1992 **S.H. No. 81389**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

ROBERT D. SUTHERLAND ARCHITECTS LIMITED

Plaintiff

- and -

MONTYKOLA INVESTMENTS INC.,
DEAN CORKUM and PATRICIA CORKUM

Defendants

D E C I S I O N

HEARD: Before the Honourable Justice D.W. Gruchy in Halifax, Nova Scotia, on February 7, 8 and 9, 1995

DECISION: May 4 , 1995

COUNSEL: William P. Thomson, Esq., Counsel for the plaintiff
John Kulik, Esq., Counsel for the defendants

GRUCHY, J.

Factual Overview

Montykola Investments Inc. owned a certain lot of land in Wolfville, Nova Scotia. Its shareholders were Dean Corkum, a chartered accountant, Patricia Corkum, also a chartered accountant and an instructor at Acadia University, Dr. Kelvin Ogilvie, the President of Acadia University, and Roleen Ogilvie, the wife of Dr. Ogilvie and sister of Dean Corkum.

Dr. Wayne Hills, a local dentist and entrepreneur, became interested in Montykola's land as a potential for residential development and approached Dean Corkum in 1988 about buying it. After some discussion, they agreed orally that Dr. Hills would buy the land for $170,000, but subject to Dr. Hills obtaining a development agreement from the Town of Wolfville; such an agreement was a mandatory municipal requirement if the land was to be developed for condominiums or apartments.

In order to present proposals to the Town for a development agreement, it was necessary for Dr. Hills to present a specific plan in accordance with the Town's Municipal Development Plan. He had previously had dealings with the plaintiff, an architect, in other developments and therefore approached it to prepare the necessary proposals. They agreed orally on certain terms, the essence of which was that the development would be a joint venture by Dr. Hills, the plaintiff and one other partner. The plaintiff is a body corporate which performs architectural services through its principal shareholder, Robert Sutherland. I will refer throughout this decision to the plaintiff as Robert Sutherland.

Robert Sutherland and Dr. Hills proceeded with the preparation and presentation of a specific proposal to the Town Engineer who is Greg Morrison, the Town Planning Advisory Committee and the Town Council. Five proposals were prepared and

discussed with the Engineer and the Planning Advisory Committee. Eventually that Committee was prepared to recommend a particular proposal to the Town Council and a public participation meeting was held. Dr. Hills and Robert Sutherland participated in the various presentations. Following that meeting the Planning Advisory Committee recommended the proposal. On October 16, 1989, the Town Council passed a Resolution approving the proposal for the development of the land and authorizing the execution of the development agreement. That proposed plan formed part of the Town's Resolution and was to be attached to the development agreement.

There is a sharp divergence of the evidence of what then occurred with respect to the purchase of the land. Dr. Hills says as soon as the Council approved the proposal Mr. Corkum raised the price of the land to $220,000. Mr. Corkum and his fellow Montykola shareholders deny that allegation and say that Dr. Hills - for various excuses - delayed the purchase of the land. The upshot was that Dr. Hills and Robert Sutherland did not buy the land and did not proceed with the development.

Another party, X.H.H. Holdings Limited, essentially controlled by one Charles Richardson, became interested in the development of the land, approached Mr. Corkum and eventually agreed to buy the land for $210,000. Those parties negotiated and executed an agreement of purchase and sale on May 19, 1990. That agreement provided, *inter alia*, that the transaction would close on the earlier of October 31, 1990, or upon X.H.H. receiving a development agreement from the Town of Wolfville.

In the meantime, Robert Sutherland essentially abandoned any thoughts of developing the land. He accepted Dr. Hills' statement that Mr. Corkum had raised the price of the land and he therefore refused to proceed further with the purchase. In the meantime as well the Town had prepared various drafts of a development agreement between it, Dr. Hills and Montykola to which was to be attached a copy of the Sutherland plan. The statutory appeal period from the decision of Town Council to approve the development agreement, according to the Town Engineer, expired on November 14, 1989.

Dr. Hills did not immediately inform the Town of his decision not to proceed. The Engineer wrote and had conversations with Dr. Hills in which he had asked for the drawings of the development, but Dr. Hills took no action.

On March 27, 1990, the Engineer requested of the Town Solicitor a further draft of the development agreement in which Montykola was shown as the owner and developer and Dr. Hills was removed. Inasmuch as Montykola had never been interested in undertaking the development itself, I conclude that this request came about as a result of activity by X.H.H. Holdings Inc. and its expressed desire to develop the property. On that day the Engineer wrote to the town solicitor and indicated that, "the owner is anxious to have the agreement signed...". The agreement, however, required copies of the Sutherland plan as it was that plan which had been approved by Town Council.

