

CANADA / JUDGMENT

Nouhi v. Pourtaghi

2022 BCSC 807

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 807 Nouhi v. Pourtaghi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nouhi v. Pourtaghi,

2022 BCSC 807

Date: 20220516

Docket: S184410

Registry: Vancouver

Between:

Massimo Aki Nouhi

Plaintiff

And

Nahid Pourtaghi, Naki Enterprises Inc.

Defendants

And

Massimo Aki Nouhi

Defendant by Way of Counterclaim

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for Plaintiff/Defendant by Counterclaim:

C. Ramsay

A. Colpitts

Counsel for Defendants:

D. Lysak

V. Mensink

Place and Dates of Trial:

Vancouver, B.C.

October 4-8, 12-15,

18-22, 25-28 and

November 2-3, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 16, 2022

Introduction

- [1] Massimo Nouhi, (the "plaintiff") is a Swiss/Italian businessman of Persian origin who, for many years, has operated an international business or businesses primarily involving real estate investment and development. He is a long-term resident of Milan, Italy, although his corporate holdings conduct businesses worldwide. His corporate headquarters are in Switzerland. It is safe to say he is an extremely successful and wealthy businessman.
- [2] The defendant and plaintiff by counterclaim, Nahid Pourtaghi, (the defendant") is the plaintiff's maternal niece. She emigrated from Iran to Canada in or about 2000 with her then husband and two children. She trained as a dentist and both practiced and taught dentistry in Tehran prior to her emigration.
- [3] Naki Enterprises Inc ("Naki") is a British Columbia company now owned by the defendant. It is a holding whose primary asset is residential property on Paladin Terrace in Port Coquitlam ("Paladin"). Throughout the course of the dealings between the parties, the defendant and her two children resided in it at various times. Prior to 2012, Naki was an investment vehicle owned by both the plaintiff and defendant that owned multiple residential rental properties. The defendant oversaw the management of them prior to sale.
- [4] AKNO is the brand name under which the plaintiff's North American commercial ventures operated in Ontario, Michigan and Missouri. Individual AKNO companies owned real estate in each of those three areas. AKNO's shares are all owned indirectly through a holding company solely owned by the plaintiff. For ease of reference, I will refer to AKNO

Enterprises Ltd., the Canadian arm of the business, as AKNO Canada, and the various Michigan companies, AKNO Enterprises Michigan Limited LLC, AKNO Enterprises Michigan Book Tower LLC and AKNO Enterprises Michigan Muskegon LLC, collectively as AKNO Michigan. Individual reference to those three entities makes no difference to the result.

- [5] The defendant currently resides at Paladin. For a time, the plaintiff owned an expensive residence in West Vancouver at 1622 Langston Place ("Langston"). It was purchased in 2006 and sold in 2017. The defendant and her children resided there for a number of years; the defendant says to manage and maintain the property; the plaintiff says she more or less moved in uninvited and lived rent-free. The plaintiff resided at Langston when he visited Vancouver.
- [6] The plaintiff's claims against both defendants were discontinued at the commencement of the trial upon application by the plaintiff. That application was unopposed provided leave was granted to the defendant to address the matter of costs at the conclusion of the trial by which I mean delivery of these reasons for judgment. The defendant argued the costs should be special costs given the allegations of fraud and dishonest behaviour levied by the plaintiff against the defendant personally and the wrongful placement of certificates of pending litigation ("CPLs") against properties owed by both defendants.
- [7] The plaintiff's claim against the two defendants, in abbreviated form, alleged Dr. Pourtaghi and Naki were in breach of various commercial arrangements entered into between the plaintiff and the defendant relating to the acquisition of real property within Canada. As well, the notice of civil claim ("NOCC") alleged the defendant misappropriated the plaintiff's funds and wrongly used them for her own purposes.
- [8] Only the defendants' counterclaim proceeded. In it, the personal defendant alleges an agreement was reached between her and the plaintiff which her counsel characterized as follows:
- [A]n agreement [] as to how Dr. Pourtaghi would be compensated for her efforts identifying suitable properties to acquire and overseeing their operation and eventual sale. Mr. Nouhi promised that if the properties that they would acquire were sold at a profit, after he received back 10% on the funds he invested any remaining after-tax profits would be split 50-50.
- [9] In the alternative, absent a contract, the personal defendant alleges her efforts resulted in the plaintiff being unjustly enriched and she seeks compensation based on quantum meruit.
- [10] The plaintiff denies any such agreement and says any enrichment enjoyed was to the benefit of one or more of the AKNO companies and that the defendant was compensated for all of work via the terms of her employment with AKNO Canada.

- [11] The central focus of the counterclaim is a trio of properties located in Detroit, Michigan, a property in Muskegon, Michigan and another in St. Louis, Missouri. The first two Detroit properties, adjacent lots on Washington Avenue (collectively the "Book Tower"), were purchased in 2008; the third, an adjacent lot serving as a community centre, was purchased in 2011. All three were sold in 2015 at a substantial profit. The Muskegon property was sold at a loss.
- [12] The Detroit properties were owned by AKNO Enterprises Michigan Book Tower LLC, a wholly owned subsidiary of AKNO Enterprises Michigan Limited, LLC. The essence of the defendant's claim is that the profit-sharing agreement entitles her to one half the profit after the plaintiff recovered his original capital investment, plus a 10% return on his investment, deduction of the operational costs incurred to maintain the properties and taxes paid upon sale. The amount claimed exceeds \$6,000,000 USD.
- [13] Subsequent to the sale of the Michigan holdings, AKNO Michigan acquired a further property at 1010 Market Street, St. Louis, Missouri ("Market Street"). That property was assigned to another AKNO company, AKNO 1010 Market Street St Louis Missouri LLC ("AKNO 1010 Market Street").
- [14] The defendant claims she located the latter investment opportunity for AKNO and managed the property from its acquisition in 2016 until she left the employ of the AKNO group in late October or November of 2017. The property remains unsold.
- [15] Finally, as part of his original claim, the plaintiff placed CPLs upon four pieces of real property owned by Naki or the defendant. Since 2012, following a gratuitous transfer of 83% of the shares to her by the plaintiff, the defendant has owned all the shares in Naki.
- [16] Both defendants claim damages for slander of title. In the original NOCC, the plaintiff alleged the defendant held Naki's share in trust for him and placed CPLs against Naki's property: Paladin, and on two properties in the name of the personal defendant; Mainland and 1908-660 Nootka Way, Port Moody. Another property, a condominium on Mainland has been sold.
- [17] Ultimately, the CPLs were ordered removed upon application by the defendants. The defendants claim damages for slander of title and/or abuse of process alleging the placement of the CPLs was tactical to restrict the defendants' access to legal representation.

Background

- [18] Dr. Pourtaghi is 58 years old. She trained and qualified in Iran as a periodontist but currently works as a sessional dentistry instructor at the University of British Columbia. She has a sister, Nadia, who also became closely involved with the plaintiff both personally and in business dealings. Nadia resided in Europe for many years but has, since the commencement of this litigation, returned to Vancouver.

- [19] The defendant is a businessman living in Italy, although apparently a Swiss citizen. Indirectly, through a holding company; SSP, he is the sole owner of the shares in the AKNO group of companies that owned the properties underlying the counterclaim. The plaintiff owns all issued shares in SSP.
- [20] Dr. Pourtaghi immigrated to Canada in 2000 with her husband and two children. Shortly after the family's arrival, her husband returned to Iran and she was left in difficult financial circumstances. She was unable to practice dentistry because her credentials were not recognized in B.C. As a result, she took a number of other low paying jobs unrelated to her professional training.
- [21] It seems common ground that after Dr. Pourtaghi's husband left to return to Iran, she became closer to her uncle, the plaintiff and, from that closer relationship, a business relationship emerged.
- [22] The defendant attributes the strengthening of the relationship to her uncle's divorce and his subsequent estrangement from his children. Nadia Pourtaghi ("Nadia"), the defendant's sister, similarly also became closely associated with her uncle at or near the same time.
- [23] The plaintiff denies the estrangement from his children but not that he became closely connected to both his nieces. The defendant and him became increasingly intertwined both personally and in through business endeavours after her husband left Canada. Nadia, similarly, became close to her uncle and worked for him both in Vancouver and Europe. Nadia testified she became one of her uncle's personal assistants and lived and worked for him in Italy while her sister, Nahid, worked for him in North America. The plaintiff denied Nadia was ever his assistant or that she lived with him in Milan.
- [24] The business relationship between the plaintiff and defendant evolved following a visit by her to her uncle's Milan residence in 2001. According to the defendant, the plaintiff encouraged her to put aside her other pursuits and assist him with business ventures in Canada. Previously, the plaintiff operated a fashion business selling designer clothing in Europe and he maintained a large inventory of unsold clothing that he wanted to offer for sale through a retail store in Vancouver.
- [25] He enlisted the defendant and Nadia to establish a retail operation, Stile Moda, which attempted, over the next two or three years, to profitably operate a high-end fashion retail outlet in Vancouver.
- [26] The business floundered, in part, because of the outdated inventory that was supplied from Italy. Regardless of the reasons, the store closed in or about 2004 resulting in the next business interaction between the plaintiff and defendant; the formation of Naki. Upon the closing of Stile Moda, Nadia left Vancouver and went to Italy where she, according to her testimony, continued to have business dealings with her uncle, the plaintiff.

- [27] Once Stile Moda closed its doors, the defendant stored the excess inventory either at her parents' place or her own modest rental accommodation. According to the defendant, her uncle saw the state in which she was living on a trip to Vancouver and volunteered to assist her financially by purchasing a home for her and her two children.
- [28] The original concept of buying her a home changed to an idea embark upon the acquisition of other residential properties that the defendant would locate for purchase and then oversee their management once acquired.

The Evolution of Naki Enterprises Inc.

- [29] On instructions from the plaintiff, the defendant engaged a Vancouver law firm to incorporate Naki in 2004. The first acquisition, a residential property on Paladin, was purchased in Naki's name. The plaintiff made the initial down payment on Paladin and the defendant and her family commenced residing in it. A suite on the property paid for or subsidized the mortgage.
- [30] Naki was to be owned 83% by the plaintiff and 17% by the defendant. The plaintiff was to supply all of the capital; the defendant to invest "sweat equity". Upon the death of her father, the defendant used \$23,000 of her separate funds to make a down payment on a suite at 977 Mainland Street, Vancouver ("Mainland") for her own investment purposes. Title of Mainland was put into Naki's name.
- [31] Naki acquired other residential homes for rental in the year(s) following. The defendant managed the properties; five others in total, until their eventual sale. In 2012 all but the two properties in Naki's name, Paladin and Mainland, were sold. The equity in Naki's other properties was distributed to the plaintiff or his nominee. Thereafter the plaintiff transferred his shares to the defendant. The timing accorded with the defendant's divorce from her husband putting her assets, she surmised, beyond her former husband's reach.
- [32] The defendant lived with her family in the Paladin home after its acquisition until approximately 2009 when she moved into the West Vancouver home the plaintiff purchased through a numbered company for his use when in Vancouver. Naki paid the defendant a salary from 2005 through 2008.
- [33] Although nothing was ever reduced to writing, both parties agree that Naki shares were to be distributed 83% to the plaintiff and 17% to the defendant despite her lack of a capital contribution. Dr. Pourtaghi says that notwithstanding the uneven ownership of shares, the plaintiff promised her two properties, Paladin and Mainland, would be hers regardless of share ownership. Despite the original pleadings in the NOCC and the assertion that the defendant was to acquire her beneficial interest in her shares only upon her payment of her proportionate share of capital, the plaintiff did not dispute the defendant's testimony that she was to retain the Paladin residence and Mainland condo regardless of Naki's ownership.

- [34] In late 2004 or early 2005, the defendant introduced the plaintiff to a senior Italian speaking lawyer at the same firm that incorporated Naki. The lawyer, Mr. Boscariol, then incorporated a number of B.C. companies, AKNO 1; 2; 3; 4; and 5 to further the plaintiff's business aspirations of further real estate investment and/or development in B.C.
- [35] Apart from the residential properties acquired within Naki, the parties, in concert, continued the business venture of acquiring properties within the Lower Mainland area. AKNO 1 Enterprises acquired a development property in Pitt Meadows in 2006. Dr. Pourtaghi testified that she discovered the property, recognized its potential for development, and took an active role towards its planned development without compensation. Eventually, the property was sold before development. The defendant says there was a profit on the sale but that she was paid nothing for her efforts beyond the salary she received from Naki.
- [36] By 2012, Naki's "other residential properties" were sold leaving only Paladin and Mainland under its ownership. The defendant testified that, as originally promised, the entirety of the outstanding shares were transferred to her without further consideration. The ownership of Naki's shares only became an issue when raised by the plaintiff in his NOCC.
- [37] From 2012 to present, the defendant has been the sole owner and director of Naki. The plaintiff, in his evidence, spoke variously of giving the original 17% holding in Naki to the defendant or her having to pay her share of the capital before she beneficially owned the original allotment but he never disputed her evidence surrounding the transfer of his shares in Naki in 2012 or her assertion that it was mutually understood that the defendant would own both Paladin and Mainland regardless of Naki having legal title. Nor did he deny having received, directly or indirectly, the sale proceeds of Naki's other properties.
- [38] The defendant testified that at or around the time the plaintiff transferred his 83 shares into her name and resigned as an officer of Naki, he remarked, to the effect, "this is for all you have done for me", referring, I infer, to not only the work she had done for Naki, for which she was paid, but, as well, the defendant's other efforts on his behalf which I shall come to in more detail.

The Agreement

- [39] The defendant referred to a "Gain and Profit-Sharing Agreement" ("agreement"), described in her original counterclaim as "initially commenced in June of 2008 and continued until September of 2017 at which time it became apparent to Pourtaghi that a pattern of Nouhi continuously and repeatedly breaching the promises and the terms of the Gain and Profit-Sharing Agreement, established that he had no intention of honouring the agreement".

[40] The agreement was, according to the defendant, spoken of many times between her and the plaintiff but never reduced to writing. Nor, she conceded, was it ever referred to in any of the voluminous email exchange between the defendant and the plaintiff's various legal and/or financial representatives. Most of the direct communication between the plaintiff and defendant is mutually acknowledged to have occurred by telephone or in person when the plaintiff was in North America.

[41] In responding to her counsel's inquiry as to the origins and terms of the agreement, the defendant said initially:

Mr. Nouhi always promise me that that I am doing for---separate from Naki in AKNO is going to be compensated to me later on when we get the gain and profit in the properties, and that's keep me encouraged me to do more job in the time with him and me started.

[42] She elaborated on that response, when asked by counsel, stating the following:

Yes, well actually, the way he design it and planned and told me was that he invest the money and then at the end of the project is done or sold we get the gain or profit, then he is going to take out the money that he put it in front for the whole project plus the 10 percent of the interest in his money and then after paying all the taxes and expenses regarding the transaction, then whatever that is going to be gained in that transaction we are going to divide it by half.

