

CANADA / JUDGMENT

Roeder v. Morton & Co.

2003 BCSC 1259

COURT

Supreme Court of British Columbia

DECIDED

14 August 2003

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2003BCSC1259

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roeder et al. v. Morton & Company et al.,

2003 BCSC 1259

Date: 20030814

Docket: C993055

Registry: Vancouver

Between:

John Roeder, James Mashburn,

Larry Mashburn and William Gordon Buchanan

Plaintiffs

And

Morton & Company and Robin D.A. Blues

and Robin D.A. Blues, Personal Law Corporation

Defendants

And

Tim Pinchin and Larry Mashburn and

James Mashburn and William Gordon Buchanan

Defendants By Counterclaim

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for the Plaintiffs

and Defendants By Counterclaim:

J.H. Frank

Counsel for the Defendants:

A.A. MacDonald

Date and Place of Trial:

April 14-18,

April 21-25, 2003

Vancouver, B.C.

Introduction

- [1] On April 29, 1993, the plaintiffs, John Roeder, James Mashburn, Larry Mashburn and Gordon Buchanan, agreed to sell shares of Keywest Resources Ltd. to Tim Pinchin. On the same date, Morton & Company, Barristers and Solicitors (the "Firm"), agreed to act as trustee, and not as solicitors for either the vendors or the purchaser, in respect of the receipt and delivery of the shares that were the subject of purchase and sale and related documents.
- [2] The plaintiffs claim that Robin D.A. Blues, a lawyer employed by Robin D.A. Blues, Personal Law Corporation, a partner in the Firm, caused the Firm to breach the trustee agreement by wrongfully delivering shares and documents to Pinchin. The plaintiffs claim damages of an amount equal to the trading price of the wrongfully delivered shares on the date of delivery.
- [3] The defendants claim there was no breach of contract or fiduciary duty because the plaintiffs authorized the release of the shares and documents. Alternatively, the defendants say that if the release was not specifically authorized, the plaintiffs acquiesced to the defendants' actions with the result that there was no actionable breach of contract or fiduciary duty by the defendants. The defendants also claim that they are entitled to indemnification in respect of legal fees and disbursements incurred in defending this action.

Origin of the Share Purchase and Trustee Agreements

- [4] In 1993, Keywest was a public company whose shares were listed on the Vancouver Stock Exchange. It possessed funds of approximately \$425,000 derived from a public share offering. For reasons not material to this action, the intended use of the funds had been frustrated. Pinchin wanted to acquire control of Keywest in order to use its treasury to

acquire certain business ventures in which he was interested. His plan was to use his knowledge of the stock market to sell some of the shares he was buying to others. If his plan succeeded, Pinchin would acquire, at little or no cost to him, an escrow position and sufficient free-trading shares to give him control of Keywest.

- [5] Relevant clauses of the share purchase agreement (the "SPA") are reproduced as Appendix A to these reasons.
- [6] The SPA provided for the sale of 701,150 free-trading and restricted common shares, collectively called the "free-trading shares", and 1,088,850 escrow shares for an aggregate purchase price of \$850,000. Free-trading shares, described in the SPA as "working shares", were to be delivered against instalment payments of the purchase price as follows:

PAYMENT DATE

NO. OF FREE-TRADING SHARES

PAYMENT

May 5, 1993

50,000

\$100,000

May 30, 1993

200,000

\$400,000

August 31, 1993

175,000

\$350,000

Totals:

425,000

\$850,000

- [7] Clause 4 of the SPA provided that that "the date that the Third Instalment [August 31, 1993] is to be paid will be referred to as the 'closing date'."
- [8] Clause 2 of the SPA required delivery to the Firm of the free-trading shares, executed powers of attorney in respect of the escrow shares which were held by Pacific Corporate Trust, and undated but signed resignations of the incumbent Keywest directors. The agreement described these documents, other than the working shares, as the "control documents". Clause 4 of the SPA provided that the Firm, as trustee, would follow the terms of the trust arrangement agreed upon between the vendors and the purchaser in respect of the delivery

of shares and documents.