In June, 1990, X.H.H. Holdings, with its agreement of purchase and sale of the property in hand, applied to the Planning Advisory Committee to develop the land pursuant to its own plan of development. It presented that proposal, apparently by oral submission, according to the minutes of that committee at its meeting of June 7. The Committee expressed comments and concerns, the effect of which was that X.H.H. was likely going to be required to go through the same development process as Dr. Hills and Robert Sutherland had done.

On September 6, 1990, X.H.H. came back to the Committee. Its presentation was now changed and "Mr. Cormier (on behalf of X.H.H.) said that at this point X.H.H. Holdings requested that they be permitted to build under the development agreement issued to Dr. Hills".

After some discussion by the Committee the Town Engineer, "...reminded the Committee that the Development Agreements travel with the land and that X.H.H. Holdings could proceed with the project and apply for an amendment to the original

agreement in order to change the roadway."

The Committee then agreed to recommend to Town Council a certain amendment to the Hills agreement concerning the road access.

Charles Richardson, who did not give evidence at trial but whose discovery evidence I admitted, explained that he had discussed this matter with the town engineer and he knew that X.H.H. Holdings could proceed to develop the land pursuant to the Hills development agreement and obtain any amendments as they moved along.

At the request of X.H.H. Holdings Dean Corkum telephoned Robert Sutherland requesting copies of the plan. Sutherland refused to forward them and says that he made it clear to Mr. and Mrs. Corkum that the plans were his and were not to be used for that purpose. The Town Engineer says that blueprint copies of the original plans then appeared anonymously at his office. He attached them to the development agreement to be signed by Montykola. The Engineer then requested Mr. and Mrs. Corkum to come into the Town office to sign the agreement which they did. The agreement, together with the plans attached, was then recorded at the Registry of Deeds at Kentville.

X.H.H. Holdings then proceeded to develop the lands.

Robert Sutherland learned in the latter part of October, 1990, that the development plan which he had produced had been used. He wrote to Mr. Corkum on October 25, 1990, and forwarded an account for $25,000, being the amount he claimed for architectural services. Robert Sutherland forwarded that account to Mr. Corkum as he says he did not know of the existence of Montykola, always having dealt with Dean Corkum. He says it was much later that he learned that the owner of the property was Montykola. That assertion seems quite consistent with other evidence that suggests Dr. Hills represented to the Planning Advisory Committee that he was the owner of the property - or at least held an option on it.

Certain correspondence ensued between solicitors wherein Robert Sutherland demanded payment and Montykola refused. A development proceeded on the property under the original development agreement with the Town by X.H.H. Holdings Limited.

After the sale of the property the shareholders of Montykola stripped the company of its assets by paying themselves the proceeds of the land sales. The company is a shell only.

In due course this action was commenced for the professional fees the plaintiff claims in relation to the preparation of the development plan.

Sale of Land

Much evidence was adduced concerning the proposed sale of land by Montykola to Dr. Hills. I find that most of that evidence is irrelevant to the issues to be addressed herein. The upshot of the matter was that there was no written agreement of sale between Montykola and Dr. Hills and Montykola appeared not to be under any legal obligation to sell the land to Dr. Hills at the price orally agreed upon or any other price. Dr. Hills claimed that Montykola immediately increased the price upon the Town of Wolfville approving the development agreement. Montykola denies that and says that Dr. Hills delayed unreasonably in completing the purchase of the land and the price was therefore raised to what Montykola considered to be a reasonable market price for the situation then existing. For purposes of this decision I need not form a conclusion as to which version of these facts is correct.

In the agreement of sale of the property by Montykola to X.H.H. Holdings those parties to that transaction contemplated that X.H.H. Holdings would obtain a development agreement with the Town of Wolfville. The closing of the transaction was set for the earlier of October 20, 1990, or within fifteen days after the Town of Wolfville issued a special development agreement.

As I have set forth above, during the currency of the agreement of sale between X.H.H. Holdings and Montykola, they learned that X.H.H. Holdings could proceed with the development under the Hills' development agreement which had been approved by the Town, but which had not yet been executed.

