

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fulton v. McKay*,  
2021 BCSC 2316

Date: 20211126  
Docket: S199025  
Registry: Vancouver

Between:

**Tara Elaine Fulton**

Plaintiff

And

**John S. McKay  
Kristina Louise Heiss-McKay  
Symmetry 2 Mortgage Investment Corporation**

Defendants

Before: The Honourable Madam Justice W.A. Baker

## Reasons for Judgment

Counsel for Plaintiff:

R.S. Fleming  
J.H. Frank

Counsel for Defendants:

C. Ferris, QC  
J.J.R. Schachter

Place and Date of Hearing:

Vancouver, B.C.  
October 4, 6-8, 2021

Place and Date of Judgment:

Vancouver, B.C.  
November 26, 2021

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##### **I. INTRODUCTION**

[1] The parties appear before me on two applications, both flowing from injunction orders I granted in favour of the plaintiff, *ex parte*, on June 25, 2021. The defendants seek to set aside the injunctions, and the plaintiff seeks orders relating to production of documents seized pursuant to one of the orders.

[2] The plaintiff is an investor and preferred shareholder in the defendant Symmetry 2 Mortgage Investment Corporation (SMIC). The defendant John McKay is alleged to be the controlling mind and alter ego of SMIC, and the defendant Kristina Heiss-McKay is his wife. SMIC is an investment and lending entity designed for mortgage lending as authorized by the *Income Tax Act*, RSC 1985, c.1. SMIC allows investments in a diversified and secure pool of mortgages.

[3] Mr. McKay is a shareholder in Symmetry 2 Mortgage Management Corp. (SM). SM was responsible for managing SMIC for some period of time. Mr. McKay is the sole director of 0749780 BC Ltd. (0749). Mr. McKay also owns Claymore Capital Corp. (Claymore), through which he provided management services to SMIC. Mr. McKay is a part owner of 1048354 BC Ltd. (1048), and has signing authority for this company.

[4] SMIC became involved in the development of certain lands, in the Fort St. John area. These developments are central to the complaints raised in this application.

## **II. BACKGROUND**

### **A. Notice of Civil Claim**

[5] On August 5, 2019 the plaintiff filed the Notice of Civil Claim in these proceedings. In her claim, the plaintiff made the following allegations, amongst others:

- a) she relied on Mr. McKay for investment advice and, through him, agreed to make various investments in SMIC beginning in 2005,
- b) she was given papers to sign by Mr. McKay over the years, but she was never given the entire document and did not understand what she was investing in,
- c) on Mr. McKay's recommendation, she invested \$91,000 in a real estate limited partnership located in Fort St. John (FSJ LP), but she had been given no documentation with respect to either this investment or its financial performance,
- d) in 2016 the plaintiff was assessed approximately \$100,000 in income tax for her share of net partnership income in the FSJ LP,
- e) in 2019, she went to the registered and records office of SMIC to verify her investments, but was unable to locate any evidence of her investment, or the investments of any other person,

- f) Mr. McKay breached various regulatory requirements under the BC Securities Act, and the BC Mortgage Brokers Act,
- g) Mr. McKay misappropriated the plaintiff's investments for the benefit of himself and his wife, and the funds were used in whole or in part for the purchase real estate in Vancouver,
- h) Mr. McKay had a duty to, among other things, not engage in self dealing using the financial resources of SMIC, and that Mr. McKay breached his fiduciary obligation to her by, among other things, making likely speculative investments with her funds, making investments for his personal benefit without regard to her interests, and failing to make available information on the affairs of the entities in which she had invested,
- i) Mr. McKay as the sole directing mind of SMIC, acted in a manner oppressive and unfairly prejudicial towards her in failing to provide her with any documents that would enable her to determine the nature of her investment, failing to provide any notices of annual general meetings, failing to provide financial statements or information on the affairs of SMIC, and failing to provide proper books and records for her review.

[6] The plaintiff relies on various legal bases for her claims, including on the equitable doctrines of fiduciary duty and unjust enrichment, and the oppression provisions of the *Business Corporations Act*, S.B.C. 2002, c. 57.

[7] The plaintiff seeks relief on a number of heads, including damages for loss of her investment, an accounting of her investment monies, and the production of SMIC's books and records and periodic financial statements from 2004 to the present.

## **B. Course of Proceedings**

[8] In September 2019 the defendants filed their response to civil claim. On January 9, 2020 the defendants prepared their first list of documents, which was very short, containing only four email. On February 28, 2020 the defendants prepared their second list of documents, which included management agreements

between SMIC and SM, various email, invoices relating to the plaintiff, an order for foreclosure, monthly cash ledgers and bank reconciliations for SMIC for some but not all months in 2012, 2013, 2014, 2016, and 2017, financial statements for the FSJ LP in 2012 and 2013, unaudited financial statements for SMIC in 2013, 2014, and 2016, and certain documents from the Registrar of Mortgage Brokers.

[9] On May 14, 2020 counsel for the plaintiff wrote to defence counsel stating that the document disclosure was lacking, and setting out details of what was still being sought. The plaintiff sought, in general terms, documents relating to foreclosure proceedings in which SMIC was a party, financial information for 2015 and after December 31, 2016, accounting records, documents relating to marketable securities, and corporate records.

[10] On August 21, 2020 the plaintiff provided the defendants with a draft amended notice of civil claim, seeking consent to the amendments. This draft proposed the addition of SM and Claymore as defendants, alleging that Mr. McKay was the sole beneficial shareholder and director of both companies.

