SUPREME COURT OF NOVA SCOTIA
Citation: Belliveau v. Belliveau, 2011 NSSC 397

Date: 20111028
Docket: SDD 206004
Registry: Digby

Between:

Gary Belliveau

Plaintiff

v.

Jovite Belliveau

Defendant

Judge:	The Honourable Justice Patrick J. Duncan
Heard:	July 13, 14, 15, 16, 17, 20, 21; August 24; and October 16, 2009 in Yarmouth, Nova Scotia January 18, 2010, in Digby, Nova Scotia January 19, 20, 21, 22, March 1,2,3,4,5, 8,9,10,11,12, 15, 22,23,24,25,26, 2010 in Yarmouth, Nova Scotia
Final Written Submissions:	October 1, 2010
Counsel:	Andrew Nickerson Q.C. and Charles Ford, for the Plaintiff Clifford Hood, Q.C., and Matthew Fraser, for the Defendant

By the Court:

Background

[1] The defendant, Jovite Belliveau, ("defendant") and the plaintiff, Gary Belliveau, ("plaintiff") are father and son respectively.

[2] In 1980, the defendant and the plaintiff signed a partnership agreement for a mink farming business known as JR and Son Mink Ranch. The plaintiff had just graduated from high school and was being offered a future in business with his father. Under that partnership agreement the defendant was entitled to 51% of the profits and the plaintiff was entitled to 49%. I find that the agreement has no bearing on the claims of either party.

[3] In August 1987, a limited corporation was formed called JR and Son Mink Ranch Limited. ("Mink Ranch") The business was established solely with the contribution and loan of assets from the defendant. The share structure reflected 50% ownership for the defendant and 50% ownership for the plaintiff. The defendant was the President of the corporation and the plaintiff was the Secretary. Initially both were active in the operation of the business until, as it appears, the operations were passed to their spouses to manage. Nevertheless, both men

retained their positions as officers and retained their equal ownership interests. They were, together, the directing mind and will of the corporation. I am satisfied, on the evidence presented, that each of them was in a fiduciary position with corresponding obligations to this corporation.

[4] At the same time, a second corporation was formed called J.R. Belliveau's Truck Repairs Limited. ("Truck Repairs"). Again, the share structure reflected 50% ownership for defendant and 50% ownership for plaintiff. Again, the defendant contributed and loaned the assets to establish the corporation. The defendant was the President and the plaintiff was the Secretary. They were, together, the directing mind and will of the corporation. I am satisfied on the evidence presented that each of them was in a fiduciary position with corresponding obligations to this corporation. The defendant was primarily responsible for the operation of this business.

[5] A Shareholders' Agreement was entered into by both men for Truck Repairs on March 24, 1988 with a term of fifteen years. It provided for the transfer of shares upon certain conditions in the event of either man's death. It has no bearing on the claims of either party.

[6] A third corporation was formed in 1999, Bellscape Construction Limited, ("Bellscape"). It provided for the same share structure and the same officers as the other two corporations. It was established to take over the growing business in excavation, wells, septic and road construction that the parties were developing. Bellscape had no assets and was apparently created, successfully, to shield assets in the event of potential lawsuits.

[7] Again, I am satisfied on the evidence presented before me that each of the defendant and the plaintiff was in a fiduciary position with corresponding obligations to this corporation. The plaintiff was primarily responsible for the operation of this business. This business apparently used the corporate assets of Truck Repairs and Mink Ranch, together with assets of the defendant to carry out its work.

[8] Both Truck Repairs and Mink Ranch acquired parcels of land for various purposes. As well, the defendant retained ownership of certain lands he acquired prior to incorporation of the businesses.

[9] It is clear that both men worked very hard and profited significantly from their labors with their companies. However, in the late 1990's, following the death, by accident, of the plaintiff's son, there was an increasing strain in the relationship between plaintiff and defendant.

[10] This time frame coincided with the plaintiff's decision to surreptitiously enter business with others as discussed below. The corporate relationship became strained, acrimony increased and it culminated in the cessation of active business by the three companies and the auctioning off of the assets in 2003. Claims and counterclaims were levied by both parties. This action is the result.

Overview of the Claims

[11] In essence, each of the parties seeks to obtain an unequal division of what remains of the corporate assets and proceeds obtained on sale of assets, together with whatever other remedies the law and facts might permit.