- [9] Pinchin's obligation to complete the share purchase was subject to the conditions precedent set forth in clause 10(a) through (g) of the SPA. These included shareholder approval if required in respect of the change of control, shareholder approval to the reallocation of corporate funds to purposes other than those that had been specified for purposes of the underwriting, and regulatory approval in respect of these same matters to be obtained not later than August 30, 1993. The conditions precedent, other than the requirements of shareholder and regulatory approval, were for Pinchin's benefit and could be waived by him at any time.
- [10] The SPA clearly contemplated that the necessary shareholder and regulatory approvals would be obtained before payment of the last instalment of \$350,000 on August 31, 1993. Clause 12 permitted the closing date to be extended by mutual agreement in the event the conditions precedent had not been satisfied by the closing date.
- [11] Clause 13 provided that the SPA would terminate in the event any condition precedent not waived by the purchaser had not been satisfied; in the event the third instalment was not paid on August 31, 1993 assuming the closing date had not been extended; at the vendors' option in the event the first and second instalments were not paid on the due dates; or in the event the required shareholder and regulatory approvals had not been obtained by the closing date.
- [12] Relevant portions of the trustee agreement are reproduced as Appendix B to these reasons.
- [13] The agreement provided that the Firm would act as trustee and not as solicitors for either vendors or purchasers in respect of the receipt and delivery of the shares and documents which were to be dealt with in accordance with clauses 4, 5, 6 and 13 of the SPA reproduced as part of Appendix A. In the event of a dispute with respect to the delivery of the shares and documents to any person, the trustee was entitled to deliver the shares and documents to a court of competent jurisdiction whereupon the trustee would be relieved of responsibility in respect of them.

Conduct in Relation to Share Purchase and Trustee Agreements

- [14] On April 30, 1993, the Firm received 701,150 free-trading shares, stock powers of attorney with respect to the 1,088,850 escrow shares held by Pacific Corporate Trust, and signed, undated resignations of John Roeder and three other individuals as directors of Keywest.
- [15] On May 3, 1993, the Firm delivered certificates for 143,060 free-trading shares to Canaccord Capital Corp. in Vancouver against delivery of a cheque in the amount of \$286,120. On May 4, 1993, the Firm delivered another 25,000 free-trading shares to Canaccord against receipt of a cheque in the amount of \$50,000.

- [16] On May 6, 1993, the Firm delivered two cheques in the amounts of \$286,120 and \$50,000, a total of \$336,120, to the vendors' solicitor, Mr. Andrew Chamberlain, in Edmonton, Alberta. The cheques represented the amount specified by the SPA to be payable in respect of the delivery of 168,050 free-trading shares.
- [17] It follows that by May 6, 1993, the purchasers had paid more than the first instalment of \$100,000 and had received more than the 50,000 shares contemplated by the SPA. The acceleration was permitted by the SPA.
- [18] On June 4, 1993, the Firm delivered another 140,735 shares to Canaccord against delivery of a cheque in the amount of \$242,148, an amount less than the amount of \$281,470 that would have been payable under the SPA in respect of 140,735 shares at \$2.00 per share. As a result, certificates for some of the 140,735 shares were split and a certificate for 19,661 shares was returned to the Firm and Canaccord retained 120,074 free-trading shares.
- [19] By June 4, 1993, the purchasers had taken delivery of 289,134 shares instead of the 250,000 shares contemplated by the SPA. They had paid instalments of \$578,268 on account of the purchase price. This acceleration of delivery and payment was permitted by the SPA.
- [20] On June 10, 1993, the Firm delivered a cheque in the amount of \$240,000 to the credit of a brokerage account in the name of John Roeder at Yorkton Securities. It is not clear from the evidence why the amount was less than the amount of \$242,148 that had been received by the Firm, but nothing turns on the apparent discrepancy.
- [21] There was nothing remarkable in the share purchase transaction to this point, but that was soon to change.
- [22] I find that that Pinchin did not expect to be at risk in relation to the share purchase. He wanted to acquire a publicly traded company into which he could convey one or more business ventures in which he was interested. The cash in the Keywest treasury remaining from an earlier underwriting would assist. Pinchin intended to use his familiarity with the market to sell the 425,000 free-trading Keywest shares of which he was to take delivery to purchasers in the market place at a price of \$2.00 or more per share. He did not intend to retain any of those shares. Were he to be successful in deriving funds with which to pay the \$850,000 purchase price in the manner described, he would have taken delivery of 276,150 free-trading shares and 1,088,850 escrow shares, giving him effective, if not actual, control of Keywest at little or no cost. He would thereby have gained access to the Keywest bank account which he intended to use to complete the purchase of various business ventures in which he was involved.
- [23] Were he to fail to sell 425,000 shares of Keywest to the public, or be unsuccessful in obtaining the necessary shareholder and regulatory approvals to the change of control and the change in the use of the remaining public offering proceeds, the free-trading shares, escrow shares and undated directors' resignations of which he had not taken delivery would be returned to the vendors' group represented by Roeder as contemplated by the SPA.