[11] The draft provided more detail on the existing claims, and alleged that Mr. McKay misappropriated various funds to himself, his wife, SM, and Claymore. The newly detailed allegations of misappropriations included allegations that management fees were paid in breach of the Articles of SMIC, and its management agreement with SM.

[12] Plaintiff's counsel also expressed the view that the document production from the defendants was not adequate, and noted that no financial documents for 2015, 2018 and 2019 had been produced. Counsel stated "Your clients' apparent approach, to delay and withhold highly material documents is only going to prolong the inevitable."

[13] On September 28, 2020 defence counsel responded, stating that he would provide his position on the proposed amendments by October 16, 2020, and would also provide a further list of documents on that date.

[14] Counsel for the plaintiff responded on the same day, making a further demand for documents under Rules 7-1(10) and (11), and setting out a detailed list

and explanation of what documents were sought. The documents sought were described as:

- bank statements and cheques of Symmetry 2 Mortgage Investment Corporation for the calendar years 2015, 2018, 2019 and 2020 to date;
- accounting ledgers of Symmetry 2 Mortgage Investment Corporation for the calendar years 2015, 2016 (except for the months of July and December), May, 2017, 2018, 2019 and 2020 to date;
- audited financial statements of Symmetry 2 Mortgage Investment Corporation for the calendar years 2015, 2017, 2018, 2019, and 2020 following the completion of that year;
- brokerage account statements of Symmetry 2 Mortgage Investment Corporation for each month commencing January 1, 2012 to the present;
- bank statements and cheques for all bank accounts of Symmetry Management Group Ltd; Claymore Capital Corporation, John McKay, Kristina Heiss-McKay and McKay and Heiss-McKay jointly from January 1, 2012 to the present;
- bank statements, cheques and account records of the Fort Saint John Limited Partnership for the taxation years 2012 and 2013;
- the complete file of Dale Matheson Carr-Hilton Labonte LLP, Chartered Accountants, relating to the objections taken by the Fort Saint John Limited Partnership to tax assessments of Canada Revenue Agency for the taxation years 2012 and 2013

[15] In his September 28, 2020 letter, plaintiff's counsel set out in detail the basis for his requests, including:

- a) Bank statements and cheques are highly relevant to the \$1,022,000 [sic] taken by the McKays, to determine if it was repaid and whether any other misappropriations occurred,
- b) Ledgers will shed light on the nature of the consideration given by Mr. McKay for the 1,371,000 preferred shares he caused SMIC to issue to himself,
- c) The bank accounts of the McKays, SM and Claymore are needed to understand the basis for their receipt of funds, and management fees taken without corporate authority, and otherwise.

[16] On September 29, 2020 counsel for the plaintiff followed up with a further explanation of the relevance of documents relating mortgages receivables described in SMIC's financial statements, including ledgers, spreadsheets or any

documents evidencing the mortgage receivable assets maintained by the defendants, which were required in light of the allegations of misappropriation made by the plaintiff.

[17] On October 16, 2020, counsel for the defendants responded to the document requests of the plaintiff. While many documents were produced, there were a number of important and unexplained documents missing, including:

- a) Bank statements for SMIC for January to November 2015, and all of 2019 and 2020,
- b) General ledgers for 2019 and 2020, and all other accounting ledgers for all years,
- c) Brokerage account statements for January to November of each of 2012, 2013, 2014, 2015, 2016, September 2019 to December 2019, and for all of 2020,
- d) Cheques for FSJ LP, bank statements for FSJ LP for the year 2013, general ledgers for FSJ LP for the year 2013, and all accounting ledgers for FSJ LP other than the general ledgers,
- e) Composition of mortgage receivables in SMIC's financial statements for the years 2019 and 2020.

[18] Counsel for the defendants advised that no audited financial statements were prepared for the company, and so did not produce them. Counsel advised that the requests for bank records of SM, Claymore, John McKay, and Kristina Heiss-McKay were abusive and would not be produced.

[19] In his October 16, 2020 letter, counsel for the defendants advised that the defendants would consent to the proposed amended notice of civil claim, and the addition of Claymore and SM as defendants, provided the plaintiff agreed that she could no longer rely on Rule 6-1(1)(a) for any further amendments.

[20] On December 7, 2020, counsel for the plaintiff wrote to counsel for defendants identifying deficiencies in the document production, and demanding further document production. His letter explained the significance of the document

requests in some detail, including his need to analyze the accounts of SMIC and Mr. McKay, and others under the control of Mr. McKay, given the allegations of misappropriation and the preliminary questions raised by the documents produced at that time. For example, he explained:

- a) Only cash ledgers had been produced in 2012-2014, 2016, and 2017, and complete ledgers had only been produced for 2015 and 2018. Without the 2014 ledgers, he was unable to determine whether the \$1,024,000 paid to the McKays had been repaid, or how that transaction was characterized.
- b) The 2015 ledgers showed a payable to SM in the amount of \$515,465, and a loan to Claymore in the amount of \$720,000. He had reviewed the bank statements going back to 2012 and could find no cash receipts which explained the apparent loan from Claymore. Therefore, he required the full ledgers going back to the inception of these balances, to examine how these balances were created.
- c) While SMIC bank statements were provided for the years 2012-2014, 2016-2018, no bank statements had been provided for the year 2015. These were necessary given the many cheques written by Mr. McKay to himself or companies he controlled. The bank statements were necessary to understand Mr. McKay's personal use of SMIC funds.
- d) The December 2018 mortgage ledgers disclosed 11 mortgages, totalling almost \$11,000,000, including the Parklane loan of \$3,299,325 and the FSJ mortgage of \$2,436,829. Plaintiff's counsel was unable to locate any registered mortgages in the name of SMIC, and was unable to discern the mortgagor for the "generically" named mortgages. A number of the mortgages appeared to be in the Fort St. John area, where Mr. McKay and his wife and companies were engaged in real estate development, suggesting the potential for self dealing. Disclosure of the mortgage files and documents for each of the mortgages on the 2018 mortgage ledger was required, as well as the ledgers maintained during the currency of the mortgages.

