

Court of Queen's Bench of Alberta

Citation: Gill v 1176520 Alberta Ltd, 2020 ABQB 274

Date: 20200420
Docket: 1503 18216
Registry: Edmonton

Between:

Ajmer Singh Gill and Harinder Singh Bhatti

Plaintiffs

- and -

**1176520 Alberta Ltd., 854292 Alberta Ltd.,
Operating as Harry's Excavating and Harinder Purewal**

Defendants

**Reasons for Judgment
of the
Honourable Mr. Justice K. Feth**

Introduction

- [1] Mixing business and friendship can be the ruin of both. Here, only the business survived.
- [2] Ajmer Singh Gill ("Gill") and Harinder Singh Bhatti ("Bhatti") claim they entered into an agreement with Harinder Purewal ("Purewal") whereby the plaintiffs were each to acquire a 25% interest in a truck park business located in Edmonton, Alberta. Each plaintiff provided \$500,000 to Purewal, which they say was for the acquisition of shares in a numbered company that would own and operate the truck park business, including the land on which it is situated (the "Truck Park"). Purewal would own the remaining 50% of the shares.

[3] After providing the purchase monies, the plaintiffs participated in and helped develop the Truck Park for almost two years. The shares, however, never legally transferred.

[4] Purewal denies the existence of any agreement for an interest in the Truck Park or the purchase of shares in a company. He says the plaintiffs were merely lending him money so he alone could buy the Truck Park business and the land.

[5] Purewal argues that if no loan agreements were formed, the parties' positions demonstrate no consensus *ad idem* was reached about any agreement. He proposes the plaintiffs' monies be returned, with interest, and he retain the shares of the numbered company.

[6] The plaintiffs contend the business increased in value after 2012, in part due to their investments and efforts. They seek recovery for the expectation loss suffered because of Purewal's breach of contract and oppressive conduct, including their beneficial interests in the profits and the appreciated value of the Truck Park. They complain that merely returning their original investments undercompensates them and rewards Purewal for his breach of contract and oppressive conduct.

[7] For the reasons that follow, I conclude that Gill, Bhatti and Purewal entered into a share purchase agreement. The agreement was deliberately breached by Purewal. Each plaintiff is a beneficial owner of 25% of the shares of 854292 Alberta Ltd. ("854") and entitled to relief.

Background

[8] The Truck Park consisted of approximately eight acres of land, only part of which was developed.

[9] In 2012, the Truck Park was owned by 1176520 Alberta Ltd. ("117"), which was controlled by four shareholders, including Purewal. Each shareholder had an equal share. Purewal wished to buy the Truck Park from the other shareholders.

[10] In October 2012, Purewal approached his good friend, Gill, about investing in the acquisition of the Truck Park. Gill testified the invitation was to "put a share in with me for 50%". Gill declined.

[11] A month later, Purewal again approached Gill with the proposal. Gill agreed to speak with another friend, Bhatti, and if he was also prepared to invest, Gill would think about it. Gill testified he told Purewal that Bhatti would be asked to invest on a "25/25 basis", meaning the plaintiffs would collectively acquire a half interest in the Truck Park.

[12] Bhatti knew Purewal, trusted him, and agreed to invest. A follow up discussion occurred in early November 2012. Gill and Bhatti testified the conversation with Purewal was about an investment for 50% of the business, not loans. Purewal testified the discussion was about a loan from each of Gill and Bhatti. Each party asserts a verbal agreement of some sort was reached at that time.

[13] No formal written share purchase agreement or loan agreement was prepared.

[14] The plaintiffs claim the acquisition of the shares was to proceed through a company which would own the Truck Park either directly or through a wholly owned subsidiary. Purewal owned 854 through which he operated a small business of his own called "Harry's Excavating." At all relevant times, he was the sole shareholder and director of 854.

[15] One option was for 854 to buy the Truck Park from 117, with the plaintiffs acquiring 50% of the shares in 854. A second option was for 854 to buy all the shares of 117 with 117 retaining ownership of the Truck Park and the plaintiffs buying 50% of the shares in 854. A third option was for 117 to retain ownership of the Truck Park with the plaintiffs acquiring 50% of the shares in 117.

[16] On November 22, 2012, 854 entered into a real estate purchase contract with 117 to buy the Truck Park land (the "Real Estate Contract"). The Truck Park and the land were viewed by the parties as essentially one and the same. The Real Estate Contract contemplated a \$200,000 deposit on a \$2 Million purchase, with a closing date of March 31, 2013, and stipulated the deposit was to be delivered to 117's lawyer in trust.

[17] On the same date, the plaintiffs provided a \$100,000 bank draft to Purewal payable to 117.

[18] That evening, Gill received a copy of the Real Estate Contract from Purewal. The Contract confirmed 854 was buying the Truck Park land from 117. Bhatti saw the Real Estate Contract the same day.

[19] The plaintiffs contend that by the end of November 2012, they understood the share purchase was for an interest in 854 on the understanding that the company would either directly own the Truck Park, as contemplated by the Real Estate Contract, or indirectly own the Truck Park by controlling all the shares of 117, which would continue to own the Truck Park.

[20] The plaintiffs say they understood the \$100,000 was their initial payment towards the share purchase. Purewal says the \$100,000 was the first instalment of the loans.

[21] Harjit Toor ("Toor") was one of the other shareholders in 117. He was friends with Gill and Purewal before controversies arose about the sale of the Truck Park. Toor testified that in December 2012, he was attending a social event with a friend, Manmohan Sekhon ("Sekhon"), when Purewal arrived. Sekhon told Toor, in Purewal's presence, that Purewal had two new business partners, Gill and Bhatti. Toor was invited to congratulate Purewal, which he did.

[22] Purewal denies attending any such gathering or characterizing the plaintiffs as his partners.

[23] During December 2012 and early 2013, Purewal was negotiating a loan with JayCap Financial ("JayCap") for funding to assist with the purchase of the Truck Park. He was using a broker to arrange for the funding: Ken Sethi ("Sethi").

[24] In January 2013, the plaintiffs attended a meeting with Purewal and Sethi. Bhatti testified he knew Purewal wanted to borrow money from JayCap and that the possibility of all three men borrowing money from JayCap was being considered.

[25] Purewal testified that during the meeting, he told the plaintiffs he would repay their loans once the JayCap money was received; nothing was said about the plaintiffs acquiring shares in the business. Gill and Bhatti did not testify about the details of the conversation. However, the balance of their testimony was incompatible with the description provided by Purewal.

[26] Neither plaintiff testified about any follow up discussions with Sethi or JayCap.

[27] On February 8, 2013, JayCap issued a Letter of Interest to 117, represented by Sethi, confirming a willingness to consider a loan for \$722,000, secured by a first mortgage on the

Truck Park land. The Borrower was to be 117 with Purewal and 854 serving as Guarantor (the "JayCap Letter").

[28] The conditions of the loan required 117, as the Borrower, to ensure that Purewal was the sole shareholder of 117.

[29] Toor testified he was not informed at that time about the negotiations with JayCap or Sethi, or the JayCap Letter, even though he was a shareholder in 117, the proposed borrower from JayCap.

[30] The loan from JayCap did not proceed.

[31] In late February 2013, according to Toor, Purewal convened a meeting of 117's shareholders and pitched the idea of changing the purchase of the Truck Park from a real estate transfer into a purchase of 117's shares. 117 would retain ownership of the Truck Park. The 117 shareholders agreed to the switch.

[32] Toor testified Purewal confirmed for him that the other shareholders in 117 were told the plaintiffs had become Purewal's new business partners.

[33] Purewal testified the potential change from a real estate transfer to a share purchase was initiated by the other shareholders in 117, not by him. He denied ever characterizing the plaintiffs as his business partners.

[34] According to Toor, approximately one week before the March 31, 2013 closing of the real estate transfer, Purewal approached the 117 shareholders about reducing their share price if he paid each of them \$50,000 in cash. Purewal also raised a concern about work he had done for the Truck Park, for which he had not been compensated, and sought a credit from each of the 117 shareholders for that work. The meeting ended without agreement on Purewal's proposal.

[35] Two or three days later, Toor was informed by Purewal's lawyer that the other 117 shareholders had agreed to accept reduced cash payments from Purewal for their shares. Toor was told by Purewal that he had to accept the same reduction. Toor refused and declined to transfer his shares at the reduced price.

[36] Sometime before March 25, 2013, according to Gill, Purewal asked him to approach his brother, Kehar Gill ("Kehar"), for a short-term \$250,000 loan because Purewal did not have enough money for his portion of the purchase of the Truck Park. Purewal agreed to pay 9% interest on the loan. Gill made the arrangements with Kehar for this loan.

[37] Purewal testified he asked Gill for the \$250,000, but did not request that Gill approach his brother. He understood the \$250,000 was coming from Gill. He did not deny that an interest rate of 9% was negotiated for the \$250,000.