[43] Although she testified the agreement was spoken of many times following the first discussion, she did not suggest the terms, as relayed above, ever changed or were elaborated upon from her statement above. Simply put, those words constitute the whole of the agreement according to the defendant's counsel.

[44] The plaintiff denies any agreement for profit sharing between him and the defendant was ever reached. Further, he denies he ever promised an incentive if any of the AKNO ventures sold at a profit.

[45] In cross-examination, the defendant provided no time line or specifics beyond that described above as to when the agreement first arose in discussion, the setting or context for the discussion or the precise words spoken.

[46] The plaintiff, for his part, acknowledged in his testimony that salaries were often not paid to family from enterprises that were not experiencing positive cash flow.

[47] According to her pleadings, the defendant says the agreement "initially commenced in June 2008", continuing on until the conclusion of her involvement with the AKNO Group in 2017.

[48] Her evidence during her examination by plaintiff's counsel was less certain as to the commencement of the agreement; she agreed it could have been as early as 2006.

- [49] Dr. Pourtaghi testified that the agreement was discussed many times but conceded that in the thousands of electronic transmissions, emails, between herself and the defendant's representatives (the defendant seldom read his own email so dealings were mainly through his executive assistants), the gain and profit-sharing agreement was never referenced.
- [50] Even after the alleged breach following the profitable sale of the three Michigan properties in 2015, there was no written communication between the defendant and the plaintiff (or his representatives) making demand for the defendant's entitlement to a share of profits or a request to provide the necessary documentation to determine the amount of profit as per the agreement.
- [51] Nonetheless, the defendant testified it was discussed frequently between her and her uncle and that there was never any doubt that she was entitled to 50% of the profit, as described above, upon sale of a property acquired by AKNO through her efforts. There was no requirement that she provide capital funding. Funding was the obligation of the plaintiff or his companies. She referenced no additional terms beyond those mentioned above. Nor did she mention how losses in one venture might impact profit in another venture. Both a property at 880 Ouellette Street, Windsor ("Ouellette") and a property in Muskegon, Michigan sold at a loss before the defendant's departure from AKNO. A 14-story building in Windsor, Ontario ("Canada Building") sold in 2019.
- [52] The parties agree they spoke frequently by telephone from the onset of the commercial ventures until 2017. The defendant says those calls were business related. She was reporting to the plaintiff on developments in North America. She says, without further specifics, the agreement was discussed on more than one occasion in those calls. The plaintiff testified that the frequent telephone conversations between him and the defendant were more in the nature of the defendant complaining about her personal situation and not about matters affecting AKNO's North American holdings.

The Purchase of Langston

- [53] Presumably, as a result of his greater business involvement and his affectionate relationship with his niece and her two children, the plaintiff began spending more time in Vancouver. He purchased a property at 1622 Langston Place in West Vancouver. The property was elaborately furnished and of sizeable worth.
- [54] Title was taken in the name of a B.C. company of which the plaintiff was the sole shareholder. A joint account in the names of the parties was established to allow the defendant, as part of her role as property manager, to pay expenses associated with Langston including the mortgage, taxes, and insurance.
- [55] Significant problems arose, most notably, a burst pipe that caused extensive water damage. The defendant took charge of overseeing the restoration and dealing with insurance matters on behalf of the plaintiff. She also testified the security system had many false alarms causing her to have to travel from her Coquitlam residence to deal with them. She said her

duties in respect of Langston became so significant that she eventually, with the plaintiff's blessing, moved with her then teenage children to West Vancouver. She remained living in the Langston residence until its eventual sale in 2017. When the plaintiff came to Vancouver he resided there, as well.

- [56] When the joint account was overdrawn, as the defendant said it occasionally was, she paid Langston expenses from her separate funds and later reimbursed herself from funds in a joint account in the parties' names when there were sufficient funds to do so. Her transfer of funds from the joint account into her own was the source of one of the plaintiff's claims in the NOCC.
- [57] The plaintiff characterizes the defendant's move to the West Vancouver home as 'uninvited'. He did not dispute she performed a number of services in respect of Langston but did not see them as requiring her to take up residence in his West Vancouver home. There is no evidence he ever asked her to vacate prior to Langston's sale in 2017.
- [58] The defendant testified that after the plaintiff failed to honour his obligations in respect of distributing the defendant's share of profit from the Michigan properties, he instead offered her Langston, or its sale proceeds, in December 2015. The plaintiff denied such an offer.
- [59] Such never happened. When Langston sold in 2017 the plaintiff retained all of the sale proceeds.

The Expansion of AKNO to Ontario and Michigan

- [60] Dr. Pourtaghi testified that as she acquired knowledge and expertise in the acquisition of properties with potential for growth in value, discussions of profit sharing began. Nothing was reduced to writing or confirmed through email. Instead, eastward expansion began, first in Canada and then the U.S.

AKNO Enterprises Ltd. (Canada)

- [61] The first AKNO acquisition was, according to Dr. Pourtaghi, the Canada Building. She testified she located the building and went with the plaintiff to see it. AKNO Enterprises Ltd. purchased it in the spring of 2008 for a purchase price of \$2.1 million. Ouellette was purchased a few months later and held by the same company.
- [62] The defendant testified she located the properties for purchase by AKNO and went on to manage and oversee the operation of both and eventually turned the Canada Building from a money-losing proposition into, at the very least, a break-even operation over the course of her stewardship.

- [63] From Naki's inception until 2008, it paid the defendant a salary. Her work for Naki continued after the shares eventually were transferred to her. Once AKNO Canada owned the two Ontario properties, the defendant received a salary from AKNO Canada of approximately \$72,000 annually (pro-rated for 2008). The defendant never had a written employment contract with either Naki or AKNO Canada nor was she ever provided a written job description establishing her duties for AKNO Enterprises.
- [64] The plaintiff testified there were many discussions between him and the defendant concerning her duties but provided no detail of the when, the where or the words spoken. He testified her employment through AKNO Enterprises included working for any endeavour of any AKNO company wherever situate. When it was put to the defendant in cross-examination she knew her salary from AKNO Canada covered all the work she did, no specifics of any discussions were put to her by plaintiff's counsel. The defendant repeatedly denied her Canadian salary covered her American duties and referred back to her understanding of the profit-sharing agreement reached between the parties for her work in the U.S.
- [65] When the plaintiff was questioned as to the absence of a written contract of employment between AKNO Enterprises and the defendant, he replied:
- I don't know. She managed everything. Perhaps I think it wasn't necessary. I don't know. She handled everything.
- [66] That response stands in stark contrast as to how the plaintiff otherwise tended to downplay the defendant's duties in AKNO.
- [67] Both of the plaintiff's adult children, Alex and Angelica Nouhi, hold positions with AKNO; Alex apparently in Europe, Angelica in the United States. According to Angelica Nouhi, both have written contracts with an AKNO company that describe both their compensation and the scope of their duties. Neither contract was offered in evidence to detail the scope of the duties of the children as employees of an AKNO company but Angelica testified that although a U.S. company paid her, her salary was to compensate her for all involvement with AKNO throughout the world.
- [68] Presently, Angelica Nouhi is paid \$120,000 USD. She currently manages Market Street, a commercial building in St. Louis which has professional property managers in place. In 2017, she was paid \$100,000 USD. Following the defendant's departure, Angelica also oversaw the management of the Canada building until its sale. It, too, had professional property managers in place.
- [69] The plaintiff's assertion that her salary from AKNO Canada covered her U.S. contributions lies at the heart of the defence to the claim for unjust enrichment.

- [70] Despite the plaintiff's characterization of the defendant as "managing everything; handling everything" when explaining the absence of a written contract, the plaintiff was dismissive of the defendant's contribution to either the Canadian holdings or the U.S. holdings, referring to her often as "an assistant", a "translator" or a "dentist"; the latter presumably to demonstrate her lack of skills in commercial real estate.
- [71] The defendant's salary from AKNO Canada was paid in two separate equal installments monthly. The defendant says this reflected an original salary of approximately \$36,000 per annum for each building she oversaw; the Canada building and Ouellette. Though disputed by the plaintiff, through his counsel's submission, there was no contrary evidence as to the rationale for two separate cheques for the same amount each month other than that offered by the defendant.
- [72] Despite that assertion, when Ouellette was sold in 2011, the defendant's salary continued without reduction. The defendant testified such was with full knowledge and agreement of the plaintiff and noted that by 2011, two events that warranted continuation of wages at the same level despite Ouellette's sale: (1) the Canada Building had, under her stewardship, significantly reduced its operating losses, in part because (2) she took over the role of building manager instead of paying an outsider to do the task.
- [73] The plaintiff offered no evidence disputing that claim through his or other testimony.
- [74] The only job description for the defendant, which she admittedly prepared herself in support of a mortgage application, did not define a geographic area where she was to perform her duties, but the description of her duties did not include locating and negotiating for commercial property acquisition and/or sale. By her own assessment, the defendant's job duties for AKNO Canada did not include functions she claims to have performed on behalf of AKNO Michigan in Michigan and later Missouri.
- [75] The defendant continued to oversee the Canada Building until the end of her employment. In 2016, the year following the sale of the Michigan properties, the defendant's income increased from approximately \$81,000 to \$142,500, and again in 2017 to \$150,000.
- [76] The plaintiff says the defendant unilaterally increased her salary without permission and, in May 2017, communicated his displeasure via a personal email to the defendant and another through an assistant seeking repayment of the increase in salary from AKNO Canada. The defendant's employment carried on until near the end of 2017 and the "excess salary" alleged by the plaintiff was never repaid.
- [77] The defendant says the increase was approved by the plaintiff and that quarterly reports she submitted to his assistant for his review clearly indicated the increase in her salary. The explanation for the increase was the Canada Building's enhanced performance.

AKNO Michigan

- [78] While the plaintiff and defendant were in Windsor to complete the purchase of the Canada Building, the defendant testified she saw a building across the river in Detroit that interested her. She testified she learned online it was for sale and, alone, without instruction from the plaintiff, she drove across the Detroit River to view it while the plaintiff was resting.
- [79] 2008 is memorable for the worldwide financial crisis which disproportionately affected different areas of the globe. Detroit in 2008 was a depressed area. The Book Tower and adjacent Book Building were in a state of disrepair and largely unoccupied save for some ground-floor retail tenants.
- [80] The defendant testified that she alone drove across the Canada/US border to Detroit where she investigated the Book Tower and, following inquiries with the building manager, learned that there was an outstanding offer to purchase which was subject to conditions including inspection.
- [81] She testified that she discussed the prospect of acquiring the Book Tower with the defendant, who agreed. AKNO's Canadian lawyer referred her to a U.S. law firm with whom she dealt and, after further investigation and without the aid of a broker or realtor, she caused an offer to be prepared without subject clauses to purchase the Book Tower and the adjacent Book Building (collectively the "Book Tower") for \$5.5 million USD. The defendant signed both offers to purchase (the Book Tower and Book Building); not the plaintiff. Those offers were accepted and the properties acquired by the newly-formed AKNO Michigan.
- [82] Ultimately, 4 properties were acquired, the Book Tower, Book Building, the adjacent community centre in 2011 and a stand-alone property in Muskegon. The defendant was made both an officer and director of the Michigan companies and remained so until removed in October 2017.
- [83] The manner in which the Book Tower was 'discovered' is a point of contention between the parties. The plaintiff says that he accompanied Dr. Pourtaghi across the border to Detroit and it was he, not her, that came upon the idea to acquire the Book Tower after he entered into discussions with the onsite building manager, and it was him who concluded the purchase at a price of \$5.5 million.
- [84] Despite his professed lack of proficiency in English--the plaintiff offered his evidence at trial through an interpreter--he testified that he went with the defendant and spoke to the building manager, who spoke Spanish, making communication possible between them. He claimed credit for locating the Book Tower and minimized any role of the defendant to that of a translator.

- [85] Later in his testimony he stated the Book Tower was on his radar as a possible acquisition because of advice from his brother, Hoss Nouhi, a residential realtor from Los Angeles. No details were provided as to the when, where and what Hoss Nouhi said which gave rise to the possibility of expansion into the U.S. Hoss Nouhi testified and denied any involvement in locating the Book Tower.
- [86] Throughout the whole of Mr. Nouhi's evidence, he was dismissive of the role played by the defendant. Never once did the plaintiff describe the defendant as playing a significant role in either the acquisition, development plans or eventual sale of the Book Tower. On the other hand, the plaintiff acknowledged the defendant's instrumental role in locating the two Canadian buildings and another commercial building in Muskegon, Michigan noting at least two of them resulted in losses to AKNO when they sold.
- [87] The defendant portrayed herself as the manager of the Michigan endeavour, noting she reported frequently via email to the plaintiff's assistants and spoke almost daily to the plaintiff by telephone. Included in some of the email threads concerning North American issues was her sister, Nadia, who testified that she was one of the plaintiff's assistants and, for much of her time in Europe, lived in the plaintiff's home in Milan.
- [88] A number of emails from the defendant dealing with AKNO Michigan matters were copied to Nadia Pourtaghi among others.
- [89] Following the purchase of the Book Tower, AKNO Michigan acquired an adjacent building ("community centre") in 2011 as development plans proceeded and parking requirements made obvious the need for additional space. The community centre operated as a food kitchen run by the Catholic diocese that owned the building.
- [90] Again, there are differences in the evidence as to the role played by each of the parties in the acquisition of the property. Each claim that they individually were instrumental in the negotiations leading to the purchase of that property for \$400,000 USD. The property was seen as necessary to the ultimate development of the Book Tower so as to provide parking space sufficient to conform with municipal requirements.
- [91] AKNO Michigan purchased a further property in Muskegon, Michigan. It appears uncontroverted that this was as a result of investigation by the defendant. Muskegon is a three-hour drive from Detroit. The defendant testified she made the drive then stayed overnight and returned the next day when she dealt with that asset. As noted above, the plaintiff freely acknowledged the defendant's 100% responsibility for the acquisition of the Muskegon property given it sold later at a loss. The same applies to Ouellette.
- [92] The defendant testified that in addition to her duties managing the two Canadian buildings, once the Book Tower was acquired, she began to investigate its development potential. It was a heritage building. Its heritage status affected its redevelopment potential. Any redevelopment would have to preserve all or part of the façade. However, its status as a heritage building provided an opportunity for a variety of city and state financial

inducements either through outright grants or tax concessions that would substantially contribute towards the redevelopment cost.