- e) All SMIC bank records, brokerage records, ledgers, mortgage files, and audited financial statements from 2018 to the present, to allow plaintiff's counsel to complete a meaningful analysis of the SMIC accounts.

[21] No written response to counsel's December 7, 2020 was provided by counsel for the defendants. In January 2021 counsel for the plaintiff had a number of conversations with counsel for the defendants regarding the outstanding documents, and was told the defendants were working on it. No further communication from the defendants on document production happened before June 2021.

### **III. JUNE 25, 2021 APPLICATION**

[22] On June 25, 2021 counsel for the plaintiff appeared before me on a without notice application for an Anton Pillar order, and various injunctions restraining the assets of SMIC, certain assets of the individual defendants, and specific property in the names of 1048 and Claymore.

[23] I granted the Anton Pillar order and an injunction restraining the disposition of certain properties registered in the name of 1048. The application was brought as a Mareva injunction generally restraining the disposition of many assets. However, the order granted was more in the nature of a preservation order restraining the disposition of certain specific real estate parcels.

[24] Any party affected by the orders was granted leave to come back before the court at any time on no less than two hours notice to the plaintiff's counsel. The injunction restraining disposition of the properties in the name of 1048 was to remain in place only until the plaintiff's motion to commence a derivative proceeding against 1048 was determined, and the plaintiff was required to deliver her application materials for such a proceeding within 30 days of the order.

[25] On June 28, 2021 Mr. McKay was served with the Anton Pillar order and the preservation order at his home. The parties agreed that the supervising solicitor would receive all financial documents held by Mr. McKay, and that the parties would later address how to produce those documents described on schedule "C" to the order, which included the following:

- a) Accounting ledgers from January 1, 2007 to the present for SMIC, Claymore, SM, and 0749, including cash and mortgage accounts,
- b) Bank statements, cheques and lines of credit for SMIC from January 1, 2007 to December 31, 2011, January 1, 2015 to November 30, 2015, January 1, 2019 to the present,
- c) Bank statements, cheques, lines of credit balances for Claymore, SM, and 0749 from the date of their incorporation to the present,
- d) Mortgage or loan documents for all mortgages or loans of SMIC as at December 31, 2018, including those listed in mortgage ledgers as at that date,
- e) Brokerage account statements for each month commencing January 1, 2012 to December 31, 2016 (excluding December statements), and August 1, 2019 to the present.

[26] By the time of the applications before me, neither party had accessed the documents. Before me, the plaintiff applied for an order seeking access to those documents. Counsel for the defendants advised that, in relation to the documents held by the supervising solicitor, he was prepared to list and produce all relevant documents in accordance with the Rules.

#### **IV. APPLICATION TO SET ASIDE ORDERS**

[27] At the outset of the application to set aside the orders, the plaintiff sought to adjourn the application until the documents received pursuant to the Anton Pillar order had been listed and reviewed. Counsel argued that he was entitled to rely on the fruits of the order in response to the application to set aside. The defendants argued that they agreed to list all documents in accordance with the Rules of Court, and that the Anton Pillar order had been fully executed in July. However, the defendants argued they wished to proceed as there was an important principle at stake, and they did not want the stain of the order continuing throughout the litigation.

[28] I agreed to proceed with the application. If it became apparent during the course of the hearing that an adjournment was necessary to produce the fruits of

the Anton Pillar order, I would address how to proceed at that time.

[29] Both parties agree that the Anton Pillar order and the preservation order are extraordinary orders. Mr. Justice Macintosh described the extraordinary nature of the orders, the test for granting such orders, and the question on a set aside application, in *Northwestpharmacy.com Inc. v Yates*, 2018 BCSC 41:

[10] The tests for obtaining a *Mareva* injunction are similar to those for obtaining injunctions generally, with two qualifications.

[11] First, the applicant has a higher standard to meet. Instead of needing to show only a case that is not frivolous, or an arguable case, to borrow the language employed in countless injunction decisions, the applicant needs to show what is sometimes called a strong *prima facie* case. That is more than an arguable case, although it does not mean that the applicant's case is bound to succeed. See *Tracy v. Instalcoans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481, at para. 54. Courts have cautioned that the precise expression of the test may be difficult. However it is expressed, the test is at least somewhat more rigorous than it is for injunctions generally.

[12] Second, for obtaining a *Mareva* injunction, the applicant should demonstrate a real risk that assets will be disposed of or dissipated, such that without the injunction, a judgment would be hollow. The second test, risk of disposal or dissipation of assets, is not rigidly applied. Nonetheless, it remains an important criterion for determining whether *Mareva* relief is called for. See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, 1998 CanLII 6468 (BC CA), [1998] B.C.J. No. 2887 (C.A.) at paras. 16–23; and *Tracy*, cited earlier, at paras. 45–46.

