

**SMALL CLAIMS COURT OF NOVA SCOTIA**

**Citation:** *Russell v. Hamilton*, 2022 NSSM 13

SCCH 502561

**BETWEEN:**

Robert Russell

Claimant

and

Daniel Hamilton

Defendant

**AND BETWEEN:**

Seam Development Solutions

Claimant

and

Daniel E. Hamilton

Defendant

**AND BETWEEN:**

Hamilton Excavating and Landscaping Limited

Claimant

and -

Robert Russell and Odilio Lopez

Defendant

**REASONS FOR DECISION (3 claims)**

**Adjudicator:** Eric K. Slone

**Heard:** September 21, October 1, October 18, November 8 and December 6, 2021 (via zoom) in Halifax, Nova Scotia

**Decision date:** January 16, 2022

**Appearances:** Robert Russell for himself, Odilio Lopez and Seam Development Solutions

Thomas Morehouse, counsel, for Daniel Hamilton and Hamilton

Excavating and Landscaping Limited

**BY THE COURT:**

[1] The Court has before it three files involving overlapping and related parties. The events all arise out of the same short-lived business relationships. By agreement the three cases were heard as one trial, which proceeded on parts of five days: September 21, October 1, October 18, November 8 and December 6, 2021.

[2] Each of the three cases potentially involves significant amounts of money. There are claims and one counterclaim.

[3] No one suggested that these cases violate the rules against case splitting. The parties are overlapping, but the issues are separate. Each case is potentially subject to the court's full monetary jurisdiction.

**The parties**

[4] Before setting out the specific cases, it is worth listing the main people who are either personally, or through their business entities, involved in each of the files.

[5] Robert Russell ("Russell") is a businessman and entrepreneur in his late 70's. Along with his background in business he has significant knowledge of and experience with accounting.

[6] Daniel Hamilton ("Hamilton") (in one file named as Daniel E. Hamilton) is in his mid-50's, and is in the demolition business. As part of his business Hamilton Excavating and Landscaping Limited ("Hamilton Excavating"), he sometimes personally operates heavy equipment.

[7] Odilio Lopez ("Lopez") did not specify his age. He has worked in construction most of his life since he arrived in Canada 45 years ago.

[8] Seam Development Solutions ("Seam"), though registered as a sole proprietorship of Israeli Morris ("Morris") is (according to Russell) a partnership between Russell and Morris. Russell described himself as a "silent partner." Seam is primarily engaged in trucking and as part of the relevant events came to own an excavator and hydraulic hammer attachment. Morris himself is primarily a

truck driver, and he worked extensively as a truck driver on the project that brought all of these parties together.

[9] There are other minor participants in the relevant events whose names will crop up throughout the narrative.

### **The claims**

[10] The claims, in chronological order of their filing, are:

- a. SCCH 502561 - Robert Russell v. Daniel Hamilton. This is a claim filed November 30, 2020, for personal loans allegedly made by Russell to Hamilton, or payments made by Russell to others on Hamilton's behalf.
- b. SCCH 502558 - Seam Developments v. Daniel E. Hamilton. This is a claim filed December 1, 2020, for damages for Hamilton's alleged failure to return the hydraulic hammer attachment belonging to Seam.
- c. SCCH 507361 - Hamilton Excavating and Landscaping Limited v. Robert Russell and Odilio Lopez. This is a claim filed July 5, 2021 by Hamilton Excavating for an accounting and termination of the (alleged) partnership between the named parties, and for money the Claimant claims is owed from the venture. There is a counterclaim by the Defendants, to the same (though opposite) effect.

### **Some basic facts**

[11] In about August 2020, Hamilton began negotiating (on behalf of Hamilton Excavating) a contract with Armco Capital Inc. to demolish concrete and metal structures and remove material on an Armco property on Hammonds Plains Road in Halifax. The base price for the contract was \$60,000.00 (plus HST) and the work was supposed to start in September 2020. Two later extras to the contract for \$5,000.00 (plus HST) and \$1,500.00 (plus HST) were negotiated, bringing the total Armco contract to \$66,500.00 plus HST (\$76,475.00). (This amount does not include gravel sales, which generated additional revenue and will be discussed later).

[12] Although the formal contract with Armco was not signed until mid-September, work actually began on September 4, 2020.

[13] Hamilton knew Lopez from past dealings and approached him in August 2020 about becoming involved in the project. Hamilton apparently did not have the financial strength to undertake the project on his own, and he did not at the time own his own excavator. Through Lopez, Hamilton was introduced to Russell, and the idea of a three-way joint venture developed.

[14] The terms of the joint venture were never committed to writing, but many of the basic terms are not significantly disputed.

- a. The venture would complete the Armco contract and profits would be split 50% to Hamilton Excavating, 25% to Russell and 25% to Lopez.
- b. Russell would supply some initial capital (\$10,000.00) to cover expenses until revenue started to flow from the contract.
- c. Russell's responsibility would be to set up an accounting system and look after the finances. He says, and I accept, that this meant that all the revenues should have been funneled through Russell to be deposited and accounted for properly.
- d. Hamilton was anticipated to operate the excavator, though he would eventually hire Jerry Pleasant to perform that function. He was also tasked with hiring subcontractors and performing other functions on site.
- e. Lopez's main responsibility was to act as a site supervisor.
- f. Although it is not clear that this was part of the initial discussions, Russell was convinced early on (he says pressured) into purchasing an excavator to work on the project. This was an expensive purchase of almost \$100,000.00. This machine (a used 22.5-ton Doosan) was stronger and more effective than a rented one which had been used at the start of the contract.
- g. The excavator purchase was made on September 14, 2020 and was done through Seam Development Solutions ("Seam"), which (as previously noted) is registered as a proprietorship but in fact is a partnership or joint venture between Russell and one Israeli Morris ("Morris"), who is a truck driver. Seam already owned a dump truck and was doing hauling for another unrelated company.
- h. Along with the excavator Seam acquired a used 2.5-ton hydraulic

hammer attachment which was needed to efficiently break up concrete structures. This hammer was acquired at an auction and shipped to Nova Scotia. It cost \$6,000.00 (no HST), commissions (\$675.00) and shipping fees (\$1,725.00), for a total of \$8,400.00.