In addition, the evidence of Charles Edward Richardson suggests very strongly that X.H.H. Holdings might have had some second thoughts about proceeding with the development. Mr. Richardson's partner in X.H.H. Holdings had done some work on the property before the transfer of title and had expended money on the development. X.H.H. made an approach to Montykola in an attempt to reduce the price. That failed, but Montykola was in a position of being able to assist X.H.H. by executing the development agreement which would allow X.H.H. Holdings to proceed with the development almost immediately. Therefore, when Montykola executed the development agreement the way would be cleared for X.H.H. Holdings to proceed with the development. A copy of the Sutherland plan was required so it could be attached to and form part of the development agreement. X.H.H. Holdings contacted Dean Corkum and asked for a copy of the plan. Mr. Corkum contacted Robert Sutherland and requested a copy of the plan and Robert Sutherland refused to forward one to him. Robert Sutherland says, and I accept, that he then contacted the Town Engineer and Mr. and Mrs. Corkum notifying them expressly that he did not permit the use of the plan. There is a divergence of the evidence given by Robert Sutherland on the one hand and Mr. and Mrs. Corkum on the other as to when Robert Sutherland made certain telephone calls. Indeed, the plaintiff has attempted to refer in argument to certain telephone bills which are not in evidence before me, although they were used for the purposes of cross examination. I have disregarded the plaintiff's references to that evidence. The combined effect of Robert Sutherland's evidence concerning the calls themselves, however, and the lack of recollection by Mr. and Mrs. Corkum lead me to accept as a fact that Robert Sutherland contacted Mr. and Mrs. Corkum prior to their execution of the development agreement and specifically and emphatically refused permission for the use of the plans.

Four days after the execution of the development agreement the property was transferred.

The plans were in fact unique for the property. Robert Sutherland did not simply take plans off a shelf; he developed them for the property in question. He developed them for use by Dr. Hills, himself and a partner. Montykola never had an ownership interest in the plans. Montykola did not intend to enter into the development of the property in any way; it merely intended to sell the property. It never had any contractual relationship with Robert Sutherland concerning the ownership or use of the plans.

Execution of the Development Agreement

Mr. and Mrs. Corkum both say that they executed the development agreement as a result of the request by the Town Engineer who wanted to go through the formality of such an agreement so as to clean up his files. Indeed, Mrs. Corkum says that due to some personal difficulties she was then experiencing she did not even realize what she was signing. Mr. Corkum said that he was under a great deal of pressure because of financial difficulties he was suffering at that time. Mr. and Mrs. Corkum did not plead *non est factum.* I do not accept the explanations given by Mr. and Mrs. Corkum as to why they signed the development agreement. They are both intelligent, skilled professional accountants; they must be taken to have known precisely what they were signing. Even if Mr. Morrison did tell them that the execution of the agreement was merely to clean up some paper work, reasonable people of their abilities must be taken to have understood the nature and intent of the document in question. They must be taken to have known that by the execution of the agreement with the Sutherland plan attached, they were in fact using the plan. I infer from the facts known to me that they executed the agreement on behalf of Montykola as an accommodation to X.H.H. Holdings and so as to facilitate the sale of the property to X.H.H. Holdings.

Issues

I. Was Montykola unjustly enriched as a result of any work performed by Sutherland?

II. Did Montykola infringe any copyright Sutherland may have in its development plan contrary to the provisions of the **Copyright Act**, R.S.C. 1985, C-42?

III. If Montykola was unjustly enriched or if it infringed Sutherland's copyright in its plan, what, if any, damages is Sutherland entitled to?

IV. If Sutherland is entitled to damages, is Sutherland entitled to bypass the corporate identity of Montykola and collect damages from two of its shareholders, Mr. and Mrs. Corkum, personally?

I. Unjust Enrichment

Hart, J.A. thoroughly canvassed the law of unjust enrichment in **Carabin v. Offman** (1988) 87 N.S.R. (2d) 407 and I need not re-cite the cases examined by him. It is clear that a trial judge does not have a complete and unfettered discretion in the application of the principle of unjust enrichment. Rather, the principle must be applied in accordance with those cases Justice Hart cited and approved. He said, at p.411-412:

> There can be no doubt that an action now lies in Canada for restitution based upon the unjust enrichment of a defendant at the expense of a plaintiff and that this remedy can be applied with or without the aid of legal techniques such as quasi-contract, constructive or resulting trusts. **Deglman v. Guaranty Trust Co. of Canada et al.,** [1954] S.C.R. 725; **County of Carleton v. City of Ottawa,** [1965] S.C.R. 663; **Becker v. Pettkus,** [1980] 2 S.C.R. 834; 34 N.R. 384; **White, Flubman and Eddy v. Central Trust Company** (1984), 54 N.B.R. (2d) 293; 140 A.P.R. 293; 7 D.L.R. (4th) 236 (C.A.).