[13] In *Tracy*, Madam Justice Saunders, writing for the Court, also expressed this caution, at para. 46:

In all cases, great caution is to be shown to avoid the mischief of litigious blackmail or bullying, and due regard must be paid to the basic premise that a claim is not established until the matter is tried. Great unfairness may be occasioned, and the administration of justice brought into disrepute, by an order which impounds assets before the merits of the claim are decided. It is useful to recall the words of Huddart J.A. in *Grenzservice Speditions Ges.m.b.H. et al. v. Jans et al.* (1995), 1995 CanLII 2507 (BC SC), 129 D.L.R. (4th) 733, 15 B.C.L.R. (3d) 370 (S.C.) at 755-756 at p. 23:

[*Mareva* and Anton Pillar orders] represent an extraordinary assumption of power by the judiciary. Judges must be prudent and cautious in their issue.

[14] For the present applications, two by the Defendants, to set aside the existing *Mareva* order, and the Plaintiff's application for a new *Mareva* order, the authorities provide the following guidelines.

[15] In the set-aside hearing, a court considers whether the *ex parte* order should be set aside because of material non-disclosure by the *ex parte* applicant. If not, the court proceeds to a hearing *de novo* on the merits of the injunction application, where the *ex parte* applicant must again

meet the tests for obtaining the injunction, even though that party is the respondent on the set-aside application. See *Mooney v. Orr*, 1994 CanLII 1779 (BC SC), [1994] B.C.J. No. 2652 (S.C.); and *Global Chinese Press Inc. v. Zhang*, 2016 BCSC 874, at para 11.

[16] A material fact is one that may affect the outcome of the application. See *Pierce v. Jivraj*, 2013 BCSC 1850, at paras. 37–38.

[17] The applicant in the *ex parte* application must be "profoundly fair", must disclose all important aspects of the evidence, and must avoid opinion and invective. See *Pierce v. Jivraj*, cited above, at paras. 22 and 37–38; and *Hollinger Inc. v. Radler*, 2006 BCCA 539, at para. 39.

[18] If a court finds material non-disclosure, it may, and likely will, set aside the *Mareva* order. However, material non-disclosure is relevant as well in the second part of the analysis. The court can take non-disclosure on the *ex parte* hearing into account when it is deciding whether to maintain an existing *Mareva* order, or grant a new one. See *Mooney v. Orr*, cited above, at para. 30; and *MacLachlan v. Nadeau*, 2017 BCCA 326, at paras. 28, 32 and 37.

[19] The legal analysis, summarized above, is grounded in fairness. The ultimate question is whether it is just or convenient that the injunction be given, or maintained, in accordance with s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. "[J]ust or convenient" is perhaps not highly informative in itself. However, it derives from the fact that injunctive relief is equitable. It will only be granted, or maintained, in accordance with principles of fairness.

[30] These general principles apply equally to the granting of a without notice Anton Pillar order.

[31] The defendants argue that when the plaintiff appeared before me in June, she presented a one-sided picture of the business, selectively relying on accounting documents produced by the defendants. They also object to the submissions of counsel for the plaintiff based on his review of the accounting documents, as they say he overstepped his role as counsel and provided, essentially, opinion evidence on what the documents meant.

[32] The defendants argue that the plaintiff's presentation of the evidence on the June hearing failed to outline the valid business purposes for which various expenditures and loans were made. The plaintiff's submissions left the court with an impression, unjustified on the whole of the evidence, that Mr. McKay improperly benefited himself at the expense of the plaintiff.

[33] In addition, the defendants argue that the plaintiff failed to advise the court of important mitigating factors in relation to various regulatory offences determined

against Mr. McKay in the past, instead relying on invective and inflammatory language to improperly demean the defendants in the eyes of the court.

[34] In June I was provided with affidavits from the plaintiff, her counsel and a legal assistant from the plaintiff's counsel's office. The affidavits from the counsel's office contained copies of documents produced by the defendants in the litigation, along with certain other documents obtained from third parties. On the set aside application, I was provided with three affidavits from Mr. McKay, a new affidavit from the plaintiff, two affidavits from legal assistants from the defendants' counsel's office, and one affidavit from a legal assistant from the plaintiff's counsel's office.

[35] Both counsel provided me with extensive submissions on what they say various business records mean. These submissions were very detailed and, for the purposes of this decision, I have attempted to summarize the essence of the positions, rather than repeating all of the detail I heard on the application and reviewed in the course of preparing my decision.

[36] The defendants allege that the plaintiff made material misrepresentations in relation to a number of issues, which may be summarized as: mortgages in Fort St. John, expenses of Mr. McKay, management fees, "warehousing" of \$1,024,000 with the McKays, the plaintiff's connection to Mr. McKay and SMIC, various regulatory matters, gratuitous payments to various entities, and the status of document production.

[37] To the extent additional issues were raised by the plaintiff on the June hearing, but were not raised by the defendants on this set aside application, I have not expressly dealt with such issues in my analysis of material non-disclosure.