- i. The joint venture was specifically limited to this one project, although there was some discussion about future ventures if this one was successful.

[15] The joint venture had no name separate from Hamilton Excavating. Had it been documented and the parties legally advised, they might have considered explicitly contracting out of the provisions of the *Partnership Act*, as many joint ventures do. Under the circumstances, it is inescapable that a legal partnership came into effect, for whatever effect that might have.

[16] In the course of this business relationship between Russell and Hamilton, the lines between business and personal became blurred. Beginning in late August 2020, Russell began making personal loans to Hamilton, which he seeks to recover in one of the claims (#502561) before the Court. As well as personal advances, Russell says he gave Hamilton the use of one of his personal credit cards to pay some business expenses, which (Russell says) Hamilton also used to make personal purchases. Hamilton denied at trial ever using the credit card, though in some of counsel's submissions he appears to accept that he did, and there is a great deal of evidence that points to his having used the card. As will be further discussed, I find that Hamilton did use the card to make personal purchases.

[17] Hamilton admits some of the personal loans, but there is a significant dispute about how much is owed from such loans.

[18] Also, at the end of the relatively short-lived venture, the hydraulic hammer owned by Seam went missing. In a separate claim (#502558) Seam seeks to hold Hamilton personally liable for the value of the hammer as well as for consequential damages. Hamilton claims that he delivered the hammer as directed by Russell and that this fulfilled any responsibility that he had.

[19] In the only one of the claims initiated by Hamilton (actually by Hamilton Excavating) (claim #507361) he seeks an accounting and remedies under the *Partnership Act*. Essentially, he claims that he did not receive his proper share of profits and that he has been left with outstanding liabilities, including HST owing to the government which has not been paid. Russell and Lopez defend and counterclaim for moneys they say that Hamilton owes them.

## **The evidence**

[20] Over the course of sessions on five days, the Court heard from all of the principals, sometimes more than once, and a number of other witnesses. A fair bit of documentation was submitted, and both parties supplemented their presentations with spreadsheets and other suggested ways to account for the tangled financial situation they found themselves in.

[21] From Russell's point of view, the venture should have been relatively easy to keep track of. He is experienced in business and accounting and set up the venture on the quickbooks accounting program. He opened up a special bank account for the venture at the iNova Credit Union. In an ideal situation, everything would have been easily trackable. But almost immediately, the situation was muddied by the use of cash to pay certain subcontractors, often unsupported by any documents, or at least by any reliable documents. And to compound the complexity there was a certain amount of mixing of business and personal transactions, specifically personal loans by Russell to Hamilton.

## **Credibility**

[22] Much has been written in the case law and textbooks on the subject of credibility. Many, if not most civil cases, require fact finders to make difficult choices between differently shaded versions of the same events. We apply the principle best exemplified in *Faryna v. Chorny*, [1952] 2 DLR 354 (BC CA), that the most probable version is the one that best accords with the inherent probabilities of the situation:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. (at p.357)

[23] In such cases we often conclude by politely stating that we "prefer" the credibility of one party over the other.

[24] Here, there are stark differences between the versions of events told by the main parties (Russell and Hamilton). They cannot be both telling the truth. One or the other of them has floated lies that are nothing short of audacious.

[25] Where a party has clearly lied to the court, nothing he says can be trusted. He forfeits the privilege of having his evidence taken at face value. Put another way, once a witness (especially a party) is caught in a lie, everything else he

testifies to suffers from the taint of the earlier lie, and is at least suspect.

[26] It gives me no pleasure to have to say that I believe that Hamilton lied to the court on a number of significant issues in these claims, and this causes me to reject most of his evidence, and in particular those parts of his evidence that conflict with the version of events posited by Russell.

[27] As a general matter, I find Russell to be a credible witness. I am satisfied that he was essentially honest in his accounting for the project, and in his recounting of events. That is not to say that he did not make mistakes, but I am satisfied that these were honest mistakes.

[28] There are several large ticket items which convince me that Russell is telling the truth and Hamilton is not. It makes sense for me to resolve these factual differences at the outset, which will lend support to my credibility assessment. With my specific findings on these issues, the accounting will begin to fall into place. Also, other smaller issues can be resolved along the same lines.

### **The withdrawals of cash from iNova Credit Union**

[29] On two occasions, September 25, 2020, and October 14, 2020, Russell and Hamilton attended together at the iNova Credit Union to deposit cheques from Armco payable to Hamilton Excavating as partial payments on the contract. As captured on bank video surveillance footage on both occasions, which footage Russell obtained, the two men walked into the branch together. Russell dealt with the teller, while Hamilton stood waiting a few steps behind. Bank documents confirm that cheques of \$23,000.00 and \$20,700.00 respectively were deposited, and simultaneously cash in the amounts of \$6,000.00 and \$7,000.00 was withdrawn. In both instances, the cash was placed in envelopes and was taken away by Russell. The two men then walked out of the branch.

[30] Russell's version of what happened next was that, once out of the branch and in the car, he handed the cash over to Hamilton. He said that this was the main reason that Hamilton drove him to the branch in the first place. He said that Hamilton was in need of money and wanted these advances which would be charged against his eventual share of profits. He also said that Hamilton might need cash to pay some of the subcontractors.