[12] The plaintiff's claim alleges the defendant has breached his fiduciary duty to the corporations by converting assets to his personal use, hiding corporate assets

and using corporate assets for his personal gain. The plaintiff also alleges the plaintiff entered into an agreement with the defendant to sell the assets of the corporations at auction under duress and that agreement should now be set aside. He claims the amounts realized at auction were substantially below market value and the defendant is accountable for the difference because it was the defendant's breach of fiduciary duty to the corporations that necessitated the sale.

[13] The plaintiff, in his capacity as shareholder, seeks the benefit of the oppression remedy under section 5 of the **Third Schedule** of the **Companies Act** R.S.N.S. 1989, c. 81, as amended:

> 5 (1) A complainant may apply to the court for an order under this Section.
>
> (2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates
>
> (a) any act or omission of the company or any of its affiliates effects a result;
>
> (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or
>
> (c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,

> that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[14] The plaintiff has requested an accounting for the alleged breach of fiduciary duty and conversion of assets by the defendant. He further claims partition or judicial sale of certain lands not otherwise dealt with by an earlier order granted by Stewart J., of this court.

[15] The defendant alleges that the plaintiff has breached his fiduciary duty to the corporations, by converting assets to his personal use and wrongly using corporate assets for his personal gain and the personal gain of his spouse.

[16] He has also alleged that the plaintiff improperly seized a ripening corporate opportunity of land development for his own personal gain and that of his spouse.

[17] The defendant, in his capacity as shareholder, seeks the benefit of the oppression remedy under section 5 of the **Third Schedule** of the **Companies Act**. He has requested an accounting for the alleged breach of fiduciary duty and conversion of assets by the plaintiff.

[18] The parties, therefore, each claim the actions of the other to be oppressive, unfairly prejudicial, and/or to have unfairly disregarded their respective interests. Each claim to be an "aggrieved person" under the **Third Schedule** of the **Companies Act.**

[19] The plaintiff asks for liquidation of the companies and for an award of compensation for his losses. The defendant asks for an accounting and an order paying him and the companies such sums as would put him and the companies in the same position they would have been were it not for the plaintiff's actions.

[20] The remedies sought by the parties, including accounting and disgorgement, are in large measure, equitable remedies that are intended to fashion an order that ensures fairness in all of the circumstances.

[21] The court heard lengthy evidence that far exceeded counsels' pretrial estimate of time required. This necessitated the trial being convened on various dates over several months between July 2009 and March 2010. Written representations followed, the last of which was received on October 1, 2010. The

acrimony between the parties was palpable throughout the trial and continued through post trial submissions of counsel.

[22] Below I list the specific allegations of the parties against each other. I note that both parties made allegations at trial that did not appear in their pleadings. For completeness, I have listed the allegations presented both at trial and in the pleadings. It will become clear that testimony concerning allegations not set out in the pleadings nevertheless was useful in assessing credibility of the respective parties.

Specific Claims by the Plaintiff against the Defendant

[23] The plaintiff adduced evidence in support of fourteen allegations of wrongdoing on the part of the defendant. They are that the:

1. Defendant received a personal benefit for the construction of his house with the use of company materials, assets and manpower;

2. Defendant collected accounts receivables of the companies after the auction of company assets and did not account for them;

3. Defendant paid corporate monies to a person who did not work for the company, (Kathleen Hunlin) and did not, but should have, reimbursed the companies for same. (Not in the pleadings);

4. Defendant exerted duress, threats and coercion upon the plaintiff causing him to agree to sell corporate assets at auction, some of which were sold at an extraordinary loss (*e.g.* Case bulldozer - The plaintiff claims the difference between the auction sale price and market value from the defendant);

5. Defendant sold various items including lumber, scrap iron, culverts, septic tanks, well rings, forklifts, a hydraulic press, generators, slings, staging, forms, pipes, a tractor, parts and equipment and other items of the companies, and retained the proceeds for his personal benefit. Others of these items, the defendant kept for his personal benefit. The plaintiff asks that the defendant compensate the companies for these assets or return them;

6. Defendant wrongly used corporate money to arrange for a survey to establish the line between land of Mink Ranch and the personal residence of the plaintiff. (Not in the pleadings);

7. Defendant wrongly used corporate money held in the trust account of Mr. Hood (counsel for the Defendant) to pay Louise Doucette (accountant/bookkeeper) for work the plaintiff did not consider to be for the benefit of the companies;