[38] On March 25, 2013, the plaintiffs and Purewal met to transfer the plaintiffs' monies. Gill had two cheques totaling \$750,000. Bhatti had a cheque for \$400,000 since he had provided the bank draft for the initial deposit of \$100,000. The cheques were made payable to 854, as directed by Purewal. Bhatti understood he was buying shares in 854. Gill understood he was buying shares in the business that would own the Truck Park, which could be either 854 or 117.

[39] At the meeting, Bhatti wanted some comfort in writing before providing his cheque. In response, Gill wrote a short note, in the presence of Purewal and Bhatti, and then signed by Gill and Purewal, which stated:

Harinder BHATTI Paid \$500000.00 For 25% share 854292 Ab Ltd. % 1176520 Ab Ltd. (the "Share Note").

[40] Gill testified the "%" in the Share Note was intended to mean "or". English is not Gill's first language.

[41] Purewal, for whom English is also not his first language, was able to read out the contents of the Share Note in English before me. He did not express any lack of understanding about the words.

[42] Purewal testified, however, that the Share Note was only meant to convey a security interest in the companies in the event he did not repay the loan. In that case, each plaintiff would be entitled to a 25% share in one of the companies. He acknowledged the note made no mention of a loan, borrowing, or security. He provided no details about a default event that would trigger the transfer of the shares, including the length of delay before a default would arise.

[43] The transfer of the Truck Park from 117 to 854 did not close on March 31, 2013.

[44] In April 2013, according to Bhatti's testimony, he asked Purewal to transfer 25% of the shares in 854 to him. Purewal said he could not because of a dispute with Toor about Toor's shares in 117. However, Purewal assured him that he was sorting out the problem and suggested the transfer would eventually happen.

[45] Gill testified he also followed up from time to time about his share transfer but was told by Purewal that the dispute with Toor was delaying it.

[46] After March 2013, Gill worked at the Truck Park for two years, without remuneration, performing various duties, including:

- a. Issuing access cards to truck owners who rented space at the Truck Park;
- b. Collecting rent cheques from customers; and
- c. Cutting grass around the sides of and in the ditches next to the Truck Park.

[47] Gill promoted business for the Truck Park. He operated his own truck wash business and sent many customers to the Truck Park. Gill used his office at his truck wash for Truck Park matters. He estimated that his contributions consumed approximately 15 hours per month over the two years.

[48] Purewal testified Gill had a history of providing free services for the Truck Park prior to 2013, largely because they were good friends and Gill was more proficient with written English. Preparing a customer invoice and signing a garbage bin contract were given as examples. Purewal did not contest the services provided by Gill after March 2013 nor Gill's estimated time commitment.

[49] After March 2013, Gill paid for various Truck Park expenses including:

- a. Gravel used to improve the undeveloped portion of the land so that the Truck Park could be expanded for more customers;
- b. An industrial garbage bin for the property;
- c. Fence repairs to the gate controlling access to the Truck Park; and
- d. Casual labour provided by two of Gill's truck wash employees.

[50] While the total cost of the expenses paid by Gill was not in evidence, the available receipts for fence repairs, labour, and the quantities of gravel suggested many thousands of dollars, including credit card payments to a gravel supplier exceeding \$20,000.

[51] After March 2013, Gill possessed many Truck Park customer access cards and frequently collected customer rent cheques, all with Purewal's knowledge.

[52] During 2013 and 2014, Bhatti helped develop the Truck Park property by expanding the useable area for parked trucks. Specifically, he provided the following services and materials:

- a. Placed rocks, concrete and gravel to expand the serviceable area; and
- b. Supplied trucking services for the transportation of gravel to the site, including both his own driving and some services provided by his employees from his trucking business, Bhatti Enterprises.

[53] Purewal stated Bhatti's services were provided in exchange for free parking on the lot for Bhatti Enterprises' trucks. However, no evidence was offered to show that the value of the trucking and site development services provided by Bhatti were comparable to the value of the free parking he received.

[54] In April 2013, the Truck Park consisted of approximately 2 to 2 ½ acres of developed land. Over the next two years, the developed property expanded to more than 6 acres. Revenues increased during that time.

[55] On or about May 27, 2013, Purewal caused a bank draft for \$200,000 to be made payable to Kehar, followed by another bank draft to Kehar for \$54,125 dated June 26, 2013. The sum of \$4,125 is consistent with interest of 9% payable from late March 2013.

[56] Gill testified the bank drafts were for the repayment of Kehar's loan plus the interest. Purewal testified the monies were paid to Gill for the partial repayment of Gill's loan and that Purewal knew nothing about Kehar's involvement. Purewal said the bank drafts were made payable to Kehar at Gill's direction, which Gill denied.

[57] On or about April 23, 2014, Purewal caused a cheque to issue from 117 to Bhatti Enterprises for \$32,392.50. Gill testified Purewal told him approximately \$50,000 was available within 117, which could be distributed to the plaintiffs and Purewal as "shareholder profit". The payment of \$32,392.50 was approximately two-thirds of the available funds. Each plaintiff was to receive half of that amount; Purewal was to receive the other third, being roughly \$17,000.

[58] Bhatti testified Purewal told him the money had accumulated in one of 117's bank accounts from rents paid by Truck Park customers and Purewal was concerned that Toor would try to access the money since Toor had not relinquished his shares in 117. Purewal told Bhatti that the three men should divide the money as partners, with each taking a third.

[59] Purewal testified the cheque was a payment towards Gill's loan and that Gill asked him to make the cheque payable to Bhatti Enterprises. Purewal did not explain why the loan repayment was such an unusual amount, was only for Gill's loan rather than the loans from both Gill and Bhatti, and was coming from 117 rather than from Purewal personally. He did not deny taking roughly \$17,000 for himself.

[60] In March 2015, Gill went to Purewal's home to demand the transfer of the shares. Purewal refused. The relationship between the two men was then broken. Gill stopped working at the Truck Park. By then, Bhatti had already withdrawn his services.

[61] Purewal stated Gill and Bhatti never described themselves as shareholders before August 2015.

[62] The Truck Park was transferred from 117 to 854 on March 25, 2015 at Purewal's direction.

[63] By then, a dispute had erupted between Toor and Purewal about the legitimacy of the transfer of the Truck Park and the valuation of Toor's shares. That dispute was the subject of a separate lawsuit, which resulted in a decision of this Court by Browne J: *Toor v 1176520 Alberta Ltd*, 2018 ABQB 483, affirmed 2019 ABCA 334 (the "Toor Lawsuit").

Issues

[64] The issues between the parties are:

- a. Was an agreement reached between the parties and if so, what were the essential terms?
- b. If the parties had an agreement, was the agreement breached by Purewal?
- c. Is Purewal's conduct actionable under the oppression sections of the *Alberta Business Corporations Act*, RSA 2000, c. B-9 ("ABCA")?
- d. If no share purchase agreement was formed, is the Truck Park land imposed with a resulting trust or alternatively, has Purewal been unjustly enriched?
- e. Are the plaintiffs entitled to relief, and if so, in what form?

Analysis

a) Whether an agreement was reached and if so, the essential terms

[65] The plaintiffs contend an agreement was concluded with Purewal that by words and conduct was understood to contain at least the following essential terms:

- a. Each of Gill and Bhatti would acquire a 25% interest in 854 for \$500,000;
- b. The share interest would entitle the shareholder to an equivalent portion of the profits from the business commencing immediately after the closing date of March 31, 2013;
- c. The \$500,000 would be provided through an initial deposit of \$50,000 with the balance of the funds to be paid prior to March 31, 2013;
- d. Purewal, as the sole director and shareholder of 854, would transfer 25% of the shares of 854 to each of Gill and Bhatti when the balance of the purchase funds was advanced;
- e. The purchase was subject to 854 owning and controlling the Truck Park, either directly or, if 117 maintained ownership and control of the Truck Park, by owning all the shares of 117; and

- f. The Truck Park would be free and clear of all encumbrances when Gill and Bhatti acquired the shares, as would 117 if the Truck Park continued to be owned by 117 as a subsidiary of 854.

[66] The plaintiffs were also amendable to a purchase structure by which they would acquire shares in 117 with that company retaining unencumbered ownership and control of the Truck Park, but that alternative did not materialize.

[67] The general rule of contract formation is that, for an agreement to be binding, the parties must have a meeting of the minds by which an objective, reasonable bystander would conclude, in light of all the material facts, that the parties intended to contract and that the essential terms of the contract can be determined with a reasonable degree of certainty: *Ron Ghitter Property Consultants Ltd v Beaver Lumber Co*, 2003 ABCA 221 at para 9.

[68] Purewal submits no meeting of the minds occurred about the nature of the investment because each side had a different understanding of the deal.

[69] As the parties seeking to enforce an agreement, Gill and Bhatti carry the burden of proving, on a balance of probabilities, that the parties reached a consensus: *Schluessel v Margiotta*, 2018 ABQB 615 at para 8 [*Schluessel*].