[31] Hamilton claimed that he was only driving Russell because he (Russell) was already intoxicated from drinking early in the day. He says that he did not pay attention and did not know that Russell was withdrawing large sums of cash, although he did see cash being handed over by the teller. Part of his claim in the



Partnership action is that Russell should account for this cash.

[32] Consistent with my generally favourable assessment of Russell's credibility, on the particular evidence of these excursions I believe him when he says that the cash was given to Hamilton. Hamilton contends otherwise, but I don't believe him. He claims that he was not paying attention, but this is farfetched. He did acknowledge knowing that Russell was withdrawing cash from the Credit Union, which ought to have concerned him since this was the joint venture's bank. There would be no reason for Russell to withdraw money for himself. In particular, he would have had no expectation of loans or advances from the venture at this early stage. In fact, he had earlier advanced \$10,000.00 to the venture to get it off the ground. Hamilton, on the other hand, was the one apparently anxious for some money out of his anticipated profits. Also, it was he who needed cash to make some cash payments to subcontractors, not Russell, who was not on site as often and who preferred to pay invoices with cheques. All of the evidence points to Hamilton being the one who was financially strapped; this is why he was also borrowing money personally from Russell even before the joint venture was in place.

[33] In other words, Russell's version makes sense in the context of all of the evidence, and Hamilton's does not. There were fairly large cheques from Armco to be deposited. Russell was more than capable of attending to these deposits alone. I reject the suggestion that he required Hamilton to drive him because he was intoxicated early in the day. There is no credible evidence to support this allegation. There would have been no reason for Hamilton to tag along, other than to receive the cash. I do not find it in any way significant that the exchange of cash (from Russell to Hamilton) was not captured in the bank surveillance video. Russell says it happened once they were back in the car, which is quite believable.

[34] Russell produced Google Maps logs of his movements on two of the days in question in these proceedings, September 18 (when a personal loan was made) and September 25, 2020, when the first of the two Armco cheques was deposited. In this day and age, it appears that one potentially leaves a digital trail of everywhere one goes with one's phone. Mr. Morehouse objected to this evidence which he suggests was susceptible to being fabricated or manipulated. I would not base my findings on this evidence alone, but it does corroborate Russell's account of his movements while being driven by Hamilton, and it is at odds with what Hamilton contends. I find the evidence to be authentic and credible. I very much doubt that Russell would be capable of fabricating such documents, nor do I believe that he would fabricate documents, as I find him generally to be credible and honest.

[35] I also do not find it significant (as argued by Hamilton's counsel) that Russell did not get Hamilton to sign anything acknowledging receipt of the cash. This was not the nature of their relationship. These were not personal loans; they were advances from the joint venture which Russell planned to enter into the bookkeeping system in due course. It is true that for two personal advances Russell got Hamilton to sign promissory notes, but on several other occasions he did not do so. This does not mean that those advances were not made; rather it means that Russell was not as diligent as he could have been to document personal loans.

[36] Russell's evidence, which I accept, is that Hamilton received a further cash draw of \$2,000.00 from the venture on October 28, 2020.

[37] In the result, I find that Hamilton Excavating should be regarded as having received this \$15,000.00 in cash from the venture, which will be accounted for along with other moneys that it received.

[38] A broader consequence of this finding is that Hamilton has forfeited his credibility. He has lied to the Court and attempted not only to keep money without accounting for it, but also attempted to hold Russell accountable for this very money. In the grand scheme of things, this is a \$30,000.00 spread between the respective positions.

[39] This was not Hamilton's only major falsehood.

### **Factoring of the RCS receivable**

[40] Russell does at least some of his personal banking with the Bank of Montreal. On September 25, 2020, Russell attended at the Bank of Montreal branch on Quinpool Rd. in Halifax and withdrew the very precise sum of \$10,701.25 in cash. He says Hamilton was with him, and that he waited in the car while Russell went in and withdrew this money which he was going to provide to Hamilton. September 25, 2020, was the same day that the two men had attended for the first time at the Credit Union to make a deposit and cash withdrawal.

[41] The Google Maps document for that day supports Russell's contention that the two of them visited first the Credit Union and then the Bank of Montreal as part of the same excursion. Hamilton denied driving Russell to the Bank of Montreal that day, which denial is totally at odds with the Google Maps information which is consistent with Russell's evidence and inconsistent with Hamilton's.



\$10,701.25 cash to Hamilton. He says he proceeded that day to prepare a formal invoice which he conveyed by email to RCS, directing them to make the payment to Hamilton Excavating at Russell's address on Aartz Street. He engaged in further email correspondence with RCS over the ensuing days, who advised him that the calculation of hours on the project was slightly inflated. A corrected invoice for \$10,853.13 was emailed to RCS on September 30, 2020. Russell understood that he would be getting a slightly smaller profit in the transaction, but did not consider it significant.

[49] In the end, Hamilton was also in touch directly with the RCS office and intercepted the cheque, after having issued a different version of the invoice (dated October 8, 2020) for the correct amount. Hamilton testified that he did not attempt to sell the receivable to Lopez or Russell, and he insisted that he never received any cash from Russell for it. He says that Russell had wanted to be involved (in some capacity) in the RCS project, but that he did not allow him to do so. Hamilton had no real explanation for how Russell got hold of the precise billing information for the RCS job, but the implication of his testimony is that Russell stole it, or at least did not obtain it legitimately.

[50] Hamilton disclaimed any knowledge that Russell had withdrawn money from his bank in the amount of \$10,701.25.

[51] From Hamilton's point of view, this was an unsuccessful effort by Russell to steal for his own benefit the money owed to him by RCS. From Russell's point of view, this was a personal factoring loan to Hamilton of \$10,701.25 that was supposed to be covered (with a profit) from RCS but which remains due and owing as part of his claim for personal loans.