> The problem with this type of action is in the limitation or control of its use as a method of preventing injustice within our legal system. At one extreme it is argued that any unjust enrichment can be remedied by a trial judge by the exercise of an unfettered discretion. At the other end of the spectrum, the remedy must be withheld unless it can be shown that the enrichment was obtained by some form of fraudulent or unconscionable action which would demand that the courts restore the equilibrium of the parties. The many cases that have been based upon claims of unjust enrichment in recent years have rejected both of these extremes and have attempted to place the type of limits and controls on the grant of the remedy that they consider appropriate in each individual factual situation.

Hart, J.A. then set forth certain competing views of the extent of the application of the principle of unjust enrichment and referred to **Becker v. Pettkus**, [1980] 2 S.C.R. 834 as follows:

> There have been many references in the cases to the undesirability of permitting courts to have a free reign in granting the remedy of restitution in the case of unjust enrichment. Dickson, J. (as he then was), when writing the majority judgment in **Becker v. Pettkus**, [1980] 2 S.C.R. 834; 34 N.R. 384, stated:
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> > "How then does one approach the question of unjust enrichment in matrimonial causes? In **Rathwell** I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.
> >
> > "The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of **The Ruabon Steamship Company, Limited v. London Assurance** with these words: '...I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the

> person who had done it.' (p.10) Lord Macnaghten, in the same case, put it this way: 'there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it'. (p.15) It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be 'unjust' in the circumstances of the case."

Hart, J.A. then considered the decision of the Court of Appeal of New Brunswick in **White et al v. Central Trust Company** (1984), 54 N.B.R. (2d) 293. He said:

> The Court of Appeal in New Brunswick in **White et al. v. Central Trust Company** (1984), 54 N.B.R. (2d) 293; 140 A.P.R. 293; 7 D.L.R. (4th) 236, dealt with a factual situation somewhat similar to the **Deglman** case. La Forest, J.A. (as he then was), had this to say:
>
> > "Not surprisingly, of course, where possible courts will rely on established categories to meet restitutionary claims. Thus in **Pettkus v. Becker** (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C.R. 834; 19 R.F.L. (2d) 165, Martland, Ritchie and Beetz, JJ. relied on the concept of resulting trust, but Dickson J. (Laskin, C.J.C., Estey, McIntyre, Chouinard and Lamer, JJ. concurring), after rejecting the applicability of a resulting trust in the circumstances, used the concept of a constructive trust as a tool to effect restitution where an unjust enrichment had occurred. At least in the context of matrimonial causes, Dickson, J., was willing to suggest a wide application for the principle of unjust enrichment. He stated at p.273 D.L.R., pp. 847-848 S.C.R.:
> >
> > > '"Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of **Moses v. Macferlan** [supra] put the matter in these words: "... the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise ... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles

> so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury ...'
>
> "This would appear to mean that the law will afford a remedy for unjust enrichment in the absence of valid judicial policy militating against it. The real challenge for the courts, therefore, appears to be the definition of the outward limits of restitutionary remedies ...
>
> 'Most authorities, but not all, recognized that an action for unjustified enrichment is subject to the existence of the following conditions:
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> 1. an enrichment;
>
> 2. an impoverishment;
>
> 3. a correlation between the enrichment and the impoverishment;
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> 4. the absence of justification;
>
> 5. the absence of evasion of the law;
>
> 6. the absence of any other remedy.'

Hart, J.A. then considered other cases and upon reviewing the factual situation then before the Appeal Court considered various factors listed by LaForest, J.A. (as he then was).

Applying the factors set forth by LaForest, J.A. to the facts before me, I have reached certain conclusions:

1. The use of the plans by the defendant Montykola in the execution of the development agreement is arguably an enrichment of Montykola inasmuch as it expedited the sale of the land by Montykola to X.H.H. Holdings.

2. I do not see that there was any impoverishment of the plaintiff. The plans had been prepared on the speculation of proceeding with the development with Dr. Hills and that speculation had not come to fruition. The preparation of the plans was a gamble taken by Mr. Sutherland that the development would proceed and he would be paid. It did not proceed and he was not paid.

3. There was, therefore, no correlation between the enrichment of Montykola and an impoverishment of Sutherland.

4. There was no justification for Montykola to have adopted the plans to its own use.

5. There was no special relationship here between the parties as recognized in **Nicholson v. St. Denis et al** (1976), 57 D.L.R. (3d) 699 or in **Preeper et al v. Preeper et al** (1978), 27 N.S.R. (2d) 82.

6. Finally, as I will now set forth, there is another obvious remedy available to the plaintiff by virtue of the **Copyright Act.**

In view of these conclusions I find that unjust enrichment is not the appropriate remedy in the circumstances of this case.