- [24] The share purchase arrangement, while unusual in that the full purchase price was to be paid against delivery of some, but not all shares, was workable provided that shareholder and regulatory approvals were obtained within the time horizons specified in the SPA. The last instalment would only have been payable on August 31, 1993 if shareholder and regulatory approvals had been obtained by that date. As provided in clause 13(d), the SPA would automatically terminate if the approvals were not obtained by August 30th.
- [25] Pinchin's plan did not unfold as intended. Pinchin had agreed to acquire property from a telecommunications company operating under the name of Comm-Tech in the State of Washington. The acquisition was to be made personally or through a company Pinchin controlled. Pinchin required US \$150,000 to close that transaction. While he intended to obtain the funds from Keywest, he did not have control in early June 1993 when the Comm-Tech payment was due. Pinchin wanted access to the Keywest bank account.
- [26] Pinchin testified that he met Roeder by chance on the steps of the Four Seasons Hotel in Vancouver on June 7th or 8th, 1993 just after he had paid the sum of \$242,148 and taken delivery of 121,074 shares of Keywest on June 4th. He testified that he asked Roeder if he could use a portion of the Keywest bank account balance to complete the Comm-Tech transaction. Roeder told him the funds could not be used for that purpose without regulatory approval of the change in the nature of the Keywest business.
- [27] Pinchin testified in chief that his understanding of the purchase arrangement was that he would have the right to receive the control documents comprised of 276,100 free-trading shares, 1,088,850 escrow shares and the directors' resignations immediately upon payment of \$850,000, a state of affairs that he referred to as the closing. Pinchin testified that he first learned of the requirement of regulatory approval during his chance meeting with Roeder on the steps of the Four Seasons Hotel. He had known the transfer of the escrow position would require shareholder approval, but he had not been party to any discussion nor advised about the need for regulatory approval at the time the transaction was negotiated. If that is the case, Pinchin could not have read the documents that he signed since the requirements in relation to shareholder and regulatory approval and his inability to waive the requirements are clear on the face of the documents.
- [28] On cross examination, Pinchin admitted he was aware of the need to obtain regulatory approval of the change of control when he signed the SPA. He maintained he did not know about the requirement of regulatory approval in relation to the proposed changes in the use of the underwriting funds until his conversation with Roeder in June.
- [29] Pinchin testified that Roeder agreed to personally lend him US \$150,000 which he could not obtain from the Keywest account on condition that Pinchin proceed to close the Keywest share purchase by paying the balance of the \$850,000 that was owing. In Pinchin's mind, that payment would entitle him to the remaining free-trading shares, the escrow shares and the resignations giving him control of Keywest and access to its bank account so that the loan from Roeder could be repaid.

- [30] While Pinchin had raised funds to pay prior instalments on account of the purchase price by selling Keywest shares to members of the public, he raised the last of the funds to make up the \$850,000 by engaging in what were essentially borrowing transactions with professional stock traders. He borrowed \$140,000 on June 11, 1993, in order to take delivery of 93,750 shares. He borrowed another \$130,000 on June 14th and, from his own funds, made a residual payment of \$3,880 to the Firm on June 15th. By that date, he had paid the full amount of \$850,000 and the trustee's fees and disbursements, thinking that he was then entitled to receive not only 425,000 free-trading shares but also the other shares and documents held by the Firm under the trustee agreement. Pinchin testified that he engaged in the acceleration of the payment of the balance of the \$850,000 following his meeting with Roeder.
- [31] Pinchin testified that he telephoned and then met with Blues on June 11th to advise him of the acceleration plans. I find he asked Blues about release of the documentation held by the firm. Blues told him the full purchase price of \$850,000 had to be paid before Blues would release any documents.
- [32] Pinchin testified that he spoke to Roeder on June 15th to advise that the final payment had been made, and to ask Roeder to instruct his solicitor, Andrew Chamberlain of Edmonton, Alberta, to authorize Blues to close the share purchase and release the documents, steps that would trigger Roeder's obligation to lend Pinchin US \$150,000.
- [33] On June 15th, Pinchin called Blues and asked him to call Chamberlain to obtain instructions to release the closing documents. Later on the same day, Blues delivered the control documents consisting of the 276,100 free-trading shares, the stock powers of attorney in respect of the escrow shares, and the undated directors' resignations to Pinchin.
- [34] Roeder's account of the June discussion with Pinchin is different. Roeder testified that for most of the month of June 1993, he was in Cassiar, B.C. attending to business matters. He testified that he could make telephone calls from Cassiar, but he did not have a direct number at which people could reach him there. Roeder denied being in Vancouver where he might have met Pinchin at the Four Seasons Hotel. Roeder's telephone records for the period were tendered as evidence. They indicate that long distance calls were made and charged to Roeder's cell number for calls made from Cassiar daily from June 1st through 15th inclusive with the exception of June 6th, a Sunday, when two calls were made from nearby Watson Lake. I accept Roeder's evidence and reject that of Pinchin in relation to the meeting. I find as a fact that Roeder was not in Vancouver from June 1st through June 15th inclusive. As a result, no meeting occurred between Pinchin and Roeder in Vancouver from June 1st through 15th, 1993.