[70] In applying the objective, reasonable person test, a Court considers the parties' conduct before, during and after a disputed agreement: *Schluessel* at para 13. Where a disagreement arises about how the parties conducted themselves, "the court must decide which version of the events is the most reliable", including the version most "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable": *Own v Wong*, 2017 ABQB 35 at para 21.

[71] Applying these principles, I am satisfied that a share purchase agreement was concluded between Gill, Bhatti and Purewal, largely as alleged by the plaintiffs.

[72] The plaintiffs testified the investment was repeatedly described between the three parties in their conversations as the acquisition of a 50% share of the Truck Park. The Real Estate Contract confirmed the Truck Park would be owned by 854. Before the end of November 2012, all three men saw the Real Estate Contract, which was consistent with that understanding. A share of the Truck Park logically meant a share of the company owning or controlling the Truck Park.

[73] The plaintiffs paid 50% of the deposit in November 2012, consistent with acquiring a 50% share of the business. Bhatti covered Gill's \$50,000 portion of the deposit, which was later reconciled between the two men when they advanced the balance of their funds.

[74] Purewal did not explain why he needed the plaintiffs to fund half of the deposit if they were only lenders. He appeared to have sufficient funds of his own to cover the full deposit.

[75] Purewal did not describe the terms of any loans for one half of the deposit. He offered no evidence of any discussion or agreement in November 2012 about an interest rate, repayment terms, or any security for the alleged loans.

[76] In March 2013, the remaining funds were advanced by the plaintiffs, again in proportion to their collective interest in the business. The Share Note, written by Gill, signed by Purewal and received by Bhatti, characterized Bhatti's investment as \$500,000 for a "25% share" in 854

or 117. That wording is fundamentally inconsistent with a loan, which does not contemplate a partial interest or share in an entity or property.

[77] Purewal submits the Share Note captured a contingent interest in the shares of 854 or 117, triggered only in the event of default on the loan. However, the Share Note contains no wording describing a contingent interest, a loan, or a default event. The plain wording of the Share Note is incompatible with Purewal's submission. No one testified that the three parties discussed any security for a loan prior to the creation of the Share Note.

[78] At trial, Bhatti said he requested the creation of the Share Note because he wanted some "surety". Gill testified Bhatti wanted some "security". Both men testified through a Punjabi translator. Caution must be exercised not to place inordinate weight on an intermediary's quick interpretation of isolated words. Context is important.

[79] Purewal contends these words are evidence that the plaintiffs understood the Share Note to capture a contingent security interest in shares. However, that reads too much into them. Neither plaintiff demonstrated any sophisticated understanding of creditors' security interests or used formalistic language conveying a technical legal meaning. The words are best viewed at their simplest: each plaintiff understood the Share Note provided written confirmation about the basic deal – a share purchase. "Security" or "surety" meant the comfort of that written acknowledgement. That is consistent with the balance of the plaintiffs' testimony, both before and after they used those words at trial, and the surrounding context.

[80] The plaintiffs' conduct in gathering and advancing the investment funds was more consistent with a substantial investment in 854, rather than a short-term loan with an unknown, if any, return on investment, as illustrated by the following:

- a. Both plaintiffs borrowed money from multiple sources to pull together the investment funds, mostly from banks on personal lines of credit at institutional rates, which involved inconvenience, risk and borrowing costs;
- b. For both plaintiffs, the magnitude of the investment was a substantial draw on personal resources, requiring a compelling reason to undertake the risk; and
- c. While the initial deposit was paid to 117, so as to satisfy the payment to the vendor's solicitor contemplated by the Real Estate Contract, the remaining funds were made payable to 854 (the entity in which the plaintiffs believed they were acquiring shares), rather than to Purewal personally (who claimed to be the person borrowing the money).

[81] The plaintiffs' conduct after advancing the funds was aligned with ownership, rather than just being lenders. The nature and magnitude of Gill's contributions were more than a friend would realistically volunteer, especially since he had his own business to run at the truck wash. His conduct was more rationally attuned with a shareholder trying to improve a business than a passive lender.

[82] Purewal asserted that he and Gill had a history of providing favours for each other and later reconciling charges incurred on each person's account. However, no evidence was provided of any efforts to record or repay Gill's expenses and labour during the almost two years of his involvement in the Truck Park after March 2013. The magnitude of Gill's participation after March 2013 was substantially greater than the small favours described in the years preceding the investment.

[83] Bhatti also made a substantial investment of labour and other resources after March 2013. Purewal testified Bhatti was compensated through free parking for Bhatti's trucks at the Truck Park. Bhatti denied any such arrangement. While Bhatti acknowledged some parking privileges, no evidence was provided of a rent-free benefit being tracked to compare with the expenses he was incurring in developing the Truck Park. If Bhatti was merely a passive lender, with no interest in the business, some tracking would be expected to ensure he was not being overcompensated for the services provided. Conversely, a business partner might be expected to incur some investment of labour and resources for the mutual benefit of all partners without being fully compensated, such that tracking would be unnecessary.

[84] Purewal submitted the plaintiffs' conduct was incompatible with a share purchase: they did not demonstrate the due diligence expected for this kind of commercial transaction and did not move promptly to seek the transfer of any shares after March 2013. As examples, they did not examine the Financial Statements for either 117 or 854, seek legal advice, or formalize a written share purchase agreement.

[85] This informality is explained by the relationships the plaintiffs had with Purewal and their trust in him. Gill characterized Purewal as being "like a brother". Bhatti trusted Gill and Purewal as senior members of his cultural community.

[86] The alleged delay in seeking enforcement of a share agreement is disputed by the plaintiffs. Gill testified he repeatedly spoke with Purewal about the shares and received excuses about a dispute between Purewal and Toor causing the delay. Bhatti sought the transfer of the shares in April 2013, but received the same reply.

[87] The plaintiffs also heard words and observed conduct from Purewal confirming their share interest. In conversations with Purewal about the outstanding share transfers, he reassured them their share interests would be formalized. The April 2014 payment of \$32,392.50 was characterized as "shareholder profit" and money divided between business partners.

[88] Throughout the trial, Purewal denied any share purchase arrangement or telling the plaintiffs they were acquiring a share in the Truck Park or any company. However, his characterization of the investments as loans is implausible.

[89] The three men were experienced business people, although legally unsophisticated. According to Purewal, the plaintiffs were lending him \$1.25 Million with no predetermined interest rate, no repayment terms, and no meaningful security. The alleged security interest in the shares of 854 or 117 for Bhatti did not have a defined default event. Further, the shares were transferable at some unknown time in the future, by which point the company could be substantially indebted or stripped bare of its holdings.

[90] The suggestion that two experienced business people would incur this magnitude of risk and inconvenience, for a short-term loan with no defined return on investment, particularly when they each had to borrow the money from multiple sources to pull together the funds, has no air of commercial reality.

[91] Purewal's conduct towards the plaintiffs may be contrasted with his approach to Kehar, who did provide a loan. While Purewal denies knowing Kehar loaned the additional \$250,000, Gill testified an interest rate was determined in advance for the extra \$250,000 – 9%. Purewal did not deny that assertion. He repaid the loan promptly, providing \$200,000 by a personal bank

draft dated May 27, 2013, followed by another personal bank draft dated June 26, 2013, including an interest payment consistent with the 9% rate.

[92] Purewal said the monies were paid to Gill for the partial repayment of Gill's loan. Purewal did not explain why loan repayments were only made to Gill, rather than divided between Gill and Bhatti, and did not explain why a 9% interest rate was chosen when his evidence was the three men never discussed an interest rate for the alleged loans from the plaintiffs.

[93] Purewal testified the April 2014 payment of \$32,392.50 was another payment towards the loan from Gill. However, he did not explain why the loan repayment was for an irregular amount, paid only towards Gill's loan, rather than divided between both plaintiffs, and came from 117 rather than himself. Under Purewal's story, he repaid more than \$282,000 of Gill's loan by April 2014 and none of Bhatti's, even though both loans were intended to be for a short term and repaid in good faith. No justification was given for the incongruity of making no repayments to Bhatti for two years.

[94] No plausible explanation came from Purewal for the isolated payment of \$32,392.50 or the timing of it. The plaintiffs' assertion that the payment represented two-thirds of accumulated rents in 117 is a reasonable explanation for the irregular figure and an isolated payment. Their version of events also explains Purewal taking approximately \$17,000 for himself at the same time.

[95] Purewal was representing that Toor had improperly kept 25% of the shares in 117. Each of Purewal, Gill and Bhatti had a 25% interest in the business, pending the removal of Toor and the transfer of his 25% interest in 117 to Purewal, so a three-way split of the profits, to the exclusion of Toor, had an intuitive logic. A reconciliation of the 25% interest held by Toor could be conducted at a later date when the dispute between Purewal and Toor was resolved.

[96] Since the transfer of the Truck Park from 117 to 854 was delayed, nothing was odd about the profits issuing from 117 rather than 854. These were still profits from the business in which they each had a share.