II. <u>Copyright Act</u>

Section 27(1) of the **Copyright Act** states:

> **SECTION 27. INFRINGEMENT OF COPYRIGHT**
>
> (1) Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything that, by this Act, only the owner of the copyright has the right to do.

"Copyright" is defined in s.3(1) of the **Copyright Act,** inter alia, as follows:

SECTION 3. DEFINITION OF "COPYRIGHT"

> (1) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever...or, if the work is unpublished, to publish the work or any substantial part thereof....

Section 5(1) of the **Copyright Act** states:

SECTION 5. CONDITIONS FOR OBTAINING COPYRIGHT

> (1) Subject to this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work....

Section 2 of the **Copyright Act** defines "artistic work" as follows:

> "Artistic work" includes paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship and architectural works of art;

I have found that the Sutherland plan was in fact designed specifically for the lot of land in question. It was unique. In my view it is included in the definition of artistic work. The copyright, however, is restricted to the plan. It does not extend to the obtaining of a development agreement with the Town of Wolfville.

I have concluded that only Robert Sutherland had the right to reproduce the plan; only he had the right to exploit the plan by attaching it to the development agreement.

It is not clear who actually reproduced the pirated copy of the Sutherland plan. That in itself was probably another breach of copyright, but is not germane to this decision. The defendants had said that they did not "...produce or reproduce the work"....

In the circumstances before me, I cannot accept that position. I have found that Robert Sutherland specifically declined permission for, in fact, forebade, the reproduction or use of his plan. That plan was his work. By executing an agreement which had the effect of publishing that plan (and undertaking to construct the buildings planned) the defendants participated in the reproduction of the work as surely as if they had operated the blueprint machine. The question is not whether the development was produced, but whether the plan was reproduced and/or published. The fact that the plan was not used in the actual construction is relevant to the question of damages, but does not take away from the fact of use. Similarly, the fact the plan had previously been made public at meetings of the Planning Advisory Committee and of the Town Council impacts only on the question of the quantum of damages, not liability.

In the circumstances before me I also find as a fact that Robert Sutherland extended the prohibition of the use of the plan to the Town of Wolfville by his conversations with the Town Engineer, Mr. Morrison. It was well known to both parties to the development agreement that the plan was not to be used.

I accept Mr. and Mrs. Corkum's evidence that they did not arrange or make copies of the plan. I make no finding as to who did.

The defendants have said that Mr. and Mrs. Corkum had nothing to do with the preparation of the development agreement. It was not the preparation of the agreement that breached the copyright; it was the execution of the agreement for purposes of registration and making that plan available to future owners of the property in accordance with the agreement that constituted the breach.

The defendants have also said that if copying the plan was a copyright infringement then it was performed by Richardson and/or the Town of Wolfville. That may well be correct. That, however, does not excuse the infringement by the execution of the agreement.

The defendants cite the case, **Hay v. Saunders** (1958), 17 D.L.R. (2d) 352 in support of their position that as there was little similarity in the buildings designed by the plaintiff and those ultimately constructed by X.H.H. Holdings, there was no breach of copyright. That may be correct, but it was not the construction of the buildings that breached the copyright, rather, it was the use of the plans in the development agreement. There was no evidence to contradict Robert Sutherland's position that the plans were unique and I accept Robert Sutherland's evidence that it was.

I have therefore concluded that the defendants breached Robert Sutherland's copyright of the plans in question.

III. If Montykola was unjustly enriched or infringed Sutherland's copyright in its plan, what, if any, damages is Sutherland entitled to?

When the plaintiff learned that the project was proceeding, he forwarded an account on October 25, 1990, to Mr. Corkum with an explanatory letter. He said,

> Dear Sir:
>
> I have determined that you have made substantial financial gain on my work to obtain a development agreement with the Town of Wolfville, on the above noted project. I wish to be paid for this work.
>
> My bill for consulting services is enclosed. Please note that if I have not received payment by Nov.2/90, I am turning this matter over to my lawyer, Mr. William Thomson, for legal action.

The account read:

> For architectural consulting services to prepare development drawings, including all revisions as required by the Town of Wolfville, presentation of the project to various Citizen's Groups, and also to Wolfville Town Council: ... Our fee: $25,000.00

Additionally the plaintiff claimed the sum of $40,000 apparently related to the difference of the agreed price to be paid by the plaintiff and his associates to Montykola and the price obtained from X.H.H. Holdings. During trial the plaintiff advanced further claims for loss of consulting fees to which the plaintiff claims it would have been entitled had its retainer been continued throughout the construction of the project. That additional claim was for the completion of working drawings and for site supervision during construction, for a total of $48,000.