- [35] Roeder testified that he called Pinchin from Cassiar on June 14th. What prompted the call is not in evidence. Pinchin testified that he spoke to Roeder by telephone on June 15th. Roeder's long distance records indicate a call of 18 minutes' duration to Pinchin's number on June 14th. No call is recorded on June 15th. I reject Pinchin's evidence, accept that of Roeder in this regard, and find as a fact they spoke once by telephone on June 14th.
- [36] Roeder testified that during the conversation, Pinchin told him of his immediate need for funds to close a transaction in Washington State, the Comm-Tech transaction, which Pinchin portrayed as a Keywest deal. He asked Roeder if he could use Keywest cash for that purpose. Roeder told Pinchin he could not, absent necessary regulatory approval of the change in the intended use of the funds from the purpose for which they had been raised in Keywest's earlier public offering. Roeder offered to lend Pinchin US \$150,000. Roeder denied that his agreement to lend the amount was conditional on either an accelerated closing of the Keywest share sale, or payment of the remaining portion of the \$850,000 purchase price.
- [37] Roeder testified that after his call with Pinchin, he telephoned his lawyer, Andrew Chamberlain. As I have previously remarked, Chamberlain acted for Roeder in relation to the share sale and had been instrumental in drafting the SPA and trustee agreements.
- [38] Chamberlain testified to notes he made of a telephone conversation with Roeder on June 15, 1993. The following portions of the notes are material:
- All money should be in Robin Blues' trust account.
- John Roeder will put up the money for the \$150,000 (US).
- Call Robin Blues to verify money.
- Send to Jim Mashburn account #71-0292-4 at Yorkton - Grant Caldwell.
- [39] Roeder testified that he did not have a specific recollection of his discussion with Chamberlain, but he did have a vague recollection of speaking to him in relation to the matters described in the notes.
- [40] Unlike Pinchin, Roeder testified that payment of the remainder of the \$850,000 purchase price was entirely independent of his agreement to lend Pinchin US \$150,000. I will resolve the conflict in the evidence in due course.
- [41] On June 15th, Roeder instructed his broker to deliver a cheque in the amount of \$192,000 to Pinchin in order to provide the sum of US \$150,000. Neither the cheque nor particulars of the transfer was tendered in evidence.
- [42] Blues testified that he met with Pinchin on June 11th to discuss what would be required to pay the balance of the \$850,000 in order to get the rest of the shares. Blues and Pinchin worked through the mechanics resulting in Pinchin's actions of June 11th and 14th as earlier described.

- [43] Blues testified that he returned to his office from a legal education seminar at noon on June 15th. He was told by his assistant that Pinchin had called to say that \$130,000 had been deposited as required, he wanted to bring in the remaining sum of \$3,880 to which I have earlier referred and he wanted to pick up the remainder of the shares held by the Firm. Blues called Pinchin who confirmed the message Blues had received from his assistant. Blues testified that Pinchin asked him to call Chamberlain to say he would have the final purchase price that day and to investigate an early closing of the transaction. Blues testified that he called Chamberlain, told him he would have the final purchase price that day, advised that Pinchin wanted an early closing, and asked if Chamberlain had any objection. Blues testified that Chamberlain asked if he, Blues, would have all the funds that day, Blues said yes, and Chamberlain said he had no objection.
- [44] Blues' testimony suggests that the conversation with Chamberlain occurred before Blues took any steps to assemble documents for release. I find that was not the case. The Firm's telephone records tendered as evidence record a call of 30 seconds duration to Chamberlain at 1229 hours on June 15th. That call reflects a minimum charge and I find that Blues and Chamberlain did not converse at that time.
- [45] Blues testified that he gathered the documents in the firm's possession, drafted and signed a letter to Pinchin, left an envelope at reception for pick-up by Pinchin, and left to return to the education seminar shortly after 1300 hours. I find as a fact he had prepared and packaged in an envelope the control documents comprised of a certificate or certificates representing 276,150 free trading shares, executed stock powers of attorney in respect of those shares and 1,088,850 escrow shares, and undated directors' resignations before he had a conversation with Chamberlain of 1 minute 35 seconds duration at 1314 hours on June 15th. I also accept Blues' testimony and find as a fact that he did not review the terms of the SPA or the trustee agreement before deciding to release, or actually releasing, the documents to Pinchin.
- [46] On June 22, 1993, Blues wrote to Chamberlain enclosing a cheque for \$273,880 to make up the balance of \$850,000. Chamberlain admitted that the letter referred to the release of all share certificates, stock power of attorney forms and undated resignations for directors of Keywest that were held by the Firm pursuant to the appointment of trustee agreement dated April 29, 1993.
- [47] Chamberlain testified that he was involved in the preparation of the Keywest share purchase documents on Roeder's behalf. Chamberlain was aware of the contents of the agreements, the first drafts of which were prepared by the Lyons & Cawkell law firm on Pinchin's behalf. Chamberlain continued to represent Roeder after the execution of the documents by taking receipt of funds from the Firm, preparing press releases for Keywest, and working with the Lyons & Cawkell firm with a view to obtaining the necessary shareholder and regulatory approvals.