- [93] The defendant testified she spent considerable effort investigating the availability of such inducements because of their potential effect on either the net development costs or re-sale potential. The plaintiff testified all available credits simply came with the purchase and were known at the time and left the impression once purchased, the strategy was simply to wait and hold the property for improved economic times.
- [94] At no time did the defendant obtain immigration status in the U.S. so as to allow her to work and receive compensation through a U.S. company. Even as an officer or director of AKNO Michigan, the defendant received no compensation from AKNO Michigan. Its corporate tax returns indicate it had no employees begging the question as to who did what during the seven years AKNO Michigan owned the Book Tower and, later, the community centre next door.
- [95] There were consulting agreements in place including, according to the plaintiff, an office manager who 'sat and read the newspaper and provided security'. The plaintiff attended Detroit sporadically. He provided no detail of the frequency of his attendance or what he did when he was there. None of AKNO's professional consultants gave evidence indicating their contribution to the Book Tower's evolution save for Fred Beal, owner of a construction firm that dealt primarily with the defendant over the years AKNO Michigan owned the Book Tower.
- [96] Dr. Pourtaghi testified she worked extensively towards the development and ultimate sale of the Book Tower and the neighbouring property until their sale in 2015. It is common ground she was not paid by AKNO Michigan for her efforts. She said she was reliant upon the plaintiff's promise to share profits, if any, upon sale. The plaintiff says her salary in Canada covered all of her duties whether in Ontario, B.C. (Naki), Michigan or, after the sale of Michigan, Missouri.
- [97] I note here, the defendant had separate credit cards for her expenses whilst in the U.S. Her travel and related expenses were charged to AKNO Michigan and paid from its U.S. account when she worked in the U.S.
- [98] The plaintiff testified in response to a question as to whether his son Alex was paid a salary from AKNO Michigan, the plaintiff replied as follows:

Mr. Lawyer, we're a family and in a company that has losses, we don't take out salaries from that company. We don't triple out salaries like your client. We're a family.

- [99] The Book Tower, unlike both Canadian buildings, was essentially vacant when purchased except for retail space on the ground floor. Nonetheless, it was still fully serviced with heat and water to satisfy those few tenants. The enterprise was bleeding money. There were substantial arrears in property taxes owing when it was purchased. The defendant testified that she negotiated, along with AKNO's lawyers, to have the retail tenants vacate such that

power and water could be turned off resulting in substantial reductions to the operating costs of the building.

- [100] Dr. Pourtaghi testified that her work on the Michigan properties was extensive. Whether done from Canada or Michigan she testified she was responsible for negotiating with developers, contractors, accountants, property management companies and lawyers to effect positive changes in the marketability of the Book Tower.
- [101] Early after its acquisition, there was a flood in the Book Tower as a result of broken pipes. The defendant oversaw the restoration work and related insurance claim. She engaged the contractor, JC Beal, to make to provide the necessary cladding for security once the building was unoccupied.
- [102] JC Beal Construction, was owned and operated by Mr. Fred Beal. In addition to construction work, Mr. Beal consulted with the defendant on the accumulation of available tax credits if the property were to be redeveloped by AKNO or a subsequent purchaser.
- [103] Mr. Beal testified that he dealt extensively with the defendant on related matters and worked under her direction. Initially to provide repairs and outside cladding to it to prevent squatters. Although Mr. Beal eventually met the plaintiff in a meeting with architects to discuss the redevelopment of the Book tower, he dealt primarily and extensively with the defendant over the years of his involvement. His evidence corroborated that of the defendant as to the level of her engagement as it related to strategies concerning the Book Tower's redevelopment. He also consulted with defendant on the Muskegon property.
- [104] Mr. Beal met the plaintiff on two, possibly three, occasions; once when the plaintiff travelled to Detroit with architects in 2012 and another in 2014 when Mr. Beal met the plaintiff in Italy to introduce the plaintiff to a potential buyer for the Book Tower.
- [105] The economic impact of the credits/incentives available were significant. At the time, although not today, credits or outright grants of up to 60% of the development costs were potentially available to underwrite the cost of redevelopment. The evidence of the defendant and Mr. Beal was that the credits, or most of them, required investigation, application, discussions and engagement with various levels of government to maximize the amount available to the ultimate developer.
- [106] Mr. Beal corroborated the defendant's testimony as to her extensive involvement dealing with governmental agencies, contractors, architects and in negotiations over the costing of items relating to the redevelopment.
- [107] While only an estimate, Mr. Beal estimated the value of concessions and/or tax credits/abatements connected to the Book Tower at \$50,000,000.

- [108] The efforts of the defendant occurred over years, not months, according to Mr. Beal's unchallenged evidence. Emails referred to in the evidence as to the steps taken towards the accumulation of the concessions ultimately available to the purchaser span the period from the acquisition of the Book Tower in 2008 until its eventual sale in 2015. Mr. Beal's involvement with the defendant, as the putative boots on the ground manager of AKNO Michigan, spanned approximately seven years.
- [109] Through his construction company, Mr. Beal wanted either to acquire the Book Tower and the adjacent building to develop it through his construction company or engage in a joint venture with AKNO. His company was under capitalized for a development of the magnitude of the Book Tower but, nonetheless, he made an unsolicited offer to buy the properties from AKNO Michigan with cash and a back-end payment. The offer was for \$18,000,000 USD in total. The plaintiff responded, through his representatives, with what can only be considered a counter proposal of a joint venture between AKNO Michigan and JC Beal Construction, offering JC Beal 81% of the ownership for \$15,000,000 USD. Such never came to fruition but provides some insight as to the plaintiff's assessment of Book Tower's worth when the counter offer was made.
- [110] The Book Tower, originally acquired for \$5.5 million, was held for a seven-year period. During its ownership, the costs of holding the building as an investment were significantly reduced through cost saving measures such as negotiating the termination of leases with the retail occupants of the ground floor so as to remove the need for power and water. Never were there tenants in the building. All of its operating costs were absorbed by AKNO Michigan with a view to long-term development and/or sale when the market was refreshed.
- [111] Eventually, the plaintiff decided against redevelopment by AKNO and decided to sell. No real estate broker was immediately engaged. The defendant testified that upon learning of AKNO's intention to sell, she googled wealthy investors in Michigan with a view to contacting them or their representatives to locate a potential buyer for the Book Tower. One such person was Mr. Dan Gilbert; a principal of Payday Loans.
- [112] The defendant reached out to one of his representatives and established a dialogue leading to the commencement of negotiations which resulted, eventually, in the sale of the three adjacent properties.
- [113] The plaintiff denied the defendant's role in the introduction of the ultimate buyer, claiming it was either him or his brother, Hoss, who made the introduction. The plaintiff was vague on details surrounding the manner in which AKNO came to "sell the building to a gentleman who owned a small bank".
- [114] Hoss Nouhi testified but agreed he played no role in securing a buyer for the property. Hoss did not refute the defendant's evidence that he, Hoss, earlier on, had given a much lower estimation of the value of the Book Tower.

- [115] Ultimately, the Book Tower and adjacent community centre sold for \$26,000,000 USD. The seller paid no commission because of the private introduction of the purchaser. That said, there was a suggestion the previous agreed upon price was reduced at closing to reflect, at least in part, the absence of a seller's commission.
- [116] The plaintiff claims entitlement to over \$6,000,000 USD as her share of "profit" under the agreement, after allowing for a return of the capital investment by AKNO Michigan, a 10% premium on that investment, and the tax paid the U.S. government upon sale. The profit, she claims through counsel, is readily apparent upon a layperson's review of the corporate tax returns for AKNO Michigan. No accounting evidence was provided; just AKNO's tax filings.
- [117] Instead, counsel notes the acquisition price of the three properties, \$5.9 million USD plus ! 0%; the selling price of \$26 million USD; the total U.S. tax paid upon sale, \$6.785 million USD. The result, counsel argued, is profit of \$12,725,000 USD.
- [118] After deducting 10% of the profit for the "return on investment", the profit, under the terms of the alleged agreement, is \$6,362,500 USD.
- [119] Following sale, a portion of the sale proceeds, after payment of some disposition taxes, was returned to Europe into the plaintiff's personal or other corporate accounts. Some of the proceeds went to his children. The payments were described as loans, presumably for tax purposes, and documented as such. At trial the loans remained unpaid.
- [120] Who received what is of little moment to the outcome of this litigation save to say AKNO Michigan distributed funds to the plaintiff and his immediate family but not the defendant.
- [121] The U.S. tax laws extant in 2015 allowed for the deferral of capital gains tax if invested into another property by the seller within six months from the closing date resulting in the gain. The tax deferral opportunity was significant.
- [122] According to the defendant, the plaintiff's children became involved in AKNO U.S. at or near the time of sale. They, not her, were entrusted with finding a suitable property to acquire so as to allow AKNO the tax deferral. Hoss Nouhi also participated in the search.
- [123] No suitable replacement property was found within the six-month window with the result that all U.S. taxes became payable and were in fact paid by AKNO Michigan. The defendant's claim recognizes the tax payment as reducing her entitlement to profit but it is unclear what effect a tax deferral, if achieved, of approximately \$3 million USD would have had in the defendant's claim to profit.

- [124] Following completion of the sale of the Book Tower, despite the wide discrepancy between the acquisition cost and the sale price, the defendant never communicated her demand for fulfilment of the agreement's terms in writing to the plaintiff or any of his representatives. Nor did she seek documents which would presumably enable her to calculate profit. She testified she spoke to the plaintiff about her share following the sale and was advised to be patient.
- [125] He, according to the defendant, continued to encourage her to expect compensation but, by December 2015, in an effort to have her continue working, offered to transfer the Langston property in West Vancouver in lieu of 50% of the profit from the Book Tower. All these communications were verbal between the defendant and the plaintiff. Never was a confirmatory email or letter sent.
- [126] Seemingly, that promise kept the defendant engaged in AKNO's U.S. venture, specifically the acquisition of Market Street but, when Langston was sold in 2017, the defendant received none of the proceeds. Instead, a large portion of the sale proceeds went to Angelica Nouhi and another sizeable sum went to the plaintiff's Swiss holding company.
- [127] In addition to the promise of Langston in lieu of 50% of the profit on Book Tower, the defendant testified the plaintiff told her to contact AKNO's lawyers to draft a consulting agreement respecting her ongoing engagement with AKNO in the U.S.
- [128] In July 2016, almost a year after the sale of Book Tower, the defendant opened communications with AKNO Michigan's accountants and lawyers via email to prepare a draft consulting agreement detailing the compensation payable to the defendant for efforts for both brokerage and/or property management on AKNO's behalf. She testified she engaged the company lawyer and accountant on instructions from the plaintiff.
- [129] While I shall refer to the email exchange at greater length later in these reasons, it seems evident that they refer to both past and prospective compensation for her efforts. Specifically, the defendant suggested an entirely different model of compensation respecting her efforts regarding the Book Tower than what the agreement she alleges provided for.
- [130] As a result of the email exchanges, a consulting agreement, or draft, was prepared by AKNO's lawyer. AKNO's counsel noted he had no specifics of the arrangement between the plaintiff and the defendant and the draft was for discussion purposes only. The defendant received it but did not say she sent it to the plaintiff. He denied ever having seen it.
- [131] Following the sale of the Book Tower, the defendant's salary from AKNO Canada increased significantly as earlier noted. She continued to work managing the Canada Building and remained an officer and director of AKNO Michigan albeit there were no remaining holdings in Michigan after the sale of Book Tower and Muskegon.

- [132] Following the failure to locate an alternate investment and the resultant payment of all U.S. tax due upon the sale of Book Tower, the defendant says she located a prospective alternative in May 2016. She testified she located the building by online search and, with the approval of the plaintiff, attended and engaged in the online auction resulting in the purchase of Market Street in St. Louis, Missouri. The price paid was less than the amount authorized by the plaintiff according to the defendant's evidence.
- [133] The plaintiff denies the defendant's involvement and, once again, credits his brother, Hoss, or "his agents" in locating the opportunity.
- [134] By 2016, or perhaps somewhat earlier, Angelica Nouhi had assumed a managerial role with AKNO in its pursuit of U.S. commercial properties. Pursuant to the terms of her written contract she was paid \$100,000 USD annually.
- [135] Angelica had been tasked, along with Hoss Nouhi, to find a replacement purchase so as to avail AKNO of the tax deferral on the gain from AKNO Michigan. No replacement building was found within the allotted six-month time frame.
- [136] Following the acquisition of Market Street, the defendant was involved in overseeing the property management and had dealings with the property management company that performed day to day management. Conflicts apparently arose between the defendant and the management company but they do not impact the result in this proceeding.
- [137] More importantly, conflict arose between the plaintiff and defendant following the Book Tower's sale. Demands were made of the defendant by the corporate accountants to have the defendant explain various withdrawals and transfers of funds from the joint account operated by the plaintiff and the defendant. The defendant's purchase of a computer using a company credit card was questioned.
- [138] In October of 2017 she was removed as an officer and director of both U.S. corporations. She was offered a contract to continue managing the Canada Building for \$45,000 a year. She declined.
- [139] In the summer or fall of 2017 Langston was sold. The defendant was aware it was for sale. The proceeds were not paid to her as she alleged was promised. Following its sale, the defendant did not communicate her entitlement to the sale proceeds to the plaintiff or his legal representatives.

The Litigation History

- [140] The impugned transfers/withdrawals eventually became the subject of litigation in Michigan between AKNO and the defendant. AKNO alleged misappropriation of its funds by the defendant.

- [141] The litigation was resolved in favour of the defendant after a summary trial. Counsel for the plaintiff informed me that ruling is under appeal in Michigan although there was no testimony to that effect.
- [142] The civil proceedings the plaintiff personally commenced in B.C., which were discontinued the morning of trial, parallel, in some respects, allegations raised in the Michigan lawsuit. The NOCC alleged fraud, breach of fiduciary duty, breach of trust, etc.
- [143] Despite dismissal of fraud claims in the U.S., the discontinuance of the claims in B.C. and over the objection of the defendant's counsel, plaintiff's counsel cross-examined the defendant on some of the impugned transactions where funds were transferred from the joint account in the names of the plaintiff and defendant into the defendant's account. I overruled counsel's objection and allowed the questions based on plaintiff's counsel's argument that the transactions he sought to examine on were different than those already litigated or abandoned in the present litigation and would show, alternatively, that (1) the defendant derived benefits greater than the salary paid to her by AKNO Enterprises or (2) demonstrate she was disentitled to equitable relief based on the premise equity will only assist those with "clean hands".
- [144] As will become apparent later on in these reasons, the assault on the defendant's honesty in respect of those transactions was wholly without foundation. From the documents already in evidence, together with those I allowed in response to counsel's questions, the propriety of the transactions is apparent to anyone with basic accounting skills. The transfers suggested to have been inappropriate were, in essence, repayments of amounts advanced by the defendant into the accounts needed to service expenses on Langston when the plaintiff failed to maintain a balance in the joint account operated specifically to pay for Langston's expenses.
- [145] The salary adjustment (increase) in Canada was never repaid by the defendant. She carried on with her duties in Canada and Missouri until late 2017, continuing to draw salary of \$150,000 annually from AKNO Enterprises. It is unclear whether there are proceedings outstanding by AKNO Enterprises Ltd. in respect of the defendant's alleged improper adjustment of her salary.
- [146] In the Spring of 2018, the plaintiff commenced the Michigan litigation (on behalf of AKNO) and here (personally). He also commenced an action against Ania Pourtaghi, his niece. In the course of his testimony, he suggested a lawsuit might be initiated against Nadia Pourtaghi for the return of educational expenses he incurred on her behalf.
- [147] In this litigation, the plaintiff placed CPLs against 4 properties owned by either Naki or the defendant. Justice Matthews initially ordered the removal of the CPLs based on a lack of foundation in the pleadings: *Nouhi v. Pourtaghi*, 2019 BCSC 794.