8. Defendant failed to deliver up tools and equipment of Truck Repair to the auction, claiming them as his own;

9. Defendant artificially inflated the hours and costs he, and others paid by him, spent preparing for the auction, which was then billed to the companies. The plaintiff says the work was performed by the companies and by company employees. (Not in the pleadings);

10. Defendant received cash payments for work done by the companies, which cash was divided up between, among others, the plaintiff and defendant before Christmas each year. (The plaintiff also received cash payments for work he was

doing with Europeans. The plaintiff claimed the companies received all the benefit of these funds.) (Not in the pleadings);

11. Defendant took possession of, and claimed as his own, lands and premises at Little Brook, Nova Scotia, which were owned by the companies. He also kept title in his name of some lands belonging to the companies. The plaintiff wants return of the lands to the companies or compensation to the companies for the assets;

12. Defendant used credit cards of the companies for his personal expenditures and used companies' funds to pay his own liabilities;

13. Defendant, by preventing the companies from completing work in 2003, caused losses to the companies for which he should be accountable;

14. Defendant stripped fixtures from a jointly owned cottage at Beaver Lake, Nova Scotia, and thereby deflated the sale price of the cottage.

Specific Claims of the Defendant against the Plaintiff

[24] The defendant adduced evidence in support of twenty allegations of wrongdoing on the part of the plaintiff. They are that the:

1. Plaintiff and his wife improperly received funds from two Austrian nationals, or their companies, for work done using corporate assets of the companies, or which should have been done by Bellscape. In doing this, the Plaintiff wrongly appropriated a ripening corporate opportunity of the companies to his own benefit. This was a breach of fiduciary duty and all profits, assets, should be disgorged to the companies;

2. Plaintiff traveled to Europe to develop his personal business with the Austrians and others. The defendant claims that the plaintiff improperly charged the expenses to the companies' credit cards and that this amount should be repaid to the companies;

3. Plaintiff kept bank accounts in various communities in Germany to hide his activities and assets from the companies. The defendant says these assets were

wrongly obtained in breach of fiduciary duty and should be disgorged to the companies. Included in these bank accounts were substantial deposits obtained from logging and timber, as well as funds belonging to Bellscape;

4. Plaintiff and his wife received various lots of land, located in Nova Scotia, from the Austrians or their companies as compensation for the use of time and equipment of the companies in the land developments. They also received commissions on the sale of lots in the developments. The plaintiff failed to disclose this compensation and should be accountable;

5. Plaintiff wrongly entered into a land purchase of lands on the Sissiboo River, Nova Scotia, with Austrian business associates. This land sale was brought to the attention of the plaintiff in his capacity as officer of the companies and should have been made available to the companies for purchase;

6. Plaintiff wrongly purchased several lots of land with Laurie Ann O'Neill, and with the Austrians. Those lots of land should have been made available to the companies in furtherance of their own development/lumbering opportunities;

7. Plaintiff wrongly took assets from Mink Ranch for his personal benefit;

8. Plaintiff wrongly obtained a benefit from the construction of his personal residence in the 1980's. (abandoned at trial)

9. Plaintiff took Class A gravel and cement gravel that was mined, screened and made marketable by company labours;

10. Plaintiff took solar panels that belonged to the companies;

11. Plaintiff used corporate assets to cruise lands, transport non-residents, construct homes, buildings, create septic systems and create and grade roads, and failed to compensate Bellscape for the full value of the work. This included the home of Horst Micket, the Dorwalt house, the steel building for Heinz Leiter, the home of Herbert Hofstadter, the septic system of Denise Comeau, the solar panels and the home of Anne Zimmerman, the grading of the road in Third Lake and snow removal, the gate of Tyler Colwell and the Lake Midway development. The plaintiff diverted funds from these projects to non-company accounts and should be accountable for the same;

12. Plaintiff used the company tree farmer, company labour and the defendant's personal loader for the plaintiff’s benefit, logging wood belonging to the companies, and then failing to compensate the defendant or the companies for the work;

13. Plaintiff wrongly obtained a personal benefit from the purchase of a 4 wheel all terrain vehicle acquired using companies' funds;

14. Plaintiff wrongly obtained a personal benefit from renovations made by the companies to the plaintiff's personal residence including interior renovations, brickwork, construction of retaining walls, repair of a clothesline and street lamp, and installation of a basketball pad;