[97] The repayments by Purewal after March 2013 speak to his real understanding of the plaintiffs' investment. The \$1 Million was for the purchase of an interest in the business while the \$250,000 additional payment was a loan. The latter was repaid promptly while the \$1 Million remained in the business.

[98] Purewal said his intention was always to buy the Truck Park as sole owner and that selling shares to the plaintiffs was incompatible with that objective. However, the simple rebuttal to his contention is that his financial circumstances constrained pursuit of that objective, compelling him to accept equity partners. A last minute loan from Kehar in the amount of \$250,000 reflected Purewal's limited financial resources.

[99] Purewal submits the loan negotiations with JayCap strongly corroborate his stated intention to own a 100% interest in the Truck Park. The terms of the JayCap Letter required him to own all the shares of 117, which would continue to own the Truck Park. He testified the JayCap funds of \$722,000 would have repaid the plaintiffs' loans. He paid a \$5,000 application fee to JayCap, which would have been wasted if he was bound to a share purchase agreement, as claimed by the plaintiffs. Finally, he said the plaintiffs attended the January 2013 meeting with

Sethi at which the possibility of a loan from JayCap to repay the plaintiffs was allegedly discussed.

[100] The loan negotiations and the JayCap Letter do not provide the suggested corroboration.

[101] First, the plaintiffs met with Purewal and Sethi in January 2013 before the JayCap Letter existed. Purewal asked for an inference to be drawn from the plaintiffs' participation in the meeting that they knew the JayCap funding was for the purpose of repaying their loans. However, the plaintiffs' reasons for attending the meeting were not explored in any detail at trial.

[102] Bhatti briefly testified that the purpose of the meeting was to explore the possibility of all three men borrowing from JayCap. Gill testified that Purewal told him the JayCap loan was being pursued because Purewal needed money to buy his interest in the Truck Park. Gill was not asked about his understanding of the meeting's purpose, but he might have had the same understanding as Bhatti or might have believed Purewal's lender wanted some comfort that his partners were aware of the proposed loan since the Truck Park land was being mortgaged. Mere participation in the January meeting does not lead to the logical inference that the meeting was about the repayment of loans.

[103] Neither plaintiff made any admission that the conversation was about repaying loans. To the contrary, the balance of their testimony was incompatible with that version of the meeting. Sethi did not testify.

[104] Purewal submits that if the purpose of the meeting was for all three men to explore borrowing from JayCap, suspicion should arise from the absence of any follow up and the omission of the plaintiffs from the lending arrangement in the JayCap Letter a few weeks later. However, the trial evidence did not explore whether the plaintiffs engaged in any follow up with Sethi about a loan. A variety of circumstances might explain why the JayCap Letter did not identify the plaintiffs as borrowers including: Purewal excluding them, since he was the person negotiating through Sethi; Purewal telling them sometime after the meeting that a loan from JayCap was not available; the plaintiffs choosing not to pursue borrowing through JayCap after meeting with Sethi; the plaintiffs not being comfortable with Sethi; and the plaintiffs becoming committed to other borrowing options before a satisfactory arrangement with JayCap could be explored in greater detail. In short, this line of argument was not sufficiently explored in the trial evidence to draw any negative inference.

[105] Second, the JayCap Letter demonstrates that Purewal's approach to the acquisition of the Truck Park was changing over time. The terms of the letter are inconsistent with Purewal's original deal, which was a purchase of the Truck Park by 854 from 117, as contemplated by the Real Estate Contract. The JayCap Letter contemplated a different transaction. 117 would borrow the money and secure the loan through a first mortgage on the Truck Park land. The implication was that 117 would retain ownership of the Truck Park since the JayCap Letter required 117 to have an equity interest in the property of at least \$2,176,000.

[106] The JayCap Letter demonstrates Purewal was looking at an alternative to the original Real Estate Contract signed on November 22, 2012. He could have been exploring his options without fully informing the plaintiffs.

[107] Purewal testified he started his discussions with Sethi and JayCap in December 2012. His negotiations with JayCap and the contents of the JayCap Letter merely confirm the type of transaction Purewal was pursuing many days or weeks after a deal had been reached with the

plaintiffs. The JayCap negotiations might have been Purewal's effort to find a better financing arrangement for himself, hoping the plaintiffs would withdraw from a share purchase in favour of loans. That would have enabled him to return to his original plan of owning the Truck Park by himself. He might have decided to pursue that strategy after the meeting with Sethi which they all attended. The cost to Purewal of exploring that alternative was the \$5,000 application fee, which was very modest in the context of the overall acquisition.

[108] Third, neither plaintiff saw the JayCap Letter before advancing the balance of their investments. The letter does not impugn the plaintiffs' own understandings of their investments.

[109] Fourth, Purewal's explanation of the JayCap proposal creates an incongruity. He was attempting to borrow as much as \$722,000 from JayCap, which he testified was for the purpose of paying back the plaintiffs' loans. However, by February 2013, he had only borrowed \$100,000 from the plaintiffs. The maximum amount of the JayCap loan greatly exceeded the amount he needed for that purpose.

[110] Purewal did not testify that the JayCap funds would arrive after the Real Estate Contract closing date and that he therefore required the plaintiffs' monies to close, following which he would repay them. However, even if that was the expectation, he did not explain why the maximum amount of the JayCap loan was less than the total amount he would be borrowing from the plaintiffs. He also did not explain why a partial repayment to the plaintiffs was desirable. For example, he did not testify that the JayCap loan provided a lower interest rate to him and reduced borrowing costs (the JayCap interest rate was 9%, the same as the Kehar loan). He also did not testify that he wanted to reduce the number of lenders or that the plaintiffs wanted their money returned as soon as possible.

[111] Finally, the JayCap Letter itself makes no mention of a loan repayment to the plaintiffs. The letter contemplated a loan to 117, but that company did not borrow money from the plaintiffs. The alleged borrower was Purewal.

[112] On March 22, 2013, the plaintiffs advanced an additional \$1,150,000, payable to 854. The funds were accepted by Purewal. The payment was consistent with the acquisition of shares in 854, the provisions of the Real Estate Contract (which contemplated 854 acquiring direct ownership of the Truck Park), and the share purchase agreement asserted by the plaintiffs. A payment to 854 is inconsistent with the JayCap proposal which contemplated 117 having ongoing ownership of the Truck Park.

[113] In assessing the competing versions of the deal negotiated in November 2012, I am also mindful of the credibility of the parties.

[114] When assessing credibility and reliability, the whole tapestry of the evidence is considered, both in scope and nature. The Court may accept all, some or none of a witness' evidence: *R v JHS*, 2008 SCC 30, Binnie J at para 10. The inquiry includes a review of the story's "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": *Faryna v Chorny*, 1951 CanLII 252, [1952] 2 DLR 354 at 357 (BC CA). Several factors are utilized including: internal consistency, consistency over time, compatibility and incompatibility with other evidence, corroboration, plausibility, quality of memory, admissions against interest, evasiveness, exaggeration, bias, motivation, and demeanour.

[115] Gill's evidence was consistent with that of Bhatti and in harmony with the preponderance of the probabilities. His testimony was internally consistent and plausible. He occasionally made admissions against interest and did not exaggerate his evidence.

[116] At trial, a minor inconsistency was noted between Gill's testimony before me and evidence he gave at the trial in the Toor Lawsuit about Purewal telling Gill the investment monies would be used to buy the shares of the other 117 shareholders. However, Gill was trying to remember something said by Purewal more than 5 years ago, on a small point. I am satisfied the inconsistency arose from a lapse of memory.

[117] Another potential inconsistency arose between Gill's testimony that he did not *consult* a lawyer about his investment and Bhatti's testimony that in early 2013, both men met with a lawyer. However, Bhatti testified the purpose of the meeting was not to seek advice about the structure of their investment. As a consequence, the meeting could reasonably be understood by Gill as not being a *consultation* about the investment. No material inconsistency arose.

[118] Gill testified both in direct examination and cross-examination that he was buying a 25% interest in the business and the Truck Park land. However, in response to one leading question during cross-examination, he suggested that he was buying a 25% interest in the Truck Park land alone. Gill sometimes struggled to understand questions and to express himself clearly. Looking at the full context of his evidence, I find that he did not fully understand the leading question and did not intend any inconsistent admission.

[119] Looking at the totality of his testimony, even with these minor issues, Gill was a credible and reliable witness.

[120] Bhatti's evidence also aligned with the most plausible rendition of the events. His testimony was internally consistent. He did not exaggerate his testimony and tended to understate his contributions to the Truck Park.

[121] During cross-examination, a possible minor inconsistency was noted between his trial evidence about having used the Truck Park on an occasion before the 2013 investment, and his discovery evidence that he did not utilize the Truck Park prior to the investment. Bhatti gave a reasonable explanation for the inconsistency; he refreshed his memory while preparing for trial from records he found after the examination for discovery and the records revealed an error in his memory. In any event, the fact was largely inconsequential and I accept the error at discovery amounted to a small lapse in memory.