- [148] The plaintiff applied and received leave to amend the pleadings claiming an interest in the subject properties and re-filed the CPLs. Regardless, the plaintiff pressed on seeking to have the appeal from the Matthews order heard. See *Nouhi v. Pourtaghi*, 2019 BCCA 324.
- [149] The appeal was dismissed as moot.
- [150] The original trial date did not proceed because the plaintiff failed to set a trial management conference. The defendant re-applied for removal of the CPLs citing economic hardship: *Nouhi v. Pourtaghi*, 2021 BCSC 1779.
- [151] Justice Skolrood allowed the application and the CPLs were discharged.
- [152] The defendant testified to the financial consequences of the CPLs. She had to fund the defence or the litigation, here and in the U.S., with funds raised by a mortgage on Mainland. The interest charged, 7.5% per annum, was, she says significantly higher than she would have paid but for the CPL. As well, when renewal came up after 12 months, the lender insisted on repayment resulting in sale (after the CPL's removal) at, according to the defendant, less than the assessed value.
- [153] All of the above suggests the plaintiff is, indeed, a formidable litigation foe.

Issues

- [154] The amended counterclaim narrowed the scope of the defendant's claims to allegations of breach of contract, and alternatively, unjust enrichment and slander of title and/or abuse of process in respect of the CPLs placed upon the defendants' properties.
- [155] The first issue is whether the defendant is contractually entitled to damages from the plaintiff and, if so, in what amount.
- [156] If no contract is proven, as I advised defendant's counsel I would find at the conclusion of his reply, the next issue is whether the defendant is entitled to a remedy in equity and, if so, the nature of it. The defendant suggests a monetary award akin to the value of the real estate commissions saved for Book Tower properties and in the acquisition of Market Street without a broker's fee.
- [157] The plaintiff denies the existence of a contract between him and the defendant. The only contract, he says, is the employment contract between AKNO Enterprises and the defendant. He argued that the enrichment alleged was to ASKNO Michigan; not him personally but, in any event, the defendant's Canadian employment contract provides a juristic reason disentitling the defendant to any equitable remedy in respect of her services.

- [158] Alternatively, if the plaintiff is determined to have been unjustly enriched by the defendant's efforts through the buying, selling and/or management of any of AKNO's U.S. real estate, the plaintiff argues the provisions of the Real Estate Services Act, S.B.C. 2004, c. 42 [RESA] preclude an award to the defendant given she was, at all times, unlicensed to sell real estate in B.C. or elsewhere.
- [159] Finally, the plaintiff says the counterclaim, at least insofar as the claim in contract or equity, is statute barred because the factual matters underpinning the claim occurred in 2015. The original counterclaim was filed on October 24, 2018.
- [160] As to the claim for slander of title/abuse of process, the plaintiff argues the defendant failed to prove either damages or malice.

Credibility and Material Findings

- [161] Unsurprisingly, where a claim (or defence) is based on unwitnessed conversations, undocumented in any form, the issue of credibility looms large.
- [162] Given the paucity of "other" evidence of either a profit sharing or an employment contract between the parties, the position of each on the two main claims, breach of contract and unjust enrichment, hinge largely on findings as to the credibility/reliability of the two parties.
- [163] The defendant asked me to accept, unreservedly, her uncorroborated evidence as to the formation and existence of an oral contract between her and the plaintiff entitling her to significant damages in respect of the sale of the Book Tower. No other property she was involved with generated profit during her tenure with AKNO entitling her to damages. Market Street remains unsold. Of the other three properties sold, Ouellette and Muskegon were sold at a loss; the Canada Building, while seemingly sold for more than the purchase price, is the not subject of a claim.
- [164] The plaintiff, through counsel, argues the profit-sharing agreement, as alleged, defies common sense given the business acumen of the plaintiff, the absence of financial contribution by the defendant, and the absence of any written reference to the alleged contract either before or after the alleged breach.
- [165] Each of the parties presented markedly different visions of the extent of the defendant's actual contribution to AKNO that need to be reconciled if such forms the basis for relief based on quantum meruit given my conclusion the parties' relationship is not governed by an enforceable contract. What follows is my reasoning, based on the factual findings I make, underlying that conclusion.
- [166] In *Bradshaw v. Stenner*, 2010 BCSC 1398 [Bradshaw], Justice Dillon succinctly summarized the law respecting the assessment of a witness's credibility as follows:

- [185] Credibility is a key issue in this case. Based upon the factual analysis above, it is apparent that the credibility of the plaintiff and defendant, as well as their witnesses, has been severely tested in the evidence. Because credibility was so much at issue throughout this trial, I requested counsel to thoroughly review the law with respect to assessment of credibility for me. Both counsel did an excellent job of drawing relevant principles to my attention. It was with these principles in mind that I approached the factual analysis.
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [167] Despite receiving the evidence of Mr. Nouhi via teleconference, with all the technical challenges inherent in same, specifically, occasional freezing of the screen and loss of audio, I am satisfied that I had a proper opportunity to assess the credibility of each of the witnesses who testified from remote locations.
- [168] Dealing firstly with the evidence of non-parties, particularly family members, not a great deal hangs on findings of credibility or reliability. That is not to say the evidence does not weigh on the outcome.
- [169] Mr. Beal's evidence as to the role of the defendant, as observed by him, was uncontradicted by evidence other than the plaintiff's account. Other than a minor slip acknowledged by Mr. Beal as to the date of his first encounter with the plaintiff, his evidence was not undermined on cross-examination. Moreover, it is in harmony with the evolution of the Book Tower's increasing valuation as tax credits and grants were assembled. The documentation, such as it is, generally supports the notion of the defendant being AKNO Michigan's boots on the ground in North America.
- [170] Other evidence from attorneys, accountants, or the Book Tower's building manager, which might have cast doubt on the defendant's and Mr. Beal's account of the defendant's role, was not led.

- [171] Other than his evidence of locating the Book Tower, either on his own or with Hoss's assistance, the plaintiff did not suggest that he was dealing directly with anyone in Michigan concerning the Book Tower other than the defendant. His claimed involvement in negotiating for the purchase of the community centre is uncorroborated by any independent evidence.
- [172] Angelica Nouhi was not involved in any substantial way with AKNO's U.S. ventures until after the sale of the Book Tower. She could not speak to the terms of any agreement between her aunt and her father or to the magnitude of the work her aunt performed from 2008 until 2015. She acknowledged, despite her familial relationship with the plaintiff, she has a written contract with AKNO setting out both her compensation and her duties. She testified those duties included acting for any AKNO venture, not just the company she was paid by.
- [173] Hoss Nouhi became involved earlier but, by self-admission, had no knowledge of the dealings as between Dr. Pourtaghi and his brother, Massimo Nouhi; nor did he play any substantial role in the acquisition, disposition or sale of the Michigan properties or in the acquisition of Market Street.
- [174] The impact of Hoss Nouhi's evidence militates against the reliability of the plaintiff's evidence in several aspects. Hoss lived and worked in California selling residential real estate. He brought no specific knowledge of commercial real estate or the specific markets in which the search for potential investments occurred. His involvement in the AKNO ventures in the U.S. seems to have been as an unpaid consultant.
- [175] When asked by plaintiff's counsel: "was Nahid Pourtaghi employed by your brother?", he responded she was employed by AKNO U.S.A.
- [176] Only after plaintiff's counsel reframed his questions mentioning AKNO Enterprises, then ultimately AKNO Enterprises Canada, did Hoss Nouhi "adopt" the Canadian branch of AKNO as her employer. He conceded he had no idea of her role in Canada. He only dealt with her in the U.S. In the result, I place no reliance on Hoss Nouhi's description of the defendant's relationship with either of the U.S. AKNO companies beyond his initial conclusion that she worked for "AKNO U.S".
- [177] Hoss Nouhi, contrary to the evidence of his brother, denied any involvement in the purchase of the Book Tower and conceded his involvement was limited to advising on potential financing when AKNO was still considering development of the Book Tower. He attended a meeting or meetings to close the sale where his brother and niece were present and observed her translating for him.
- [178] When asked whether the defendant acted as broker or agent for AKNO in regards to the selling of the Book Tower, Hoss replied:

She wasn't licensed to be--because they need serve or author (sic) agent. She was just representing AKNO on behalf of my brother.

[Emphasis added.]

[179] By inference, given the reference to the Book Tower, that answer can only be seen as referring to AKNO Michigan.

[180] The defendant, Hoss and Massimo Nouhi were present at the closing. Hoss reviewed the closing documents on behalf of the seller. Hoss also testified the defendant never mentioned to him the contract she alleges in respect of profit sharing in advance of the closing.

[181] Again, contrary to the plaintiff's evidence, Hoss Nouhi testified in direct examination that he was not involved with the purchase of Market Street. Despite that reasonably clear answer, plaintiff's counsel asked him whether he brought the building to his brother's attention prior to its acquisition, and he moderated his response to: "I can't recall".

[182] That answer is conflicts with the plaintiff's testimony that his brother discovered the property and sent "a link" for the plaintiff to view. No email containing a hyperlink to the Market Street property was ever produced. Given the plaintiff's self-admitted computer illiteracy, verbal communication of a website to the plaintiff seems unlikely in the extreme.

[183] Hoss Nouhi acknowledged the defendant played a role in keeping negotiations with the eventual buyer going after discussions had stalled. He also acknowledged that the defendant made suggestions regarding prospective alternate U.S. property purchases so as to defer taxes although nothing was eventually purchased within the time allowed.

[184] His evidence, seen in totality, does not accord with the plaintiff's suggestion that he, Hoss Nouhi, originally located the Book Tower or that it was Hoss who located the Market Street property and sent him a link to view the property. Nor does it accord with the plaintiff's view of the defendant's role in AKNO in the U.S.

[185] Nadia Pourtaghi testified as to her working relationship with the plaintiff. She testified she worked as his assistant at times and resided, for the most part, in a room in his Milan residence. The plaintiff disputed this.

[186] Nadia's testimony as to her working for AKNO is consistent with a number of ANKO Michigan-related emails sent by the defendant and copied to Nadia. Her evidence as to her role as an assistant to the plaintiff is consistent with the documents she was copied with. There is no other logical reason for her to receive them. In one of the emails, the defendant asked Nadia to get the plaintiff to transfer money to an account so as to pay one of Mr. Boscariol's accounts. Nadia was copied on another email authored by Donatella Premoli, an accountant manager for SSP, advising of a transfer of funds from SSP to AKNO Michigan.

- [187] Nadia's evidence was presented in a credible fashion providing details of her accommodation while in Milan at the plaintiff's residence and the persons she worked with while assisting her uncle. Her evidence was largely unchallenged in cross examination.
- [188] Nadia also testified she overheard a telephone conversation in or about September of 2015 between her uncle and the defendant where she says the plaintiff responded to the defendant's request for "sharing the benefit" by saying, "I told yes, I told but I don't want to do it. Where did I write it"?
- [189] She also testified her uncle told her, in effect, that for the defendant to get her incentive or reward for her efforts, something great has to happen over there. He was sceptical that she could make "the impossible possible", referring, I infer, to the sale of the Book Tower and adjacent property at an amount in excess of that opined by Hoss Nouhi the plaintiff denied those statements.
- [190] While the timing of the call, said to be after the sale of Book Tower, is problematic, given by then "the impossible", the sale of Book Tower and the community centre had come to pass, the conversation Nadia relayed is consistent with the defendant's evidence that she was always encouraged in her endeavours with Book Tower with the prospect of a reward upon its successful sale/development.
- [191] The other evidence of note from Nadia Pourtaghi is her recall of a further phone call between the defendant and the plaintiff after this litigation had commenced. In May of 2019, Nadia returned to Milan to pick up her belongings from the plaintiff's home. As she was packing to leave she said the plaintiff told her to tell the defendant that he would put three million dollars into the case, not to settle the litigation, but as a statement as to his war chest to pursue his claim and defend the counterclaim.
- [192] I agree with counsel for the plaintiff that Nadia's report of her sister's side of the conversation said to have occurred in September 2015 is admissible simply for the purpose of context as to what the defendant said and is not admissible as proof of the arrangement she alleges in her counterclaim.
- [193] In general, I found Nadia a reliable and straight forward witness although I express concern her recall of the time period of the call between her sister and uncle, which is not in conformity with the timeline suggested by Nahid nor does it make sense given by September 2015, the sale of Book Tower was complete and the "impossible" had by that time occurred.
- [194] In short, where the evidence of the plaintiff conflicts with that of Nadia, I accept Nadia's evidence over that of the plaintiff.

- [195] Turning to the substantial conflicts in the accounts of the parties, I begin with my conclusion that each of them presents with issues of both credibility and reliability. Neither was a witness whose testimony I accept exclusively causing rejection of the other party's evidence in all respects.
- [196] As the trier of fact, I am entitled to accept all, some or none of the evidence of a particular witness. My conclusion that they have been either untruthful or unreliable in one facet of their testimony does not, in and of itself, lead to a conclusion that all of their evidence is tainted and cannot be relied upon.
- [197] Here, while there is no documentary evidence corroborating the existence of contracts, either the profit sharing alleged by the defendant or the employment contract in Canada alleged by the plaintiff, there is overwhelming documentary evidence supporting the conclusion, corroborated by the testimony of Mr. Beal, that the defendant was AKNO's presence in the U.S., in particular AKNO Michigan, and was involved in all facets of the Book Tower's evolution from 2008 until its sale in 2015.
- [198] The defendant's evidence was replete with sufficient detail as to give it credence as to the tasks she performed including locating the Book Tower, negotiating a purchase price with no subjects (undoubtedly then written by lawyers), locating counsel in Michigan, signing offers on behalf of AKNO regarding the purchase and then dealing with the city, the tenants still in occupation, insurance companies and, ultimately, regulatory bodies capable of making the building more valuable through grants or tax relief associated with its heritage status.
- [199] I accept that she located the eventual purchaser without the assistance of a realtor and, when negotiations stalled, re-vitalized them so as to bring about the sale.
- [200] The defendant's evidence as to the scope of her contribution was internally consistent and in harmony with the voluminous email communications and corporate documents in evidence. As well, it was corroborated by Mr. Beal whose testimony was forthright and also in harmony with the written documentation.
- [201] Not so for the plaintiff whose evidence was, for the most part, short on detail as to events underlying the discovery of the Book Tower and its purchase. He offered different versions of its discovery at different points throughout his evidence. At one point he suggested Hoss Nouhi had brought it to his attention prior to him and the defendant going to Windsor. Earlier, he suggested it was him, not the defendant, who observed the Book Tower from across the river and initiated the trip into the U.S and subsequent negotiations leading to its acquisition.
- [202] The plaintiff was thoroughly dismissive of all of the defendant's efforts, "crediting" her only with sole responsibility for AKNO's failures (Ouellette and Muskegon which sold for losses) but denying all credit, other than translation for him, in the Book Tower acquisition and sale and the purchase of Market Street.

