is such an undertaking are considerations such as professional norms, industry or other common practices and whether the alleged fiduciary induced the other party into relying on the fiduciary's loyalty; and
 - (4) The fiduciary's power to affect the other party's legal or important practical interests is a crucial factor in finding a fiduciary relationship. In fiduciary law, it is the discretionary power that results from the relationship that gives rise to the fiduciary duty that is the important concern rather than the parties' positions before they entered into the relationship.
- [215] Even though I accept that fiduciary duties may arise in the commercial context, I am not persuaded that fiduciary duties arose in this case. First, it is not clear to me that Golden Bear Mining, as a distinct legal entity, could owe fiduciary duties to the plaintiffs. If any fiduciary duties arose, they would be between Mr. McLean and the plaintiffs arising from Mr. McLean's control of Golden Bear Mining and from the obligations he undertook under the funding agreement.
- [216] More importantly, in this commercial context I cannot see how either Mr. McLean or Golden Bear Mining undertook, either expressly or by implication, to act in Mr. Moon's or SMG's best interests in accordance with a duty of loyalty reposed in them. It is true that by breaching the funding agreement they could damage the plaintiffs' interests and the plaintiffs were vulnerable to be damaged by those breaches, but that is true in any situation where one party to an agreement can unilaterally breach it to the detriment of the other.
- [217] Indeed, it is not obvious to me that the plaintiffs reposed loyalty in either Golden Bear Mining or Mr. McLean to protect their best interests. The funding agreement itself belies that conclusion. The funding agreement provides for mechanisms by which the plaintiffs would be involved in the affairs of Golden Bear Mining. They were to receive shares that would provide a measure of control. A nominee of SMG was to be a director. The agreement

gave SMG the right to nominate one signatory for banking and general signing authority; a right that SMG has never asserted. The right of first refusal protected the plaintiffs in the event the company sought to raise funds by issuing shares. All of this points away from the existence of a fiduciary relationship; I cannot see how the breach of the terms of the funding agreement converted the relationship into a fiduciary one.

[218] In the result, I reject the plaintiffs' claims in breach of fiduciary duty.

Breach of trust, participation in breach of trust, unjust enrichment, conversion and conspiracy

[219] I am not persuaded that the facts in this case ground a claim for breach of trust, participation in a breach of trust, unjust enrichment, conversion or conspiracy.

[220] First, it is not clear that the conspiracy claim in particular has any independent utility given my conclusion that the plaintiffs have made out their case in fraudulent and negligent misrepresentation and breach of contract. It adds nothing to consider conspiracy as an independent tort in these circumstances.

[221] Secondly, I do not think that trust principles apply in these circumstances. This matter is one that involves negotiations for a contract and the resulting contract. Under that contract, the plaintiffs transferred money to Golden Bear Mining in return for some of its shares. The fact that the contract identified the purpose to which the funds can be put does not, standing alone, impress those funds with a trust. I am not persuaded that trust principles have any application. In any event, it is not clear that in advancing the funds to the company, even for purposes stipulated by contract, the plaintiffs retained any beneficial interest in the moneys. Arguably, all of the interest in the funds was transferred to Golden Bear Mining, subject only to the contractual and other corporate limitations on their use. If any party has a claim sounding in equity it may be Golden Bear Mining against Mr. McLean and Mr. McGroarty. But of course Golden Bear Mining is a defendant, not a plaintiff in these proceedings.

[222] These considerations undermine the claim for participating in a breach of trust, unjust enrichment and conversion. Each of these claims presupposes that the invested moneys are impressed with a trust so that the plaintiffs retain a beneficial title in the moneys invested. But if the moneys, once invested, belong to Golden Bear Mining and not the plaintiffs, the plaintiffs have no interest that can be converted. Only Golden Bear Mining can make a claim in unjust enrichment. The claim for participating in a breach of trust likewise falls away.

[223] Finally, I observe that the defendants in these proceedings were not represented. The points in issue here were not fully argued. The plaintiffs did not provide me, moreover, with any authority, let alone binding authority, that makes clear that these general equitable principles would apply in these circumstances.

[224] Before turning to the issue of oppression, I will consider the allegation that Mr. McGroarty misappropriated the assets of Golden Bear Mining in breach of his obligations to the plaintiffs.

The plaintiffs allegations involving Mr. McGroarty

[225] Mr. McGroarty, it will be recalled, became involved with Golden Bear Mining in or about November 2009. He regarded himself as having been appointed CEO of Golden Bear Mining by the time the funding agreement was entered. Mr. McGroarty's involvement with Golden Bear Mining was opposed by the Moirs, Mr. Morrisson (apparently), Mr. Moon and less emphatically, at least at first, by Mr. Williams. The basis of their opposition to Mr. McGroarty appears to have been rooted in his failure to deliver investment funds to Golden Bear Mining and what was seen as the unsuitability of some of his ideas to restructure or reorganise Golden Bear Mining's affairs. Nonetheless, and despite promises to the contrary, Mr. McLean involved Mr. McGroarty in the affairs of the company. The other interested parties acquiesced to this.

[226] The plaintiffs, in summary, complain about the following:

- (1) contrary to promises made to Mr. Moon and other shareholders, Mr. McLean gave de facto control of the corporation over to Mr. McGroarty;
- (2) in March 2010, Mr. McGroarty and Mr. McLean established a new company, Golden Bear Exploration Inc. While the original purpose of that incorporation was something different, Mr. McGroarty attempted to use the company in an effort to strip Golden Bear Mining of its primary assets, its mining claims;
- (3) in May 2010, Mr. McLean and Mr. McGroarty together unlawfully caused Golden Bear Mining to give Mr. McLean majority control of the corporation by issuing 549 shares to himself for \$0.01 each, without honouring the plaintiffs' right of first refusal when issuing those shares. They also diluted the holdings of all shareholders other than the plaintiffs;
- (4) Mr. McLean and Mr. McGroarty spent the summer of 2010 using the plaintiffs' investment, not for the agreed purposes, but to clear Mr. McLean's name with the B.C. Ministry of Mines, through the cleanup at Davenport Creek (Atlin);
- (5) during 2010, Mr. McGroarty unlawfully removed and converted other funds, and attempted to convert and remove other assets, from Golden Bear Mining for personal use. The evidence discloses at least \$60,244.47 in funds converted by Mr. McGroarty personally (\$30,000 for Dubai, \$25,000 for Atlin, \$3,390 for Bank of China and \$1,314.12 for Golden Bear Exploration incorporation); and
- (6) in the fall of 2010, Mr. McLean and Mr. McGroarty unlawfully conspired to defraud the plaintiffs of more than \$10 million by communicating a non-existent offer to purchase Mr. McLean's shares under a first right of refusal contained in the funding agreement.

- [227] I have already dealt generally with the issue of the right of first refusal and the misuse of funds at Davenport Creek. I observe, however, that Mr. McGroarty signed the director's resolution authorizing the share issuance representing that he was a director when he was not.
- [228] The evidence clearly establishes points (1) and (2) set out above. Mr. David Moir's involvement as company accountant did not materialize in 2010. Mr. Williams was ejected from the company at the end of June 2010 by Mr. McGroarty (likely on Mr. McLean's instructions). This is important because for practical purposes Mr. Williams did not exercise control of the spending of Golden Bear Mining's money during the greater part of the time that Atlin was being cleaned up. That work began in June, but continued even into September. During those months, Mr. McGroarty was in control of Golden Bear Mining's affairs in Vancouver. I find that Mr. McLean did transfer de facto control of Golden Bear Mining's affairs to Mr. McGroarty, except to the extent that those affairs involved day to day operations at Atlin, which were conducted by Mr. McLean.
- [229] Furthermore, it is clear that Mr. McGroarty did establish (using Golden Bear Mining's funds) a company, Golden Bear Exploration Inc., in which he and Mr. McLean held shares. He purported to transfer all of the mining claims held in the name of Mr. and Mrs. McLean to this company. Mr. McLean disputed at trial that those claims were held by Golden Bear Exploration Inc., claiming that they still all belonged to him. Given my conclusion that the claims belonged to Golden Bear Mining the effect of the purported transfer, if valid, would be to strip Golden Bear Mining of its claims. I am satisfied that Mr. McLean knew of and participated in the purported transfer (although he repudiates it now), and knew that he was acting improperly. This is so because I am satisfied that he knew the claims belonged beneficially to Golden Bear Mining, despite his protestations to the contrary. Likewise, I cannot accept that Mr. McGroarty could have been under any legitimate misunderstanding about the fact that the claims belonged to Golden Bear Mining.
- [230] I turn now to focus on the alleged misappropriation of funds by Mr. McGroarty.
- [231] The plaintiffs particularize their claim that Mr. McGroarty diverted money from the plaintiffs' investment to himself. Some examples of those allegations are as follows:
- (1) in April 2010, Mr. McGroarty received in his personal bank account a \$30,000 fee on the basis of a sham claim for payment for services, including to set up a company in Dubai. He used those funds to buy a car;
 - (2) in July 2010, he received in his personal bank account \$3,930.35 for a sham expense claim based on a Bank of China letter of June 24, 2010;
 - (3) in July 2010, he received an untraceable \$25,000 (\$9,700 of which went into his bank account). He would later try to support that expense by submitting to the inspector a package of receipts, most of which had no relationship to those monies;

- (4) he used Golden Bear Mining money to incorporate Golden Bear Exploration Inc., in which he and Mr. McLean were shareholders and which was used by him to receive all of the staked claims (except 672403) as a result of an agreement in spring 2010 which Mr. McLean repudiated at trial;
 - (5) he paid \$1,314.12 for many home expenses, such as all of his internet services, his phone and many personal meals;
 - (6) he funded all of his vehicle costs, including personal fuel and car washes; and
 - (7) many of these inappropriate expenses were identified by the Inspector. Mr. McGroarty has not paid back the improper expenses he claimed from Golden Bear Mining, although he was asked to do so.
- [232] I turn to consider the primary allegations of misappropriation of the funds invested in Golden Bear Mining, setting to one side for the moment the issue whether the proper plaintiff in respect of these matters is Golden Bear Mining.