#### **A. Analysis**

[38] In assessing whether the plaintiff failed to make proper disclosure of all relevant facts on the hearing before me in June, I must consider whether any facts were not disclosed, and also whether those undisclosed facts were material on the issues decided on the *ex parte* hearing, as stated by the court in *Regal Ideas Inc. v Haus Innovations Inc.* 2018 BCSC 136:

[31] However, not every omission necessarily results in an *ex parte* order being set aside. The full, frank and fair disclosure requirement is not

a standard of perfection and it is impractical to expect every nuance of the situation to be brought to the attention of the court: *K.P.I.N. v. K.N.N.*, 2005 BCSC 1259 at para. 14. The materiality of any alleged non-disclosure must be assessed by considering the importance of the alleged non-disclosure to the issues decided at the *ex parte* hearing: *Pierce* at para. 37.

[39] I have also considered whether counsel for the plaintiff acted improperly in taking me through the accounting ledgers and other documents to establish the facts which he argued justified the orders made. I conclude that counsel is entitled to review with the court accounting documents, including ledgers, in making submissions. Counsel was not giving evidence, but simply pointing out evidence in the documents and making submissions as to the meaning of those documents. This is what counsel do every day in our courts, and I do not accept that counsel acted improperly in making the submissions on the documents that he did.

[40] Having now been taken through the accounting documents on two occasions, I can say that the issues raised by the plaintiff flow from the inaccurate and incomplete records kept by Mr. McKay and the failure of Mr. McKay to produce documents in the face of detailed requests from the plaintiff. Mr. McKay operated numerous entities, including SM, SMIC, 0749, 1048, and Claymore, for all of which he was the sole or primary decision maker. Monies, interests, and properties moved between these companies quite freely. Proper documentation for many of these transactions was not disclosed by the defendants. While Mr. McKay may ultimately prove that he operated his businesses properly, the disclosed documents do not appear to reflect the steps he says he took in his businesses.

[41] In analyzing the allegations of material non-disclosure, I will employ the same categories I set out above.

### **1. Mortgages in Fort St. John**

[42] The defendants say that, after 2012, SMIC decided to enter into mortgage loans with builders and developers in Fort St. John.

[43] In 2014, 0749 (of which Mr. McKay was the sole director) owned 47 lots in Strata EPP 29291 (Lots 61-108) in the Fort St. John area. Between 2014 and 2015, SMIC loaned close to \$2M to 0749 to fund servicing work on the lots (the "0749 Loan"). The servicing work was performed by LB Chapman Construction Co. and SMIC advanced the funds directly to LB Chapman to perform this work.

[44] 0749 sold lots 39, 81, 82, and 83 to Dark Pine Construction Co. (“Dark Pine”) and lots 61, 62, 107, and 108 to Crown Stone 2014 Ltd. (“Crown Stone”). The defendants say that Dark Pine and Crown Stone financed their lot acquisitions and construction costs through advances from SMIC secured by mortgages held by SMIC. From the position advanced by the defendants on the set aside application, it does not appear that the 0749 Loan was paid down at the time of the transfer of lots from 0749 to Dark Pine and Crown Stone. When these lots were sold by Dark Pine and Crown Stone to the end buyers, the defendants say the proceeds were used to pay down the borrowers’ loans and the 0749 Loan.

[45] 0749 sold lots 78, 79, 80, and 84 to 556081 BC Ltd., and lots 85 and 86 to Pomwell Ventures Inc. The defendants say the 0749 Loan was paid down from the proceeds of these sales.

[46] The defendants say a total of \$1,232,980 was received by SMIC from the sales of the lots to Dark Pine, Crown Stone, 556081 BC Ltd., and Pomwell Ventures Inc.

[47] On December 24, 2015, 0749 sold 33 lots to 1048 (lots 63-68, 71-77, and 87-106). \$1,250,000 was deposited in the SMIC account that same day. The defendants say that this deposit was used to repay+ the 0749 Loan.

[48] In total, the defendants say that SMIC received a total of approximately \$2,480,000 from the sale of the Fort St. John properties, which repaid the 0749 Loan in full, and provided SMIC with a further return of \$489,356.

[49] The defendants argue that the plaintiff relied on the mortgage ledgers which showed \$2,436,829 was outstanding on the FSJ mortgage account, and failed to disclose to the court that the loan was fully repaid. The defendants argued that the plaintiff “knew (or ought to have known) that the [\$2,436,829] did not include the payouts to [SMIC] from Lots 39-41, 61-62 and 81-83. Had these payouts been subtracted from \$2,436,829, the amount outstanding the 2018 Mortgage Ledger would have been reduced to zero.”

[50] The defendants also argue that the plaintiff told the court lots had been moved from 0749 to 1048, without identifying for the court that the transfers resulted from sales and the sales proceeds were used to repay the 0749 Loan.

They say the plaintiff ought to have advised the court that 1048 granted a mortgage to Integris over the Fort St. John lots.

[51] On the hearing in June, the plaintiff focussed on two mortgage loans in the Fort St. John area: one identified in the SMIC ledgers as “Parklane” and one identified as “FSJ”. The plaintiff focussed on the mortgages because their combined value was in excess of \$5,600,000, according to the December 2018 mortgage ledgers. The mortgage ledgers did not refer anywhere to a loan to 0749.

[52] The plaintiff in June raised a number of issues with these mortgages. On the year end mortgage ledger for 2012, the Parklane balance was \$2,973,325 and, in 2014, \$326,000 in interest was added to this balance, bringing the total to \$3,299,325. That balance remained unchanged from 2014 to 2018. No further interest was accrued, and no further payments were made. No enforcement actions appeared to have been undertaken.