[203] While acknowledging that the plaintiff and defendant spoke frequently by telephone, the plaintiff initially described those calls as the defendant's complaining about her personal life, not matters relating to AKNO. That does not accord with his evidence under oath in the Michigan proceedings where he swore "they spoke to one another almost daily concerning business".

[204] The plaintiff's dismissive attitude toward the defendant's role is hard to reconcile with his explanation for the lack of a written contract of employment between her and AKNO Enterprises. When asked why there was no written contract between the defendant and AKNO Enterprises he replied:

I don't know. She managed everything. Perhaps I think it wasn't necessary. I don't know. She handled everything.

[205] The plaintiff was frequently evasive and needed to be prompted to reply to the question asked instead of reframing it so as to refer back to his assessment of the defendant's overall shortcomings. From time to time he responded to a question from the defendant's counsel with his own question, not an answer. It became clear from his constantly answering a question before it was interpreted that his understanding of English was much better than he represented: the ability to exchange pleasantries but little more.

[206] As to the defendant's role in the evolution of Book Tower from purchase to sale, I accept, in the main, the defendant's evidence as to the significant role she played, although she acknowledged the plaintiff, as owner, had the final say in matters such as development versus sale.

[207] I also accept that the plaintiff verbally encouraged the defendant as she performed those tasks in the U.S. and told her that her reward would come from the final profits.

[208] Here to be clear, I accept the evidence of the defendant when she stated:

Mr. Nouhi always promise me that that I am doing for---separate from Naki in AKNO is going to be compensated to me later on when we get the gain and profit in the properties, and that's keep me encouraged me to do more job in the time with him and me started.

[209] What I do not find credible about the defendant's testimony is her assertion of an oral contract entitling her to half of the profits from "future ventures". She, like the plaintiff's description of the discussion concerning the defendant's duties for AKNO Enterprises, was extremely vague as to the when, where and what was said of the formulation of the agreement. She wavered in cross-examination as to when it was formulated and, by extension, to what projects it extended.

[210] I note, firstly, the absence of any written reference to the agreement. Nor did the defendant share the terms with anyone else, such as her sister Nadia, prior to the Book Tower's sale.

- [211] Following the sale of the Book Tower, when according to the defendant, she was due approximately \$6,300,000 USD, she never communicated orally or in writing with any representative of AKNO Michigan (other than orally with the plaintiff) inquiring as to the amount owed to her or asking when payment was to be received. She did not advise the escrow agents holding the sale funds of her entitlement to receive a portion of them. She did not seek production of the U.S tax filings which, according to her counsel's submissions, were the key to determining her share of profit from the sale.
- [212] More importantly, in the documented communications to representatives of AKNO Michigan in July, 2016, well after the sale of the Book Tower, no reference was made to the alleged agreement but, instead, a detailed proposal for compensation not only in respect of the management and eventual sale of Market Street but, as well, the sale of Book Tower. The proposed compensation for her role in the acquisition and sale of the Book Tower is significantly different than what she alleges is due under the agreement.
- [213] Specifically, I reference the defendants' email to Jim Reinhart, AKNO's accountant, on July 19, 2016. In my view, it significantly undermines her assertion of a profit-sharing agreement between her and the plaintiff. In that email, the defendant asked Mr. Reinhart for tax information on proposed payments to her arising out of the purchase and sale of the AKNO Michigan properties together with the purchase of Market Street. She noted neither a realtor nor a broker was engaged in respect of those transactions.
- [214] The defendant then referred to the sale of the Muskegon property, although sold at a loss, as part of the total sale proceeds of \$25,150,000, and noted that a 1% commission amounted to \$251,500 and that a 3% commission amounted to \$754,500. Under the terms of the agreement she alleges, she was entitled to nothing in respect of Muskegon given no profit was realized.
- [215] The email goes on to note, referencing the Book Tower, that the "total net income was 11M", 1% of which is \$110,000, 1.5% is \$165,000. In these proceedings, she claims a higher amount of net profit; over \$12,000,000, and a 50% share.
- [216] Market Street was purchased for \$7.5 million of which \$600,000 went to the broker at auction.
- [217] Ultimately, the defendant's email went on to inquire of Mr. Reinhart:
- If Akno pays me \$1,000,000 from the Akno Michigan account, how much should I pay the USA government? Beside how much should [I] pay the Canadian government? What will be the relation between the tax and work visa?

[218] The defendant attempted to explain the email by saying she was using round figures which she could then apply to her actual share of the Book Tower profits but her explanation, in my view, defies common sense. There is no reference in the email to the alleged profit-sharing agreement so as to inform AKNO's lawyer of its existence. Nor does her explanation stand in harmony with her testimony that in December of 2015 her uncle had promised her the Langston property in lieu of the profit share agreement she alleges.

[219] Moreover, the defendants' email is seemingly in response to an earlier July 18 email from Mr. Reinhart which begins:

Hi Nahid,

You have asked us to provide you with some guidance to assist you with working out a fee arrangement with Massimo. Not knowing what general understanding you and Massimo may have agreed to, we wanted to provide you with the information below.

[Emphasis added.]

[220] Mr. Reinhart's email goes on to offer up a variety of suggestions as to compensation relating to both acquisition and disposition fees as well as asset management fees. His email provided the perfect opportunity for the defendant to reduce into writing and provide to both AKNO's accountant and lawyer, her understanding of the agreement she asserted between her and her uncle. Instead, she offered examples of compensation models based on the differing models provided earlier by Mr. Reinhart in his July 18 email.

[221] Given the above exchange occurred almost one year following the sale of the Book Tower, these emails significantly undermine the defendant's credibility/reliability in asserting an enforceable contract between her and her uncle.

[222] Rounding out my rejection of the defendant's evidence on the issue of contract is my agreement with plaintiff counsel's submission that her evidence as to the contract was vague on the details. Despite the pleadings referencing a specific month, June 2008, as the date of formation, she was less certain in cross-examination as to when and where the discussions took place. More importantly, she was vague on the words spoken.

[223] After initially dithering as to the date on which the contract was formulated, the defendant ultimately agreed to the suggestion put to her by plaintiff's counsel that the agreement related to the 2006 Pitt Meadows proposed development but, without further specifics, that it carried on to the other AKNO ventures in Ontario and in the U.S.

[224] The defendant alleged the agreement, when formulated, related to the more expansive search for properties in both Canada and the eastern part of the U.S. The Book Tower, however, on her evidence, was discovered by happenstance after she and the plaintiff were in Windsor to close the purchase of the Canada Building.

- [225] Further, the suggestion that the plaintiff had promised her Langston in lieu of 50% of profits is undermined by the same exchange with the AKNO representatives over the consulting contract she sought. If the defendant were receiving Langston or the sale proceeds in lieu of her entitlement to a half share of the Book Tower profits, why the inquiry as to compensation for Book Tower and the tax consequences in the U.S.?
- [226] Finally, it is incongruous that the defendant, after the sale of the Book Tower with the consequential reduction in her duties, would receive a significant raise from AKNO Canada in 2016/2017 if, in fact, she was contractually entitled to the sum she claims is owed her under the agreement alleged. The defendant could point to no feature in the operation of the Canada Building to warrant an almost doubling of her salary.
- [227] In short, I do not accept the defendant's version as to the formation of a contractual entitlement to a share in corporate profits as she claimed.
- [228] That said, I accept her narrative of her duties over the course of her involvement with the plaintiff and AKNO. In particular, I accept that the defendant, not the plaintiff discovered both the Book Tower and Market Street on behalf of AKNO Michigan.
- [229] The defendant's overall narrative is more consistent with the objective evidence available; specifically, the voluminous collection of emails which supports the level of involvement she claims in the AKNO Michigan properties, the evidence of Mr. Beal whose evidence I accept unreservedly save for the confessed error as to the date upon which he first met the plaintiff, and the absence of any detail from the plaintiff as to acts performed by him either while in Michigan or elsewhere that advanced the Book Tower's marketability.
- [230] Despite the contrary evidence of the plaintiff, I accept the defendant performed the tasks she described and was far more than an assistant or a translator for the plaintiff.
- [231] The plaintiff's attendance in North America was sporadic. It is clear the day to day management of AKNO Michigan was left to the plaintiff. Her involvement spanned approximately seven years.
- [232] The plaintiff could point to no one else, other than the defendant, who performed the tasks she described. If it were lawyers or accountants of AKNO Michigan, the plaintiff had the opportunity to call such evidence but didn't.
- [233] Plaintiff's counsel went on at length to explore what I consider to be minor inconsistencies in the evidence of Dr. Pourtaghi explained by the passage of time. The discovery of the Book Tower and manner of its acquisition occurred 13 years prior to the testimony of each of the principal parties.
- [234] As the trial proceeded and she was challenged on her recollection, Dr. Pourtaghi located several documents which she noted refreshed her memory. In total, her evidence concerning the Book Tower, from acquisition to sale, presents a cohesive and internally consistent narrative.

- [235] As to Market Street, following the failure of Angelica Nouhi and/or Hoss Nouhi to find a replacement property in the U.S. so as to avoid the payment of a substantial amount of capital gains tax to the U.S. government, I accept the defendant located the property and participated in the online auction to acquire it.
- [236] I reject the plaintiff's evidence his brother sent him a link via email. No email was produced, either to the plaintiff or one of his assistants, and Hoss Nouhi, at best, could not recall any involvement in locating Market Street.
- [237] Further, despite the plaintiff's denial I accept that Dr. Pourtaghi was encouraged from time to time in her efforts by Mr. Nouhi who, on his own evidence, testified to the effect that you do not pay salaries to family from unprofitable enterprises. The reasonable inference from that statement is that family was rewarded on successful completion of the venture when a profit was realized.
- [238] Save for my acceptance that the plaintiff never promised the defendant a 50% share of profits, I otherwise found the plaintiff anything but credible.
- [239] Harkening back to indicia of reliability/credibility noted in Bradshaw, I note that in terms of demeanour, Mr. Nouhi repeatedly evaded answering direct and simple questions from counsel. His answers, when freely given, often resulted in a diatribe against Dr. Pourtaghi, referring to her alternately as a dentist, inexperienced, unknowledgeable, an assistant, and a translator.
- [240] With respect, none of those appellations, save for her professional credential as a dentist, fits the profile of Dr. Pourtaghi's involvement with AKNO Michigan.
- [241] Mr. Nouhi insisted that he was the manager throughout of AKNO Enterprises Michigan when, in fact, the evidence of Dr. Pourtaghi and Mr. Beal, coupled with the email exchanges I referred to, make clear that it was Dr. Pourtaghi, not the plaintiff, who managed the day to day affairs of AKNO Enterprises Michigan. That is not to mistake management for ownership. Clearly, the plaintiff ultimately made decisions surrounding the sale as opposed to the development of the Michigan properties by AKNO.
- [242] The plaintiff's original characterization of the parties' frequent telephone calls is at odds with previously sworn testimony in the Michigan proceedings.
- [243] The plaintiff claimed, I find erroneously, that the credits eventually acquired through the efforts of Mr. Beal and Dr. Pourtaghi "came with the building when it was purchased". That bare assertion is discredited by the detail of the defendant's evidence corroborated by Mr. Beal who, unlike others, has no interest in the outcome of this litigation.
- [244] Again, were that assertion so, the plaintiff could have called evidence to establish it.

- [245] The plaintiff testified as to an agreement between him and the defendant that her Canadian salary was to compensate her for all her duties in North America. He stated the agreement as a fact proven rather than providing testimony as to when and where the conversations took place. Unlike his two children's relationship with AKNO companies, there was no written contract of employment with the defendant. When asked why, he blamed her for the absence.
- [246] Not only did the defendant not have an employment contract, she had no job description save for the one she prepared herself in support of a mortgage application (after asking one of AKNO Enterprises' accountants to do it). The description references her as a "Sales marketing- Sales Officer" and makes no references to the work she performed in the U.S.: specifically, locating and negotiating property purchases, dealing with governmental agencies and or locating purchasers for properties.
- [247] While such is hardly determinative of the employment agreement in place, it gives some insight into the defendant's understanding of her role with AKNO Enterprises in advance of this litigation where the terms of her Canadian contract become pivotal in terms of her equitable claim for compensation.
- [248] When asked about the Defendant's role for AKNO Michigan and AKNO 1010 Market Street, Mr. Nouhi replied she was given \$20-\$25,000 to manage "everything"; presumably referring to her Canadian salary. He dismissed her efforts concerning the Book Tower noting that "the buildings were empty" and carried on to say she was used sometimes as a translator and intermediary.
- [249] As to Naki, he stated, alternatively, that the defendant had to pay for her 17% interest in the shares and, later in his testimony, that he gave her 13% of the shares. Nowhere did he deny the defendant's evidence that it was always agreed between him and her that she would have the Paladin house and the Mainland condo regardless of share ownership in Naki.
- [250] When queried as to why the defendant was described as the manager of AKNO Michigan in various corporate documents and in email threads to which she was privy, he replied "the documents say what they say but she was my assistant. The company was mine".
- [251] The Operating Agreement of AKNO Enterprises Michigan Limited LLC provided that management of the company was "the full and complete responsibility of the management". Management was the plaintiff and defendant. The plaintiff's evidence was woefully deficient on details of how he managed the company. He undoubtedly made the executive decisions but he provided no detail, unlike the defendant, of tasks he performed relating to the Book Tower.
- [252] The documentary evidence, together with the oral evidence I referenced, confirms that until her removal in October 2017, Dr. Pourtaghi was the manager of AKNO Michigan and all of the evidence, save that of the plaintiff, confirms that she was far more than "an assistant".

- [253] The plaintiff was dismissive of Fred Beal's involvement, describing him as a man who "laid a brick and provided maintenance". He denied any intention to have AKNO partner with Fred Beal in a joint venture despite the written counter-proposal in response to Mr. Beal's unsolicited offer.
- [254] The plaintiff stated it was the accountant and lawyers who looked after obtaining the tax credits but none were called despite some being on the witness list. They would have clarified their involvement and likely the involvement of Dr. Pourtaghi and Mr. Beal to the discredit of the testimony of Mr. Nouhi.
- [255] He denied Nadia worked as his assistant at any time leaving unanswered why she was copied on emails relating to the Book Tower or asked to have the plaintiff replenish bank accounts so as to pay AKNO accounts.
- [256] In summary, the totality of the evidence, both the oral testimony I have referred to and the documents in evidence, result in my rejection of the defendant's assertion of an oral contract for profit sharing but acceptance, in the main, of her description of her efforts for AKNO Michigan and her expectation, based on the plaintiff's words, that she would be rewarded if the venture succeeded. For the most part, for the reasons above, I reject the plaintiff's evidence.