- [48] Chamberlain could not recall details of his telephone conversation with Roeder on June 15th, nor was he able to expand upon the meaning of his notes from that date to which I have earlier referred. He could not recall any specifics surrounding the US dollar loan although he later received a draft of the loan agreement. He could not recall the content of his conversation with Blues on June 15th, but testified he could not deny that Blues told him on June 15th that Pinchin wanted to "close the deal". He testified that he was not concerned by the content of Blues' letter of June 22nd. He testified that he could not recall whether the text of the letter caused him to recognize that 276,150 free trading shares had been released along with the escrow shares, the stock powers of attorney, and the directors' resignations.
- [49] Chamberlain testified that he was not concerned about the release of the escrow shares and the powers of attorney related thereto because those shares were in the safekeeping of an escrow agent, namely Pacific Corporate Trust, and could not be transferred without shareholder approval. He was not concerned about the release of the directors' resignations because he was engaged in discussions with Mr. Lyons, who was acting for Pinchin, with a view to facilitating a change in directors at a meeting scheduled for July 21st which had been called as part of the process of obtaining shareholder and regulatory approval of the share purchase transaction.
- [50] Chamberlain testified that he met with Roeder in Edmonton on June 30, 1993, by which time Roeder had learned that Pinchin and Lyons had acted to halt trading in the shares of Keywest. Chamberlain could not recall whether Lyons gave a reason for the halt. In any event, Chamberlain and Roeder recognized that Pinchin was acting as if he controlled Keywest. Chamberlain then had a telephone conversation with Ms. James at the Vancouver Stock Exchange who told him the VSE was not amenable to the transfer of control of Keywest to Pinchin. He also spoke to Ms. Newall of the B.C. Securities Commission who advised him the Commission did not want the shareholder meeting scheduled for July 21st to proceed. The Commission froze the Keywest bank account by order dated July 12, 1993. The meeting of shareholders was called to order on July 21st, adjourned to July 28th because of a lack of quorum, and continued on July 28th solely for the purpose of appointing auditors.
- [51] The transfer of control of Keywest was never approved by its shareholders or regulatory authorities and its shares have not traded since the halt on June 30, 1993.
- [52] Chamberlain testified that he did not review the share purchase documents on June 15th when he spoke to Roeder and Blues. He reviewed the SPA before its execution. He reviewed it again after the shareholders' meeting of July 28th. He concluded that Blues had improperly released the control documents on June 15th because regulatory and shareholder approvals had not been obtained at the time. He wrote to Blues on August 5, 1993 asking him to attempt to obtain the return of the documents. Blues responded by saying the payment of the final amount on account of the \$850,000 purchase price had accelerated the closing date. Chamberlain wrote to Pinchin on September 1, 1993 advising him that the SPA was terminated by virtue of clause 13(d) because shareholder and regulatory approval had not

been obtained before August 31st. He demanded the return of the free-trading shares and other documents that Blues had delivered to Pinchin. None of the shares or documents was returned.

- [53] Roeder took no other action with a view to recovering the shares and documents until June 1999 when, on the eve of expiry of the limitation period, he commenced an action against Pinchin claiming repayment of the loan of \$192,000 and return of the control documents.
- [54] In order to complete the narrative, I recite the fact that following British Columbia Securities Commission hearings in relation to Keywest, Roeder was prohibited from serving as an officer or director of a public company in British Columbia for a period of 17 years beginning in 1995. Pinchin was similarly prohibited for a period of 25 years. The Securities Commission orders recited that the prohibitions resulted from conduct in relation to the affairs of Keywest.
- [55] In addition to the findings of fact specifically noted to this point, I find the following.
- [56] There was no discussion between Pinchin and Roeder about changing the closing date of the transaction and Roeder did not know of Pinchin's plan to ask Blues to release the control documents. Roeder denies such a discussion. I reject Pinchin's evidence that such a discussion occurred.
- [57] All of the evidence and Pinchin's course of conduct satisfy me that Pinchin wanted access to the Keywest cash. He thought he could gain access to it by paying the \$850,000 purchase price. He took steps to raise that sum from market purchasers and from professional traders in the financing transactions I have previously described. He believed that by making the full payment, he could gain access to the Keywest cash in order to close the Comm-Tech transaction on that date. He called Roeder to advise of his plan, but was told that he could not use the cash in the manner he proposed without regulatory approval of a change in the character of Keywest's business because Pinchin's intended use differed from that which had been represented in the course of the offering..
- [58] From all of the evidence of Roeder and Pinchin, I find there was no discussion about the requirement of approval of a change in control during the June 14th conversation. Approval of a change of control was distinct from regulatory approval of a change in the use of the funds. Had there been a discussion about change of control through the delivery of documents, there would have been no need for Pinchin to ask Blues to call Chamberlain to approve an early closing as Roeder would already have agreed to it.
- [59] I find Roeder agreed to lend US \$150,000 to accommodate Pinchin in respect of the Comm-Tech transaction. The loan was not conditional on a closing, with or without approval of the change of control, but it was conditional on the acceleration of the payment of the remainder of the \$850,000. That is evident from Chamberlain's notes of June 15, 1993 recording that Roeder asked him to confirm that Blues had received the balance of the funds and his advice that he would lend Pinchin US \$150,000. I conclude that if payment of the