[52] There is no middle ground. Essentially, I am being asked to choose between two polar opposite scenarios:

[53] **If Hamilton is to be believed:** This was nothing less than an elaborate charade by Russell to try and cheat Hamilton out of \$11,701.25. To create a paper record, Russell withdrew precisely \$10,701.25 from his own bank (a number that he had no legitimate way of knowing was the amount of the RCS receivable - minus \$1,000), based upon a handwritten document that had to have originated from Hamilton's circle, which Russell must have stolen. All of this happened on the same day (September 25, 2020) that he is known to have accompanied Hamilton to the Credit Union. Russell then took it upon himself (illegitimately) to invoice RCS for this amount (plus \$1,000), then adjusted the invoice upon being advised that the hours were slightly overstated, engaged in discussions with RCS - all without any authority and without Hamilton's knowledge.

[54] **If Russell and Lopez are to be believed:** Hamilton was chronically short of cash during this time frame and sought to sell the RCS receivable at a discount in order to be paid earlier. Lopez declined. Hamilton then gave Russell the handwritten invoice details in order for Russell to formally invoice RCS. Russell agreed and withdrew the cash and handed it to Hamilton. The Google maps document shows Russell traveling first to the iNova Credit Union and thereafter to the Bank of Montreal. It is already established that Hamilton was driving Russell that day. In the end, Hamilton made an end run around Russell and arranged to take the money for himself and deny it to Russell.

[55] There is no contest between these two versions, in terms of their harmony with the inherent probabilities. I am convinced that the factoring of the RCS receivable happened exactly as Russell contends. I accept Lopez's evidence that Hamilton tried to sell him this receivable, and that he refused. The fact that Russell went to his bank and withdrew the very precise sum of \$10,701.25 is consistent with his having agreed to factor the receivable, and the fact that he bargained for a \$1,000.00 discount representing his profit is totally consistent.

[56] If Hamilton is saying that he has no idea why Russell would withdraw this precise amount of money, I do not believe him. I believe he took Russell's money and then intercepted the cheque and kept it for himself.

[57] Hamilton's denial of Russell's version is without a shred of credibility; indeed, it is preposterous. I not only find that he is wrong. I am satisfied that he is outright lying in an attempt to evade paying Russell what he owes him.

[58] The consequence of this finding is not only that Hamilton owes Russell this money, which I will factor into the claim as I go through it. The additional consequence is that it appears Hamilton is prepared to lie (when it suits him) to avoid being accountable for money that he owes, either to Russell personally or to the joint venture.

### **Payments improperly taken by Hamilton**

[59] The intent of the joint venture was that Russell would receive progress payments from Armco and deposit them in the Credit Union, while also entering the payments into the quickbooks accounting program. In several instances, as I will set out, Hamilton attempted (and succeeded) in intercepting payments and keeping the proceeds for himself.

[60] One instance was a \$5,750.00 cheque from Armco which was intended to cover an extra to the contract for removing steel structures from the property. Russell only found out about the cheque when he later saw a cheque stub that Hamilton had left lying around. He confronted Hamilton, who made the excuse that the money had been accidentally wired into his account by Armco. In actual fact, we have (Ex. 4) a copy of the actual cheque and deposit details from Bank of Nova Scotia which show the cheque having been deposited by Hamilton on October 2, 2020.

[61] I find that Hamilton outright lied to Russell and simply took the money knowing full well that he had no right to it, that it was an asset of the joint venture.

[62] The other two instances were cheques from Armco in the amount of \$15,857.58 and \$7,072.50, which Hamilton also intercepted and deposited into his own account at Bank of Nova Scotia. It is noted that this occurred in November 2020 when the active operations of the joint venture were already over and the relationship was in conflict. Nevertheless, Hamilton must account for this money to the joint venture.

### **The issue of gravel sales**

[63] Another threshold issue concerns gravel sales from the Armco job site.

[64] There is nothing in the written contract with Armco that mentions gravel, but it is not disputed that there were some piles of good quality gravel (of various types) on the property that Armco wanted removed and was prepared to allow Hamilton Excavating to sell for its own benefit.

[65] The issue for this court is whether Hamilton had a right to this revenue only for himself or had to share it with the joint venture partners.

[66] Hamilton says that he never agreed that the joint venture could benefit from the gravel sales, and he maintained that the joint venture did not incur any of the costs of extracting or transporting the gravel.

[67] Russell and Lopez say that Hamilton told them about the gravel and agreed that the proceeds would be included in the joint venture income. Russell described it as a “sweetener” to make the joint venture more attractive to them.

[68] There is nothing in writing that assists in resolving this question. There was nothing in writing between Hamilton and Armco that mentions gravel. And there was nothing in writing between Hamilton and the joint venture partners.

[69] The lack of writing does not point either way. The entire joint venture was based on oral understandings (or misunderstandings).

[70] The evidence is somewhat equivocal. However, I accept Russell's evidence that the joint venture's labour and machinery was used to load up most of the gravel into customers' trucks. The one exception was Kynock Resources which bought the largest lot of gravel and came to the site with their own equipment. Kynock and several others paid for their gravel purchases by way of cheques while some others paid in cash.

[71] Hamilton stated in his testimony that all of the customers brought their own equipment to load up the gravel that they were purchasing. As Russell pointed out, this is absurd as it costs a great deal of money just to transport an excavator, which would hardly be worth it for many of the smaller sales, especially as there was an excavator on site.

[72] Two gravel customers who paid by cheque were Hatfield Farms and David Blackburn. Those cheques were deposited by Russell into the joint venture account. Hamilton testified that he allowed these cheques to be deposited as partial payments (by him) to obtain an ownership interest in the Doosan excavator.