15. Plaintiff wrongly took assets belonging to the companies including sprinklers, generators, firewood, two computers, two chainsaws, fuel tanks, limestone, a dozer body, an outboard engine, two barricades, lawn seed, lumber, staging, iron beams, culverts, well rings, septic tanks and a Kubota tractor. The

plaintiff wrongly took assets belonging to the Defendant including a paddle boat and a pulpwood steel drag;

16. Plaintiff used the buildings of Mink Ranch for his personal benefit;

17. Plaintiff failed to use due diligence in providing information for corporate tax returns and should be accountable to the companies for the losses incurred as a result;

18. Plaintiff used corporate assets to engage in maintenance and winterization of summer homes and failed to account to the companies;

19. Plaintiff wrongly interfered in the sale of the Mink Ranch property;

20. Plaintiff failed to pay his share of funds paid to Grant Thornton for corporate accounting services, or to pay his share of fines in relation to the construction of a retaining wall at a jointly owned cottage;

Facts

[25] The following are my findings of facts surrounding the various allegations leveled by each party against the other.

[26] As a preliminary point, I heard various pieces of testimony concerning the value of certain assets and benefits. Except in those few cases where there was objective evidence of value, such as an original purchase invoice, I found that on the whole the testimony was unreliable, being either grossly inflated or grossly understated, depending on the party presenting the evidence and the purpose for which it was being proffered.

[27] While both men worked hard and were successful in their corporate endeavors, I am satisfied the financial records of the companies do not reflect the full benefit each man obtained through their corporate ventures. On the evidence of various witnesses, including the plaintiff and the defendant, I accept that they both took significant cash payments that have not been reflected in the books.

[28] Basil Saulnier was one who stood out as a helpful witness who has obviously enjoyed good relations with both of the plaintiff and the defendant. I found him to be very credible and while plain speaking, showed great balance in relaying his testimony. He had a long association with both men and his testimony revealed a lot about their temperaments, their roles in the businesses and their propensity to use the resources of the companies to their own benefit. This included the preference for "cash" transactions that were off the books, and performing work on their residences using company resources.

[29] Jovite Belliveau testified that he stopped doing "off the books" transactions and taking cash. He denied that cash collected during the year was held by him and that he, annually, divided up the cash on percentages determined solely by him. I reject his denials.

[30] The defendant delivered his testimony in a manner that generally showed little difference in tone, or demeanor, with certain exceptional flare ups. Nevertheless it was possible to discern patterns in the way he answered questions. He frequently deflected cross examination questions by referencing his limited literacy skills, or by deferring to his bookkeeper or to his lawyer. In some

instances this was legitimate, but in many it demonstrated a practiced evasiveness. For example, while professing not to understand accounting, or arithmetic, he would, without pause, do math calculations as to various weights and measurements, with costing calculations based on those.

[31] He suggested that he had little understanding of taxation, or of property development issues and yet would challenge counsel on those same issues. e.g., In discussing the Mink Ranch property he was pressed on the reasons for delaying the drafting of the lot descriptions for his purported 3 lots. When he recognized that this could lead to a conclusion that such a plan had not existed, he challenged plaintiff's counsel, Mr. Nickerson, with the requirements for subdivision and migration under the **Land Registration Act.**

[32] His memory was extraordinarily selective. He could rarely recall events that he was personally involved in where to recall would open up a potentially damaging line of inquiry. When shown copies of letters to or from his counsel and which were copied to him, they were of no assistance to him in recalling the incidents, yet he would spontaneously and often gratuitously recite detail from the plaintiff's discovery evidence, the plaintiff's statements to third parties, or

statements attributed to him or his counsel that at times went back several years. The defendant's evidence was frequently internally inconsistent and inconsistent as against other documentary evidence and other witnesses.

[33] The cash payments reflect improper conversion of corporate assets to their respective personal benefits and constitute a breach of fiduciary duty. The effect was to understate the value of the business activities and assets of the companies. I cannot, on the evidence, say that one party benefitted more than the other from this activity. Both appeared to have accumulated assets which exceeded their apparent means.

[34] I am satisfied on the testimony of the parties and others that both men used corporate assets and services of Mink Ranch and Truck Repairs to build and/or improve their personal residences and that the benefit they each received is not, in large measure, reflected in the corporate accounts. Indeed, both agreed that they converted assets and obtained personal benefits in constructing/improving their residences, but each claimed the other received more benefit and should have to pay.

[35] It appears the defendant may have benefitted more in the construction of his personal residence than the plaintiff benefitted from the renovation and improvements to his residence, but for reasons that follow I am not prepared to say by how much.