balance were made, Roeder had every reason to expect Pinchin would proceed to obtain the necessary shareholder and regulatory approvals for the change in the use of the funds. I accept Roeder's evidence that he was confident regulatory approval for the change of business would be obtained so that Keywest could use its funds to purchase the Comm-Tech venture from Pinchin whereupon Roeder would be repaid the amount he would lend to Pinchin.

- [60] I find Pinchin told Blues he wanted to pay the balance of \$850,000 and take delivery of the control documents. I find that Pinchin did not know of, or omitted to recall, the terms of the SPA stipulating that delivery of the control documents was conditional upon regulatory and shareholder approval, neither of which could be waived.
- [61] I find that during the telephone conversation of June 15th, Blues told Chamberlain of the plan to close the share purchase transaction and release all documents in his possession. The conversation was not restricted to the discussion of payment of the remainder of the \$850,000 purchase price and delivery of a limited number of free trading shares. The payment of \$850,000 alone cannot reasonably be described as a "closing".
- [62] I find that Chamberlain was acting on Roeder's behalf when he spoke to Blues on June 15th. He had been instructed by Roeder to confirm that \$850,000 had been paid. Chamberlain did not object, and in fact approved, when Blues told him, as he did on June 15th, of the intended payment and proposed closing.
- [63] I find Blues did not review the share purchase documents before releasing the control documents to Pinchin. He acted on the unfounded assumption that the date for the delivery of the control documents would automatically be accelerated to the date that the \$850,000 was paid in full. He said as much when he first wrote to Chamberlain explaining his conduct. I find that Blues did not come to appreciate his error in that regard until August 1993.
- [64] I find that Chamberlain did not review the share purchase documents in June 1993 to consider whether that which was proposed by Blues and Pinchin was permitted by the agreements. I find that the letter of June 22, 1993 clearly stated that all documents held by the Firm under the trustee agreement had been released to Pinchin on June 15th. Included in those documents were 276,150 free-trading shares, which together with the escrow position, carried control of Keywest.

Analysis

- [65] In my opinion, the defendants cannot avoid liability by saying, as they do, that Blues acted on joint instructions from Pinchin and Roeder to release the control documents.
- [66] The trustee agreement employed in this case is noteworthy in that, unlike a commonplace deposit or escrow agreement that directs a custodian to deal with documents or property in accordance with written instructions received from those who are parties to a transaction,

this agreement directed the trustee to act in a specified manner, on specified dates, when certain events described in the SPA had occurred. The agreement did not provide or contemplate that the trustee would act in response to written directions from the beneficiaries. The trustee cannot say he discharged his obligations under the trustee agreement because he acted on instructions from the parties. The defence would only be available if the agreement had been amended to direct the trustee to act pursuant to instructions from the parties.

[67] Neither the SPA nor the trustee agreement was amended after execution. In that regard and contrary to the submissions of counsel for the defendants, I find, both in fact and in law, that the SPA was not amended to alter its closing and approval requirements when Roeder agreed to lend Pinchin US \$150,000 to complete the Comm-Tech transaction. The SPA and trustee agreement stipulated that control documents were not to be released without the antecedent shareholder and regulatory approvals. The trustee wrongfully released the control documents in the absence of such approvals and, in doing so, breached the trustee agreement.

[68] The remaining question is whether the plaintiffs acquiesced to the breach of trust flowing from the release of the control documents with the result that the breach is not actionable.

[69] In *Brighthouse v. Morton*, [1929] S.C.R. 512, the Supreme Court of Canada said the following at 527:

...it is established law that a cestui que trust who actively concurs, or passively acquiesces, in a breach of trust can obtain no relief against the trustees in respect of it if, at the time of this concurrence or acquiescence, he was of full age and sui juris and had full knowledge of the circumstances.

[70] In *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1974) at 1009, D.M. Waters states the following:

If a beneficiary consents to, or concurs in, a breach of trust prior to its being carried out, or he releases the trust from liability, or in some other way acquiesces in the breach after it has been carried out, he may not subsequently claim from the trustee any compensation to the trust for the loss arising. It is the beneficiary's personal fault which bars him from making such a claim, and therefore it does not bar any other beneficiary from suing the trustee.