As I understand it, the plaintiff's claim now consists of the following:

(a)	Original Account	$ 25,000.00
(b)	Loss Consulting Fees	$ 48,000.00
(c)	Profit Realized on Sale of Land	$ 40,000.00
	TOTAL:	$113,000.00

It is my conclusion that the only damages the plaintiff is entitled to arises from the breach of the copyright. The intellectual property covered by the copyright included certain of the services described by the plaintiff's expert, Paul Skerry, who testified as to the appropriateness of the $25,000 account. I conclude that the architectural services involved in the preparation of the scheme included consideration of the size and shape of the land, availability of services, an examination of the neighbourhood in which the development was to be located so as to obtain a development compatible with the neighbourhood's density, its trees and its topographics. The development had to be in accord with the university property adjacent to the development and had to be of such a nature as to be compatible in an artistic sense with the surrounding residential property. Additionally, the plan produced had to be commercially viable. Mr. Skerry and the plaintiff both described the municipal/political process involved in obtaining a development agreement. It is my view that the value of those latter services - the municipal/political process - although included in the account for $25,000, is not part of the value of the copyright.

In performing the services for the Hills' group Robert Sutherland filled at least two roles. His primary role was that of architect by which he produced the intellectual property covered by the copyright. His second role was that of an expediter whereby he assisted in guiding the proposed development through the municipal process. That role added nothing to the intellectual property. It may well have added a value to the development agreement, but the development agreement is not covered by the copyright.

I see no connection between the services rendered by the plaintiff in connection with the plan and the additional profit (if any) achieved by the defendants in the sale of the property. The claim for $40,000 is therefore disallowed.

I see no connection between the breach of copyright and the loss of future professional fees. Even if there were such a connection, I have no evidence whatsoever to find a ratio between the gross fees chargeable to profit, if any, the plaintiff might have realized on those fees. The claim for additional fees is therefore disallowed.

The **Copyright Act** addresses the question of damages for copyright infringement as follows:

> 34(1) Where copyright in any work has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts and otherwise that are or may be conferred by law for the infringement of a right.
>
> 35(1) Where any person infringes the copyright in any work that is protected under this Act, the person is liable to pay such damages to the owner of the right infringed as he may have suffered due to the infringement, and in addition thereto such part of the profits that the infringer has made from the infringement as the court may decide to be just and proper.

I am unable to conclude that the plaintiff has suffered any damage as a result

of the infringement beyond the actual value of the work expended on producing the intellectual property. There is no evidence before me that the defendants realized any profits from the infringement.

I therefore return to the claim for $25,000. That claim clearly included both architectural services and other services not related to the value of the intellectual property. I have no clear evidence as to how to divide that claim between the work and time expended on the production of the intellectual property and the time and work expended on the municipal/political process. Difficulty in assessing damages, however, is not a bar to doing so. Using my best efforts, I conclude that one-half the account should be attributed to the intellectual property covered by the copyright and one-half should be attributed to the remaining services. I have therefore concluded that the plaintiff is entitled to damages in the amount of $12,500 for breach of copyright.

The plaintiff has further made claims about risk of architect's liability as a result of the use and publication of the plans. It is abundantly clear that any use of the plans was unauthorized and I can see no likelihood of liability arising against the plaintiff as a result of the use of the plans. The plaintiff has also claimed for loss of public or professional recognition arising from the infringement, but I have no evidence whatsoever of any such loss.

IV. If Sutherland is entitled to damages, is Sutherland entitled to bypass the corporate identity of Montykola and collect damages from two of its shareholders, Mr. and Mrs. Corkum, personally?

Mr. Corkum first heard of Robert Sutherland's account when he received the letter of October 25, 1990. Robert Sutherland said that he had always understood that he was dealing with Mr. Corkum personally but it is clear that Mr. Corkum was acting as a director or agent of Montykola. Dr. Hills, Robert Sutherland's partner in the venture, was certainly aware of Montykola and the fact that Montykola owned the land. As there was

no privity of contract between the plaintiff, Mr. Dean Corkum or Montykola, this point is not significant. Correspondence then flowed from Montykola's solicitor, Mr. Erick G. Demont to the plaintiff's solicitor for the period ending on December 7, 1990, when Montykola denied liability.

On March 1, 1991, the directors of Montykola resolved to pay themselves a total dividend of $40,000, or $10,000 each. The funds were disbursed on the same day. There is no evidence that the directors considered the possible outstanding account or liability to the plaintiff. Further funds totalling approximately $42,000 were paid to the directors on July 24, 1991. Those last advances essentially cleaned out the company. There is no evidence again that the directors considered that there might be an outstanding account to Sutherland.