[36] The plaintiff's explanation that the work done to his home was a "wash" with the personal benefits that the defendant received and which were not recorded (not his personal residence) is not an acceptable disposition. I do not accept the values that the parties placed on the personal benefits each received through construction/ renovation.

[37] Again, these actions constituted a conversion of corporate assets to their respective benefits and constituted a breach of fiduciary duty.

[38] I am satisfied that land acquisition and development was a real option for the group of companies and that there was some evidence that this had occurred in the past. At the time of trial there was evidence that the companies still held certain parcels of land.

[39] I am satisfied, based on the testimony of Desiree Belliveau and of the defendant, that some opportunities were presented to the plaintiff in his capacity as officer of the companies. I do not accept the plaintiff's explanations as to why land development was not feasible for the existing companies. Certainly all the services the plaintiff provided to the Austrians, their companies and their purchasers, could have been provided through the Belliveau companies.

[40] I consider Gary Belliveau’s explanations as nothing more than rationalizations. If the companies were unable to engage in the business, there would have been no problem with the plaintiff fully disclosing the nature of his activities and restructuring his corporate arrangement with his father. I find he did not.

[41] The plaintiff needed the assets of the companies to further his own arrangements. It is clear that he hid his activities and the profits from his father because he knew he would have to share in the income/profits. I am satisfied that the plaintiff took advantage of a ripening corporate opportunity- that is of land development. He entered into an arrangement with European partners in 1999 or 2000 and hid the funds from these activities in German banks beginning in 2001.

[42] The existence of those bank accounts was not disclosed until the eve of trial. I draw a negative inference from that and accept that the records were disclosed only when it became apparent that one of the Austrian businessmen, Burghard Seyr, would testify at trial. I found the testimony of Dr. Seyr to be most helpful concerning the establishment of various bank accounts. I did not find the plaintiff or his wife, Margaret Belliveau, to be truthful in their testimony surrounding these accounts. I do not accept that the plaintiff brought back cash from these accounts or otherwise gave cash to the defendant for his "half " of these accounts. The magnitude of these accounts approximated $110,000. I am satisfied on the records that the plaintiff was depositing proceeds of work done by Bellscape into these accounts.

[43] I am satisfied that the plaintiff and his wife also received land in exchange for the plaintiff's work performed using company assets and while on company time, and that it was not disclosed to the companies. This included Lot 67 Third Lake and Lot 39, Dreamland Development. In doing so he was, again, in breach of his fiduciary obligations to the companies. He used company assets, vehicles and

time to further his development activities, all the while continuing to take compensation from the companies.

[44] I am satisfied that what was paid to the companies for the use of the assets and the development work conducted by the plaintiff with the Austrians, their companies and Ms. O'Neill, was less than the value of the services provided although I cannot say with any certainty exactly how much less.

[45] I am satisfied that the plaintiff improperly charged the company credit cards for trips made to Germany that were for his personal benefit. I am also satisfied the plaintiff charged company credit cards for gas and used corporate assets in providing services to the Austrians, their companies and non resident purchasers, while in Nova Scotia.

[46] In addition to the breach of fiduciary duty for wrongly seizing a ripening corporate opportunity, the plaintiff breached his fiduciary duty in using corporate assets for his personal benefit or to benefit others in return for compensation to him.

[47] I am not satisfied that the auction agreement entered into by the plaintiff (on advice of counsel) was entered into under duress. He was an experienced businessman. He testified he did not think of this as "duress" until his lawyers amended his statement of claim to include it in 2009.

[48] In my view the auction was a logical solution once it had become clear that all trust between the shareholders was irretrievably broken. While there may have been commercial pressure to hold the auction, there is no evidence of duress. I therefore reject the claims of the plaintiff relating to auction proceeds, including the claim related to the Case crawler tractor.

[49] I am satisfied the plaintiff obtained a personal benefit from the use of corporate funds to buy a 4 wheeler. He agreed to this at trial.

[50] I am satisfied that the plaintiff used corporate assets to engage in maintenance and winterization of summer homes in the land developments and failed to fully account to the companies for the activities.

[51] I am satisfied that the plaintiff gained some personal benefit from logging activities, but I cannot say how much. In my view, based on deposits to the plaintiff's joint account with his wife, it exceeded $15,000.

[52] I am satisfied that the plaintiff took gravel, limestone, hay, rock, two fuel tanks and a dozer body and a Honda lawnmower from the companies, indeed he agreed to most of this at trial.