The Bank of China Internet scam

- [233] The first allegation involves an expense claim for just over \$3,900, allegedly paid to the Bank of China. According to Mr. McGroarty, this money was paid by him as a means of securing \$40 million in funding for Golden Bear Mining and other companies he was involved with. He acknowledges that the Bank of China transaction turned out to be an internet scam, although he maintains that he conducted due diligence in relation to the contemplated financing.
- [234] The plaintiffs say that Mr. McGroarty took the \$3,900 personally and nothing was ever sent to the Bank of China as he maintains.
- [235] Mr. McGroarty says that the only record he has of the payment to the Bank of China is his handwritten note on the internet request for funds. His laptop on which he had his communications with the "financiers" was "fried" and is no longer available. He cannot remember how he forwarded the funds, but insists he did so. He does not know if he took the money from cash. He says he often keeps \$5,000 to \$10,000 or more in cash on hand, and he may have done a wire transfer or transferred the money through Western Union. He agreed that he has no record of the transfer of the money, has not been able to find any record of the transfer, and that his bank records do not show any withdrawal of the money corresponding to the amount provided to the Bank of China.
- [236] I am unable to accept Mr. McGroarty's evidence. The internet request for funds is an obvious and notorious "scam" of a kind familiar to almost everyone with email. Mr. McGroarty presents himself as a sophisticated businessman who has turned around numerous companies and who has raised finance in the past. Even though he said that he dislikes raising finance and is not good at it, I find it wholly implausible that Mr. McGroarty would not have recognised the e-mail solicitation of funds to be exactly what it was: a

brazen hoax capable of enticing only the most naive or vulnerable to part with money. Moreover, the notion that in return for a few thousand dollars the company, among others, would receive \$40 million is ludicrous. No sophisticated businessman could have failed to see through such a transparent ruse. Mr. McGroarty is certainly not unsophisticated or commercially unastute.

- [237] I find it most unlikely that if Mr. McGroarty had paid the money to the Bank of China using his own personal cash (for which he was then reimbursed), he would have forgotten having done so. I found his prevarication about not being able to remember the source of the funds unconvincing. I am confident that Mr. McGroarty understood the need to support his expense accounts with receipts. Indeed, he regularly provided receipts, including (apparently inadvertently) for cigarettes and lottery tickets, among other personal items. Although it may not be surprising to find that not every expense claim was backed by a receipt (after all receipts often do get mislaid) this was a sufficiently large sum of money. If he had used his personal cash, I am sure that he would have provided some kind of documentation to the company to prove the payment in the event he was challenged.
- [238] Mr. McGroarty relied on a general claim that all his expense claims were approved by Mr. Williams. Mr. Williams was not asked if he had approved this particular expense. In fact, Mr. Williams could not have approved it because he had been terminated at the end of June by Mr. McGroarty and was no longer involved in the company. The plaintiffs point to the fact that some of the suspect transactions occurred on the heels of Mr. Williams leaving the company as itself suspicious and as lending support to their claim that Mr. McGroarty took advantage of the lack of control over Golden Bear Mining's finances to benefit himself. I consider that assertion to be well-founded.
- [239] Finally, I find it implausible that if Golden Bear Mining were going to solicit \$40 million in financing in return for an outlay of a few thousand dollars, there would not be some corporate record of that initiative, but there is none. It is equally implausible that Mr. McGroarty would use his own cash rather than requisition the funds from the company. Mr. McGroarty offered no explanation of why he paid the money using his own funds.
- [240] In summary, I find as a fact that Mr. McGroarty did not use his own funds to send money to the Bank of China and, therefore, his expense claim for \$3,900 is improper. He took money from Golden Bear to which he was not entitled.

The \$25,000 cash payment

- [241] The second transaction in dispute is the receipt by Mr. McGroarty of \$25,000 in cash in early July 2010. Mr. McGroarty accepts that a payment of \$9,700 cash into his bank account later that month probably was from that \$25,000. Certainly, Mr. McGroarty suggested no other source of the \$9,700. If I understood him correctly, Mr. McGroarty justified taking the \$9,700 because Golden Bear Mining was and remains indebted to him for an even greater amount.

- [242] Mr. McGroarty says that the \$25,000 was given to him by Golden Bear Mining on the approval of Mr. Williams in early July so that he could take the money with him on a trip to Atlin and buy a vehicle, a camper I recall, for the company on his way. No camper was ever purchased, according to Mr. McGroarty, because plans changed.
- [243] The plaintiffs challenged Mr. McGroarty's evidence. They say that Mr. Williams could not have approved the cash advance of \$25,000 because he had been discharged by Mr. McGroarty in late June 2010. More significantly, they say that Mr. McGroarty is unable to explain the corporate purposes the money was used for. Mr. McGroarty provided a bundle of receipts to the inspector in support of his use of the money. It is unnecessary to descend to detail, but the clear fact is that most of the receipts do not properly support the use of the money. For example, Mr. McGroarty said that he used the cash to reimburse Mr. McLean and others in Atlin for expenses they incurred on their presentation of receipts to him. In fact the bulk of those receipts are in respect of matters that had already been paid for directly by Golden Bear Mining. Either Mr. McLean or the Atlin crew were cheating Mr. McGroarty or the cash was not used by him to reimburse those expenses. Further, other of the receipts were for expenses incurred at a time that does not correspond to the Atlin trip or were for clearly personal expenses. In brief, few or none of the receipts clearly support the use of Golden Bear Mining's cash for a corporate rather than a personal use.
- [244] Mr. McGroarty did not persuade me either that he used the \$25,000 in cash for a legitimate corporate purpose, or that he is owed money by Golden Bear Mining in excess of any inadvertent mistaken expenses he may have claimed (and acknowledges). There is a complete lack of documentation validating his explanations. What documentation exists tends to undermine and not reinforce what he says. He must have known, for example, that the receipts he provided the inspector were in response to a request to justify what he had done with corporate money, but they do not support his position.
- [245] I also consider that the use of the cash for personal purposes appears consistent with a pattern of conduct of treating Golden Bear Mining as a repository of funds for personal use. There is force in the observation that Mr. McGroarty was in need of money at the time he received the cash. He was paying rent and the leasing costs of a car for a friend and his bank account shows that he was almost out of money. The money deposited in his account from Golden Bear Mining (not just the cash here, but other money too) relieved an apparent liquidity problem. Mr. McGroarty says that he was not close to running out of money because he always kept a large amount of cash on hand and could rely on that. I am unable to place any weight on that claim in light of all of the other difficulties in Mr. McGroarty's evidence.
- [246] I find as a fact that Mr. McGroarty took \$25,000 in cash from Golden Bear Mining and used virtually all, if not all, of it for his personal use.