[122] During cross-examination, Bhatti testified Purewal told him he was looking for new shareholders because his partners in 117 wanted to sell the Truck Park. At discovery, Bhatti testified he did not know why Purewal needed new shareholders. Again, the inconsistency was on a minor point, which did not significantly undermine the overall quality of his testimony.

[123] I found Bhatti to be a credible and reliable witness.

[124] Toor presented his testimony in a straightforward manner and answered questions directly. His evidence was internally consistent. He had a clear recollection. While he had no personal stake in the outcome of this action, he acknowledged a breakdown in his friendship with Purewal. Combined with the events giving rise to the Toor Lawsuit, some risk of bias against Purewal was possible, although that was not apparent in the presentation of his testimony.

[125] A minor inconsistency arose between his testimony before me and evidence he provided at the trial in the Toor Lawsuit about the reasons for the 117 shareholders wanting to sell the Truck Park, but the discrepancy was likely explained by nuances in the questions asked and did not compromise the overall integrity of his testimony.

[126] Toor was a credible and reliable witness.

[127] In contrast to the other witnesses, Purewal's testimony was troublesome. He was repeatedly contradicted by the plaintiffs about the nature of the investment, the meaning of the Share Note, and the loan from and repayment to Kehar. His evidence was contradicted by Toor on the key point of characterizing the relationship with the plaintiffs as "business partners". He was contradicted about the characterization of the \$32,392.50 payment from 117. The contradictions cannot reasonably be viewed as innocent misunderstandings or mistakes about the nature of the relationship.

[128] Purewal's assertion of two \$500,000 loans, with no defined interest rates or repayment terms, lacked commercial reality. His explanation for the Share Note offended the plain reading of the document. The \$32,392.50 payment was more aligned with a distribution of "shareholder profit" than the alleged loan repayment to Gill.

[129] His story about a loan was incompatible with the more probable interpretation of events – a co-ownership of the Truck Park between Gill, Bhatti and Purewal.

[130] Purewal was occasionally evasive during his testimony, deflecting relevant lines of enquiry.

[131] Purewal's conduct in relation to Toor's interest in 117 is also troubling. Purewal signed a Resolution of the Sole Shareholder and Director of 117 dated March 25, 2015 by which he purported to authorize the transfer of the Truck Park from 117 to 854. At the time, he knew that he was not 117's sole director and shareholder and that the transfer was opposed by the other director and shareholder: Toor. That conduct revealed a willingness to disregard the commercial interests of a business partner and to falsely characterize his ownership of a company.

[132] Purewal swore an Affidavit of Transferee on March 25, 2015 deposing that 854 actually paid \$2 Million in cash to 117 for the Truck Park, when that was likely false. The Financial Statements for 117 and 854 for the fiscal year ended December 31, 2015 show proceeds owing to 117 from a related company of approximately \$1.51 Million, and a liability owed by 854 to a related company of approximately \$1.51 Million. Since 117 and 854 were the only related companies identified at trial, the entries in the Financial Statements are consistent with the cash purchase proceeds not having actually transferred between the companies.

[133] In the Toor Lawsuit, Justice Browne commented unfavorably about Purewal's credibility. She rejected Purewal's evidence unless it was corroborated.

[134] Before me, Purewal was confronted with, and accepted as true, various adverse findings from that trial judgment, including that he prepared many invoices for work allegedly done for the benefit of 117, which the trial judge found were not supported by evidence and therefore illegitimate. He accepted the characterization that these were "fabricated invoices". The total invoices submitted for payment totalled \$317,610, but the trial judge recognized as legitimate only a substantially reduced amount. He also agreed with the following aspect of Justice Browne's Reasons for Decision at para 35:

Purewal was evasive in his answers. His answers often did not address the simplest questions. According to his evidence, he had virtually no understanding of finances, corporations, or lending. He repeatedly blamed his lawyers and accountants for making errors when there was no answer available that supported his cause.

[135] While I place limited weight on a credibility finding made in another proceeding, that trial involved related issues and the trial judge's conclusion is consistent with the overall credibility concerns before me.

[136] Overall, Purewal was not credible and reliable. I reject his testimony where it is inconsistent with the testimony of the plaintiffs and Toor.

[137] Turning to the essential terms of the share purchase agreement, I conclude the parties had a meeting of the minds about an agreement including the parties, property and price.

[138] This was an agreement between friends, lacking in formality. They were not legally sophisticated.

[139] The essential elements of the agreement were ascertained or ascertainable.

[140] This was a deal between three individuals: Gill, Bhatti and Purewal. They all had an intention to enter into a contractual relationship.

[141] Purewal argues that the plaintiffs' evidence was unclear about the company in which they were acquiring shares (117 or 854) and that no meeting of the minds was reached about the shares to be purchased.

[142] The parties contemplated a deal by which each of the plaintiffs would acquire a 25% interest in the ownership shares of the company that would control the Truck Park and would share in the profits of the business in accordance with their ownership interest. The specific corporate vehicle was of little concern given the trust that existed between the men at that time.

[143] Three alternative corporate structures were contemplated:

- a. Ownership of the Truck Park by 854 directly and the plaintiffs acquiring shares in 854;
- b. Ownership of the Truck Park by 117, with 854 owning all the shares in 117, and the plaintiffs acquiring shares in 854; and
- c. Ownership of the Truck Park by 117 and the plaintiffs acquiring shares in 117.

[144] These options were really descending preferences with the involvement of 117 becoming necessary only if 854 did not acquire the Truck Park directly. However, by November 22, 2012, with the execution of the Real Estate Contract and the delivery of the initial \$100,000 payment towards the deposit, the share purchase was determined. The shares being purchased by the plaintiffs were to be acquired in 854, subject to any change in circumstances.

[145] By late March 2013, possibly due to Purewal's ongoing negotiation with the 117 shareholders, Gill expected that 117 would continue to own the Truck Park and be a wholly owned subsidiary of 854. However, I find that his preference continued to be direct ownership of the Truck Park by 854. That was the original and simpler structure. Gill wrote the Share Note as an option between shares in 854 or 117 to reflect the possibility that the deal might close either

way, but a purchase of shares in 117 would have required an amendment to the original bargain. That did not become necessary.

[146] Bhatti expected direct ownership of the Truck Park by 854. The Real Estate Contract, signed by Purewal, also contemplated direct ownership by 854.

[147] I find that direct ownership was acceptable to all three men, the preferred option, and consistent with their expectations in November 2012, when the agreement was reached.

[148] To preserve the value of the Truck Park business and land being acquired, the parties necessarily contemplated that the business and land would not be encumbered. Since ownership was being held through a company, 854 was also required to be unencumbered. If encumbrances existed, adjustments would have been required during the closing process to extinguish them.

[149] As for the consideration to be provided by the plaintiffs for the shares, I accept their evidence that the purchase price was \$500,000 for a 25% interest in the shares. That valuation is consistent with one half of the stated value of the Truck Park land in the Real Estate Contract.

[150] No argument was advanced by Purewal that he had an existing business and related assets in 854 which needed to be taken into account as part of the share purchase agreement. However, the Financial Statements for the year ended December 31, 2012 for 854 show an active business with a modest asset base of equipment and other property. The Financial Statements for the years ended December 2013 through to 2015 show the acquisition of some more equipment.

[151] The discussions between the parties contemplated shared ownership of the Truck Park business, but nothing more. Consequently, neither plaintiff expected to acquire a piece of the other business and assets in 854. The logistics of separating Purewal's other business and assets from the Truck Park do not appear to have been addressed by the parties, but as co-owners of 854, they could have resolved that matter, even if the other business and assets needed to be transferred out of 854 to the benefit of Purewal.

[152] I accept the plaintiffs' evidence that they were obligated to provide an initial contribution of \$100,000 towards the \$200,000 deposit pursuant to the Real Estate Contract, as they did, and that the subsequent payment of \$900,000 entitled them, collectively, to 50% of the shares in 854.

[153] The remaining \$250,000 was a loan from Kehar, which Purewal repaid with interest, and which existed outside the scope of the share purchase agreement.

[154] Purewal, as the sole director and shareholder of 854, was to arrange for the transfer of 25% of the shares of 854 to each of Gill and Bhatti when the balance of the purchase funds was advanced. As asserted by the plaintiffs, I find the shares were to transfer on or about March 25, 2013 when they provided the balance of their monies.

[155] As the acquisition of the Truck Park was to close on March 31, 2013, the profit sharing in the business was to commence on April 1, 2013.

[156] The plaintiffs' written argument before me contends that an additional contractual term was that the plaintiffs and Purewal would work to expand the Truck Park and to increase the number of vehicles that could park on it. While the parties had some common understanding about applying their efforts to develop the land, I do not accept that the understanding acquired the degree of precision necessary to form a contractual term. Nor was that necessary to create the share purchase agreement. As co-owners and shareholders in 854, they would have been able to determine their respective roles, responsibilities and commitments as time passed.