The Claim in Contract

- [257] I advised counsel at the close of submissions that I could not find for the defendant in contract. I took that somewhat unusual step to preclude her counsel from, in my view, attempting to "give" evidence in reply submissions interpreting U.S. tax filings so as to quantify profit under the agreement. By that time, having heard the evidence and counsel's submissions as to the "formation" of the alleged contract, I was satisfied the defendant had failed to discharge the burden upon her to prove the formation of an enforceable contract.
- [258] While no doubt, oral contracts are enforceable and can bind the parties to them, for the reasons I have set out above I found the defendant has not proven the agreement she alleges.
- [259] The defendant's vague description of the timing of the agreement, the failure to meaningfully identify the words spoken, by whom and where are insufficient, given the plaintiff's denial of any agreement to share profit, to conclude the parties had reached consensus.
- [260] Equally, I infer from the defendant's post-Book Tower sale discussions with AKNO's lawyers and accountants that, while she expected compensation for her U.S. efforts, she did not assert then what she asserts now: a contractual entitlement to a specified share of the profit derived from the sale.

- [261] Even if I accepted her evidence without reservation, the terms described by the defendant in her evidence are incapable of enforcement for uncertainty as to their meaning and effect. It is not for the court to "fill in the blanks" to round out the language of the terms so as to provide clarity.
- [262] I note firstly, the contract asserted is between the defendant and the plaintiff personally; not AKNO Michigan, the owner of the Book Tower and adjacent lot and the Market Street property.
- [263] Neither party's submissions addressed how, if at all, that might affect the calculation of profit if I had found a contract existed. The profit, net of taxes, for the AKNO Michigan might be (and likely is) different from that for the plaintiff. Evidence was adduced indicating the proceeds of the sale of Book Tower were distributed as loans or return of capital; not a distribution of the profit on the sale. Presumably, the plaintiff would be subject to distributive taxes upon payment to him. I am left to speculate as to what his profit might be as distinct from AKNO Michigan.
- [264] In *Shaw Production Way Holdings Inc. v. Sunvault Energy, Inc.*, 2018 BCSC 926 [Shaw], Justice Adair summarized the key principles concerning the formation and interpretation of contracts beginning at para. 139:
- [139] The test for intention to create legal relations - that is, a valid contract - is objective. In *Smith v. Hughes* (1871), L.R. 6 Q.B. 597, in a widely-cited passage, Blackburn J. formulated the test applicable to the question of whether parties have effectively agreed to enter into binding legal relations and said (at p. 607):

If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

- [140] In one of the leading texts on contract law (G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters Canada, 2011)), the author says (at p. 15):

Constantly reiterated in the judgments is the idea that the test of agreement for legal purposes is whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract. The law is concerned not with the parties' [subjective] intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable [person] in the situation of that party would have believed and understood that the other party was consenting to the identical terms.
[Footnotes omitted]

[265] Here there is no written evidence in support of such an agreement. Given the magnitude of the ventures, common sense dictates some reference in written communication as to the agreement reached. If not before the sale then certainly afterward when, according to the defendant, the profit was earned and the calculation of her share was capable of quantification.

[266] As to the adequacy of the alleged terms as described by the defendant, in *Berthin v. Berthin*, 2016 BCCA 104 commencing at para. 47 Justice Newbury noted:

[47] Of course, the terms in question must be enforceable - i.e., must have a definite as opposed to uncertain meaning such that a court can order either for damages or for specific performance in the event of breach. There is no doubt that courts will "lean heavily against finding contracts void for uncertainty" (*Copperart Pty. Ltd. v. Bayside Developments Pty. Ltd.* (1996) 16 W.A.R. 396 (S.C., Full Court) at 399, quoted in S.M. Waddams, *The Law of Contracts* (5th ed., 2005), 42 at fn.128). Thus Madam Justice D. Smith stated in *Frolick v. Frolick*, supra:

An effective agreement requires a meeting of the minds of the parties. An enforceable contract requires a consensus between the parties on all of the essential terms of their agreement. It is the responsibility of the parties, not the court, to clearly express those essential terms so "that their meaning can be determined with a reasonable degree of certainty": *Scammell and Nephew Ltd. v. Outston*, [1941] A.C. 251.

If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty so rigidly so that the intentions of the parties to create a binding agreement are thwarted.

Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves." [At paras. 30-32; emphasis added.]

[267] Here, even were I to accept the defendant's evidence as to the words spoken by the plaintiff regarding profit-sharing, the brief description of its "terms" does not provide sufficient certainty to enforce the alleged contract. Specifically, on her evidence, it is unclear if the plaintiff was to retain a 10% increase on the original investment or whether he was entitled to a further 10% return on money subsequently injected into AKNO Michigan to sustain the losses while the investment was not generating income. Was the 10% static, regardless of the length of time before the plaintiff realized on the investment?

- [268] The evidence is clear that Book Tower never generated income throughout the whole period of AKNO Michigan's ownership. AKNO invested further, unknown sums, each year for a myriad of expenses; taxes, insurance, fees to consultants, security, etc.
- [269] The defendant's submission on damages referenced only the sale price of \$26,000,000, less the acquisition cost of \$5,900,000 (gross \$20,100,000), less total taxes \$6,785,000 (\$13,315,000), less a 10% return on the plaintiff's initial \$5.9 million, leaving profit of \$12,725,000. That calculation makes no allowance for capital expenditures by AKNO from 2008 to 2015.
- [270] A further ambiguity or uncertainty arises as to what was to happen to the defendant's entitlement if the tax deferral scheme pursued after sale had resulted in the purchase of a replacement building. The result would have been something in the order of \$3,000,000 less paid to the U.S. government at sale but that amount would be deferred pending sale of the replacement property. What would the defendant receive?
- [271] In the result, I am unable to conclude the defendant has established the existence of a contract between herself and the plaintiff. That claim is therefore dismissed.

Unjust Enrichment

- [272] The alternate claim, if no enforceable contract is found, lies in unjust enrichment.
- [273] Underlying the defendant's claim for unjust enrichment is her assertion that absent payment to her for the work I have found she performed for AKNO Michigan and AKNO 1010 Market Street, she is entitled to compensation based upon the doctrine of unjust enrichment. She asserts the plaintiff was unjustly enriched at her expense and there is no juristic reason entitling him to retain the benefit. She seeks a monetary award based on quantum meruit.
- [274] The defendant's work for AKNO Michigan spanned the years 2008, when the Book Tower was purchased, until 2017 when she was removed as an officer and director. Her work for AKNO 1010 Market Street was briefer, spanning perhaps 18 months. Following the sale of the Book Tower, and before the acquisition of Market Street, the defendant's salary with AKNO Enterprises Canada rose from \$80,000 to \$142,500 in 2016 and \$150,00 in 2017.
- [275] During the period the defendant provided services to all of AKNO's U.S. holdings, I find as a fact that the defendant devoted significant time, energy and expertise into the development of the Book Tower and adjacent community centre as a project ripe for development by AKNO Michigan or sale to a third party at a significant premium over the original purchase price.
- [276] Further, I find it was the defendant, not the plaintiff, who located and first put into motion plans for purchase of the Book Tower without a broker or realtor. This was indisputably a benefit to the purchaser, AKNO Michigan, and, indirectly, its sole owner, the plaintiff.

- [277] I also find as a fact that upon learning AKNO was not intending to develop the property but would instead sell to a third party, the defendant played a key role in the introduction of the eventual buyer to AKNO with the result AKNO did not incur brokerage fees or real estate commission in respect of the Book Tower sale. It was suggested in the evidence that the eventual sale price, reduced on the day of closing, might have been, in part, because the seller had no agent but that was not in the control of the defendant; the plaintiff decided the eventual sale price.
- [278] I further conclude the defendant played a key managerial role in AKNO Michigan and was the face of AKNO in the U.S. during the years of her involvement or, at least, until the plaintiff's children, Alex and Angelica, came on board and began to assume roles in AKNO's U.S. ventures. When asked Alex's job description, the plaintiff described him as a "consultant and advisor" but outlined no specific duties.
- [279] Simply put, there was no one else present to perform the duties she claimed she performed. If other AKNO representatives performed any of the duties claimed by the defendant as part of her contribution, it was open to the plaintiff to call those persons to challenge her evidence. Neither Hoss nor Angelica Nouhi testified as to any meaningful involvement in AKNO Michigan.
- [280] During the whole time she was providing services to the U.S. ventures, the defendant was a paid employee of AKNO Canada and managed, until the sale of Ouellette, two commercial buildings in Windsor, Ontario in addition to the role I have briefly described in respect of the Michigan properties and later, Market Street.
- [281] I accept the defendant's evidence that the plaintiff encouraged her ongoing efforts on behalf of AKNO in its U.S. ventures and told her, expressly or implicitly, she would be rewarded for her efforts.
- [282] The parties each agree upon the legal burden to establish an unjust enrichment but disagree as to the application of the legal principles to the parties' relationship.
- [283] The leading case of *Kerr v. Baranow*, 2011 SCC 10 [Kerr] held that in order to succeed in a claim for unjust enrichment, a claimant must establish the following:
- a) The defendant (here the defendant by counterclaim) was enriched;
 - b) The plaintiff (here the plaintiff by counterclaim) suffered a corresponding deprivation; and
 - c) There is no juristic reason for the enrichment of one at the expense of the other.
- [284] The third element, lack of juristic reason, has two stages. In *Moore v. Sweet*, 2018 SCC 52 at paras. 57-58 [Moore], Wagner C.J.C. noted:
- [57] The first stage requires the plaintiff to demonstrate that the defendant's retention of the benefit at the plaintiff's expense cannot be justified on the basis of any of the "established" categories of juristic reasons: a contract, a disposition of law, a donative intent, and other

valid common law, equitable or statutory obligations (Garland, at para. 44; Kerr, at para. 41). If any of these categories applies, the analysis ends; the plaintiff's claim must fail because the defendant will be justified in retaining the disputed benefit. For example, a plaintiff will be denied recovery in circumstances where he or she conferred a benefit on a defendant by way of gift, since there is nothing unjust about a defendant retaining a gift of money that was made to him or her by (and that resulted in the corresponding deprivation of) the plaintiff. In this way, these established categories limit the subjectivity and discretion inherent in the unjust enrichment analysis and help to delineate the boundaries of this cause of action (Garland, at para. 43).

[58] If the plaintiff successfully demonstrates that none of the established categories of juristic reasons applies, then he or she has established a prima facie case and the analysis proceeds to the second stage. At this stage, the defendant has an opportunity to rebut the plaintiff's prima facie case by showing that there is some residual reason to deny recovery (Garland, at para. 45). The de facto burden of proof falls on the defendant to show why the enrichment should be retained. In determining whether this may be the case, the court should have regard to two considerations: the parties' reasonable expectations and public policy (Garland, at para. 46; Kerr, at para. 43).

[59] This two-stage approach to juristic reason was designed to strike a balance between the need for predictability and stability on the one hand, and the importance of applying the doctrine of unjust flexibly, and in a manner that reflects our evolving perception of justice on the other.

[Emphasis added.]

[285] By virtue of my findings described previously, I conclude the defendant has satisfied the first two stages of the test despite the plaintiff's protestation that the services performed were for the benefit of AKNO Michigan and AKNO 1010 Market Street; not the plaintiff. The plaintiff submits such results in dismissal of the claim against the plaintiff personally.

[286] With respect to that submission, I note the underlined passage above from Moore.

[287] In Moore, the Supreme Court of Canada found unjust enrichment was made out where the relationship between one party's enrichment and the other's deprivation was not direct. Mr. Moore purchased a term life insurance policy and designated his then-wife Ms. Moore as revocable beneficiary. They later separated, and entered into an oral agreement that Ms. Moore would pay all of the premiums and Mr. Moore would maintain Ms. Moore's beneficiary designation. However, Mr. Moore later designated his new common law spouse, Ms. Sweet, as the irrevocable beneficiary of the policy. When Mr. Moore passed away, the proceeds were therefore payable to Ms. Sweet. The Supreme Court of Canada found that Ms. Sweet had been unjustly enriched and that Ms. Moore, who had paid about \$7,000 in policy premiums since separation, had suffered a corresponding deprivation without a juristic reason.

[288] In adopting a more flexible approach to remediation for unjust enrichment, the majority, per Wagner C.J.C., referenced and adopted the following passage from *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 669-70, 1989 CanLII 34 [Lac Minerals]:

When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, [the respondent] never in fact owned the [disputed] property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by [the appellant], [the respondent] would have acquired the property. In *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, at pp. 1202-03, I said that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the [defendant] made at the [plaintiff's] expense." (Emphasis added.) In my view the fact that [the respondent in this case] never owned the property should not preclude it from pursuing a restitutionary claim: see *Birks, An Introduction to the Law of Restitution*, at pp. 133-39. [The appellant] has therefore been enriched at the expense of [the respondent].

[Emphasis in original.]

[289] While noting *Lac Minerals* turned on other issues, Wagner C.J.C. carried on at para. 45:

[45] The foregoing also indicates that the corresponding deprivation element does not require that the disputed benefit be conferred directly by the plaintiff on the defendant (see *McInnes, The Canadian Law of Unjust Enrichment and Restitution*, at p. 155, but also see pp. 156-83; *Maddaugh and McCamus, The Law of Restitution*, at p. 35-1). This understanding of the correspondence between loss and gain has also been accepted under Quebec's civilian approach to the law of unjust enrichment:

The theory of unjustified enrichment does not require that the enrichment pass directly from the property of the impoverished to that of the enriched party The impoverished party looks to the one who profited from its impoverishment. It is then for the enriched party to find a legal justification for its enrichment. (*Cie Immobilière Viger Ltée v. Lauréat Giguère Inc.*, [1977] 2 S.C.R. 67, at p. 79; see also *Lacroix v. Valois*, [1990] 2 S.C.R. 1259, at pp. 1278-79.)

[Emphasis added.]

[290] At all material times, the plaintiff was the sole owner of the shares in the corporate entities that owned both the Book Tower and Market Street and, in my view, was enriched by the defendant's efforts performed by her for the corporations solely owned, directly or indirectly, by him.