The \$30,000 payment of April 1, 2010

- [247] The third transaction involves the payment of \$30,000 to Mr. McGroarty on April 1, 2010. Mr. McGroarty says that this payment was a fee for services to be rendered by him to the benefit of Golden Bear Mining for two tasks. The first was to incorporate a company in Asia to pursue refining of "black sands" for trace elements in Dubai. The second was to pursue further financing for Golden Bear Mining.
- [248] Mr. Williams testified that he had never seen a letter dated April 1, 2010, between Mr. McGroarty and Mr. McLean on behalf of Golden Bear Mining, said to be the agreement for services in respect of which the \$30,000 was paid. Moreover, he testified that he had not seen the cheque for \$30,000, although it was signed by him as he acknowledged.
- [249] Mr. McGroarty says that he did the work contemplated by the agreement. He did make the arrangements to have the necessary incorporation carried out and, indeed, used \$4,000 - \$5,000 of the \$30,000 to pay for the work.
- [250] Once again, Mr. McGroarty is unable to provide any documentation that supports what he says. There is no record of a transfer of money to Asia or of any work being done there to incorporate the company. There is no record in Golden Bear Mining of legal work being done to lay the foundation for some refining activity in Dubai, although the possibility of refining black sand was discussed. In discovery, Mr. McGroarty was not able to give any indication of how much time he spent providing the services he was being paid for and also gave no details of what he did beyond accomplishing the incorporation. In particular, he gave no details of what efforts he made to raise financing for Golden Bear Mining.
- [251] Deciding whether Golden Bear Mining Ltd. and Mr. McGroarty entered an agreement on April 1, 2010, to pay Mr. McGroarty \$30,000 involves making findings involving the credibility of Mr. McGroarty and Mr. Williams. The following additional evidence bears on this question.
- [252] First, there is a letter bearing the date April 1, 2010, signed by both Mr. McGroarty and Mr. McLean evidencing an agreement to pay Mr. McGroarty for services. Secondly, refining black sands was indeed seen by Golden Bear Mining, and some of its interested parties, as a business opportunity for it. Thirdly, a cheque was written, signed by Mr. Williams and Mr. McLean apparently also on April 1, 2010, for \$30,000 in favour of Mr. McGroarty. It shows the payment being in respect of a loan, not a fee for services, but there is evidence that for "tax purposes" payments by Golden Bear Mining to compensate for services would be shown on the books as a loan.
- [253] Mr. McGroarty insists that Mr. Williams was present when the April 1st agreement was made and signed the cheque on that day when all three men were together. Mr. Williams denies this. He says that it was common practice for each of the three individuals who were authorised to sign Golden Bear Mining cheques to pre-sign some blank cheques so that bills could be paid even if two of the three authorised signatories were not available to sign

a cheque when necessary. Mr. McLean had to sign each cheque, but he was often away, so it was common to have him pre-sign a larger number of blank cheques than the other two. Nevertheless, both he and Mr. Pilkey (the third authorised signatory) would also sign some blank cheques in case they were unavailable. He says that he did not sign the cheque for \$30,000 on April 1, 2010, and conjectures that Mr. MacLean must have used a blank cheque he had already signed.

- [254] Ms. Coombs was Golden Bear Mining's bookkeeper. She processed the financial transactions and recorded them for the company. In cross-examination by Mr. McGroarty she testified Mr. McLean was the only person who signed blank cheques because he was working out of town so much of the time. On re-examination, she qualified her answer and acknowledged that she was unclear whether Mr. Williams and Mr. Pilkey also pre-signed cheques. She was unable to go so far, however, as to confirm that either or both of them did.
- [255] The concept of creating a company in Dubai appears to have come originally from Mr. Williams. The theory was to establish a refinery company on the public Dubai Metals Exchange. However, there were never actually any steps taken, to Mr. Williams' knowledge, to establish that company. The April 1st letter to Mr. McGroarty on the subject does not fit the facts comfortably. The black sands referred to in the letter would have come from Highland River, not a Golden Bear property as the letter suggests, at least according to Mr. Williams. The refinery under consideration would have cost significantly more than \$30,000 to start. There was no obvious reason in 2010 for Golden Bear Mining to expend resources in support of a Dubai venture.
- [256] Mr. McLeans' evidence on the subject is not helpful. He testified that he has no idea what was done with the money and has never asked. He had little to say that was probative of the existence of an agreement with Mr. McGroarty to set up a company to carry on refining black sands in Dubai or to pay Mr. McGroarty in advance, and independent of the result, for efforts to raise capital for Golden Bear Mining.
- [257] Mr. McLean was asked in discovery to provide any support for that \$30,000 payment to Mr. McGroarty. He was unable to do so. In fact, once again, there is a complete absence of documentation (except the letter and the cheque) supporting a decision by Golden Bear Mining to begin setting up for operations in Dubai or authorising Mr. McGroarty to devote time to raising capital for a fee paid in advance and not contingent on success.
- [258] Mr. Williams specifically denied any conversation with Mr. McGroarty and Mr. McLean in which it was suggested that they should set up a company in Dubai anyway.
- [259] In an affidavit sworn March 9, 2012, Mr. McGroarty asserts that the funds paid to him were classified as a loan because at the time "we did not know how to classify" the payment of \$30,000.

- [260] Mr. McGroarty explained that \$4,000 - \$5,000 of the \$30,000 was spent for incorporation of companies in Dubai. He indicated that he did not issue a cheque, but would have wired the money. Mr. McGroarty agreed that there would be nothing in his bank records to show that he spent \$4,000 - \$5,000 for the Dubai matter.
- [261] Mr. McGroarty's evidence in cross-examination was that there is nothing in his bank account statements showing any funds going toward setting up a company in Dubai. He explained that he always kept cash in his house, which could be anywhere from \$20,000 - \$50,000.
- [262] Mr. McGroarty agreed that in April 2010, Golden Bear Mining was his only source of income, and that his account balance was low before the fee arrived. However, he insisted he had cash available and was not short of funds and so had no incentive or motive to misappropriate money.
- [263] In assessing credibility and, in effect, resolving the conflict between Mr. McGroarty and Mr. Williams, I have to have regard to, amongst other matters, the inherent probabilities of the situation and the consistency of the evidence with any objective and independent evidence or documentation. I am also entitled to take into account my view of the credibility of the witnesses generally, that is to say, how reliable their evidence has been proven to be on other matters. I have not found Mr. McGroarty to be, generally, a reliable witness, as is apparent from these reasons.
- [264] Approaching the matter in this way, I find it difficult to accept that if a decision had been made to (1) pursue a refinery in Dubai; (2) pay Mr. McGroarty a special fee to search out investors; and (3) to do so in advance of any results, there would be no documentation evidencing those decisions or steps taken in preparation for those activities or steps taken to accomplish them. Yet there is nothing of moment.
- [265] As noted, Mr. McGroarty could not explain what he did to earn the fee except to say that he sent money from his fee to Asia to pay for the legal work to incorporate a company to conduct business in Dubai. He could not even estimate in any meaningful way how much time he spent earning the fee. Moreover, I am not persuaded that any money was sent to Asia or that a company was incorporated. Not only are there no records of either event, it is improbable in my view that Mr. McGroarty would use a portion of his personal remuneration to fund the cost of work for Golden Bear Mining when the company could have paid for those funds directly.
- [266] In my view, it is doubtful that Golden Bear Mining would have decided at the beginning of April 2010 to undertake a venture in Dubai. At that time, it had no raw material to consider shipping to a refinery anywhere, let alone Dubai. The original concept developed by Mr. Williams and Mr. Morrisonn to use so-called black sands from Highland River had been abandoned. A Dubai refinery was a project without a purpose. Moreover, it is doubtful that Golden Bear Mining would have undertaken such a venture without the participation of all interested parties. There is nothing to suggest that others such as either Mr. Moir, for

example, knew anything of the arrangement.

- [267] It is also improbable that Golden Bear Mining would agree to pay an advance fee, independent of results, to find additional investment funds. Certainly, that had not been Golden Bear Mining's historical practice. In the past, the company appears to have relied on some kind of commission or finder's fee to reward for new investments. Golden Bear Mining was in funds in April 2010, but it would have been extravagant and imprudent to enter the arrangement described by Mr. McGroarty.
- [268] Another telling factor is Mr. McLean's inability to offer a cogent account of the agreement and what services were provided for the money.
- [269] I find that I must reject Mr. McGroarty's evidence that he received \$30,000 as a fee for services to be rendered. If that had been so, I doubt he would have had any difficulty in describing it as such in his affidavit. He would not have deposed that the payment was categorised as a loan on the cheque because the parties did not know how to classify it. I am skeptical of Mr. McGroarty's claim that he kept large amounts of cash on hand and that he had no pressing need for funds in April 2010 notwithstanding the state of his bank account and fact that he was paying a friend's rent and car payments. I do not accept the April 1, 2010, letter apparently evidencing an agreement for services as genuine.
- [270] In rejecting Mr. McGroarty's evidence, I have not overlooked Ms. Coomb's initial statement that only Mr. McLean pre-signed cheques. Later in her evidence she was much less confident about that. I find that it is probable that Mr. Williams also signed some cheques to ensure that company business would not be held up if two of the authorised signatories were not available when needed. I accept Mr. Williams' evidence that he had not seen the cheque paying Mr. McGroarty \$30,000 and knew nothing of the alleged agreement for services.
- [271] I have also not overlooked the fact that Mr. Williams may not be an independent and impartial witness. I am aware that he has a 5% interest in Golden Bear Mining and potentially stands to gain if Mr. McLean is ousted from the company. Nonetheless, I prefer his evidence to Mr. McGroarty's for the reasons given and because of the other difficulties with Mr. McGroarty's evidence referred to in these reasons, which contribute generally to undermining his credibility as a witness.