[157] I conclude that the share purchase agreement is a valid and enforceable agreement and further that the plaintiffs are each entitled to a 25% beneficial interest in the shares of 854 pursuant to the terms of that agreement.

b) Breach of the share purchase agreement

[158] Purewal breached the obligation to legally transfer the shares in 854 to the plaintiffs. No lawful excuse was offered for the breach.

[159] I find the breach of the share purchase agreement was deliberate. Purewal knew the true nature of the agreement and its terms. His evidence that he believed the monies were provided by the plaintiffs as loans was not credible, had no air of commercial reality, was inconsistent with his own conduct, and was contradicted by the testimony of the plaintiffs, who described conversations with Purewal in which the nature of their investments was discussed. Toor also witnessed acknowledgements from Purewal about the plaintiffs being business partners.

c) Oppression

[160] The plaintiffs seek relief under the oppression sections of the *ABCA*. Accordingly, they must demonstrate that they are proper complainants under the *Act* and that Purewal's powers as the director and shareholder of 854 were exercised in a manner that was oppressive or unfairly prejudicial to or unfairly disregarded their interests as beneficial shareholders in 854: s 242(2)(c) of the *ABCA*.

[161] A complainant includes a "beneficial owner ... of a security of a corporation": s 239(b)(i) of the *ABCA*. A complainant also includes a person claiming to be a beneficial owner of corporate shares which should have issued to that person: *Frydman v Pelletier*, 2013 ABQB 225 at paras 23, 25 and 38 [*Frydman*]; *101147420 Saskatchewan Ltd v Swift Hotels Group Ltd*, 2016 ABQB 109 at para 58; *Wennekers v Gunn*, 2016 ABQB 358 at paras 220 [*Wennekers*]; and *Csak v Aumon* (1990), 69 DLR (4th) 567 (Ont HC) at paras 10, 12-15 [*Csak*].

[162] I find the plaintiffs are "complainants" for the purpose of the *ABCA* since they are beneficial shareholders in 854.

[163] Section 242(2)(c) permits the Court to make an order to rectify the matters complained of where the powers of a director of a corporation or any of its affiliates have been exercised in a manner that is oppressive or unfairly prejudicial to or unfairly disregards the interests of any security holder. A "security" in this context includes "a share of any class or series of shares ... of a corporation": s 1(ee) of the *ABCA*. A security holder includes a beneficial owner of a security.

[164] A failure by a director to transfer shares to a beneficial shareholder may be oppressive or unfairly prejudicial to or unfairly disregard the interests of a beneficial shareholder: *Vaillancourt v Carter*, 2016 ABQB 492 at paras 109 – 115 [*Vaillancourt*]; *Frydman* at para at 38; and *Wennekers* at para 223.

[165] Oppression invites remedies based on equitable principles of fairness rather than strict adherence to legal rights: *Vaillancourt* at para 100 and *Seidel v Kerr*, 2003 ABCA 267 at para 26.

[166] To prove a claim for oppression, the claimant must satisfy a two-part test. The complainant must first establish he had reasonable expectations concerning his treatment by the company or its representatives and secondly, those reasonable expectations were violated by conduct that was oppressive or unfairly prejudicial to or unfairly disregarded his interests:

Wilson v Alharayeri, 2017 SCC 39 at para 24 [*Wilson*]; *Vaillancourt* at para 101; and *Mudrick Capital Management LP v Wright*, 2019 ABQB 662 at para 31 [*Mudrick*].

[167] The plaintiffs contend they reasonably expected the shares to transfer to them in a timely fashion following the payment of the balance of their investment monies. The defendants' submissions do not contest that the expectation, if it existed, was reasonable. I find the expectation existed and agree that it was reasonable.

[168] The plaintiffs assert the failure to transfer the shares was oppressive, unfairly prejudicial to and unfairly disregarded their relevant interests.

[169] Oppressive conduct is described as coercive and abusive, in the sense of suggesting bad faith, or "burdensome, harsh and wrongful" or a "visible departure from the standards of fair dealing": *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at paras 67 and 92 [*BCE*].

[170] "Unfair prejudice" is generally understood to mean conduct less offensive than oppression, including squeezing out a minority shareholder and paying dividends without a formal declaration: *BCE* at para 93. "Unfair disregard" is viewed as the least serious of the three wrongs: *BCE* at para 94.

[171] Here, I find the failure to legally transfer the shares in 854 to the plaintiffs was oppressive conduct. The effect was to exclude them from overseeing the company, accessing financial information, selecting directors, making strategic decisions, and sharing in profits. It deprived them of fundamental co-ownership interests and rights in relation to the Truck Park.

[172] The plaintiffs ask that Purewal be found personally liable for the oppression. In closely-held corporations where a sole director controls the company and is behind the conduct that oppresses the complainant, the oppression remedies may lie against the director personally: *Vaillancourt* at paras 137 – 143.

[173] Determining personal liability for a director engages a two-part analysis. First, the director must be implicated by exercising or not exercising his powers to give effect to the oppressive conduct. Second, the imposition of personal liability must be fit in all the circumstances: *Mudrick* at para 106; *Budd v Gentra Inc* (1998), 43 BLR (2d) 27 (Ont CA); and *Wilson* at para 48.

[174] Here, Purewal was the sole director of 854. As the directing mind of 854, he was the architect of the oppressive actions that deprived the plaintiffs of their equity interests and profits. He did so in bad faith, motivated by his own self-interest and greed. Given all the circumstances, I am satisfied that personal liability is appropriate in these circumstances.

[175] I also conclude that the failure to transfer the shares and account to the plaintiffs for profits earned, beyond the \$32,392.50 paid in 2014, was oppressive conduct on the part of 854 in contravention of s 242(2)(a) of the *ABCA*: see *Vaillancourt* at para 143. Consequently, the remedies compensating the plaintiffs for their beneficial interests and lost profits will be payable jointly and severally by Purewal and 854.

d) Resulting trust and unjust enrichment

[176] The plaintiffs advanced claims based on resulting trust and unjust enrichment in the event a share purchase agreement was found not to have been formed. In light of my earlier findings, relief on those grounds need not be considered.

e) Claims for relief

[177] The plaintiffs do not ask for a direction that shares in 854 be legally transferred to them. That would result in each of Purewal and the plaintiffs collectively owning one-half of the company, which everyone seems to recognize is now untenable. The plaintiffs are content to terminate their interests in the Truck Park and 854 as of the date of trial, being December 5, 2019.

[178] The plaintiffs instead seek compensation for the loss of their investments in the Truck Park, consisting of their beneficial interests in the value of the Truck Park business as of the date of trial and any proportional profits earned until the date of trial.

[179] The plaintiffs did not provide evidence about the quantum of their losses. Instead, they seek the appointment of experts to conduct a business valuation, including an appraisal of the Truck Park land, and an accounting of the profits. Once that information is available, they ask the Court to determine the appropriate amount to compensate them for these losses.

[180] The plaintiffs also seek punitive damages, prejudgment interest, and costs.

[181] Pursuant to s 242(3) of the *ABCA*, I have broad, remedial authority to make any interim or final order for relief I think fit, including the following:

...

- (e) an order directing an issue or exchange of securities; ...
- (g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;
- (h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;
- (i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders; ...
- (k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;
- (l) an order compensating an aggrieved person;
- (m) an order directing rectification of the registers or other records of a corporation under section 244; ...
- (p) an order requiring the trial of any issue.

[182] Oppression remedies may include compensation for a lost ownership interest in shares as well as lost profits, and a disgorgement of profits: *Vaillancourt* at paras 116 and 143; *Bledin v Landsburg*, 2013 NSSC 418 at para 44.

[183] I will address the various requests for relief in turn.

i. Accounting and disgorgement of profits, valuation of the business and land appraisal

[184] The plaintiffs seek an accounting of the Truck Park's profits from April 1, 2013 until the date of trial (December 5, 2019) and a disgorgement of 50% of those profits to them (25% each). The defendants oppose oppression remedies on the basis that no oppression occurred. However, their submissions are silent about the availability of an accounting, if oppressive conduct is found, and the end date for the loss of profits calculation.

[185] Pursuant to s 242(3)(k) of the *ABCA*, I have the authority to order an accounting of the business's profits in any form that I consider appropriate.

[186] The oppressive conduct, including the failure to legally transfer the shares and to account to the plaintiffs for profits earned by the Truck Park, was ongoing and persisted until the date of trial. The plaintiffs were deprived of their beneficial interests in the Truck Park and 854 for the entire time. They should be put in the positions they would have enjoyed had the oppressive conduct not occurred.

[187] I am satisfied that awarding lost profits assessed to the date of trial is an appropriate remedy in the circumstances of this case.

[188] The plaintiffs have not received a proper accounting of profits from the defendants to date. The profits from the Truck Park were likely recorded through 117 until the actual transfer of the land to 854 in March 2015. A review of the Financial Statements for 117 suggests the revenues and expenses for the Truck Park were recorded through that company. However, some revenues and expenses might have been tracked through 854 as well; the delineation is not clear.