- [291] Of importance in reaching the conclusion I have is my acceptance of the defendant's evidence that her uncle frequently encouraged her efforts by telling her, in effect, her reward would come.
- [292] As between the evidence of Nadia Pourtaghi and the plaintiff concerning the phone call Nadia overheard between the plaintiff and the defendant, I accept Nadia's evidence as to the content and, in particular, the remarks attributed to the plaintiff: 'you have nothing in writing'.
- [293] As to proof that the plaintiff benefited from the defendant's efforts, I note some of the profit was returned directly to the plaintiff by way of "documented loans" that remain unpaid. Other sums were paid, upon the plaintiff's direction, to his children.
- [294] The defendant took direction throughout from the plaintiff through the frequent conversations between them. In concluding the plaintiff benefited from the defendant's actions, I consider the familial relationship between them and their historical dealings respecting Naki. In 2012, the plaintiff fulfilled his promise to leave ownership of Paladin and Mainland with the defendant by transferring his shares in Naki to the defendant without consideration. The defendant testified the plaintiff told her "it was in recognition of all that she had done for him".
- [295] By that time, 2012, the two buildings comprising the Book Tower and the adjacent lot had been purchased.
- [296] Having concluded the defendant has established the first two prongs of the test in Kerr, I turn to the third prong: did the plaintiff's enrichment and the defendant's corresponding deprivation occur absent a juristic reason?
- [297] The plaintiff argues that the defendant's employment contract with AKNO Enterprises Canada provides a juristic reason to resist a finding of unjust enrichment: Scott v. Noble, 1994 CanLII 2096 at para. 17, 99 B.C.L.R. (2d) 137 (C.A.).
- [298] The plaintiff testified he discussed with the defendant, on numerous occasions, that her compensation from AKNO Enterprises Canada covered all of her activities for any AKNO venture wherever situate.
- [299] Similar to the defendant's "description" of contractual terms relating to profit sharing, the plaintiff provided no detail as to when or where those conversations took place or what was discussed that would support his contention of a contract of employment with AKNO Canada that covered services to other AKNO entities.
- [300] He testified as to her employment contract as if it were a fact. No details of any purported discussion(s) were put to the defendant when examined. The questions posed of the defendant simply put to her the assertion that her salary in Canada covered all her duties. She denied any such agreement.

- [301] I note the only other two employees of an AKNO company referenced in the evidence, both relatives of the plaintiff, had written contracts which, according to Angelica Nouhi's evidence, covered both the compensation paid to her and her brother but, as well, the job duties of each of them. Those contracts were never produced in evidence.
- [302] While hardly determinative of the issue as to what duties the defendant's Canadian salary covered, I note the defendant's job description, which the defendant herself prepared in 2016 in support of a credit application, did not reference the duties I have found she performed in the U.S.
- [303] Similar to the dilemma facing the defendant in seeking to establish a profit-sharing arrangement with the plaintiff, there is no reference in correspondence or email between the plaintiff or his representatives that gives credence to his suggested terms of the defendant's Canadian employment.
- [304] The plaintiff's expenses in the U.S. were accounted for and paid for by the U.S. enterprise; not the Canadian one.
- [305] In the end, I have only the plaintiff's testimony, countered by hers, as to the scope of her duties for which she was paid in Canada. I have earlier remarked and provided reasons as to why I found the plaintiff to be an unsatisfactory witness. I find the plaintiff has not established that defendant's compensation from AKNO Canada was in respect of her efforts on behalf of AKNO Michigan or AKNO 1010 Market Street.
- [306] While the defendant has to establish the absence of a juristic reason, when the stated juristic reason is contractual relations between the deprived and the enriched party, or in this case, the corporation that the enriched party owns and controls, common sense indicates the burden falls on the enriched party to establish the contract; not for the deprived party to prove a negative.
- [307] Accordingly, subject to the plaintiff's submissions that the defendant cannot recover owing to the provisions of the RESA or that the claim is statute barred, I find the elements of unjust enrichment have been proven by the defendant as against the plaintiff.

Real Estate Services Act

- [308] The plaintiff argues, regardless of whether an unjust enrichment is found, the defendant is not entitled to an award or remedy in quantum meruit based upon the provisions of the RESA. In particular, the plaintiff argues s. 4(1) of RESA makes clear that an unlicensed person, such as the defendant, cannot claim compensation, including a claim founded in quantum meruit, for real estate services as described and defined in s. 1.
- [309] In particular, s. 4(1) reads:

No recovery of remuneration by unlicensed person

4 (1) No action may be brought or continued for remuneration in relation to real estate services unless, at the time the real estate services were provided, the person claiming the remuneration was

- (a) licensed under this Part to provide those real estate services, or
 - (b) exempted by this Act or the regulations from the requirement to be licensed under this Part in relation to the provision of those real estate services.
- (2) Subsection (1) does not apply to an action brought against a brokerage in relation to real estate services if the action is brought by a person who is licensed, or otherwise authorized, under the laws of a jurisdiction other than British Columbia to
- (a) provide those real estate services, and
 - (b) act in a capacity equivalent to that of a brokerage under this Act.

[310] The defendant's claim for equitable compensation is based, primarily, on her effort in acquiring and selling at a substantial profit the Michigan properties together with her management of both the Michigan and Missouri properties from 2008 until 2017.

[311] It is not disputed that the services described both in the pleadings and the evidence in relation to both the Michigan and Missouri properties are captured in s. 1 of RESA as real estate services. Nor is it disputed that the defendant never possessed the required licensing.

[312] The plaintiff argues "that taken together, these provisions, (s. 1 and s. 4) preclude an unlicensed person, such as the defendant, from receiving remuneration for a variety of real estate services, including managing a leased property or finding real property".

[313] The defendant argues the provisions of RESA are not applicable to services provided outside of British Columbia but cited no authority in support of that proposition.

[314] However, s. 2.1(1) of the Real Estate Services Regulation, B.C. Reg 506/2004, exempts employees from the licensing requirements where real estate services are provided to or on behalf of a principal by an employee so long as the employee does not provide real estate services to or on behalf of any person other than the principal.

[315] In my view the evidence establishes that the defendant was, at the relevant times, an employee of AKNO Michigan and AKNO 1010 Market Street. There are various legal tests to determine whether an employer-employee relationship is made out: *Palmer v. Clemco Industries Inc.*, 2010 BCSC 230 at paras 40-44 [Palmer]. One commonly applied test is the organization test, which considers whether the individual's work was integral to the business or merely accessory to it: *Palmer* at para. 43. In the present case, the defendant was clearly integral to AKNO Michigan's business such that I find she was an employee.

- [316] The defendant's business expenses were expensed against the company for whom she was providing services at any given time. She was issued an Amex credit card for her travels in the U.S. She was provided with a computer, grudgingly it would seem from later email threads, paid for with AKNO funds. She was an officer and director of both American companies.
- [317] She was, in the eyes of Mr. Beal, AKNO's representative in dealing with Book Tower. She was described in AKNO Michigan's governance documents as part of the management team.
- [318] Hoss Nouhi was asked, originally, about the defendant's employment with his brother; he replied she was employed by AKNO U.S. Plaintiff's counsel; not Hoss Nouhi, introduced the Canadian company into the discussion.
- [319] The plaintiff, when discussing the absence of a written contract embracing all the defendant's duties, said she "managed everything". Logically, such applies to the American ventures.
- [320] While she managed "everything", she answered only to the plaintiff whether in Ontario, Michigan or Missouri. He provided instructions she carried out as an employee; not an independent contractor.
- [321] Here, in respect of the transactions/services for which compensation is sought, the defendant's principal was, at all times and in all jurisdictions, the plaintiff. She was not an unlicensed broker/realtor providing services to a variety of principals.
- [322] The corporate documents in evidence establish that the defendant was an officer and manager of AKNO Michigan until she was removed as same in October 2017. She provided services until her removal.
- [323] As I found, the defendant held herself out and was, in fact, AKNO Michigan's sole employee from 2008 until its sale. That she was unpaid makes her no less an employee. The plaintiff was, at all times, her principal acting in his capacity as president and the guiding mind of AKNO's U.S. ventures.

Is the Claim for Unjust Enrichment Statute Barred?

- [324] The plaintiff argued that the defendant's claims are statute barred, noting that the pleadings allege the plaintiff breached his contractual obligations regarding sharing the profit from Book Tower in 2015 following completion of its sale.
- [325] Given my conclusion no enforceable contract existed, it is hard to see how the 2-year limitation contained in the Limitation Act, S.B.C. 2012, c. 13 [Limitation Act] has application to the remaining claims of unjust enrichment and slander of title.

[326] The evidence clearly established that the defendant continued to provide services (establishing an enrichment) to the defendant, indirectly, by virtue of her continuing work in the acquisition and management of Market Street up to and including October of 2017 when she was removed as an officer and director of both of the AKNO U.S. ventures. The counterclaim was filed in October of 2018, well before the expiry of the two-year limitation contained in s. 6(1) of the Limitation Act.

[327] Similarly, the cause of action for slander of title began when the plaintiff caused CPLs to be filed against the Mainland and Paladin properties following issuance of the NOCC and then again, after the court order for the removal of same.

[328] In summary, the defendant's equitable claim and Naki's claims are not statute barred.

Quantum Meruit

[329] The personal defendant framed the claim for a monetary award as follows:

By reason of the events described herein, a benefit was conferred on Nouhi at the request of Nouhi and was freely accepted by him. Nouhi must compensate Pourtaghi for the reasonable value for those services at the time they were rendered on the basis of quantum meruit, which is the market price or value of those services.

[330] Where it has been shown that a person, such as the plaintiff here, has been unjustly enriched by the efforts of another, quantum meruit is an equitable monetary remedy based on the market value of the services rendered by the "deprived party".

[331] Restitutionary quantum meruit claims provide recovery where in situations, as I have found here, contract is inapplicable but, nonetheless, the claiming party has demonstrated an entitlement in respect to work performed or services rendered for the benefit of another without juristic reason.

[332] Here, I find that the work performed by the defendant in the U.S. was at the request of and for the benefit of the plaintiff, directly or indirectly as noted earlier.

[333] The assessment of the claiming party's entitlement is based on the value of the benefit obtained by the receiving party, not the loss to the deprived party: *Bond Development Corp. v. Esquimalt (Township)*, 2006 BCCA 248 at para. 22.

[334] Equitable remedies, as noted in *Infinity Steel Inc. v. B & C Steel Erectors Inc.*, 2011 BCCA 215 [Infinity Steel], are flexible remedies which "must respond to various situations in various ways, so as to "deal with different circumstances according to principles rooted in fairness and good conscience"" (at para. 20, quoting *Pacific National Investments Ltd. v. Victoria (City)*, 2004 SCC 75 at para. 13).

[335] There, as here, a contractual remedy has been rejected but, nonetheless, a finding of unjust enrichment has been made. The appropriate measure of damages was later described by Justice Huddart in *Infinity Steel* at para. 21 as follows:

- [21] From this recent judgment, I derive the lesson that a trial judge's first task after rejecting a contractual remedy and finding unjust enrichment is to determine what measure is appropriate to remedy the unjust enrichment in all the circumstances of the case. Judges have described the appropriate measure in many ways: "the amount [the claimant] deserves" or "what the job is worth" (*Ketza Construction Corp. v. Mickey*, 2000 YTCA 4 at para. 13); "the value of the benefit obtained by the defendant" or "the reasonable market value of the services" (*Bond Development Corp. v. Esquimalt (Township)*, 2006 BCCA 248 at paras. 22 and 37); the "fair value of the services rendered" (*Degelman v. Brunet Estate*, [1954] S.C.R. 725 at 735; *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2007 ONCA 324 at para. 105); "the value of his services to the defendants" (*Palethorpe v. Bogner*, [1995] B.C.J. No. 2311 at para. 23). Recently, in *Aerovac Systems Ltd. v. [Darwin] Construction (Western) Ltd.*, 2010 BCSC 654, Savage J. came to this conclusion at para. 49:
- [49] In my view these authorities support the view that the court has a broad discretion in determining the appropriate method to apply in calculating a quantum meruit claim. Estimates, reasonable costs and expenses, quoted rates, abortive negotiations on price, and expert opinions are all methods which a court can utilize in determining a fair value for the services rendered. This is not a closed list. The appropriate method or methods to use in any individual case will depend on the evidence before the court.
- [Emphasis added.]
- [336] Finally, the remedy selected must meet the circumstances of each particular case. Important factors will include the course of dealings between the parties: *Infinity Steel* at para. 22.
- [337] Here, in assessing the course of dealings between the parties, I take note not only of the services provided by the defendant for which I found she was unpaid, but also benefits conferred by the plaintiff upon the defendant outside the scope of any legal obligation on his behalf.
- [338] Notably, in 2004 Naki Enterprises was formed and the defendant issued 17% of the shares without any capital contribution. The plaintiff injected an unknown amount of capital into Naki to acquire, ultimately, six separate properties not including the Mainland apartment.
- [339] In 2012, the plaintiff voluntarily transferred his remaining ownership of Naki to the defendant. The value of that is unknown but was not inconsequential. At the time of the share transfer, the defendant recalled the plaintiff said to her, "this is for all you have done for me", or words to that effect.
- [340] At the time of the gratuitous share transfer, the plaintiff was under no legal obligation to transfer the shares. Any "promise" he had made and the commencement of the parties' arrangement respecting his 83% shareholding in Naki was without consideration on the defendant's part.

- [341] Clearly the plaintiff felt some correlation between the defendant's efforts up until 2012 and the transfer of ownership of the entirety of Naki's shares.
- [342] As well, the plaintiff contributed a substantial amount to the education of both of the defendant's children resulting, indirectly, in a benefit to the defendant who, otherwise, might have funded their endeavours.
- [343] In my view, the defendant led no admissible evidence which provides for a pure mathematical calculation of the value of her services. The defendant submits I can refer to the draft consultation agreements as evidence of the value of the services as suggested in the accompanying email.
- [344] I agree with the plaintiff that the email exchange between the defendant and AKNO's lawyer/accountant is not admissible for the proof of the content as to the brokerage charges AKNO might have incurred had it used a broker/agent for the acquisitions or dispositions in which the defendant participated. In between the date of purchase and sale of the AKNO Michigan holdings, the defendant was actively and continuously engaged in work which enhanced the marketability of AKNO Michigan's holdings. Obviously, market forces also had much to do with the difference in value from acquisition to sale.
- [345] Nor did the defendant call expert evidence on the question of what the reasonable comparable compensation would be for someone performing the duties I have found the defendant performed for AKNO Michigan. Instead, the defendant points to commissions charged by third party agents/brokers for similar work as that performed by the defendant. Specifically, the defendant noted the real estate commissions the vendor paid in respect of the purchase of Ouellette, the auctioneer and vendor commissions in respect of Market Street and the commission on Langston Street.
- [346] With respect, the defendant, for reasons I referred to above, was never an independent agent acting for a commission (if she were, her claim would likely run afoul of RESA). Rather, she acted as an in-house employee of AKNO Michigan. She was reimbursed for all expenses she incurred on behalf of AKNO Michigan.
- [347] As such, the loss to the defendant is the salary reasonably payable to her in respect of those duties she performed.
- [348] The only evidence as to compensation paid to an AKNO employee performing, or contracted to perform similar services to that provided by the defendant, is Angelica Nouhi's contract with AKNO U.S. Her job description as she described it in her evidence is similar to the work actually performed by the defendant.