Summary

- [272] I accept that Mr. McGroarty misappropriated funds, as set out in this section of the judgment, from Golden Bear Mining for his own benefit. It will be necessary to return to consider the legal position arising since, at first blush, the wrong is done to the company and, there being no derivative action, Golden Bear Mining is not a plaintiff. I have also concluded that principles of trust, participating in a breach of trust, unjust enrichment and conversion have no application. I will discuss the availability of a remedy later in these reasons.

Were the affairs of Golden Bear Mining conducted in a manner that was oppressive or unfairly prejudicial to the interests of the plaintiffs?

[273] The plaintiffs allege that the affairs of Golden Bear Mining have been conducted in a manner that is oppressive or unfairly prejudicial to them in their capacity as shareholders. The conduct complained of duplicates in large measure that which underlies the causes of action already discussed. The oppression remedy is found in s. 227 of the British Columbia Business Corporations Act, S.B.C. 2002, c. 57 [BCA] provides corporate shareholders with a process to seek redress for oppressive conduct:

Complaints by shareholder

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
 - (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.
- (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order
- (a) directing or prohibiting any act,
 - (b) regulating the conduct of the company's affairs,
 - (c) appointing a receiver or receiver manager,
 - (d) directing an issue or conversion or exchange of shares,
 - (e) appointing directors in place of or in addition to all or any of the directors then in office,
 - (f) removing any director,
 - (g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,
 - (h) directing a shareholder to purchase some or all of the shares of any other shareholder,

- (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
 - (j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,
 - (k) varying or setting aside a resolution,
 - (l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
 - (m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
 - (n) directing correction of the registers or other records of the company,
 - (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,
 - (p) directing that an investigation be made under Division 3 of this Part,
 - (q) requiring the trial of any issue, or
 - (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.
- (4) The court may make an order under subsection (3) if it is satisfied that the application was brought by the shareholder in a timely manner.

...

[Emphasis added.]

[274] As was made clear by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, oppression is an equitable remedy: at para. 58. The oppression remedy gives a court "broad, equitable jurisdiction to enforce not just what is legal but what is fair": at para. 58. Oppression is also fact-specific. As the Court stated, "What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play": at para. 59. As outlined at para. 68, in assessing a claim of oppression a court must ask:

[68] ... (1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

- [275] The claims to oppression centre principally around alleged expectations about share ownership resulting from the investment, the commitment to share control through appointing a plaintiffs' nominee as a director, the manner of Mr. McLean's exercise of control of Golden Bear Mining and the use to which funds would be put.
- [276] Before approaching the specific question whether any representations were made or agreements reached which are relevant to the reasonable expectations of the parties about the effect of the funding agreement on the shareholdings in Golden Bear Mining, it is necessary to set the context in which those discussions occurred. It is necessary, therefore, to examine what understandings existed when the funding agreement was under discussion.
- [277] The evidence of Mr. Stuart Moir and Mr. Williams is that Mr. McLean agreed to give them 5% of the company. Mr. Stuart Moir says that interest was not to be diluted. Mr. McLean says that when he gave a shareholding interest, he was giving five shares and there was no agreement that they not be diluted.
- [278] Mr. Stuart Moir's evidence is that a agreement was reached in 2008 with Mr. McLean that involved the following terms:
8. Following the meeting in the summer of 2008, Jonn Morrisonn, Jeff Williams and I expressly agreed with Mr. McLean to help him with his plans for Golden Bear Mining Ltd. if he would share management duties with us and if he would [run] the company in a shareholder friendly manner. We also expressly agreed that Mr. McLean's job would be to focus on buying equipment, deciding where and how to mine, and conducting the mining itself. We also required Mr. McLean to agree that compensation of the individuals involved in the project would be decided jointly and that the output would be used to pay the expenses, then the balance would be divided between the shareholders pro rata by shareholdings. The distribution of raw gold to shareholders was important because the shareholders do not have to pay taxes on such raw gold until it is refined and sold.
 9. As part of the same agreement, Mr. McLean expressly agreed as follows:
 - (a) Jonn Morrisonn, Jeff Williams and I, or our respective nominees, would each receive 5% of the equity and voting shares in the company, which shares would not be diluted, so that we each ended up with 5% of the shares after investment was obtained and all shares were issued.
 - (b) Jonn Morrisonn, Jeff Williams and I would each receive a 1% net smelter royalty ("NSR") on all the Settea claims which were staked.
 - (c) Mr. McLean would receive a maximum of a 5% NSR.
 - (d) Anyone who raised monies for the company by loan, gold sale, share issuance or otherwise would receive a finders fee of 10% of the monies raised.

- (e) Those who worked for the company would receive reasonable compensation for their efforts.
 - (t) Mr. McLean would remain sole director of the company but he would manage the company jointly with us.
 - (g) We would try to limit the share issuance required to fund the mine so that our group (McLean, Morrisonn, Moir and Williams) retained control of more than 50% of the shares.
- [279] In my view, Mr. McLean did not effectively challenge the evidence that this agreement was reached. He simply asserted that he gave five shares and did not agree that they could not be diluted.
- [280] I am satisfied that Mr. Stuart Moir, Mr. Williams and Mr. Morrisonn were given a shareholding interest that represented 5% of the company. It is most unlikely that the agreement was that they receive five shares and that Mr. McLean remained free to alter the number of issued and outstanding shares at will. The shares were not given to them as a gift. They were given to them because they each had a valuable contribution to make to the potential success of Golden Bear Mining and this interest gave them a real stake in the future success of the company and an incentive to bring about that success.
- [281] It accords with common sense that in receiving shares representing a percentage of the company there is some expectation or agreement limiting the dilution of that interest. Mr. Stuart Moir says there was an explicit agreement that future investment would not dilute their interest. Mr. McLean denies that agreement.
- [282] I accept that there was an agreement substantially in the terms described by Mr. Stuart Moir involving himself, Mr. Williams and Mr. Morrisonn. It appears to me unlikely that the subject matters covered by the agreement would not have been discussed with Mr. McLean, since they are matters of material importance to all of the parties, particularly the new shareholders.
- [283] I have to say too that where Mr. McLean's evidence conflicts with that of other witnesses on a question such as this, I prefer the evidence of the other witnesses. Mr. McLean's evidence, on many points, was contradicted by documents or changed over time.
- [284] I find, therefore, that Mr. McLean agreed that the percentage interest in Golden Bear Mining he gave to Mr. Williams, Mr. Stuart Moir and Mr. Morrisonn could not be diluted at will. When discussions were occurring with Mr. Moon and it was understood that the funding agreement contemplated the plaintiffs would receive an equity interest in Golden Bear Mining, Mr. McLean must have understood that the provision of that interest could not be achieved simply by diluting the interests of Mr. Moir, Mr. Williams and Mr. Morrisonn.

- [285] Finally, I also accept that when Mr. McLean offered shares to others, such as Mr. David Moir, Mr. Koop and later Mr. Lobb, his offer was of a percentage interest which implicitly at least created an expectation limiting the right to dilute that percentage interest. David Moir, for example, testified that:
4. On or about September 29, 2009, at Golden Bear's Boulder City camp, Brent Koop and I were promised by Ernie McLean that we would receive 5% each of the shares in the company, to be taken from his shares, for finding the gold. That promise was repeated many times in subsequent meetings in Vancouver, to me personally, and in the presence of other shareholders and Mr. Jung Moon. However, as far as I know, Ernie McLean has never acted on his promise by arranging for the issuance of those shares. Subsequent to this promise, I attended numerous meetings of the shareholders and administrators of Golden Bear Mining Ltd., in reliance on that promise. I believed I was a shareholder and was treated as such. I thought we were working as a team.
- [286] Mr. Williams confirmed in his evidence that Mr. McLean had told him in late 2009 that he had offered a 5% equity position in Golden Bear Mining to Mr. David Moir and Mr. Koop.
- [287] This then was the context in which any discussion with Mr. Moon about the effect of the funding agreement on the shareholding position would have occurred. The plaintiffs plead that when they were deciding to invest they relied on "representations by Mr. McLean that he had committed certain of his shares to other persons, and by implication the fact that Mr. McLean would be a minority (45%) shareholder in the corporation".
- [288] Mr. Moon is not explicit in his evidence in detailing his discussions before entering the funding agreement with Mr. McLean about his commitment of shares to other persons. I take it from the pleadings that he does not allege that Mr. McLean explicitly told him that as a result of the investment he (Mr. McLean) would be a minority shareholder. This was a conclusion he reached by inference from the facts he was told. However, the conclusion that Mr. McLean would be a minority shareholder was material to his decision to invest.
- [289] Mr. Moon said the following on this subject:
13. On December 12, 2009, a meeting of the shareholders of Golden Bear took place to consider my offer. The shareholders who attended the meeting were Ernest McLean, Jonn Morrisonn (on behalf of Shaone Morrisonn), David Moir and Jeff Williams.
14. My offer to Golden Bear and Ernest McLean dated December 12, 2009 was approved during the shareholders meeting ...
15. This offer was explained thoroughly in detail to the shareholders, including Ernest McLean, and there were several clarifying discussions between the shareholders and me[.] Ernest McLean and the other shareholders were given a clear understanding of the [terms] of the offer. The offer involved both Golden Bear and Ernest McLean personally.