[189] The existing Financial Statements for 854 and 117 are suspect. Purewal fabricated invoices in the past, as confirmed in the Toor Lawsuit, so any bookkeeping records cannot be accepted at face value. The transfer of the business from one corporation to another might have concealed some assets or profits remaining with 117.

[190] Any evaluation of the Truck Park's profits is further complicated by the possible intermingling of Purewal's personal business in 854 with the Truck Park business.

[191] The legal transfer of the Truck Park land from 117 to 854 was delayed by approximately two years, but the parties had control of the Truck Park starting in April 2013. The evidence does not indicate whether the former shareholders in 117 took any of the profits after March 31, 2013.

[192] Due to the complexity involved in assessing the loss of profits, I find that a Court-directed accounting of the profits is appropriate. Further, the scope of the accounting should cover both 117 and 854 since April 1, 2013.

[193] While not expressly argued by the parties, I find that the claim for loss of profits must be adjusted for any profits retained by 854 as of the date of the valuation of the business, so that double counting is avoided. Further, the \$32,392.50 payment of shareholder profit to the plaintiffs in 2014 must be taken into account.

[194] I do not know whether 117 continues to be a wholly owned subsidiary of 854. If any issues arise about my authority to make orders in relation to 117, I retain jurisdiction to receive evidence and arguments about 117 being an affiliate of 854, including whether Purewal controlled both companies as contemplated by s 2 of the *ABCA*.

[195] The accounting will be presumptively determinative of the profit loss, but I retain jurisdiction to hear additional evidence and submissions before making a final determination of this compensation award.

[196] The plaintiffs have not indicated whether and to what extent Purewal should receive compensation for his efforts in running the business since the plaintiffs withdrew their involvement in 2015. Further, the plaintiffs have not addressed whether and to what extent they should be compensated for their efforts from April 1, 2013 until approximately March 2015 in developing the business or for their out of pocket expenses. No claim for special damages was advanced at trial.

[197] If the parties cannot resolve those issues about the scope of the accounting, and the possible set-offs for work performed and expenses incurred by the parties, they may approach me within 60 days to establish a process for the determination of those matters.

[198] Turning to the valuation of the plaintiffs' equity interests in 854, s 242(3)(1) of the *ABCA* allows this Court, upon finding oppression, to grant an order compensating an aggrieved person. Subsection 242(3)(g) gives me the authority to make an order directing a corporation, subject to s 34(2), or any other person to purchase securities of a security holder. A business valuation may be ordered: *Lamoureux v Golden Flooring Accessories Ltd* (1991), 118 AR 164, 79 Alta LR (2d) 178 (Alta QB) at para 41.

[199] The defendants' submissions do not take issue with my jurisdiction to order a business valuation and land appraisal, and do not contest the proposed valuation date for the business and the land. As with the valuation date for the loss of profits, I am satisfied the proposed date is appropriate.

[200] Accordingly, I order Purewal to pay to each of the plaintiffs the trial date value of their respective beneficial shares in 854, adjusted for any unrelated business activity in the company. The trial date valuation is for the Truck Park business, including the land. The assessment excludes any unrelated business ventures operated through 854, such as Purewal's personal business, and any unrelated assets owned by 854. If the parties cannot resolve that issue, they may return to me for further directions.

[201] In the plaintiffs' written submissions, concerns are raised about suspicious encumbrances registered against the Truck Park land. Issues might also arise about other creditor interests encumbering the business or the land. I retain jurisdiction to address any such issues that might arise during the valuation process.

[202] The business valuation, including the land appraisal, will be presumptively determinative of the share valuation, but I retain jurisdiction to hear additional evidence and submissions before making a final determination of this compensation award.

[203] The scope of the accounting, as well as the business valuation and land appraisal exercise, must be reasonable in the circumstances. If the parties are unable to agree about the proposed scope of work, the experts to undertake the assignments, the target completion dates, and the projected expenditures, they may approach me within 60 days to establish a process for the determination of those issues as well.

[204] The plaintiffs ask that Purewal be responsible for the expenses associated with the accounting, business valuation and land appraisal. In regard to the accounting, s 242 of the *ABCA*

does not expressly address who bears the expense. However, s 242 provides broad jurisdiction to fashion interim and final orders to remedy the consequences of oppressive conduct.

[205] The accounting has been made necessary by Purewal's misconduct and is complicated by his own history of using fabricated invoices. If the plaintiffs had received their shares in a timely way, as contemplated by the share purchase agreement, Financial Statements and bookkeeping could have been reviewed and vetted by them in the normal course. The exercise is now potentially more complicated and expensive. Purewal will bear the full cost of the accounting.

[206] The business valuation is another matter. At some point, if the parties had decided to go their separate ways, or one of the parties had decided to leave, a business valuation would likely have been necessary to determine fair market value for a disposition of shares. All three shareholders would have received some benefit from understanding the value of the business and the shares. The effect of this proceeding is to formally trigger an expense that likely would have occurred at some point in any event.

[207] The business valuation expenses, including the land appraisal, will be divided between Purewal, Gill and Bhatti in accordance with their proportionate interests in the business. In the event that the plaintiffs front the full expense, the formal judgment will grant them recovery for 50% of the cost.

[208] The parties should consider whether they require the appointment of a referee as permitted by Rule 6.45 of the *Alberta Rules of Court*. If they cannot agree on whether a referee is necessary or the selection of the person, I retain jurisdiction to resolve those issues.

ii. Compensation for borrowing expenses

[209] The plaintiffs incurred the following borrowing expenses, up to November 30, 2019, for their \$500,000 investments in 854:

- Gill's interest charges: \$25,882.75;
- Bhatti's interest charges: \$32,283.60.

[210] Since the plaintiffs are taking the benefit of the share purchase agreement, their borrowing expenses are properly borne by them.

iii. Punitive damages

[211] The plaintiffs seek punitive damages on the basis that Purewal's breach of contract was deliberate, deceitful, motivated by greed, persisted over a lengthy period of time, and was not deterred by the award of punitive damages in the Toor Lawsuit.

[212] Punitive damages may be awarded against a person for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 196.

[213] The objectives of an award of punitive damages are punishment, deterrence and denunciation. Punitive damages should only be awarded in exceptional cases and with restraint: *Whiten v Pilot Insurance Co*, 2002 SCC 18 at paras 68 – 69 [*Whiten*].

[214] As explained in *Whiten*, at paras 67 – 76, punitive damages require a rational and measured response to the facts of the case, having regard for the objectives being served. The principles guiding whether to make an award and the quantum of that award, if granted, include:

- The court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or more of the objectives of punishment, deterrence and denunciation, and what is the lowest award that would serve the purpose.
- Punitive damages may be used to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a license fee to earn greater profits through outrageous disregard for the rights of others.
- The proper focus is not on the plaintiff's loss but rather the defendant's misconduct.
- A mechanical or formulaic approach is discouraged.
- The governing rule for quantum is proportionality. The overall award, including compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objective for which the punitive damages are given.

[215] In the present circumstances, I conclude that punitive damages are appropriate.

[216] As explained by the Supreme Court of Canada in *Bhasin v Hrynew*, 2014 SCC 71 at paras 60 and 73, an organizing principle of good faith and honesty applies to contractual performance:

Commercial parties reasonably expect a basic level of honesty and good faith in contractual dealings. While they remain at arm's length and are not subject to the duties of a fiduciary, a basic level of honest conduct is necessary to the proper functioning of commerce. The growth of longer term, relational contracts that depend on an element of trust and cooperation clearly calls for a basic element of honesty in performance, but even in transactional exchanges, misleading or deceitful conduct will fly in the face of the expectations of the parties...

... there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract.

[217] Purewal's conduct, in deliberately withholding the share transfer while misleading the plaintiffs to believe a transfer would be completed in time, offended the general duty of honesty expected in performing the share agreement.

[218] The breach was not isolated to the failure to perform a particular transaction. He also engaged in a lengthy campaign of deception over two years by which the plaintiffs were led to believe that their business relationship and shareholder interests were in place. The falsehoods included the lie that the Toor dispute was delaying the transfer of shares (which had nothing to do with the transfer of shares in 854) and assurances to both plaintiffs that the shares would eventually transfer.

[219] Relying on those deceptions, the plaintiffs dedicated themselves to developing the Truck Park through substantial labour and other resources, resulting in disadvantage to them. Purewal's charade then continued through the course of this litigation. The effect of that delay was to allow Purewal to hold the plaintiffs' investment monies for his advantage.

[220] The share purchase agreement was closer to a relational contract than a transactional agreement given the ongoing business relationship created through it. The expectation of good faith between the parties made the plaintiffs more trusting and therefore more vulnerable to Purewal's unscrupulous behaviour. That vulnerability was exploited for the better part of two years.

[221] Purewal's deception continued in the years that followed, through the course of this litigation and at trial, even when testifying under oath. The Court's process was therefore abused.

[222] All of that is misconduct requiring punishment, deterrence and denunciation.