- [349] The plaintiff suggests that if, as I have found, a monetary award is appropriate, then I should conclude the defendant's total entitlement is something less than Angelica Nouhi's compensation because of Ms. Nouhi's superior qualifications and the appropriate compensation in this litigation for her efforts ought to be reduced to consider the salary paid to her by AKNO Canada.
- [350] With respect, I reject that characterization. Despite the lofty description of her job duties, as at the date of trial Angelica Nouhi oversaw, as opposed to performed, the day to day management of Market Street and, up until its sale in 2019, the Canada Building. Both have professional management companies in place. Unlike the defendant, despite being paid to do so following the sale of the Book Tower, she has not located any potential investments for AKNO to replace the portfolio acquired during the defendant's tenure.
- [351] Angelica Nouhi testified her salary was \$100,000 USD annually at the time the defendant stopped working on AKNO's behalf. Currently she earns \$120,000 USD despite a diminished real estate portfolio; one overseen by professional property managers in a different state from where Angelica Nouhi resides.
- [352] Angelica Nouhi's duties, according to her verbal testimony, included working for other AKNO ventures, presumably referring to her oversight of the Canada Building upon the defendant's departure until its sale in 2019, but she provided nothing more to detail what she actually did beyond overseeing the two properties in Ontario and Missouri.
- [353] Here, the defendant's duties, in the main, performed between 2008 and 2015 in the U.S. seem, by comparison, more valuable than those described by Angelica Nouhi. Her Canadian salary prior to Book Tower's sale, grew gradually to approximately \$80,000 then, following the Book Tower sale, rose to \$142,500 in 2016 and \$150,000 in 2017.
- [354] There is a dispute as to whether the pay increase was self-help on the part of the defendant--that is to say she unilaterally raised her salary in response to the plaintiff's failure to compensate her for her contribution to the highly profitable sale of the Book Tower--or whether her salary was raised consensually with the plaintiff. The defendant says the plaintiff authorized the increase; the plaintiff denies it.
- [355] Frankly, although there appears little reason warranting such a sizeable increase, the spreadsheets for AKNO Canada were provided to the plaintiff quarterly through one of his assistants. The plaintiff acknowledged reviewing same but says he didn't notice the increase until 2017, presumably giving rise to the email asking for repayment. Given the increase began in 2016 and would have appeared in the quarterly statements of AKNO Canada throughout 2016, such is hard to fathom.
- [356] Given there is no claim before me concerning AKNO Canada's alleged 'overpayment', it is unnecessary to decide this collateral issue. Her enhanced salary from Canada forms no part of my consideration as to the appropriate award for her unpaid services in the U.S.

- [357] Assuming, for the moment, the two AKNO U.S. ventures for which the defendant provided services paid the defendant a salary similar to that paid Angelica Nouhi in 2017, monetary compensation would amount to approximately \$900,000 USD for the years 2008 until 2017.
- [358] Just as Angelica Nouhi's income increased over time from \$100,000 in 2017 to \$120,000 in 2021, the defendant's income would likely have started lower and increased over the years had she remained with the U.S. ventures. Hence, her compensation in 2008 would likely be less than \$100,000 annually.
- [359] Further, unlike Angelica Nouhi, the defendant's efforts on behalf of the U.S. ventures were "part time" given she had paid employment in Canada and obviously devoted some of her time and energy in respect of the two Ontario buildings. With that said, I find the defendant worked tirelessly on behalf of AKNO Michigan and, her description of her job performance in the U.S., which I accept, far exceed the duties and results achieved by Ms. Nouhi.
- [360] In assessing a proper award in equity, some recognition needs to be given to the plaintiff's generosity given the defendant's acknowledged correlation between the share transfer in 2012 and the work she had done to date, including locating and acquiring the Book Tower and community centre. In the parlance of Infinity Steel, in crafting an appropriate remedy one looks to the entire course of dealings between the parties.
- [361] In arriving at what I consider to be a just award given the above considerations, it is my view that I am entitled, indeed obliged, to take into consideration the gratuitous transfer of Naki's shares in 2012 and to discount the salary otherwise payable to defendant for her U.S. endeavours to recognize the part time nature of the work: *Moyes v. Ollerich*, 2005 CarswellBC 2633 (B.C.C.A.) [Moyes].
- [362] In *Moyes*, the B.C. Court of Appeal upheld an award of \$125,000 from the estate of the plaintiff's stepmother after concluding the bequest in the decedent's will of \$25,000 to the plaintiff was insufficient to redress the unjust enrichment of the decedent by virtue of the services provided by the plaintiff to her during the latter stages of her life. The following paragraphs from the trial judge were quoted in the judgment upholding the award:
- [20] In this case, there is no evidence to suggest that a monetary award would be inappropriate or unfair. In determining the amount of the award, the whole of the mutually supportive relationship between the plaintiff and her step-mother, in addition to the specific services provided by the plaintiff to her step- mother, in addition to the specific services provided by the plaintiff to her step-mother since at least 1989 should properly be taken into account
- [22] Taking all of the evidence into account, including the \$25,000 specific bequest already received by the plaintiff, I have concluded that the award to the plaintiff for unjust enrichment should be a further \$125,000.
- [363] As to my reference to the part time nature of the defendant's provision of services to AKNO U.S. given her Canadian salary, that does not mean subtracting her Canadian salary from that which would otherwise be due to her but rather to reflect her less than full time efforts

on behalf of AKNO's U.S. ventures. I conclude a fair award based in quantum meruit is \$400,000 USD. That amount should be converted to Canadian dollars based on the exchange rate posted by the Royal Bank of Canada as at the date of the release of these reasons for judgment.

Slander of Title and Abuse of Process

[364] The plaintiff's original NOCC alleged a number of causes of action, including the allegation that the defendant held all of her Naki shares in trust for the plaintiff either on the basis of express or resulting trust. Based upon that pleading, CPLs were placed on both the Mainland and the Paladin properties.

[365] The defendant brought an application for their removal and, in reasons indexed at 2019 BCSC 794, Matthews J. ordered the discharge of the CPLs noting at para. 55:

[55] The pleadings are inadequate, in their present form, to disclose a claim for an interest in land based on a constructive trust and the amended notice of civil claim does not disclose a claim for any other interest in land. Consequently, the certificates of pending litigation were not valid when filed as required by s. 215 of the Land Title Act. The certificates of pending litigation are cancelled.

[56] As I have found that the pleadings do not disclose a claim for an interest in the Pourtaghi Properties or the Naki Properties, it is not necessary to address the Rule 9-6(4) avenue to cancel the certificates of pending litigation nor to consider cancelling them based on hardship and inconvenience pursuant to s. 256 of the Land Title Act.

[366] She went on to similarly dismiss the cross application brought by the plaintiff for a Mareva injunction over the subject properties.

[367] The plaintiff then appealed that judgment while concurrently obtaining leave to amend the NOCC. After filing the amended NOCC, fresh CPLs were filed against the same properties. Nonetheless, despite the respondent's assertion that the appeal was rendered moot by the filing of fresh CPLs, the appellant sought to have the appeal heard noting "it is in the public interest that the issues he wishes to raise be heard now to prevent them from arising in future litigation".

[368] The appeal was dismissed as moot.

[369] The defendant applied after the adjournment of the scheduled trial before Justice Skolrood for the removal of the CPLs registered on 1908 616 Nootka Way, Port Moody and the Mainland condo, two of which were in the name of the plaintiff personally. Naki retained ownership of 851 Paladin Terrace.

[370] The application before Skolrood J. was based on s. 256 of the Land Title Act, R.S.B.C. 1996. c. 250; that is, hardship experienced by the owner of the property.

- [371] Justice Skolrood found that hardship was established. At para. 21 of his reasons for judgment, indexed at 2021 BCSC 1779, he noted:
- [21] I am satisfied that the defendants have established hardship and inconvenience within the meaning of s. 256(1) of the LTA. I reach this conclusion for the following reasons:
- a) The uncontroverted evidence is that the properties are the only significant assets of Dr. Pourtaghi and Naki that can be used to fund expenses, including the expenses associated with this litigation. While I appreciate that the evidence proffered in support of the hardship claimed is somewhat general in nature, I think the court can fairly infer hardship and inconvenience in circumstances where a party's sole assets are tied up for an extended period of time.
 - b) This leads me to my second reason, that being that the CPL's were originally filed at the time the plaintiff filed his claim in April 2018. They were cancelled pursuant to the order of Matthews J. in May 2019, but then refiled upon the plaintiff filing an amended notice of civil claim. As a result, the properties have been encumbered by CPL's for the better part of three years, during which it appears that the plaintiff has made minimal effort to set this matter for trial. CPL's are an extraordinary form of pre-judgment execution that is often used improperly to gain leverage in litigation. To be clear, I am not saying that this is what has occurred here, but I am saying it is unreasonable to file CPLs then essentially leave them on title without moving expeditiously to trial.
- [372] The result was the cancellation of the CPLs against all three properties.
- [373] Given the weakness of the claims as set out in the pleadings and the evidence on the application, Skolrood J. declined to order the posting of security in respect of the cancellation of the three CPLs.
- [374] The defendant testified that as a result of the filing of the CPL against the Mainland property, the defendant was required to refinance that property on onerous terms from the Nova Team ("Nova"). The interest rate was 7.5%, far above prevailing rates, and required the payment of a \$5,000 lender fee and a \$7,700 brokerage fee.
- [375] No evidence was led as to the difference in interest rates the defendant might have obtained but for the CPL. I was not provided with submissions on the extent of the defendant's proven damages.
- [376] In 2020, the defendant testified Nova notified her they would not renew the mortgage on Mainland that expired August 1, 2020. She went on to say she could not find a willing lender and was forced to list the property and find a seller on short notice. She says she sold the property for \$150,000 below its assessed value but other than her bare assertion, there is no evidence of the selling price as being under market value.

- [377] The legal framework underpinning an action for slander of title and/or abuse of process is set out in *Western Surety Company v. Hanco Holdings Ltd. et al.*, 2007 BCSC 180 [Western Surety].
- [378] The defendants must prove that the plaintiff published words in disparagement of their property, the words were false, the words were published with malice and the plaintiff sustained special damages as a result.
- [379] Where there is an absence of evidence establishing bad faith on the part of the filing party, slander of title has not been made out: *Midland Resources Holdings Ltd. v. Bokserman*, 2021 ONSC 3077 at para. 51.
- [380] *Western Surety* at para. 52 established that the filing of a CPL is an actionable abuse of process providing the placement of the CPLs is one for "improper purposes collateral to the ostensible purpose of the proceeding".
- [381] To establish abuse of process the defendants must establish:
- a) a collateral and improper purpose;
 - b) an overt act in furtherance of the collateral improper purpose; and
 - c) a resulting loss.
- Oei v. Hui*, 2020 BCCA 214 at paras. 5 and 6 [Oei].
- [382] A collateral or improper purpose is one that is "outside the normal incidents of litigation": *Oei* at para. 9. It is for a "purpose not reasonably related to the subject matter of the litigation": *Gaukel v. Buksh*, 2021 BCSC 1751 at para. 258.
- [383] The plaintiff says that malice has not been shown nor has it been established there was a collateral or improper purpose. The plaintiff asserts his claims establish a triable issue and that the CPLs were filed in furtherance of his claim. With respect, I disagree.
- [384] The defendants here must prove that the plaintiff had no reasonable claim to an interest in the lands as against which the CPLs were registered at the time they were registered.
- [385] Such, in my view has been proven here.
- [386] Firstly, I note the lethargic pace of the litigation noted in the reasons for judgment of Skolrood J. In his original pleadings, the plaintiff made no claim that title to the subject properties would change as a result of the action but rather the share ownership in Naki would change.
- [387] When the deficiency in the pleadings resulted in the removal of the CPLs by Matthews J., the plaintiff not only amended his pleadings to remediate the deficiency and thus restore the CPLs on title, but also attempted to argue the appeal on the basis of public interest despite his non-residency. Given his non-residency in Canada, the plaintiff's actual motivation was, in my view, more closely related to the infliction of ongoing financial pain

on the defendant. In this regard, I harken back to Nadia Pourtaghi's unchallenged version of the plaintiff's response to the defendant during the telephone call she said she overheard. The plaintiff said in effect, he would spend millions in the lawsuit.

- [388] That the plaintiff discontinued the action shortly before trial is not determinative of malice, but when seen in the context of the litigation pattern of the plaintiff, I infer the plaintiff was always more interested in financial oppression through litigation than any bona fide belief he was entitled to assume title of the three properties or even a return of the shares in Naki.
- [389] Even in his evidence he equivocated as to whether he gave the defendant the initial stake in Naki or she was obliged to pay her share of the capital before becoming entitled to the beneficial ownership of them. He never denied the defendant's evidence of the understanding between them from the onset that she would beneficially own Paladin and the Mainland condo.
- [390] I note his parallel litigation against Ania for money he advanced, during happier times, for her education; the litigation in Michigan (that could have been carried on in B.C. as part of this proceeding) and his veiled threat to engage Nadia Pourtaghi in future litigation given her expected evidence on behalf of her sister.
- [391] I note as well the re-emergence of claims of financial dishonesty by the defendant in cross-examination. The purported intent was to show her disentitlement to an equitable remedy or a reckoning in any financial award to account for money the defendant allegedly improperly removed from the parties' joint account.
- [392] I repeat, the plaintiff established no improper dealings by the defendant with the joint account used to pay expenses on Langston. Plaintiff's counsel never pursued this in his submissions.
- [393] Standing alone, each of features might lead to the conclusion the plaintiff was bona fide in his assertion of an interest in one or all of the properties encumbered by CPLs; either contractually or based on trust principles. Seen cumulatively, they lead to the conclusion the plaintiff has weaponized litigation, here and elsewhere, since the commencement of these proceedings and other proceedings designed to punish the defendant.
- [394] The defendant led evidence of expenses the CPLs caused her but never quantified those damages in closing submissions. Nowhere did she suggest the claim was abandoned.
- [395] I find the proven damages are the lender's fee of \$5,000 and the brokerage fee of \$7,700 paid by the defendant to secure financing on the Mainland condo.
- [396] The defendant led no evidence as to the prevailing interest that would have been available to her but for the CPL or the duration of the mortgage such that I could calculate her loss. Thus, I decline to award damages based on speculation as to what the difference might have been had the Mainland condo not been encumbered by the CPL.

- [397] Absent expert evidence as to the actual value of the condominium said to be sold at less than market value due to the "fire sale" nature of the sale of one of the Mainland condominiums, I find the defendant has not established a loss on the sale of the condo.
- [398] In addition to the pecuniary damages referenced above, the defendant's amended counterclaim seeks either punitive or aggravated damages to compensate her for the resulting from the plaintiff's oppressive and high-handed conduct.
- [399] While I have found the plaintiff's conduct to be oppressive and high-handed, absent submissions by the defendant on the issue of either punitive and/or aggravated damages, I decline to make an award given it was not fully argued. In my view, the behaviour I have characterized above can be properly dealt with through the vehicle of costs.

Costs

- [400] Having regard to my conclusions above, I invite submissions by both parties as to the question of costs. They are to set a date with the registry as near in the future as can be accommodated by both counsel and the court.
- [401] Similarly, given the result set out above, I invite submissions on the applicability of the Court Order Interest Act, R.S.B.C. 1996, c. 79, to both the monetary awards.

"Harvey J."

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