[290] Mr. Moon does, however, make reference to what had been discussed in December 2009 leading up to the signing of the funding agreement when he deposed:

21. In early January 2010, I attended Golden Bear's shareholders meeting in Vancouver. Jeff Williams, David Moir, Jonn Morrisonn (on behalf of Shaone Morrisonn) and Ernest McLean also attended the meeting. During the meeting, the paperwork for David Moir's new positions as a director and a signatory of the banking signing authority were discussed. 5% shares of Golden Bear that McLean had promised to each of Jeff Williams, Shaone Morrisonn, Stuart Moir, Brent Koop and David Moir were reconfirmed by Ernest McLean.
22. On February [1], 2010, I had a meeting with Ernest McLean at the Knight & Day restaurant on Boundary Road in Burnaby. I urged Ernest McLean to comply with the [terms] of the Funding Agreement since no paperwork for the SMG's directorship and the banking signatory in Golden Bear had been prepared until then.
23. At the same meeting, I confirmed with Ernest McLean that Shawn McGroarty would not be involved in the management of Golden Bear. I reconfirmed with him who the shareholders were namely: Ernest McLean & his family 45%, Shaone Morrisonn 5%, Jeff Williams 5%, Brent Koop 5%, David Moir 5%, Stuart Moir 5%, Jung Moon 5%, and SMG 25%.
24. The fact that Ernest McLean was a minority shareholder in Golden Bear was very important to my decision to invest. I would have considered the risk of the investment to be considerably higher if he controlled a majority of the shares and would not have invested on the terms that I did if I thought that he held more than 50% of the shares of the company.

[Emphasis added.]

[291] When read in conjunction with the observation about the importance of Mr. McLean being a minority shareholder to the decision to invest, the references to reconfirming the shareholdings of the individuals are references to discussions with Mr. McLean before the funding agreement about the then existing distribution of shareholdings in the company.

[292] David Moir said this about the December 12th meeting at which the proposed investment was discussed:

8. On December 12, 2009 the shareholders of Golden Bear Mining Ltd. - Jeff Williams, Ernie McLean, Jonn Morrisonn (for Shaone Morrisonn) and I - met with Jung Moon at a Vancouver restaurant. At the meeting, Mr. Moon presented a revised proposal for his investment into Golden Bear Mining Ltd. The proposal was discussed at length, shareholdings were discussed, money and budget questions arose. Jung Moon's proposal was accepted completely by Ernie McLean and the other shareholders present at the meeting. ...

[Emphasis added.]

[293] Mr. Williams also provided a little more detail about the December 12th meeting:

24. On December 12, 2009 there was a meeting of the shareholders of Golden Bear Mining Ltd., including Mr. McLean. An offer from Mr. Moon was accepted and the eight hundred thousand dollar equity funding (\$800,000) for a thirty (30%) percent stake in Golden Bear Mining Ltd. was agreed, along with the non-dilution of the minority shareholders and the appointment of Mr. David Moir as Mr. Moon's nominee Director in Golden Bear Mining Ltd. Mr. McLean agreed to provide the thirty (30%) percent of Golden Bear Mining Ltd. shares to Mr. Moon from his share holdings.

[Emphasis added.]

[294] Mr. Stuart Moir also attended the meeting. He said:

34. The shareholders of record of Golden Bear Mining Ltd. at the time were Mr. McLean, Jeff Williams and myself, and we were all in attendance at the meeting. We all accepted the offer and Mr. Moon agreed to immediately pay the \$100,000.00 initial payment. At the meeting, we discussed who the shareholders were and who the directors would be. Mr. McLean confirmed that he had agreed to give a 5% position from his shares to each of Brent Koop and David Moir for their efforts in September and October 2009. Mr. Moon and his company was to receive a 30% position. Mr. McLean confirmed that Jonn Morissonn, Jeff Williams and I each would hold a 5% interest in the company after all the shares were issued. Mr. McLean would remain as director.

[Emphasis added.]

- [295] None of this evidence was challenged in cross-examination. I do not accept that Mr. McLean only ever committed to providing each of the minority individuals with five shares. Moreover, I find as a fact that Mr. McLean did discuss the fact with Mr. Moon and represent to him that he had given or promised a 5% shareholding interest to each of the five individuals discussed and that that interest would not be diluted as a result of Mr. Moon's intended investment. The inference to be drawn from these representations is that Mr. McLean would be a minority shareholder after the investment was made. I accept also Mr. Moon's evidence that it was material to him that Mr. McLean be a minority shareholder and that he would not have entered the funding agreement if that were not the case.

- [296] I have no doubt that Mr. McLean understood the position clearly. It was important to all concerned. This conclusion is reinforced by the events of a follow up meeting in January 2010 to discuss the implementation of the funding agreement. Mr. David Moir had this to say about that meeting:

9. Another meeting of the Golden Bear Mining Ltd. shareholders took place at the same restaurant in early January 2010. In attendance was Ernie McLean, Jonn Morrisonn (who holds shares in trust for his son, Shaone Morrisonn), Jeff Williams, Jung Moon, and I. Brent Koop and Stuart Moir did not attend this meeting.

10. At that meeting, the written agreement of Jung Moon was again fully explained in detail to Ernie McLean. He said that he understood each and every point, including the effect to him personally of each point.
11. Also at that meeting, the shareholders made certain decisions. We decided to keep the business of Golden Bear Mining Ltd. in house, decided on how to issue shares to Jung Moon and [confirmed] who would be the nominee director for Jung Moon and SMG Canada Gold Corp. It was stated and agreed by those present that I was to be made a director, and I was to be the accountant and work for the company, as Mr. McLean needs help in many areas. We agreed that, to give effect to the new shareholdings, there would be no proportional dilution of shares for Shaone Morrisonn, Jeff Williams, Stuart Moir, Brent or myself. Ernie McLean would transfer 30% of his Golden Bear Mining Ltd. shares to Mr. Jung Moon, who would invest \$800,000, as per their agreement. The share capital and shares outstanding were not to be changed. It was again reaffirmed at that meeting that Mr. McGroarty was not part of any aspect of the company. Ernie McLean expressed complete agreement with these matters and everyone else at the meeting agreed as well.

...

13. I remember, after the meeting, hearing Ernie McLean saying, under his breath, "I am going to lose control". It was barely audible. I believe I was the only one who heard this comment. I told Ernie McLean we are a team, we are good people.

[297] Mr. Williams confirms the evidence of David Moir in its essentials:

26. In early January 2010, another shareholders meeting for Golden Bear Mining Ltd. ... was held and it was re-confirmed at this time that David Moir would be the nominee Director for Mr. Moon in Golden Bear Mining Ltd. ..., and in charge of the company accounting. Further it was re-confirmed by Mr. McLean that Stuart Moir, David Moir, Jonas Morrisonn, myself and Brent Koop each were to receive their 5% equity interests in Golden Bear Mining Ltd. ...

[298] I conclude that Mr. McLean did make representations to Mr. Moon about commitments made to shareholders that would affect his own relative shareholding if the investment was made. Those representations were, however, true. Importantly, they establish certain critical reasonable expectations relevant to the claim for oppression.

[299] I am satisfied that the evidence supports finding a number of other reasonable expectations about the way the affairs of Golden Bear Mining would be conducted. These expectations arose from the discussions and arrangements between Mr. McLean and the individual stakeholders, such as Mr. Williams, the Moirs, Mr. Morrisonn and Mr. Lobb, as well as the more specific discussions and arrangements entered into with Mr. Moon.

[300] In particular, I find that there was a common understanding that those individuals who had, or had been promised, shares were holders of a 5% shareholding interest and that that interest would not be diluted by the plaintiffs' investment in Golden Bear Mining. I find that the plaintiffs' investment was induced by an understanding and an expectation that Mr.

McLean would not be a controlling majority shareholder after the shares were issued to the plaintiffs. In other words, the expectation was that Mr. McLean's shareholding position would be diluted relative to the others by the investment and that he would be a minority shareholder. I find that the obligation in the funding agreement to appoint a nominee of SMG as a director created and reinforced a reasonable expectation that management and control of Golden Bear Mining would be shared and include a role for the plaintiffs. I find also that Mr. McLean did agree not to involve Mr. McGroarty in the management of Golden Bear Mining and defied the reasonable expectation so created by appointing him its CEO.