By the actions of paying out directors' fees and dividends, the directors effectively stripped the company of its remaining assets.

Dr. Ogilvie and Mrs. Ogilvie say they knew nothing of the Sutherland bill when they agreed, as shareholders, to strip the company. Dr. Ogilvie had been concerned (and with considerable reason) about any ongoing liability which Montykola might have incurred by the execution of the development agreement. He would likewise have been concerned about Robert Sutherland's bill, but he says he had never seen it and was not aware of any correspondence concerning it. I accept those statements as truthful, even though it is somewhat at variance with other defence evidence.

Dean Corkum, however, was fully aware of Robert Sutherland's position concerning the use of the plan. He was also fully aware of the Sutherland account for $25,000. He was also aware of the correspondence between the solicitors concerning the account and must have been aware that there was an unresolved and outstanding dispute with Robert Sutherland. He testified that he assumed his lawyer's letters had satisfied Robert Sutherland and that the matter of the account was dead. I do not accept that

evidence. He also said that as the correspondence had been directed to him personally, there was no liability flowing from Montykola. He points out that Mr. Thomson's letters make no mention of Montykola. A fair reading of the correspondence, however, reveals that the plaintiff's lawyer inquired as to who was the owner of the property, thereby giving a clear indication that he did not know of Montykola. That correspondence, as well, was likely before Robert Sutherland had ever seen the Montykola development agreement or even knew of it.

The combined effect of Mr. and Mrs. Corkum's evidence is troubling with respect to the signing of the development agreement and the handling of the Robert Sutherland account.

The evidence is clear with respect to the following:

1. Dean Corkum and Patrician Corkum were the controlling minds in the day-to-day management of the company.
2. The four shareholders had reached the decision that their business venture in Montykola should be wrapped up and, indeed, they appeared to be anxious to do so.
3. Dean Corkum was under great financial pressure at that particular time. He had entered upon a financially disastrous venture in a restaurant with others, including Dr. Hills, and was reduced at times to washing dishes to try to keep the business going. Eventually his efforts failed.
4. The proposed sale to Dr. Hills had clearly fallen through. Montykola had agreed to sell the property to X.H.H. Holdings for a price greater than that agreed upon with Dr. Hills, but there were indications that sale might fall through as well.
5. Upon the sale of the land, Montykola's last physical assets would be gone and the shareholders would take the remainder of the cash.

With this background Mr. Corkum was faced with a problem. By executing the development agreement with Wolfville - whether at Greg Morrison's request or otherwise - the sale of the land to X.H.H. was expedited. Dr. Ogilvie had expressed concern about ongoing liability but Mr. Corkum did not obtain any legal advice. Mr. and Mrs. Corkum executed the agreement. They seemed to take refuge from the idea of ongoing liability incurred thereby from the fact that the agreement "ran with the land". It did not need a lawyer, however, to point out that the agreement did incur very heavy obligations. Mr. and Mrs. Corkum, each being a chartered accountant, must be taken to have recognized the legal impact of what they were signing. The implication of their actions is that they intended to distribute the assets of the company leaving a shell with no personal liability to themselves.

The same attitude must have existed with respect to the Sutherland account. Mr. Corkum must have known that the bill, while addressed to himself, was really intended for the owner or developer of the property. He said he knew that he had no personal liability for it, yet did not even discuss the matter with Dr. and Mrs. Ogilvie. Even when the shareholders decided to pay themselves the final dividends, directors' fees and accounts, he and Mrs. Corkum did not raise the subject of the potential liability. They must be taken to have known the risk they were running. That is particularly so by virtue of their profession and also by virtue of the fact that it was Mr. Corkum who had incorporated the company in the first instance.

The corporate veil which protects shareholders from personal liability may only be pierced or lifted in very proscribed circumstances. (See **Salomon v. Salomon & Co. Ltd.,** [1987] A.C. 22) Davison, J. considered this subject carefully in **Lockharts Ltd. v. Excalibur Holdings Ltd. et al** (1987), 83 N.S.R. (2d) 181, at pp.185-188. For the purposes of this decision I need not recite all the authorities examined by Davison, J. in that case.