[53] I am satisfied that the plaintiff used one or more of the buildings of Mink Ranch for his personal benefit or for his new enterprise without compensating the companies for this. The value of the benefit is not clear.

[54] I am satisfied that Gary Belliveau Construction and Excavation Limited is entitled to payment of $4,624.76 from amounts held in trust for work done for Municipal Contracting Limited in 2007.

[55] By his own admission the defendant acknowledged that his claims against his son were exaggerated. I am not satisfied that the plaintiff:

- failed to cooperate in providing information for corporate tax returns
- took solar panels
- received a benefit from or took the 'tree farmer'
- took a paddle boat.

[56] I am satisfied that the defendant hid corporate assets that, according to the auction agreement, should have been put up for sale at auction. He has kept those assets for his own benefit.

[57] Included in these was a Massey Ferguson Tractor that was acquired by the companies in 1988. I find the Defendant altered a Bill of Sale for the tractor in an attempt to mislead the court into accepting that he had acquired the tractor before incorporation of the companies. This constituted a breach of fiduciary duty and an improper conversion of corporate assets. I find the value of this item was $1,625. Also included in assets kept for the defendant's benefit was an International tractor, the value of which I find to be $6,000.

[58] I am satisfied that the defendant sold some of lumber, scrap iron, culverts, septic tanks, well rings, forklift, compressor, generators, slings, staging, forms,

pipes, a tractor, two truck bodies, a lawn mower and other items of the companies, retaining the proceeds for his personal benefit. Others of these items he kept for his personal benefit.

[59] I am satisfied that the defendant used credit cards of the companies for his personal expenditures and used companies' funds to pay his own liabilities. I am also satisfied the defendant received a personal benefit from a company acquired truck.

[60] I am satisfied that the defendant had "straw men" attend at the auction and purchase company equipment in violation of the agreement that the parties would not be permitted to participate in the bidding.

[61] I am satisfied that the defendant removed items, including fixtures from the cottage at Beaver Lake.

[62] I am satisfied that the defendant collected accounts receivables of the companies after the auction and did not fully account for them to the plaintiff or the companies.

[63] I am satisfied that the following land parcels are the lawful property of the defendant and his wife in their personal capacities and are not corporate assets: PID 300046635, 30205801, 30205793. I refer to the testimony of Norbert Thimot for the history of the acquisition of the properties. I am satisfied that while the properties were used in Truck Repair/ Mink Ranch business they did not become assets of the companies.

[64] I am also satisfied that there was never an intention that the defendant be compensated to any significant extent through rental of the land beyond corporate payment of taxes and related expenses. I am not prepared to order such compensation now.

[65] I am satisfied that the following allegations have been proven against the defendant:

- the hiding of automotive parts and supplies at Lake Doucette;
- the hiding of an hydraulic press;
- taking chain saws.

[66] On the other hand, I am not satisfied that the following allegations against the defendant have been proven:

- deliberate damage to the plaintiff's well;
- damage to equipment of GBCE;
- overstatement of fuel use and work completed to prepare for auction;
- payment to Kathleen Hunlin was improper.

[67] In summary, I find that both the plaintiff and the defendant treated corporate assets as their own, took substantial cash payments without properly reflecting or disclosing same, failed to properly record or declare benefits received from their labours, and converted corporate assets to their own.

[68] I am unable to say, having regard to the poor quality of the evidence before me, whether the value of the plaintiff's breaches of fiduciary duty exceeded the value of the breaches of fiduciary duty of the defendant and vice versa. As such, I am not prepared to find either party to be unfairly prejudiced or disadvantaged as a result of the activities of the other.

Analysis

Duress and the Auction

[69] Duress is a coercion of will so as to vitiate consent. In order to meet the test for economic duress it must be shown that the conduct coerced did not amount to a voluntary act. Commercial pressure is not enough. e.g., *NAV Canada v. Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28.

[70] As I have already indicated, the plaintiff has fallen far short of establishing that he entered into an agreement to auction off the companies' assets as a result of duress. The decision was made following a complete breakdown of the corporate relationship, with significant misdeeds by both parties, and followed failed negotiations for the purchase and sale of the companies. The decision was made with the benefit of legal advice and made good commercial sense in all of the circumstances.

[71] I accept that there were commercial pressures brought to bear in that the companies were incurring significant ongoing expenses without an ability to earn income to meet them, but commercial pressures do not amount to duress. In my view, the decision was voluntary on the part of both parties. The plaintiff's claim that he entered into the auction under duress fails.