[53] The FSJ mortgage balance in 2014 was \$3,676,887. In the 2018 mortgage ledger, an amount noted as “FSJ Final” shows a balance of \$3,866,768. Against that the plaintiff in June referred me to a number of lots sales, including for lots 78, 79, 80, 85, 86, 107, and 108, and a payment of \$1,250,000, all of which brought the balance down to \$2,436,829. The mortgage ledger balance remained at \$2,436,829 as of December 2018. No further interest was accrued, and no further payments were made. No enforcement actions appeared to have been undertaken.

[54] In June I was also taken to the general ledger of SMIC for 2015 which showed a deposit of \$1,250,000 on December 24, 2015, described as “mortgage payout FSJ Homes”.

[55] The plaintiff submitted that the Parklane and FSJ mortgages were brought forward as assets, but these were questionable as there were no existing registered mortgages held by SMIC in the Fort St. John development.

[56] In addition, the plaintiff submitted that the defendants had disclosed nothing to identify who the mortgagor was for these mortgages. None of the records disclosed by the defendants identified how the Parklane mortgage was created,

and documents going back to 2007 were required to determine the answers to the questions arising from the documents.

[57] The plaintiff submitted that she had attempted to gain some information about the FSJ mortgage by investigating one notation in the 2014 mortgage ledger, which identified a payment as “FSJ Final Chapman”. She was then able to go through cheques issued by SMIC to find three other cheques issued to LB Chapman in 2014: two were noted on their face as “Parklane” and one was noted as “FSJ Draw #5”. However, in the general ledger for SMIC, all cheques were referenced as “FSJ Acct”. The total value of the four cheques was \$1,721,523.

[58] The plaintiff’s counsel contacted LB Chapman directly, and was able to obtain copies of invoices and cheques. All invoices were issued to 0749. The payment for the invoices were made by some cheques from SMIC, and two cheques on the joint account of Mr. McKay and his wife. I was told at the June hearing that the total value of cheques written on the account of Mr. McKay and his wife to LB Chapman was approximately \$827,000. In addition, LB Chapman received payment for a number of liens it had filed against the lands, and those payments can be traced to the SMIC mortgage account.

[59] 0749 no longer owned the lands over which the LB Chapman work had been performed, as the lands had transferred to 1048 on December 24, 2015. 0749 was dissolved in October 2020.

[60] Plaintiff’s counsel identified the lands held by 1048 as the subject of the preservation order. He advised me that 1048 had two directors, one of which was Mr. McKay. He also advised me that he sought the preservation order on an interim basis until he could commence a derivative action by SMIC against 1048, as only SMIC had a proprietary interest in the lands which could support a certificate of pending litigation against the 1048 lands.

[61] With respect to the documents going back to 2007 related to the Parklane mortgage, plaintiff’s counsel advised me that the defendants’ position may be that these document requests were a fishing expedition. However, the plaintiff argued, in relation to the FSJ mortgage, a real question was raised as to whether Mr. McKay used SMIC funds to advance his personal interests, including in 0749 and 1048. She argued that a similar concern arises with respect to his use of the

Parklane mortgage funds, potentially, in relation to the new house and separate office on property in Southlands he built in the years 2008, 2009 and 2010.

[62] The plaintiff argued that Mr. McKay, and the companies he controls, are the sole source of much of the historical financial documents, and there was a real risk that these records would go missing.

[63] The plaintiff argued on the set aside hearing that she could not have known about any loan arrangement with 0749, as the documents disclosed by the defendants said nothing about such a loan. No mortgage files have been produced by the defendants, and no loan or other agreements between SMIC and 0749 have been produced.

[64] The plaintiff also advised the court in June that 33 lots moved from 0749 to 1048. The transfers completed on December 24, 2015, the same day the \$1,250,000 was deposited to SMIC. The defendants argue the plaintiff ought to have told the court that the lots were sold for \$1,250,000, as the language used by the plaintiff on the June hearing suggested some untoward transaction between the companies. The defendants argue that the plaintiff ought to have known that the \$1,250,000 payment related to the sale of the lots. The plaintiff argued that the defendants had not produced the mortgage files, and so there was no way to know that any consideration had been paid for the transfer of these properties to 1048, and there was nothing in the disclosed documents that would have allowed the plaintiff to draw the conclusion that the \$1,250,000 related to these property transfers, beyond mere speculation.

[65] Mr. McKay produced for the first time on the set aside hearing the contract of purchase and sale between 0749 and 1048. The plaintiff did advise the court in June that 1048 granted mortgages to Integris on the lots currently held by Integris, and provided copies of the title searches and mortgage itself which counsel obtained from the registry. Counsel for the plaintiff pointed out that the form of mortgage was a running account mortgage, which allows the borrower to increase its borrowings. Counsel relied on this form of mortgage in support of his argument that this form of mortgage would allow the borrower to reduce the equity in the assets, resulting in a dissipation of the assets.

[66] With respect to the payouts from the sales of lots 39-41, 61-62, and 81-83, I agree these payouts were not linked to the FSJ mortgage in the mortgage ledger. Therefore, it is not clear how the plaintiff could know that these sales were to be deducted from the FSJ mortgage balance shown on the ledgers.

[67] I agree that the mortgage ledger in December 2018 shows the outstanding balance on all mortgages, including the FSJ and Parklane mortgages, to be \$6,862,945.43. The outstanding mortgage amount in the 2018 general ledger is essentially the same amount (\$6,862,955.82). It is not clear if the outstanding mortgages in the 2018 general ledger are the same as those referred to in the mortgage ledger, but the coincidence in the outstanding totals certainly suggests to me that they are related.