[73] I do not accept any of Hamilton's evidence insofar as it conflicts with Russell's evidence. I find that Hamilton did agree that gravel income would be to the benefit of the joint venture. I find that joint venture machinery and personnel were used to execute some of the sales, which is consistent only with that overall understanding. I find that Hamilton improperly kept some of the cheques and all of the cash from gravel sales, for which he must be held to account. I will attempt to account for these moneys in the final accounting later in this decision.

[74] The cheques for gravel sales were:

- |    |                  |   |
|----|------------------|---|
| a. | David Blackburn  | \$2,875.00 (deposited to joint venture) |
| b. | Hatfield Farms   | \$2,173.50 (deposited to joint venture) |
| c. | Hatfield Farms   | \$2,875.00 (deposited to joint venture) |
| d. | Kynock Resources | \$5,980.00 X 2 (kept by Hamilton)       |

[75] There is no good record or account of the amount of cash from gravel sales that Hamilton pocketed, though there is evidence that Hamilton sold \$1,800.00 worth of gravel to Danny Nagle in barter for a debt that he owed Nagle.

### **The hammer claim**

[76] As the Armco job wound down in late October 2020, the relationship between Russell and Hamilton deteriorated. The hydraulic hammer which had been used extensively to break concrete on that job was no longer needed on that project. For reasons which have never been satisfactorily explained, Hamilton had it carted away from the job site and placed in the yard of his personal home.

[77] Hamilton claimed that it was to guard against the hammer being stolen from a job-site that was now deserted much of the time. While this is not totally farfetched, it should be noted that this “hammer” weighs 2.5 tons, or as much as a large car. It takes specialized equipment just to lift and transport it. And it would only be useful to someone with a particular type of excavator to which it could be attached.

[78] As the Armco job was winding down, Russell negotiated (for himself) a contract with Danny Nagle to provide his excavator and the hammer to a job on Pockwock Road, starting on or about November 1, 2020. Russell was able to deliver the excavator to Pockwock, but needed the hammer. He asked Hamilton to surrender it or arrange for it to be delivered to that job. I find that he began making these requests as early as October 30, 2020. I also find that he renewed these requests on several occasions thereafter.

[79] As confirmed by Hamilton, on November 11, 2020, Israeli Morris paid him an unscheduled visit at his home asking for the hammer. Instead of handing it over, he refused, and the encounter became tense. Someone called the police. Hamilton says he did while Morris says he did. In the end, it does not matter who called the police. The police took the position that this was a civil matter and suggested that Hamilton had a “colour of right” to the hammer.

[80] Hamilton’s explanation to the court was that he was waiting for some type of joint venture accounting from Russell. He also floated, not very convincingly, the theory that he had an understanding with Russell that he would be acquiring an ownership interest (over time) in the excavator and hammer.

[81] Russell says that Hamilton knew he owed money to the joint venture partners and was withholding the hammer as a trading chip in this anticipated negotiation.

[82] To me, it seems obvious that Hamilton only took the hammer home to use it as some type of leverage with Russell and Lopez. While there may have been some minor security concerns, that was not his primary purpose. Even though Russell mistakenly charged the cost of shipping the hammer to the joint venture -



something that came to light during the trial, but which Hamilton likely had no prior knowledge of - I find that Hamilton had no colour of right or claim to ownership of the hammer. I find that while there may have been some discussion of the subject, there was never any concluded agreement that he could obtain an ownership interest in the excavator and the hammer. Russell has since corrected the accounting treatment of the shipping charge.

[83] Russell says that he has not had possession of the hammer since Hamilton first took it away. He knows that it was in Hamilton's yard on November 13, 2020, because he hired a drone operator to fly over and photograph it.

[84] Hamilton testified that he eventually relented and agreed to have the hammer returned to Russell (or more accurately Seam) on November 16, 2020. He says that Russell had wanted it transported to "the job site" which he interpreted as the Armco job site on Hammonds Plains Rd. (Of course, Russell would have wanted it transported to Pockwock Rd., where it was to be used.) Hamilton says that he loaded the hammer on his trailer and instructed Dave Watson to transport it to Hammonds Plains. Watson, in turn, testified that he dropped the hammer off next to an excavator that was parked just outside the entrance to the Armco property.

[85] Hamilton says that he does not have the hammer and he disclaims any knowledge of what happened to it after he delivered it as he believed he was instructed to do. He says that he fulfilled his duty and is not responsible for what may have happened to the hammer.

[86] Russell says that Hamilton knew that his excavator was no longer on the Armco property, and that there would have been no logic in delivering the hammer there. He also says that he was clear that he needed it for a job on Pockwock Rd.

[87] In connection with this issue, once again I believe Russell and disbelieve what Hamilton says, to the extent that it differs from Russell's evidence.

[88] I find that Hamilton had no authority to take the hammer home initially, and at the very least he should have returned the hammer when it was demanded. In both instances, he committed the tort of conversion.

[89] If, as Hamilton contends, he had the hammer transported to the Hammond Plains work site and dropped off next to some unspecified excavator, that would have been a reckless thing to do. He knew full well that the Hammonds Plains project was over and Russell's excavator had been floated to the Pockwock Rd. work site about two weeks previously. There was no logic to taking the hammer

to Hammond Plains because it was needed elsewhere. I am in fact rather skeptical that it was ever delivered to Hammond Plains. I consider it highly suspect that it has apparently vanished. In either event, Hamilton's obligation was to return the hammer to Seam and this he failed to do. He is liable for its value and for a certain amount of consequential damage for its loss of use, which I will assess later.

### **The use of Seam to perform trucking**

[90] During the course of the project, Morris drove Seam's dump truck regularly transporting material from the job site to places where it was dumped. Russell created invoices and charged the project approximately \$12,000.00 for these services.

[91] Hamilton argues that this is unauthorized self-dealing on Russell's part, because there was never any agreement that Seam could bill for its work. He says that this trucking was simply part of Russell's contribution to the joint venture. Counsel pleaded two sections of the *Partnership Act*, arguing that they would bar Russell from profiting above and beyond his partnership interest.