I have concluded that the actions of Mr. and Mrs. Corkum amounted to "improper conduct" as that phrase was used by Davison, J. when he said at p.186:

> [28] In Canada, the principle enunciated in **Salomon** is alive and well, but it is also clear that courts will disregard the corporate entity in certain circumstances including situations involving "fraud or improper conduct". Authors of texts on company law are fond of saying that the only consistent principle which has evolved is that in the **Salomon** case (see Gower, **The Principles of Modern Company Law** (3rd Ed.) p.189). In my respectful opinion the courts have been equally consistent in clearly enunciating an exception to the basic principle by refusing to permit a corporate entity to be used for fraudulent or improper purposes. It is true that there has been inconsistency in the application of this exception but the existence of the exception has been recognized by all levels of Canadian Courts.

Davison, J. reviewed various cases appropriate to the facts before him and then referred to a case which seems quite germane to the facts before me. He said:

> [34] The recognition of the right by the Supreme Court of Canada is even more apparent since the dicta of Madame Justice Wilson in **Kosmopoulos v. Constitution Insurance Co. of Canada** (1987), 74 N.R. 360; 21 O.A.C. 4; 34 D.L.R. (4th) 208, at 213-214:
>
> > "The law on when a court may disregard this principle (**Salomon**) by 'lifting the corporate veil' and regarding the company as a mere 'agent' or 'puppet' of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interest of the Revenue': L.C.B. Gower, **Modern Company Law** (4th Ed. 1979), at p.112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in **American Indemnity v. Southern Missionary College**, supra, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
> >
> > "There is a persuasive argument that 'those who have chosen the benefits of incorporation must bear the corresponding burdens, so that if the veil is to be lifted at all that should only be done in the interests of third parties who would otherwise suffer as a result of that choice': ..."
>
> [35] Her Ladyship went on to point out that in the case before her,

> ignoring the corporate entity would be of benefit to the shareholder who chose to incorporate the company and secure the benefits of that incorporation. In the case before me lifting the veil benefits the innocent third party.
>
> [36] What can be drawn from the foregoing authorites? In my assessment, the fundamental principle enunciated in the **Salomon** case remains good law in Canada and "one man corporations" should be considered as separate entities from their major shareholder save for certain exceptional cases. A judge should not "lift the veil" simply because he believes it would be in the interest of "fairness" or of "justice". If that was the test the veil in the **Salomon** case would have been lifted. On the other hand the courts have the power, indeed the duty, to look behind the corporate structure and to ignore it if it is being used for fraudulent or improper purposes or as a "puppet" to the detriment of a third party.
>
> [37] One of the fundamental purposes of establishing a corporate existence is to limit the liability of the shareholders. In doing so, growth of commerce is encouraged by providing a vehicle by which monies can be invested with the knowledge that losses would be restricted to an amount usually equivalent to the extent of the investment.
>
> [38] The purpose of the corporate entity was not to defraud or mislead others including creditors and shareholders and in my opinion where a company is being used for this purpose the "veil" should be lifted and a remedy made available to the victims of such conduct.

I have found that the nature of the actions of Mr. and Mrs. Corkum, put in the context and sequence of other events, raised a strong prima facie inference that the stripping of Montykola's assets, at least as far as they were concerned, was intended, in part, to defeat any right of action Sutherland might have had against Montykola. The defendants have not rebutted that inference; they have failed to meet the burden. I have been convinced, on a balance of probabilities, that they used the corporate entity for an improper purpose.

In addition to the jurisprudence with respect to the corporate veil, there are also statutory considerations.

Montykola Investments Limited was incorporated under the **Canada Business Corporations Act** on July 28, 1983. The **Canada Business Corporations Act, R.S.C. c.44** applies. Section 42 of that **Act** reads:

> 42. A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that
>
> (a) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

Section 118 of that **Act** provides in part

> (2) Directors of a corporation who vote for or consent to a resolution authorizing
>
> (a) a purchase, redemption or other acquisition of shares contrary to sections 34, 35 or 36,
>
> (b) a commission contrary to section 41,
>
> (c) a payment of a dividend contrary to section 42,
>
> ....
>
> are jointly and severally liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation.

In the circumstances before me, and on the basis of the **Canada Business Corporations Act,** it is open to me to find that Mr. and Mrs. Corkum participated in an act contrary to s.42(2)(c). They knew the plaintiff had advanced a claim against Montykola for the sum of $25,000. Their liability, however, pursuant to this **Act** extends only to Montykola. The **Act** gives no redress directly to creditors. Rather than rely on that **Act** I choose to lift

the corporate veil and order a direct payment by Mr. and Mrs. Corkum and Montykola to the plaintiff.

I have decided therefore to hold Montykola and Mr. and Mrs. Corkum jointly and severally liable for the sum of $12,500. That is the "amount involved" herein and will form the basis for costs under Tariff A, Scale 3. If necessary, I will hear counsel further concerning costs.

J.

Halifax, N.S.