[68] The 2015 general ledger for SMIC did show that payments of \$4,775,599 were made towards the mortgage accounts. This was not brought to the attention of the court in June. The mortgage files were not produced by the defendants, which might have shed some light on the state of the mortgages. I find there remains a disconnect between the general ledger and the mortgage ledger which was not understandable on the disclosed documents. While the defendants argue the 0749 Loan was fully paid out, that fact is not fully established on the disclosed documents.

[69] While Mr. McKay may ultimately be able to prove that the Fort St. John mortgage loans were properly made and fully paid out, as he suggested on the set aside application, I do not agree that the plaintiff failed to disclose material facts in relation to the mortgages which were knowable on the face of the documents produced by the defendants by June. The plaintiff cannot be faulted for not having access to the defendants' documents which might have shed more light on the matters, or for the fact that the defendants' own disclosed documents were potentially inaccurate or misleading.

## **2. Expenses paid by Mr. McKay**

[70] The defendants say that SMIC advanced funds to borrowers by way of Mr. McKay making purchases from suppliers on his personal credit card. In addition, Mr. McKay paid the day to day operating expenses of SMIC, and legal and

accounting fees incurred by SMIC, on his personal credit card. He would then have SMIC write a cheque to himself to cover these expenses.

[71] The defendants argue that the plaintiff advised the court that approximately \$2.1M was paid to Mr. McKay from SMIC “purportedly for a business purpose”, which implied that Mr. McKay had misappropriated SMIC funds.

[72] The defendants say the plaintiff ought to have advised the court that \$785,952 was paid to Mr. McKay in reimbursement of construction advances he paid personally to Dark Pine and its owner, Mr. Jensen, and that SMIC had mortgages over eight of the Dark Pine properties, and one mortgage over property held by the principal of Dark Pine, during this same period.

[73] The defendants say the plaintiff ought to have advised the court that \$491,950 was paid to Mr. McKay in reimbursement of construction advances he paid personally to Mr. Guenther, and SMIC had a mortgage over property held by Mr. Guenther during the relevant time.

[74] The defendants say the plaintiff ought to have advised the court that \$122,049 was paid to Mr. McKay in reimbursement of construction advances he paid personally to the principal of Crown Stone, and that SMIC had mortgages over four properties owned by Crown Stone during the relevant time.

[75] Finally, the defendants say the plaintiff ought to have advised the court that \$50,106 was paid to Mr. McKay in reimbursement of legal and accounting fees of SMIC paid personally by Mr. McKay.

[76] On the hearing in June, the plaintiff did advise me that the expenses were purportedly used to fund expenses in the development of properties in Fort St. John. The plaintiff advised in June that while some of these expenses may have been incurred for business purposes, it was not possible to confirm this on the documents produced by the defendants.

[77] The plaintiff argues that on the set aside application, Mr. McKay produced documents that were not available for the June hearing, namely receipt and disbursement records for the various construction arrangements with Dark Pine, Mr. Jensen, Mr. Guenther, and Crown Stone. These details of the loan advances were not available at the June hearing.

[78] In June, plaintiff's counsel did not advise me of the details raised by the defendants on the set aside hearing. However, those details were not available on the documents previously disclosed by the defendants. The plaintiff sought additional documents which might have explained these transactions, but her requests did not result in the production of any such documents. Certainly, on the face of the ledgers, a considerable amount of money was paid by SMIC to Mr. McKay personally for expenses in relation to properties owned by 0749, of which he was the sole director. This was a red flag as to the propriety of these transactions.

[79] Even on the set aside hearing, Mr. McKay produced no written agreements between 0749 and Dark Pine, Mr. Jensen, Mr. Guenther, or Crown Stone and no agreements between SMIC and 0749 as to any financing arrangements, or between Mr. McKay and SMIC as to any arrangements permitting Mr. McKay to use his personal credit cards to fund loan advances.

[80] While the new documents produced by Mr. McKay go some way to explaining how SMIC funds were used, they do not disclose the terms of the underlying arrangements. As a result, the propriety of the underlying arrangements still raises concerns.

[81] Mr. McKay may ultimately be able to prove that acceptable arrangements were in place between himself and the companies he controlled, and between those companies and various borrowers. However, I do not agree that the plaintiff failed to disclose facts which were knowable on the face of the documents produced by the defendants prior to the June hearing. I find the plaintiff fairly represented the apparent facts, as set out in the documents produced by the defendants at the time of the initial hearing. The plaintiff cannot be faulted for not having access to the defendants' documents which might have shed more light on the matters, or for the fact that the defendants' own disclosed documents were potentially inaccurate or misleading.

### **3. Management fees**

[82] The defendants argue that as of 2010 SM had earned approximately \$930,000 in management fees from SMIC over the previous eight years. SM used those funds to invest in the Fort St. John Limited Partnership (FSJ LP), which was

involved in developing 60 lots in Fort St. John (Strata EPP 29291, lots 1-60). FSJ LP did generate a return for its investors. Rather than returning SM's investment in FSJ LP to SM, in 2013 Mr. McKay directed that the capital be deposited into SMIC, where the funds were used to generate monthly returns for its preferred shareholders.

[83] The defendants argue that the plaintiff failed to advise the court of Mr. McKay's position, as set out in his response to civil claim, that all performance bonus fees earned by management before 2012 had been returned to SMIC and, since 2012, Mr. McKay had received no compensation for his management of SMIC. The defendants say the plaintiff had an obligation to advise the court that Mr. McKay reinvested all management fees earned before 2012.