Fiduciary Duty

[72] As officers and equal shareholders both parties were in a fiduciary relationship with the companies. That fiduciary relationship imposed upon them a "strict ethic", a duty of loyalty, good faith and avoidance of a conflict of duty and self interest. *See*, *Canadian Aero Service Limited. v. O'Malley* [1974] 1 SCR 592.

[73] *Canadian Aero Service* also provides a useful discussion of "ripening corporate opportunities" in the context of a breach of fiduciary duty. Its reasoning has guided me in determining that the plaintiff inappropriately took advantage of a ripening corporate opportunity in his business with the Austrians, their companies and with O'Neill. In my view, the plaintiff owed an exacting duty to the companies that imposed upon him an avoidance of a conflict of duty and self interest. When

he diverted a corporate opportunity to enter a relationship with the Austrians, when he hid proceeds of the work of Bellscape in Austria, when he sought out land on company time with company vehicles for his own benefit and in furtherance of his business relationship with others, when he took lots for services performed on company time with company assets, he seized a ripening corporate opportunity from the companies and thus deprived the companies.

[74] Having regard to these findings and to all of the facts as I have determined them, I find both parties were in substantial breach of their fiduciary duties to the companies.

Remedies for Breach of Fiduciary Duty

[75] I have found that both parties engaged in breaches of their fiduciary duties. In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 the following principles were set out at paragraphs 74 to 78:

1. Equitable remedies are always subject to the discretion of the court;

2. Disgorgement of profits is an equitable remedy which may be ordered either:

a) for a prophylactic purpose (the objective being to preclude the fiduciary from being swayed by considerations of personal interest; to teach the fiduciary that conflicts of interest do not pay); or

b) for a restitutionary purposes (to restore to the beneficiary the profit which properly belongs to the beneficiary, but which has been wrongly appropriated by the fiduciary in breach of its duty. This rationale is applicable, for example, to the wrongful acquisition by a fiduciary of assets that should have been acquired for a beneficiary); or

c) both.

[76] In circumstances such as this, where any award would ultimately flow to the parties - the wrongdoers - neither of whom I can say is particularly aggrieved by the actions of the other, I decline to order an equitable remedy in general and disgorgement of profits in particular.

Clean Hands Doctrine

[77] While I do not believe it necessary for the disposition of this case, I feel obliged to comment on another matter.

[78] This case triggers a consideration of the legal maxim "he who comes to equity must come with clean hands." This means that the court may exercise its discretion not to grant an equitable remedy where the plaintiff has participated in a dishonest or fraudulent act, leading to the necessity of the remedy.

[79] While a finding that the plaintiff does not come to court with clean hands carries some weight, it is not necessarily determinative of the final issue. It may be possible for a plaintiff without clean hands to yet obtain equitable relief. The clean hands doctrine serves to deny equitable relief only where the misdeeds or misconduct has "an immediate and necessary relation to the equity sued for": *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167; *DeJesus v. Shariff* 2010 BCCA 121, at paras. 84 to 86.

[80] In **The Principles of Equitable Remedies**, 6th ed. (Spry, I.C.F.) (UK: Sweet & Maxwell, 2001) the author wrote at pp. 169-170:

> ... it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief.

[81] I find, on the facts as set out herein, that in each party's actions there is an "immediate and necessary relation between the relief sought and the delinquent behaviour." The use of the court in these circumstances is pure chicanery and not appropriate.

Oppression Remedy

[82] There remains to be considered whether the oppression remedy under the **Companies Act** offers relief to either plaintiff or defendant. In granting the oppression remedy a court has the ability to allow remedies to shareholders, among others, against acts or omissions that are:

1. oppressive; or

2. unfairly prejudicial; or

3. unfairly disregard the interests of others.

[83] For a helpful discussion of oppression claims, reference may be had to *Harbert Distressed Investment Master Fund, Ltd. v. Calpine Canada Energy Finance II ULC* 2005 NSSC 211, a decision of Associate Chief Justice Smith of the Nova Scotia Supreme Court, beginning at para. 105.