- [301] It was, moreover, reasonable for the plaintiffs to expect that the funds they invested would be used in accordance with the terms of the funding agreement. It was also reasonable for them to believe that because all of the claims in the Settea Valley belonged beneficially to the Golden Bear Mining, the company would not fail to assert its right to them in the face of any effort to divert them from the company to another person or entity.
- [302] I am satisfied that the evidence demonstrates, and I so find, that these reasonable expectations were defeated in a manner that supports an oppression claim: see BCE, at para. 89. In reaching this conclusion it is necessary to bear in mind the difference between oppression and wrongs done to the company. In the right circumstances, the same conduct can be both oppressive and a wrong to the company. For example, in *Furry Creek Timber Corp. v. Laad Ventures Ltd.* (1992), 75 B.C.L.R. (2d) 246 (S.C.), the Court considered the difference between a shareholder's oppression claim and a derivative action claim. The Court concluded that a shareholder can bring an oppression claim in respect of the same breach for which a company could also claim "provided the complaining shareholder has been affected by the breach in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally": *Furry Creek*, at para. 16.
- [303] In that case, the respondents had, by indirect means, issued themselves additional shares in the company, thereby increasing the total number of their shares in proportion to the number of the complainant's shares. An application to dismiss the oppression claim was denied because the complainant, if its assertions were true, was the only shareholder injured by the respondents' actions: at para. 16. While the value of all the shares as a whole in the company did not change, the value of each share had been reduced and the total value of the complainant's shares therefore had decreased in relation to the total value of the respondent's shares.
- [304] In this case, it is important to keep in mind the totality of the conduct that supports the view that the affairs of Golden Bear Mining were conducted oppressively. The whole may be greater than the sum of the parts.
- [305] I find that the issuance of the 549 shares to Mr. McLean was oppressive to the plaintiffs. It is relevant that the effect of issuing those shares was to dilute tenfold the individual shareholding interests of the shareholders other than the plaintiffs. Although, the plaintiffs received their 30% of the company, the position of the plaintiffs relative to Mr. McLean was

altered from what was reasonably expected by them. Instead of participating in a company which included Mr. McLean as the largest minority shareholder, they were in a company controlled by him. Mr. McLean had understood that the effect of the plaintiffs' investment was that he would lose control. The plaintiffs expected to have an ownership interest of 30% alongside a group of other independent shareholders who collectively owned some 25% of the company. By participating in issuing 549 shares to himself, Mr. McLean maintained a degree of control over the company's affairs he was not reasonably expected to enjoy.

- [306] I am satisfied that these shares could not have been issued to Mr. McLean without his participation and knowledge. Involving Mr. McGroarty in the transaction by having or permitting him to sign the resolution as a director, when he was not, is troubling. In my view, it evidences an effort by Mr. McLean to keep effective control of Golden Bear Mining by involving Mr. McGroarty in management and control in a way he had agreed not to do. This delegation of responsibility to Mr. McGroarty and Mr. McLean's apparent failure to control Mr. McGroarty's conduct also led to further oppression.
- [307] Courts have recognized that the exercise by directors of the power to issue shares without regard for shareholders' pre-emptive rights, or in a way that reduces a majority shareholder to a minority shareholder or gives a majority shareholder voting control of the company, may be oppressive: see, for example, *Otawara Co. v. Masuda*, [1992] B.C.J. No. 427 (QL) (S.C.); *Starcom International Optics Corp. v. Macdonald*, [1994] B.C.J. No. 548 at paras. 39-40 (QL) (S.C.), *var'd on other grounds* [1994] B.C.J. No. 842 (QL) (S.C.); and *Re Peterson et al. and Kanata Investments Ltd. et al.* (1975), 60 D.L.R. (3d) 527 (B.C.S.C.).
- [308] I have previously concluded that Mr. Moon should be a director and made an order that he be appointed, although that has not occurred. Here it is necessary to say that I find that Mr. McLean's failure to appoint a nominee of SMG as a director is also part of a pattern of oppressive conduct because it maintained Mr. McLean's effective control (and Mr. McGroarty's *de facto* control) of the conduct of the affairs of Golden Bear Mining. It also diminished the opportunity of the plaintiffs to exercise the degree of management and control they reasonably expected and anticipated. I conclude that had the plaintiffs been able to exercise some degree of management and control, it is unlikely that their investment in Golden Bear Mining would have been squandered and their interest as shareholders would not have been damaged to the same degree.
- [309] I find, further, that the misuse of the plaintiffs' investment was oppressive. Certainly, the diversion of funds to the cleanup and the misappropriation of money from Golden Bear Mining were wrongs to the company and had an effect on the interests of all of the shareholders (including Mr. McLean) by affecting the value of their shares. However, in my view, the breaches did affect the complaining shareholders in a manner different from or in addition to the indirect effect on the value of all shareholders' shares generally. (I should say that I do not include here the misappropriation of funds by Mr. McGroarty because I view that simply as a wrong to the company, affecting all shareholder equally, and not,

therefore, as oppressive.)

- [310] The rationale for the plaintiffs becoming shareholders in the first place was to support the mining operation in the Settea Valley. They provided funds for that purpose, but that purpose was defeated by the misuse of their investment. By contrast, Mr. McLean was using the resources to Golden Bear Mining to sort out his personal difficulties with the regulators. Obviously, there is a benefit to the company in resolving those issues, because if left unresolved Golden Bear Mining would not get a permit to mine in the Settea Valley. However, the difficulties were not Golden Bear Mining's, they were Mr. McLean's, and he was using the company as a personal asset to address them.
- [311] Again, courts have recognized that a shareholder using corporate cash and other assets for non-corporate purposes can constitute oppression: see, for example, *Mananquil v. Philippine Chronicle Newspaper Ltd. et al.*, 2001 BCSC 1257 at paras. 33-34, 37; *Mahood v. High Country Holdings et al.*, 2000 BCSC 1755; *Redekop v. Robco Construction Ltd.* (1978), 7 B.C.L.R. 268 (S.C.); *Re Little Billy's Restaurant (1977) Ltd.* (1983), 45 B.C.L.R. 388 at 393 (S.C.); and *Brokx v. Tattoo Technology Inc. and Prpic*, 2004 BCSC 1723.
- [312] Finally, I also conclude that the treatment of the claims staked in the Settea Valley is oppressive conduct. I have found that the beneficial interest in those claims belongs to Golden Bear Mining. I have found that Mr. McLean represented as much to the shareholders of the company, including the plaintiffs. Mr. McLean, in his capacity as a director and officer of Golden Bear Mining, should have asserted or recognized Golden Bear Mining's entitlement to those claims, but he did not. He has taken the position that they belong to him and his wife personally. He repudiates, at least in court, an agreement apparently of spring 2010 transferring all of those claims to Golden Bear Exploration. While this conduct is no doubt a wrong to the company, it is also part of a pattern of oppressive conduct for the same reasons as the misuse of funds is oppressive.
- [313] In result, I find that the affairs of Golden Bear Mining have been conducted in a manner oppressive or unfairly prejudicial to the plaintiffs.
- [314] I turn now to deal with remedies, beginning with the remedies for oppression.

Remedies

Oppression

- [315] Directors and others can be held personally liable for the oppressive or unfairly prejudicial acts of a corporation: *Budd v. Gentra Inc.* (1998), 43 B.L.R. (2d) 27 (Ont. C.A.) at paras. 44, 46. The Ontario Court of Appeal set out the factors to consider in determining whether such a person should be personally liable in *Budd*, at para. 52:
- (1) whether the director or officer gained a personal benefit from causing the corporation to act oppressively or unfairly prejudicially;

- (2) whether the director or officer furthered his or her control of the corporation through the oppression; and
- (3) whether the corporation is closely held, as that director or officer is more likely to have "total control" of the company.

[316] I am satisfied that these factors all support holding Mr. McLean personally liable for the oppressive conduct. That personal liability may duplicate the monetary award to be discussed later, but it also bears on whether it is appropriate for Mr. McLean to continue as a director. In principle, personal liability could also attach to Mr. McGroarty for his participation in the oppression. Here, however, as noted, his misappropriation of funds for his personal use affected all shareholders equally and is exclusively a wrong to the company. I do not consider his conduct to be oppressive. He has not, in fact, benefited otherwise from his participation in the oppressive conduct I have outlined, despite his attempt to do so. I would not attach any personal liability to him arising out of his participation in the oppression.

[317] In devising appropriate remedies it is also necessary to have regard for the obligations of directors where it is their conduct that is found to be oppressive. Section 142 of the BCA represents a codification of the case law, imposing express duties upon company directors and officers:

142 (1) A director or officer of a company, when exercising the powers and performing the functions of a director or officer of the company, as the case may be, must

- (a) act honestly and in good faith with a view to the best interests of the company,
 - (b) exercise the care, diligence and skill that a reasonably prudent individual would exercise in comparable circumstances,
 - (c) act in accordance with this Act and the regulations, and
 - (d) subject to paragraphs (a) to (c), act in accordance with the memorandum and articles of the company.
- (2) This section is in addition to, and not in derogation of, any enactment or rule of law or equity relating to the duties or liabilities of directors and officers of a company.
- (3) No provision in a contract, the memorandum or the articles relieves a director or officer from
- (a) the duty to act in accordance with this Act and the regulations, or
 - (b) liability that by virtue of any enactment or rule of law or equity would otherwise attach to that director or officer in respect of any negligence, default, breach of duty or breach of trust of which the director or officer may be guilty in relation to the company.