[71] In my opinion, Chamberlain's concurrence on behalf of Roeder with the proposed course of action in his June 15th telephone conversation with Blues, Chamberlain's acceptance of the advice contained in the Blues letter of June 22nd, the failure of Chamberlain and Roeder to assert any wrongdoing by Blues or to assert any claim to the property or documents on June 30, 1993 when they learned that Pinchin had halted trading in the shares of Keywest, the omission to allege any wrongdoing until August 1993, and the omission to take any legal proceedings against Pinchin to recover property to which he was not entitled until the eve of the expiry of the limitation period six years after the events in question, amount to

concurrence in, or acquiescence to, Blues' course of conduct. In my opinion, that concurrence or acquiescence was not vitiated by virtue of the fact that Chamberlain omitted to review, consider, or focus on the specific terms of the SPA or trustee agreement on June 15 or 22, 1993. Blues made no misrepresentation to Chamberlain who was fully aware of the requirements relating to the share purchase transaction and fully aware of the course Blues intended to follow.

- [72] It follows that I reject Roeder's claim that Chamberlain did not appreciate or understand that which Blues planned to do on June 15th. I am satisfied Blues spoke to Chamberlain of a closing and release of the control documents. Earlier transactions that had resulted in the accelerated payment for, and delivery of, free-trading shares had not been referred to as "closings" in any discussions between Blues and Chamberlain. Chamberlain testified that he was not concerned about the release of the escrow shares or the directors' resignations. It is unreasonable to conclude that he would not have been concerned about those releases, but concerned about the release of the 276,150 free-trading shares without expressing that concern to Blues. As between Roeder and the defendants, any oversight by Chamberlain to which Roeder might point cannot be visited upon Blues.
- [73] In the result, the defendants are not liable to the plaintiffs and the action is dismissed.
- [74] The final issue is whether the defendants are entitled to be indemnified by the plaintiffs for legal costs in defending this action. The form of indemnity is contained in clauses 4 and 5 of the trustee agreement reproduced in Appendix B to these reasons. In this regard, the question is whether, on its wording, the indemnity should be interpreted to include costs incurred by the defendants in defending an action brought against them by the beneficiaries of the trust or custody arrangement. I think not.
- [75] The indemnity applies in respect of actions taken by the trustee, anything in any manner relating to actions of the trustee, or losses suffered by the trustee by reason of compliance, in good faith, with the terms of the agreement.
- [76] The release of control documents did not comply with the trust agreement. Acquiescence by the plaintiffs to the trustee's breach does not make a non-compliant act compliant for purposes of the indemnity. The trustee is not protected by the compliance test stipulated in the agreement.
- [77] Construed in a purposive manner, the indemnity is directed at the protection of the trustee in respect of the actions of persons other than beneficiaries. Acceptance of the defendants' claim for indemnity in respect of actions by a beneficiary would lead to an unusual result. If the indemnity is construed to require reimbursement of legal costs incurred by the trustee in defending an action by beneficiaries for wrongdoing or negligence, it would also apply to require a beneficiary to reimburse the trustee's loss as measured by damages in circumstances where the beneficiary was successful in establishing liability on the part of the trustee.

- [78] So construed, the indemnity would exonerate the trustee from liability to a beneficiary for a loss occasioned by the trustee's negligence or wrongdoing. An intention to deny beneficiaries the right to claim against their trustee in respect of damage caused them by the trustee's negligent acts must be clearly stated in the trust agreement as the exoneration of a trustee for wrongful acts in relation to the beneficiary is inimical to the nature of a trust obligation.
- [79] Reasonably and purposively construed, the indemnity only applies in relation to losses and expenses incurred by the trustee against non-beneficiaries.
- [80] The defendants' counterclaim is dismissed.
- [81] In the absence of agreement, the parties may address the matter of party and party costs in written submissions through the registry.

"I.H. Pitfield, J."

The Honourable Mr. Justice I.H. Pitfield

Appendix A

Extracts from Share Purchase Agreement

4. The Trustee will follow the terms of the trust arrangement agreed upon between the Vendors and the Purchaser in respect of the delivery to the Purchaser of all or part of the Shares and the documents referred to in Clause 2. The trust arrangements will require that the Purchaser make arrangements for payment of the Purchase Price in instalments. The instalments will be paid against delivery of a portion of the Free-Trading Shares, which for the purposes of this Agreement, will be referred to as the "Workings Shares".

PAYMENT DATE

NO. OF FREE-TRADING SHARES

PAYMENT

(May 5, 1993)

50,000

\$100,000

(the First Instalment)

May 30, 1993

200,000

\$400,000

(the Second Instalment)

August 31, 1993

175,000

\$350,000

(the Third Instalment)

Total:

425,000

\$850,000

The date that the Third Instalment is to be paid will be referred to as the "Closing Date".