[223] The quantum of damages must be rationally proportionate to the ends sought to be achieved. In *Whiten*, Binnie J identified several dimensions of proportionality at paras 112 – 125, holding that the quantum must be proportionate to the following considerations:

- a. the blameworthiness of the defendant's conduct;
- b. the degree of vulnerability of the plaintiff;
- c. the harm or potential harm directed specifically at the plaintiff;
- d. the need for deterrence;
- e. the impact of any other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct; and
- f. the advantage wrongfully gained by a defendant from the misconduct.

[224] In considering the blameworthiness of the defendant's conduct, the relevant factors include those identified in *Whiten* at para 113:

- a. Whether the misconduct was planned and deliberate;
- b. The intent and motive of the defendant;
- c. Whether the defendant persisted in outrageous conduct over a lengthy period of time;
- d. Whether the defendant concealed or attempted to cover up the misconduct;
- e. The defendant's awareness that what he did was wrong;
- f. Whether the defendant profited from the misconduct; and
- g. Whether the interest violated by the misconduct was known to be deeply personal to the plaintiff (e.g. personal reputation, irreplaceable property).

[225] Here, the blameworthiness of Purewal's conduct is substantial. The deception was deliberate. The JayCap Letter suggests he was taking steps prior to the closing date to change the nature of the deal, so that his new business partners would be excluded from the acquisition of the Truck Park. That involved planning. He was motivated by greed. The outrageous conduct persisted for years. Purewal attempted to cover up the misconduct through his testimony and his use of the JayCap Letter. The limited financial information provided to me suggests he profited from the deception as the business undertaking expanded, the revenues grew, and many of the expenses associated with expansion were borne by the plaintiffs.

[226] Purewal's awareness of his wrongdoing would be apparent to any reasonable commercial person, but here, that awareness was accentuated by the prior award of punitive damages in the Toor Lawsuit, which should have delivered a message to Purewal. Justice Browne was overtly critical of Purewal's conduct in ignoring and oppressing the rights of a fellow shareholder in 117, while depriving that shareholder of the use of his money for years: paras 56 – 57.

[227] Due to the existing friendship, these were vulnerable plaintiffs, who relied on Purewal's good faith to perform the share purchase agreement and honour the commitments that would come with the shares, rather than resorting to a written contract. While the pursuit of mutual self-interest generally militates against an award of punitive damages in commercial situations, as noted in *Whiten* at para 115, personal relationships can easily be exploited. Many small businesses are built on personal relationships and mutual trust, without the legal formalities of written agreements. Such commerce should be protected by deterring exploitative behaviour.

[228] The harm to the plaintiffs was appreciable. Their efforts during the two years after March 31, 2013 went largely unrewarded (except for the one time shareholder profit payment and some free parking for Bhatti Enterprises) and they were deprived of their investment funds while still servicing the debt on their lines of credit. However, the Court-ordered accounting and disgorgement of 50% of the profits will significantly address the harm done.

[229] A need for deterrence is present. Purewal's cooperation will be required for the business valuation and accounting, including an assessment of his own contributions to the business since April 1, 2013. Further deception needs to be prevented.

[230] Justice Browne's punitive damages award of \$30,000 in June 2018, which was not challenged on appeal, did not deter Purewal from continuing to engage in similar behaviour in relation to these plaintiffs. He did not adequately learn from nor was he deterred by the previous award of punitive damages.

[231] To the extent a defendant has experienced other retribution, deterrence and denunciation, either civil or criminal, for the misconduct in question, the need for additional punishment in the case before the trial court is lessened and may be eliminated: *Whiten* at para 123. Here, no other penalties have been imposed on Purewal for the misconduct directed at these two plaintiffs.

[232] A traditional function of punitive damages is to ensure a defendant does not treat compensatory damages merely as the cost of getting his way regardless of the legal and other rights of the plaintiffs: *Whiten* at para 124. Purewal's "wrongful profit" will be addressed by the accounting of the profits and disgorgement. The punitive damages award need not duplicate that exercise.

[233] A progressive escalation in the quantum of punitive damages is appropriate and proportional given that the punitive damages award in the Toor Lawsuit did not deter Purewal's misconduct.

[234] The Amended Statement of Claim, however, seeks \$25,000 for punitive damages. In the written submissions provided on behalf of the plaintiffs, the request is for either \$85,000 or \$100,000, but no amendment to the pleadings was expressly sought.

[235] Pursuant to Rule 13.6(2)(c) of the *Alberta Rules of Court*, a pleading must state:

- (c) the remedy claimed, including
 - (i) the type of damages claimed,

(ii) to the extent known, the amount of general and special damages claimed, or if either or both are not known, an estimate of the amount or the total amount that will be claimed,

(iii) a statement of any interest claimed, including the basis for the interest, and the method of calculating the interest, and

(iv) costs, including any known special costs.

[236] The Rule does not require the amount of punitive damages to be stated or estimated.

[237] For most categories of damages, the traditional approach was to restrict the damages award to the amount claimed in the pleadings. See: *Staats v CPR* (1914), 6 WWR 401, 7 Sask LR 184 (Sask SC) at para 9 and *Munton v Edmonton (City)*, [1936] 2 WWR 481 at para 21.

[238] However, the Alberta Court of Appeal in *Campbell et al v Moxness; Co-Operative Fire and Casualty Co, Third Party and 3 Other Actions*, [1975] 2 WWR 64, 1974 CanLII 1196 (Alta CA), affirmed by (1976), 64 DLR (3d) 766, [1976] 2 WWR 384 (SCC), concluded “the necessity of stating the amount of damages claimed is less vital to the outcome of a trial” and so long as a claim in excess of the amount pleaded does not impair trial fairness, an under-estimated amount in the pleading may be remedied by an amendment application to the trial judge before the judgment roll is settled and entered.

[239] The Alberta Court of Appeal subsequently confirmed the reduced significance of the amount claimed in the pleadings, stating in *Jones v Trans America Life Insurance Co of Canada*, 1996 ABCA 165 at para 6: “[t]he prayer for relief has little legal status and is not really much of a ceiling.”

[240] Rule 13.6(2)(c) requires a plaintiff to identify the types of damages being sought, including a claim for punitive damages, but the amounts sought need only be stipulated or estimated for general and special damages, as required by the wording of the Rule. Where a specific amount is pleaded for punitive damages, that may be expressly or implicitly amended by the trial judge. In deciding whether to amend the pleading, the trial judge considers any potential prejudice to the defendant. See for example: *Roberts v Safadi*, 2018 ABQB 165 at para 33 where an implicit amendment to the pleadings was recognized for under-estimated damages where no prejudice was occasioned on the defendant.

[241] The plaintiffs’ written submissions provided notice about the size of the punitive damages claim being advanced. The defendants’ written submissions neither object to the size of the claim nor assert any prejudice. Further, the quantum of the punitive damages award in the Toor Lawsuit, a related proceeding, should have put the defendants on notice that the size of any punitive damages award in the current litigation might equal or exceed the \$30,000 awarded by Justice Browne.

[242] Taking into consideration the various factors discussed above, and not being bound by the amount originally pleaded in the Amended Statement of Claim, I set the quantum of punitive damages at \$45,000.

[243] If the parties are not prepared to proceed on the basis of an implicit amendment, an application to expressly amend the pleading may be brought to me before the formal judgment is settled and entered.

Conclusion

[244] The plaintiffs are granted the following relief against Purewal and 854, jointly and severally:

- a) A Court-directed accounting of profits in 117 and 854 from the Truck Park business for April 1, 2013 to the date of trial, being December 5, 2019;
- b) A Court-directed business valuation of 854 as of December 5, 2019;
- c) A Court-directed appraisal of the Truck Park land as of December 5, 2019;
- d) The reasonable expenses of the accounting;
- e) One-half of the reasonable expenses of the business valuation and land appraisal, in the event that they are required to pay the full cost upfront;
- f) Disgorgement of 50% of the profits in 117 and 854 arising from the Truck Park business, allocated equally between the plaintiffs, in amounts to be determined after the Court's receipt of the Court-directed accounting and any further evidence and submissions from the parties as allowed by the Court, plus applicable prejudgment interest;
- g) Compensation for each plaintiff for his beneficial interest in 854, in relation to the Truck Park business, as of December 5, 2019, in amounts to be determined after the Court's receipt of the Court-directed expert reports and any further evidence and submissions from the parties as allowed by the Court; and
- h) Punitive damages of \$45,000 to be divided equally between the plaintiffs.

[245] I retain jurisdiction to determine the final quantification of the compensation awards for lost profits and the plaintiffs' beneficial interests in 854, and any other relief, and to provide further directions as indicated in this Judgment and any matter incidental to unresolved issues.

[246] If the parties cannot settle the costs of the action, they may approach me within 60 days to address a process for determining those issues.

Heard on December 2 - 5, 2019.

Written submissions delivered on February 19 and March 2, 2020.

Dated at Edmonton, Alberta this 20th day of April, 2020.

K. Feth
J.C.Q.B.A.

Appearances:

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