[Emphasis added.]

- [318] Section 227(3)(e) of the BCA gives the Court the explicit authority to remove and appoint directors. The plaintiffs seek the removal of Mr. McLean as a director of Golden Bear Mining. I agree that in the circumstances such an order must be made.
- [319] The removal of a director of a corporation is a rarely exercised, exceptional remedy. More is required than directors "running afoul of their obligations, more than anticipated misconduct, or more than an apprehension of bias": *Walker et al v. Betts et al*, 2006 BCSC 1096 at para. 23. In cases where oppression is found, however, removal of a director may be appropriate to "alleviate the oppression": at para. 23.
- [320] Courts have ordered removal of the directors as oppression remedy relief where corporate funds have been appropriated for personal benefit in cases such as *Walker*; *Brokx*; and *Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2004), 50 B.L.R. (3d) 250 (Ont. Sup. Ct. J.), *aff'd* (2006), 15 B.L.R. (4th) 171(C.A.).
- [321] Mr. McLean has admitted that he does not have the interest or ability to lead a company. He has demonstrated his incapacity to administer the affairs of Golden Bear Mining. He needed the assistance of colleagues to try and put in place a management and administrative structure to assist him as early as 2008. He has described himself as President in name only. His skill set does not seem well suited to being a director or a key officer of a company.
- [322] Moreover, I find that Mr. McLean did not make a wise choice in involving Mr. McGroarty in the company. He ought to have made inquiries of Mr. McGroarty's background that would have revealed circumstances that should have led him to pause before hiring him. He did not do so. He ought to have respected the views of his colleagues that Mr. McGroarty should not be involved with the company. He did not do so.
- [323] The following factors illustrate Mr. McLean's inability to act in the interests of Golden Bear Mining:
- (1) his previous securities suspension in 1998;
 - (2) his historical and unabated environmental misconduct;
 - (3) his insistence on having and maintaining Mr. McGroarty as his CEO;
 - (4) his disavowing of the responsibilities of President and sole director of the corporation;
 - (5) his refusal to appoint Mr. Moon as a director according to his obligation and commitment to do so;
 - (6) his inability to explain his own use of, and Mr. McGroarty's entitlement to, company funds;
 - (7) his converting of Golden Bear Mining's assets, including his failure to protect its interest in all but one of the mining claims; and
 - (8) his mismanagement of Golden Bear Mining's only financial asset, the plaintiffs' investment.

- [324] I have no doubt that Golden Bear Mining has no future with Mr. McLean in charge. His involvement with the company remains an impediment to securing regulatory approval to mine in the Settea Valley. It is doubtful that the company could raise any money to conduct any business if he is involved with it. It is doubtful that there is any prospect of Mr. McLean being able to work with the other stakeholders in the company in the future.
- [325] There is another factor that is, in my view, relevant to whether Mr. McLean should be permitted to continue as a director. In fall 2010, Mr. McLean attempted to rely on the right of first refusal to sell his shares to Mr. Moon for \$10.5 million. Mr. McLean, with Mr. McGroarty's participation, represented that a group of investors were willing to buy his shares for \$10.5 million and he demanded that Mr. Moon decide whether to exercise the right of first refusal under the funding agreement.
- [326] I do not intend to examine these events in any detail, except to say that the evidence is overwhelming that this was an attempted fraud. I am satisfied there were no investors willing to pay \$10.5 million for Mr. McLean's shares. Mr. McLean admitted that fact. He said, in effect, it was a ruse to flush out Mr. Moon and find out where he was coming from. Remarkably, Mr. McGroarty took a different approach. He suggested either that there were investors, or he had good faith reasons to believe that there were potential investors. He admitted they were not Chinese investors who Mr. McLean and Mr. McGroarty claimed were making inquiries through a restaurant owner in Dease Lake, but Russian investors who were prepared to buy the shares. Once again, documents were supposed to have been created, but no longer exist.
- [327] I appreciate that in engaging in this admitted fraud, Mr. McLean was acting in his capacity as a shareholder and not as a director or officer of Golden Bear Mining, and strictly speaking this is not a matter of oppression. It is, however, revealing of the way Mr. McLean is willing to conduct business and does, therefore, bear on whether it is realistic to think that he could remain a director of Golden Bear Mining.
- [328] In the circumstances, I think there is no alternative but to order that Mr. McLean be removed as a director and an officer of Golden Bear Mining.
- [329] I turn to the question of Mr. McLean's shareholding in Golden Bear Mining. I include in his shareholding any shares of family members held in trust.
- [330] There are difficulties in approaching this question. Although I had doubts on the matter, I have been persuaded that the additional 549 shares issued to Mr. McLean were validly issued even though the effect of doing so was oppressive in defeating the reasonable expectations of other shareholders about the relative shareholdings of the various interested parties. Assuming that each of Mr. Williams, Mr. Morrisonn, Mr. Stuart Moir, Mr. David Moir, Mr. Koop and Mr. Lobb each have a 5% interest in the company and the plaintiffs have 30%, then Mr. McLean's interest ought to be 40%, even though on the register he is shown as having a 60% interest.

- [331] I intend to approach the issue of a remedy affecting Mr. McLean's shares on the basis that his shareholding should represent 40% of the company.
- [332] The plaintiffs had sought an order when they brought a petition for an oppression remedy compelling the sale of the 549 shares to them under the right of first refusal for the price of \$5.49. I did not make that order then, instead referring this matter to the trial list. I would not make that order now, after trial, having concluded that, although oppressive, the share issuance did not trigger the right of first refusal.
- [333] Nonetheless, I have concluded that Mr. McLean cannot remain involved in an ownership position with Golden Bear Mining anymore than he can remain in its management. It must not be forgotten, however, that Mr. McLean does currently have a legitimate ownership position that must be acknowledged. He started the company. Other individuals became involved in Golden Bear Mining at his invitation and to compensate them for what they offered the company. It was Mr. McLean who unearthed the geological reports that suggested that the Settea Valley may be worth exploration and without his skill and expertise Golden Bear Mining would not have acquired the claims. Golden Bear Mining also has assets in the form of equipment. There is some prospect that the claims and other assets of Golden Bear Mining have some real value and that, therefore, the shares of the company may have value, even allowing for the effect on their value of any judgment against the company.
- [334] In my view, an appropriate order would require the plaintiffs to buy Mr. McLeans' shares at a fair market value. I do not know how that interest should be valued or what the mechanisms for the sale should involve. I invite submissions on the form of order that would accomplish this objective.
- [335] Finally, I invite submissions on the form of order necessary to have Mr. Moon appointed a director of Golden Bear Mining. No doubt this will involve some kind of direction to move the records of the company to a law firm able and willing to accept instructions to appoint Mr. Moon a director.

Damages

- [336] The Supreme Court of Canada made it clear in BG Checo that pre-contractual representations by an arm's length party in a commercial negotiation may be actionable as both a breach of contract and misrepresentation, unless there are clear exceptions arising from express terms of the contract, such as an express clause in the contract waiving the right to sue in tort: at 26. There are no express terms here and the plaintiffs have available to them remedies sounding in tort and contract.

[337] It is well known law that damages in civil actions are intended to put the wronged party in the same position he or she would have been, to the extent that money can do so, had the wrong not occurred: *Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co.* (1988), 30 B.C.L.R. (2d) 273 (C.A.) at 305. In the case of damages for misrepresentation inducing contracts, the plaintiff can recover by the "contract" measure or the "tort" measure: at 304-305.

[338] In discussing the tort measures of damages, the Court in *Rainbow Industrial Caterers Ltd.* cites Professor D.W. McLauchlan from his article "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6:3 *Otago Law Review* 370: *Rainbow Industrial*, at 305. At 374 of his article, Professor McLauchlan states:

The object of tort damages ... is restitution in integrum, because "the plaintiff is not complaining of failure to implement a promise but of failure to leave him alone". The plaintiff is entitled to be put in the position in which he would have been if the tort had not been committed and, in the case of a tortious misrepresentation inducing a contract, this is usually taken to be the position he would have been in if the contract had not been entered into. Generally speaking, therefore, the plaintiff recovers the difference between the value of what he received and amount he has outlaid -- his positive losses. In tort, the relevant question is "what loss flows from the entry into the contract induced by the misrepresentation?"...

[339] I accept that the plaintiffs would not have made their investment if they had known the truth. As a result of the misrepresentations they have lost their entire investment. On the face of it they are entitled to the return of their investment. There is, however, a potential difficulty with that remedy. In return for the investment, they received shares in *Golden Bear Mining*. Unless the plaintiffs were willing to return the shares to the company and accept a judgment representing the return of their investment, a judgment that did not recognize the potential value of their shares risks overcompensating them. If the plaintiffs intend to retain their shares, any judgment must be adjusted to reflect the value of their shares, if any. I assume that each share held by the plaintiff would carry the same value as each share held by Mr. McLean.