5. Subject to Clause 7, at such time as the Trustee has received each of the instalments described in Clause 4 above, the Trustee will cause the number of Working Shares for which payment is received to be delivered to the direction of the Purchaser (together with Stock Powers of Attorney, if required). The Purchaser may make an instalment payment in an amount greater than the minimum payment indicated, and he may accelerate the payment dates, in which case appropriate adjustments will be made as to the number of Working Shares to be delivered, on the basis of \$2.00 for each Working Share paid for. Upon delivery of any of the Working Shares to the Purchaser, the Trustee shall release that portion of the Purchaser Price for which such Shares are delivered, to the direction of the Vendors.
6. On the Closing Date, and provided the Purchase Price has been paid in full, the Trustee will deliver to the direction of the Purchaser, the remaining Free-Trading Shares they then hold (being 276,150 shares), and all of the remaining documents referred to in Clause 2 (stock powers of attorney and documents to effect transfer of the Escrow Shares, etc.).
10. The Purchaser's obligations to complete the transaction hereby contemplated shall be subject to the following condition precedents:
 - (a) that the Company receive shareholder approval if required to the change of control;
 - (b) that the Company receive shareholder approval if required, to the disposition of all or substantially all of the Company's assets;
 - (c) that the Company receive shareholder approval if required, to the reallocation of funds raised by the Company pursuant to its Prospectus offering;
 - (d) that this Agreement and the transactions described in Paragraph 10 (a), (b) and (c) receive the approval of regulatory authorities of the Company including but not limited to the Vancouver Stock Exchange which approval shall be approved not later than August 30, 1993;
 - (e) ...
 - (f) ...

(g) ...

The conditions set forth in this Clause except those that may require shareholder and regulatory authorities approval are for the exclusive benefit of the Purchaser and the Purchaser may waive any of the said conditions at any time.

13. Notwithstanding any other provision of this Agreement, this Agreement will terminate:

- (a) in the event any of the condition precedents described herein in Clause 10 have not been satisfied and provided the Purchaser has not waived any of the said conditions that may be waived;
- (b) in the event the Purchaser does not pay the Third Instalment to the Trustee on the required date provided the Closing Date is not extended;
- (c) in the event that the Purchaser does not complete the First and Second Instalments on the dates set out hereinbefore, then in such event, the Vendor shall have the option to terminate the Agreement;
- (d) in the event shareholder approval, if required, and regulatory authorities approval that the transaction herein contemplated is not obtained by the Closing Date, provided the Closing Date is not extended;
- (e) ...

In the event of a termination of this Agreement, all of the shares and documents then held by the Trustee and not otherwise released to the Purchaser shall be returned to the Vendors and any of the Purchase Price instalments which may then be held by the Trustee and not yet paid to the Vendors shall be returned to the Purchaser, neither the Vendors or the Purchaser shall have any claim against the other in respect of any matter arising from and during the term of Agreement.

Appendix B

Extracts from Trustee Agreement

1. Morton & Company, Barristers and Solicitors, are hereby appointed as Trustee and Morton & Company hereby agree to act as Trustee and not solicitors for either the Purchaser or the Vendors in respect of the receipt and delivery of the Shares and Documents.
2. The Shares and Documents will be held by the Trustee and dealt with in accordance with Clauses 4, 5, 6 and 13 of the Agreement, a copy of same is attached hereto as Schedule "A" and which clauses are to be read as part of this Agreement.
3. In the event of a dispute arising with respect to delivery of the Shares and Documents as provided for herein, or the payment of any of the Purchase Price in respect thereof, the Trustee shall be entitled to deliver such Shares and Documents to a Court of competent jurisdiction, thereby relieving the Trustee of responsibility over same.

4. Each of the Purchaser and Vendors further acknowledges and agrees that in consideration of the premises and of Morton & Company's agreement to act as Trustee, each of the Parties does hereby joint and severally covenant and agree from time to time and at all times hereafter to save, defend and keep harmless and fully indemnify the Trustee, its successors and assigns from and against all losses, costs, charges, suits, demands, claims, damages and expenses which the Trustee, its successors or assigns, may at any time or times hereafter bear, sustain, suffer or be put unto for or by reason or on account of its acting as Trustee or anything in any manner relating thereto or by reasons [sic] of the Trustee's compliance, in good faith, with the terms hereof.
5. It is further acknowledged and agreed by and among the Parties, and without restricting the foregoing indemnity, that in case proceedings should hereafter be taken in any Court respecting the Shares and Documents, then the Trustee shall not be obliged to defend any such action or submit its rights to the Court until it shall have been indemnified by other good and sufficient security in addition to the indemnity hereinbefore given, in respect of any costs of such proceedings.

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