[92] Section 27(f) states:

27 The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement, express or implied, between the partners, by the following rules:

(f) no partner shall be entitled to remuneration for acting in the partnership business;

[93] He also refers to s.32 which states:

32 (1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection.

[94] As for s.27(f), I am satisfied that there was at least an implied, if not an express agreement, that Seam could provide trucking services to the venture at normal commercial rates. In fact, Morris provided as much as half of all the trucking to the venture, and trucking was the largest single category of expense. There was nothing in the discussions leading up to the venture to indicate that trucking by Israeli Morris would be part of Russell's capital contribution to the venture. The evidence satisfies me that Russell's contributions consisted of the

provision of capital, his excavator and bookkeeping and administrative services, as already discussed. I find it extremely unlikely that Russell would have added trucking services to the deal, especially given that Morris did not have any share of the venture and rightly expected to be paid for his work.

[95] Hamilton's theory would mean that Morris worked for nothing, which I find to be improbable and unconscionable.

[96] As for the possible effect of s.32(1), this is just an affirmation of the common law fiduciary principal that holds a partner to account for secret profits. I find here that the other parties, namely Lopez and Hamilton knew about Russell's relationship with Morris and consented to the arrangement. On the other side of the ledger, Hamilton was likewise hiring people, such as Watson, with whom he had extremely close relationships.

[97] Hamilton also complains that Seam overcharged for its work. He bases this argument on the fact that Seam charged slightly less to another customer in the same time frame. I consider this argument to be without merit. Morris explained that the material being hauled on this job was heavier and rougher and merited a slightly higher price.

[98] It is at least as likely, if not more so, that many of the sub-contractors that Hamilton paid, were overcharging. Even so, given the lack of evidence to determine otherwise, I will be accepting all of the claimed sub-contractor amounts at face value.

### **Danny Nagle's evidence**

[99] Danny Nagle is the contractor who contracted with Russell to use his excavator and hammer at a job on Pockwock Rd., starting October 30, 2020. He stated that there was no written agreement with Russell and said that they never actually settled on a price. In the end he hired someone else for 8 hours at \$200.00 per hour. He says that he would have used Russell's machine for longer but could not say precisely how much.

[100] Nagle also provided evidence that corroborated certain facts relating to other claims.

[101] Nagle testified that he bought gravel from the Armco site. He said that it was Russell's excavator that loaded the gravel for him, with Jerry Pleasant operating the machine. This is consistent with Russell's theory that the gravel was included in the joint venture, and it is inconsistent with Hamilton's theory that it

was not.

[102] Nagle said that he took the gravel in a barter exchange for \$1,800.00 that Hamilton owed him for other dealings unrelated to the joint venture. I accept this evidence, which also means that Hamilton should be treated as having received \$1,800.00 of joint venture money.

[103] Nagle also testified that he saw the hammer at Hamilton's property on or about November 13, 2020, and that he told Hamilton he needed to use it for his project. He admitted on cross-examination that he might have simply told Hamilton to bring it to the (unspecified) "work site."

[104] The implication of this line of questioning was to suggest that Hamilton might have interpreted this to mean the Armco site, but as I have already noted it is totally farfetched that Hamilton could have honestly believed that it should be sent there, given that the Armco project had been completed roughly two weeks earlier and that Russell's machine was elsewhere.

### **The claims**

[105] With all of the foregoing in mind, I will begin to assess the merits of each claim in turn.

#### **Claim #502561 - Personal loans from Russell to Hamilton**

[106] Claim #502561 concerns personal loans from Russell to Hamilton or amounts otherwise owing between the two men personally. The amount claimed slightly exceeds \$25,000.00, though Russell abandons any excess and claims the court's maximum of \$25,000.00. As will become clear, I accept most of Russell's claim but arrive at a slightly smaller amount.

[107] The Statement of Defence contains mostly denials, even for advances that I would have thought were uncontroversial. The Defence also seeks to deflect attention to the joint venture issues, where Hamilton Excavating claims to be owed money, and concludes with a blanket denial that Hamilton is indebted to Russell for any amount, possibly on the basis of set-off, though that is not explicitly pleaded.

[108] With due respect to counsel for Hamilton, Hamilton personally was not a party to the joint venture - the company was - and his personal liability to Russell must be determined on its own merits.

[109] The pattern of transactions between Russell and Hamilton (both personal and joint venture related) paints a portrait that helps explain why the joint venture was formed in the first place. Hamilton was clearly struggling financially and needed a partner who could put up some capital; otherwise, Hamilton could not have performed the Armco contract by himself. Hamilton's willingness to pay Russell significant amounts of interest on his advances is also telling. Someone with good conventional credit would not (for example) have to pay \$500.00 to borrow \$4,000.00 on a short-term basis.

[110] Hamilton testified that he only needed to borrow money from Russell because he had lost his wallet. This evidence lacked the "ring" of truth.

[111] I am left with the strong impression that Hamilton identified Russell as a bit of a soft touch and began immediately hitting him up for personal loans. As the venture proceeded, Hamilton became more greedy and desperate for moneys, going so far as to hold back cheques belonging to the joint venture on the flimsy and bogus excuse that he was being taken advantage of by Russell.

[112] Over the course of about two months, Hamilton took moneys directly from Russell and used one of his personal credit cards to make personal purchases. At trial, Hamilton denied altogether ever using Russell's card, but I find otherwise both on the evidence and also on the basis that in the Statement of Defence he actually admitted using the credit card but claims that he repaid Russell for all non-venture expenses! His denial at trial, in the face of his admission in the Defence, is a further blow to his credibility.