[84] The remedy is designed to protect reasonable expectations including the reasonable expectation that officers and directors will manage their company in accordance with their legal obligations, to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person. *See, SCI Systems, Inc. v. Gornitzki Thompson & Little Co.* 1997 CanLII 12436 (ON SC), (affirmed at 110 O.A.C. 160) where Epstein J writes at para. 36:

> I agree that the oppression remedy is designed to protect reasonable expectations. However, one of the most reasonable of all expectations of those dealing with corporations must be that the directors will manage the company in accordance with their legal obligations. Some of these obligations are specifically prescribed

> by statute. Others are more generally derived from the common law. However, they essentially add up to the same thing: namely, to act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person.

[85] The decision of *Budd v. Gentra Inc.* 1998 111 O.A.C. 288 considered analogous provisions in the **Canada Business Corporations Act** to those set out in the **Third Schedule** of the Nova Scotia **Companies Act**. In discussing personal liability of an officer or director in fashioning an oppression remedy Doherty J.A., wrote, at para. 46, that:

> … A director or officer may be personally liable for a monetary order under that section if that director or officer is implicated in the conduct said to constitute the oppression and if in all of the circumstances, rectification of the harm done by the oppressive conduct is appropriately made by an order requiring the director or officer to personally compensate the aggrieved parties.

And further, at para. 52, the court commented that:

> … the remedial reach of s. 241 is long, but it is not unlimited. Any order made must "rectify the matter complained of" by the parties seeking the remedy. To maintain an action for a monetary order against a director or officer personally, a plaintiff must plead facts which would justify that kind of order. The plaintiff must allege a basis upon which it would be "fit" to order rectification of the oppression by requiring the directors or officers to reach into their own pockets to compensate aggrieved persons. The case law provides examples of various situations in which personal orders are appropriate. These include cases in which it is alleged that the directors or officers personally benefitted from the oppressive conduct, or furthered their control over the company through the oppressive conduct. Oppression applications involving closely held corporations where a director or officer has virtually total control over the corporation provide another

> example of a situation in which a director or officer may be held personally liable to rectify corporate oppression.

[86] In *Danylchuk et al. v. Wolinsky et al. and Feierstein and Fishman Medical Corporation v. Wolinsky et al.* 2007 MBQB 65 Keyser J. explained that self dealing was a form of oppressive conduct. At paragraph 36 the court wrote:

> The author of **Oppression and Related Remedies** describes self-dealing, at p. 124, as one of the most common forms of oppressive conduct yet one of the easiest to establish. It involves the actions of directors who treat corporations as if they were their own property. This is the essence of what the applicants allege in this case. They argue that the reasonable expectations of the shareholders and creditors can be determined by looking at whether the provisions of the **CBCA** were followed, general commercial practice, the nature and structure of Protos, as well as representations made by the respondents to the applicants.

[87] In my view, both parties engaged in egregious self dealing and hence oppressive conduct. In light of my findings of fact, it should be clear that I find that neither the plaintiff, nor the defendant acted in their capacity as officers "honestly and in good faith in the interests of the corporation and exercise the diligence expected of a reasonably prudent person".

[88] In other circumstances, they could be held to account to each other and to the companies for their actions. I say “in other circumstances” because in my view it should be clear that the oppression remedy was created to remedy an injustice to

innocent or otherwise vulnerable parties. It is not a device to be utilized by somewhat sophisticated business people holding positions of equal bargaining power caught in the web of their own intrigue and mutual deceit. I decline to order any remedy to either party under the oppression provisions of the **Companies Act**.

Conclusion and Order

[89] There are funds held in trust pending this decision which each party claims an entitlement to that exceeds the equal division that their shareholder interests would otherwise entitle them to. The evidence has not satisfied me that there is a basis in law and fact upon which to justify such a result. The parties interests as dictated by their shareholding will be the basis on which this dispute is resolved.

[90] I order equal division of the funds held in trust after payment of $4624.76 to Gary Belliveau Construction and Excavation Limited. No amount is to be deducted for shareholder loans payable as in my view, in light of the conduct of the parties, these amounts are shams.

[91] I could direct the defendant to pay to the plaintiff the amount of $21,750 being one half of the account receivable that the defendant acknowledged at trial as due and owing to the companies for the construction of his home. I decline to do so, however, as I am also waiving the requirement of the plaintiff to pay to the defendant for his interest in the bank accounts in Austria.

[92] If there are unsold properties owned by the companies then I will hear counsel with respect to the method of their disposition, but in my view the properties should be sold at public auction, or in such other ways as the parties agree to, and proceeds divided equally between the parties.

Costs

[93] I am prepared to hear the parties on costs if they cannot come to an agreement.

J.