[340] Although in principle the tort measure of damages may include consequential losses beyond the lost value of the investment, I have no evidence of any such losses here.

[341] Damages for breach of contract should as much as possible be calculated in such a way as to put the injured party in the same position as he or she would have been had the contract been performed, subject to the principle that damages are limited to those losses which would have been in the reasonable contemplation of the contracting parties at the time of contracting. At 374 of his article, Professor McLauchlan states the contract measure of damages in this way:

Applied to actions for breach of contract, where "the wrong consists not in the making but in the breaking of the contract", the general rule becomes - the plaintiff is entitled to be put in the position he would have been in if the contract had been performed. He is to be compensated for

the loss of his bargain, his lost expectation. In the case of a misrepresentation which is held to constitute a breach of contract, prima facie the measure of damages is the difference between the value of what the representee received and what he would have received if the representation had been true.

[342] Here, if the contract had been performed, at least \$650,000 would have been spent on mining Settea Valley, although to what effect is unknown. The obvious measure of damages is the amount of money not spent on mining in Settea or Highland. It is, however, impossible to quantify that sum with any precision. At least \$400,000 was spent at Atlin on the cleanup and not for purposes directly referable to collecting equipment located there to bring to Settea. Some equipment was bought that could have been used in Settea, even if in the meantime it was used for the Atlin cleanup.

[343] I have decided to defer awarding contract damages to give the plaintiffs the opportunity to consider whether they wish to request such an award in light of the tort award I have already made which, in all likelihood, exceeds a contract award. It may prove to be necessary to make a reference to the registrar to quantify damages. I am prepared to receive additional submissions on these matters.

[344] The plaintiffs seek an award of punitive damages. Punitive damages may be awarded only where there has been conduct on the part of a defendant that is so outrageous as to deserve condemnation beyond his liability for compensatory damages, in order to achieve the objectives of retribution, deterrence and denunciation - objectives normally the preserve of the criminal law. Punitive damages are awarded for the commission of wrongful acts that were outrageous or reprehensible, and which offend the ordinary standards of decent conduct in the community. Any award of punitive damages must serve a rational purpose: see, *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36 - 77, 100.

[345] According to the Supreme Court of Canada in *Whiten*, at para. 94, the principles in considering an award of punitive damages are as follows:

94 ... (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which

to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

- [346] I am satisfied that an award of punitive damages is justified against Mr. McLean. I do not think that Mr. McLean set out with the subjective intention to mislead or cheat the plaintiffs or his other shareholders. I reject the plaintiffs' theory that the series of events described in this judgment represented the implementation of a scheme orchestrated from the outset with Mr. McGroarty to benefit himself at the expense of the plaintiffs. To the contrary, I think Mr. McLean did want to get into the Settea Valley and mine there, at least on claim 672403. He knew the plaintiffs were the best and most likely source of funds to help him do that. Both he and the plaintiffs stood to benefit if the venture would prove to be a success.
- [347] But things went wrong. Mr. McLean must have come to regret the bargain he had made. His problems in Atlin were substantial, as he was reckless in not recognising. Likely, he concluded that he had given up too much for the money he got. He had given up control of the company, but he did not have the money to begin mining in the Settea Valley. At some stage, perhaps early on, Mr. McLean began to look for ways to escape the implications of the deal he struck.
- [348] Whatever the motive, Mr. McLean did begin to act in ways I consider high-handed. He tried to frustrate sharing control of the company by refusing to make a nominee of SMG a director, unless the terms of the appointment limited the effective authority of the director. Later he failed to abide by a court order appointing Mr. Moon a director. He did decide either to strip Golden Bear Mining of its claims or refuse to acknowledge the company's claim to them. He did participate in a share restructuring, together with Mr. McGroarty whom he knew not to be a director, which gave him majority control he had agreed to give up in the context of the funding agreement and his commitment to the other shareholders. He did not disclose to anyone what he done. Finally, he participated in a fraudulent attempt to induce Mr. Moon to pay \$10.5 million for his shares. In my view, although he did not set out to do so, Mr. McLean did act in highly reprehensible ways that arbitrarily disregarded the interests of those with whom he was associated.
- [349] I find that an award of punitive damages is warranted. I was not provided with authorities giving guidance on an appropriate award. I invite submissions to assist me on this issue in light of the findings of fact I have made.
- [350] For reasons to which I will refer, any consideration of an award of punitive damages against Mr. McGroarty should be deferred.

- [351] Several times I have referred to the fact that Golden Bear Mining is not a plaintiff, but is a defendant. There is no derivative action. I appreciate that when the plaintiffs applied by petition for relief from oppression one order they sought was that Mr. Moon may direct Golden Bear Mining to initiate a civil claim against Mr. McLean and Mr. McGroarty if he considered it in the best interests of the corporation to do so. That order was not granted because the entire matter of oppression, except the appointment of Mr. Moon, was referred to the trial list. No other attempt to bring a derivative action in the orthodox way was made.
- [352] Although it is probably now unnecessary, I make an order that Mr. Moon may, in his capacity, bring an action on behalf of Golden Bear Mining against either Mr. McLean or Mr. McGroarty or both in respect of any wrongs to the company.
- [353] I have concluded that Mr. McGroarty's misappropriation of funds is a wrong to the company and does not ground relief in these proceedings. Although he participated in the oppressive conduct, I have declined to make him personally liable for any misuse of the investment funds in breach of the funding agreement principally because he did not benefit personally from that oppressive conduct. Other aspect of the oppression did not in fact lead to pecuniary benefit to him.
- [354] Since, no money judgment goes against Mr. McGroarty in these proceedings, it is premature to award punitive damages against him.

Conclusion

- [355] The plaintiffs are entitled to the following orders canvassing the matters as described in more detail above:
- (1) judgment for negligent and fraudulent misrepresentation against Mr. McLean and Golden Bear Mining;
 - (2) damages for negligent and fraudulent misrepresentation to be calculated as set out above;
 - (3) judgment for breach of contract against both Mr. McLean and Golden Bear Mining for breach of the funding agreement;
 - (4) damages for breach of contract, if requested, to be assessed or referred to the registrar;
 - (5) a declaration that the affairs of Golden Bear Mining have been conducted in a manner oppressive to the plaintiffs;
 - (6) consequential orders:
 - i. transferring the books and records of Golden Bear Mining to solicitors able to give effect to the necessary orders arising from these proceedings;
 - ii. confirming Mr. Moon's appointment as a director of Golden Bear Mining;
 - iii. removing Mr. McLean as a director;

iv. cancelling the existing share structure and issuing shares representing 40% to Mr. McLean, 30% to the plaintiffs, and 5% each to Stuart Moir, David Moir, Shoane Morrisson, Jeff Williams, Brent Koop and Norman Lobb;

v. requiring the plaintiffs to buy Mr. McLean's shares at fair market value;

vi. declaring that all mining claims in the Settea Valley are beneficially owned by Golden Bear Mining and transferring legal and beneficial title to those claims to Golden Bear Mining; and

(7) Awarding punitive damages against Mr. McLean in an amount to be assessed.

[356] Other claims advanced against the defendants are dismissed as set out in this judgment. I have concluded that the proper plaintiff in respect of certain claims against Mr. McGroarty is Golden Bear Mining which is not a plaintiff in these proceedings. No order will go against Mr. McGroarty personally in these proceedings in respect of those matters.

[357] I understand that the form of order necessary to give effect to this judgment will likely need to be spoken to. There will, no doubt, be many technical requirements to be considered.

[358] The effect of these orders will be binding on Mrs. McLean and Golden Bear Exploration Inc. to the extent necessary to give effect to this judgment. No evidence was led against Mrs. McLean that would make her personally liable for any money judgment. Golden Bear Exploration Inc. appears to be a defendant because it received the mineral claims under the spring 2010 mining agreement. It is bound by this judgment.

[359] Counsel may make submissions on costs.

Postscript

[360] The defendants sought at the outset to adjourn the trial. I dismissed that application. They then applied that I recuse myself on the grounds of actual or a reasonable apprehension of bias. The application was grounded on the suggestion that I had already made up my mind on a number of factual matters in issue in this trial. The evidence for that was some comments I made in previous reasons in which I dismissed the plaintiffs petition for relief from oppression and referred this matter to the trial list.

[361] I gave very brief reasons dismissing the application. It is unnecessary to refer to the law on such a matter, but, in summary, I dismissed the application on the ground that I had not made up my mind about any facts in issue in the trial and that I had an open mind about what the evidence at trial would disclose. I refer to this matter here to acknowledge, as I think I should, that both Mr. McGroarty and Mr. McLean expressed their concern about my presiding at the trial of this matter.

"Harris J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/12/08/2012BCSC0829.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/moon-v-golden-bear-mining-ltd-2012>

Prepared on 28 October 2026 · Esheria