### **Direct loans to Hamilton**

[113] I have already found against Hamilton on the largest item, namely the RCS receivable. Hamilton owes Russell both the \$10,701.25 which he received in cash, plus the \$1,000.00 in "interest" promised.

[114] There are a few other fairly large ticket items. Russell advanced Hamilton \$4,000.00 on August 25, 2020, for which Hamilton signed a promissory note for \$4,500.00 (including \$500.00 interest). I find that this is an enforceable obligation.

[115] On September 3, 2020, Russell claims to have advanced Hamilton a further \$1,000.00, though there is no writing reflecting this loan. Hamilton denies receiving it. I believe Russell, disbelieve Hamilton, and find that it was made and is owing.

[116] On September 4, 2020, Russell advanced Hamilton \$2,400.00 in cash, and had him sign a note for it. I find that this money is due and owing.

[117] On September 18, 2020 Russell says that he advanced Hamilton a further personal loan of \$2,500.00. This was the same day that Hamilton received \$6,000.00 out of the Armco advance. Though there is no note reflecting the advance, I accept Russell's evidence and find that this amount is also owing.

### **Credit card and other items**

[118] On several occasions Hamilton asked Russell to send money to his woman friend, Dana Tulip, by interac e-transfer. Russell kept records of these transfers, which totalled \$1,010.00. I find that this amount is owing.

[119] On October 2, 2020, Russell says he gave \$700.00 to Lopez to pass on to Hamilton, for the purpose of paying a trucker (Discount Trucking). Russell says that Hamilton pocketed the money and never paid the trucker. Russell admitted that he did not see Lopez give Hamilton the money. Also, this was not a personal transaction, given that it was for a joint venture expense. I am not prepared to allow it in this claim.

[120] Russell says that on September 25, 2020, he personally paid \$250.00 to Battlefield Rental for a trailer that Hamilton was personally renting for a weekend trip. I allow this claim.

[121] As mentioned, Russell provided Hamilton with a personal TD credit card, which was supposed to be used on the Armco job to pay for miscellaneous expenses. Between October 5 and October 20, 2020, a number of charges were put on the card that Russell says were done by Hamilton for his own personal expenses. A number of those charges were for cash advances. Many of the others were at gas stations or restaurants. The total is \$1,652.45.

[122] Once again, I am faced with diametrically opposite stories from Russell and Hamilton. Hamilton said at trial that he never had, nor used, the credit card and he speculated that Russell himself incurred these expenses. I find otherwise and hold Hamilton responsible for these expenses.

[123] One last item of some controversy is a claim by Russell for \$1,500.00 for damage which Hamilton did to Russell's personal vehicle when he accidentally hit it with his truck, while the car was parked.

[124] Hamilton does not deny being at fault for this accident but seeks to avoid

paying anything on the ground that this should have been handled through insurance. However, the facts are important. Russell was obviously upset that Hamilton had damaged his car, and he says that Hamilton offered to pay Russell \$1,500.00 rather than put it through insurance.

[125] There is nothing to indicate that either Russell or Hamilton was aware of s.138A of the *Insurance Act*) which provides (in effect) that in accidents involving two insured vehicles, the innocent party can make a claim for the property damage from their own insurer and is precluded from taking any direct action against the at-fault driver.

[126] As such, Russell would have been precluded from suing Hamilton, and would have been obliged to seek his remedy through his own insurance.

[127] However, I do not see how this section precludes parties from agreeing to settle a minor matter without involving insurance. Whether accurately or not, there is a prevailing view that any reported accident, however minor, can have an effect on the at-fault party's insurance rates. In the situation here, I find that Hamilton made an enforceable promise to pay Russell \$1,500.00 on the understanding that Russell would not report the accident to either insurer. The claim by Russell is not for damages to his vehicle, which would be captured by s.138A, but is rather a claim to enforce a verbal promise (supported by consideration) to pay a sum of money.

[128] To summarize the personal claims:

<b>Date</b>	<b>item(s)</b>	<b>amount</b>
August 25, 2020	personal loan + interest	\$4,500.00
September 3, 2020	personal loan	\$1,000.00
September 4, 2020	personal loan	\$2,400.00
September 18, 2020	personal loan	\$2,500.00
September 18, 2020	RCS receivable + interest	\$11,701.25
September 25, 2020	Battlefield Rental	\$250.00
Various dates	interac transfers to D. Tulip	\$1,010.00
October 2, 2020	promise to pay for car damage	\$1,500.00

October 5 to October 20, 2020	credit card charges	\$1,652.45
October 5 to 23, 2020	less repayments received from Hamilton	(\$2,000.00)
NET AMOUNT OWING TO RUSSELL		\$24,513.70



**Claim #507361 - the Partnership claim**

[129] The simplest and most straightforward way to resolve this claim, which is brought by Hamilton Excavation, is to determine a credible profit for the venture and focus on what Hamilton Excavating has received, and what it has paid out - or will have to pay out.

[130] I accept Russell's accounting for revenue earned on the project. Although his accounting shows the numbers net of HST, I will include HST in a separate column as it is easier to match up with actual amounts received which included HST. But I will also set out the number pre-HST as that is the basis for calculating profit.

[131] The main difference between Russell's and Hamilton's accounting is, obviously, the inclusion of gravel sales. These figures do not include cash sales of gravel, which Hamilton apparently received and kept. There is simply not enough evidence for me to make any findings in connection with these cash sales, and as such Hamilton is not being held accountable for these moneys.

<b>income</b>	<b>incl. HST</b>	<b>net of HST</b>
Armco contract (including extras)	\$76,475.00	\$66,500.00
Gravel sales - Blackburn	\$2,875.00	\$2,500.00
Gravel sales - Hatfield	\$2,173.00	\$1,890.00
Gravel sales - Hatfield	\$2,875.00	\$2,500.00
Gravel - sales Kynock	\$5,980.00	\$5,200.00
Gravel - sales Kynock	\$5,980.00	\$5,200.00
<b>Gross income</b>	<b>\$96,358.00</b>	<b>\$83,790.00</b>

[132] I note that this amount does not include the \$1,800.00 gravel sale to Danny Nagle. This brings the net revenue to \$85,590.00.

[133] The parties have both submitted multiple versions of proposed amounts for the expenses attributable to the project.

[134] Hamilton, in one of counsel's submissions, says that the total expenses are \$46,100.22. He also submits that he has personally paid \$29,489.50 of those expenses consisting of:

Jerry Pleasant	\$5,800.00
David Watson	\$8,000.00
MARDO Construction	\$7,509.50
Tipping Fees	\$4,500.00
G.Veinot Metal	\$3,680.00
	\$29,489.50

[135] Russell is skeptical that Hamilton actually paid the amounts shown, but in the end he did not press his objections. I am prepared to accept these figures. If any of these individuals claim not to have been paid by Hamilton, and have legitimate claims, it would be Hamilton's obligation to make good on them as he is credited with having paid them.

[136] Based on Hamilton's total expense figure, the profit from the enterprise would be as follows:

<b>income</b>	\$85,590.00
<b>expenses</b> (per Hamilton)	(\$46,100.22)
<b>profit</b> (per Hamilton)	\$39,489.78

[137] Russell's proposed expenses (in his most recent submission) are \$49,436.22, which is surprisingly close to Hamilton's figures. This difference is partly though not completely explained by the different treatment of invoices from, and payments to, Seam. I have already found that Seam was entitled to charge for trucking.

[138] Having considered all of the evidence and submissions, I accept Russell's expense figure, as contained in his profit and loss statement dated December 5, 2021. I therefore calculate the profit of the venture to be, as calculated:

<b>income</b>	\$85,590.00
<b>expenses</b>	(\$49,436.22)
<b>profit</b>	\$36,153.78

[139] Based on this profit, Hamilton would have been entitled to 50% or

\$18,076.89. Or to put it another way, after accounting for everything he paid, the HST he remains liable to pay, and everything he pocketed along the way, he would be entitled to be ahead by his profit share.

<b>Hamilton Excavating</b>	<b>moneys paid out or payable</b>	<b>moneys received</b>
HST liability	\$8,520.22	
Jerry Pleasant	\$5,800.00	
David Watson	\$8,000.00	
MARDO Construction	\$7,509.50	
Tipping Fees	\$4,500.00	
G.Veinot Metal	\$3,680.00	
cash from Russell		\$6,000.00
cash from Russell		\$7,000.00
cash from Russell		\$2,000.00
cheque from Armco		\$5,750.00
cheque from Armco		\$15,857.56
cheque from Armco		\$7,072.50
Kynock - gravel cheques cashed (\$5,980 X 2)		\$11,960.00
Barter with Danny Nagle for gravel		\$1,800.00
	\$38,009.72	\$57,440.06

[140] The difference between these two amounts is \$19,430.34, which means that Hamilton is overdrawn by \$1,353.45. It will be my order that Hamilton Excavating account to Russell and Lopez for this amount, plus the cost of the counterclaim.

[141] It is not necessary for me to make any findings as between Russell and Lopez, who should be left to work out between themselves how to account for their respective interests.

[142] For whatever it is worth, I find that the partnership was dissolved once the work on the project was completed, and all invoices were paid by Armco.

**SCCH 502558 - Seam Developments v. Daniel Hamilton - the hammer claim**

[143] I have already found that Hamilton is legally responsible for the loss of the hammer. The appropriate framework is the tort of conversion.

[144] Part of the damages would include the value of the item in question, which I find to be \$8,400.00.

[145] Seam is also entitled to damages for the lost opportunity to use the hammer on the job for Danny Nagle. Russell's evidence was that he anticipated being able to earn \$4,000.00 per week for the excavator and hammer. Nagle's evidence on this point was not as definite. He said that he hired someone else with an inferior hammer and paid him \$1,600.00 for one day's work, which was all he was available to do. He stated that he would likely have used Seam's hammer more, and that it would have done a better job for him. But he did not indicate how many days or weeks of work he would have hired Seam's equipment for.

[146] Russell's estimate is a bit speculative, but that is often the case with damages for lost opportunities. That has never prevented courts from looking at "loss of chance" damages.

[147] I propose to be conservative and estimate that Seam lost the opportunity to earn income in the amount of \$4,000.00 from the Nagle job.

[148] I should note that there was no realistic opportunity for Russell to mitigate Seam's damages in a timely way by acquiring another hammer. I accept that these items are hard to source, especially at a reasonable cost.

[149] I accordingly assess Seam's damages at \$12,400.00 for this claim, and Seam is entitled to judgment on this claim for \$12,400.00 plus interest and costs.

### **SUMMARY OF ORDERS**

[150] In SCCH 502561 - Robert Russell v. Daniel Hamilton - there will be judgment in favour of the Claimant for \$24,513.70 plus costs of \$199.35 and prejudgment interest at the statutory rate of 4% from the date of filing to the date hereof.

[151] In SCCH 502558 - Seam Developments v. Daniel E. Hamilton - there will be judgment in favour of the Claimant for \$12,400.00 plus costs of \$199.35 and prejudgment interest at the statutory rate of 4% from the date of filing to the date hereof.

[152] In SCCH 507361 - Hamilton Excavating and Landscaping Limited v. Robert Russell and Odilio Lopez - the Claim by Hamilton Excavating and Landscaping Limited is dismissed and there will be judgment on the counterclaim in favour of Russell and Lopez in the amount of \$1,353.45, without interest, plus costs of the counterclaim in the amount of \$66.00.

**Eric K. Slone, adjudicator**