[84] On the set aside hearing, the defendants argued that, in fact, since 2012 Mr. McKay (through his company Claymore) received management fees totalling \$220,000, or approximately \$25,000 per year.

[85] The pleadings were available to me on the June hearing, and therefore the position of the defendants was before the court.

[86] The plaintiff did not advise the court that the defendants' position was that all management fees payable to SM were in fact paid to SMIC. However, the plaintiff did point out that the 2012 unaudited financial statements of SMIC showed management fees of \$476,400 were owing, and the 2015 general ledgers for SMIC show \$515,465 owing to SM. It is not clear to me how the plaintiff was to discern that SM transferred its right to management fees to SMIC, as that was not expressly pleaded and it was not apparent on the face of the documents disclosed at the time of the June hearing.

[87] In June, the plaintiff did spend considerable time reviewing the management fees paid by SMIC since 2012. Counsel provided the court with a copy of the agreement between SMIC and SM allowing SMIC to pay management fees to SM equal to 8% of the fair market value of its assets, payable out of profits. The plaintiff made extensive submissions regarding the extent of the management fees received, compared to the permissible fees pursuant to the management agreement. The thrust of the argument was that Mr. McKay breached his fiduciary duties, by paying himself directly and through companies he controlled, excessive

management fees, contrary to the 8% cap on fees set out in the management agreement, and contrary to the management agreement which does not provide for fees to be paid to any entity other than SM.

[88] In terms of what was relevant to me in determining the June application, I focussed on the quantum received by Mr. McKay and his companies as presented on the disclosed financial records, compared to the position advanced by the defendants in their pleadings. In other words, while the plaintiff also focussed on whether the 8% cap had been exceeded, this had no bearing on my decision as the plaintiff's theory of profit calculation rested on incomplete disclosure by the defendants which I did not find to be adequate to support the plaintiff's theory on the June hearing, in the absence of hearing from the defendants.

[89] Based on the evidence which I review below, I was concerned that the records strongly suggested that management fees were paid to entities which were not parties to the management agreement, and were paid in amounts far in excess of the amounts advanced by the defendants in their response to civil claim. As the recipients of the management fees were Mr. McKay personally and his directly controlled company, Claymore, I was satisfied that the plaintiff had raised a strong *prima facie* case that Mr. McKay had acted contrary to his obligations by transferring funds from SMIC to himself and companies he controlled, contrary to the terms of the management agreement between SMIC and SM.

[90] In 2013, the unaudited financial statements of SMIC showed \$180,000 in management fees. The ledger for 2013 shows 11 cheques in the amount of \$15,000 each, paid to Claymore almost every month. While there is no notation on the ledger as to the purpose of these funds, seven of the cheques bear the notation "mgmt fees" and four of the cheques have no notation. Given the regularity with which the cheques were issued, it suggests that all cheques were written to Claymore for management fees. The total of the cheques produced is \$165,000 for 2013.

[91] The unaudited financial statements of SMIC for 2014 show management fees of \$164,400. The general ledger for 2014 shows eight cheques issued to Claymore Capital for management fees from August to December, and the corresponding cheques confirm on their face they were paid for management fees. These eight cheques total \$90,000. The general ledger for 2014 also shows ten

cheques issued to Claymore Capital between January and December 2014, nine of which are in the amount of \$15,000, and one is in the amount of \$45,000. The general ledger does not indicate the purpose of these funds, but eight of the cheques bear the notation "Mgt fees". The \$45,000 cheque indicates on its face that it covers management fees for November and December 2014 and January 2015. Given the regularity with which the cheques were issued, it suggests that all cheques were written to Claymore for management fees. Taking the notation on the \$45,000 cheque as accurate and accepting that only \$30,000 in funds related to 2014, the total paid to Claymore in 2014 for management fees is likely \$255,000.

[92] The unaudited financial statements of SMIC for 2015 show no management fees were paid. The 2015 general ledger for SMIC shows \$90,000 in management fees were paid. Added to this is the \$15,000 paid to Claymore in December 2014 as part of the \$45,000 cheque, which was noted as including a management fee for January 2015. The total of management fees paid by SMIC in 2015 is therefore \$105,000. The defendants did not produce banking records for 11 months of 2015, and so the plaintiff could not confirm who the cheques were written to. However, one general ledger entry was noted as "mgmt fee/Kristina Account" and the plaintiff questioned whether this meant a cheque was written to Mr. McKay's wife, Kristina Heiss-McKay.

[93] SMIC paid Mr. McKay personally management fees of \$25,000 in 2016.

[94] The records disclosed by the defendants and presented to the court in June, appear to disclose that from 2012 to 2016 management fees in the amount of at least \$550,000 were paid to Mr. McKay or his company Claymore. This evidence is diametrically opposed to the position advanced by the defendants in their response to civil claim and their position on the set aside hearing. Other than a bald statement by Mr. McKay in his affidavit on the set aside hearing that he only received \$25,000 per year, through his company Claymore, he pointed to nothing in the records that the plaintiff failed to disclose which would support his position.

[95] The defendants focussed on their position that SM allegedly transferred to SMIC the management fees it was entitled to as of 2012, and that the plaintiff had failed to advise the court of this fact. It was not clear on the face of the documents disclosed at the time of the June hearing that SM had transferred a significant

amount of funds to SMIC and waived its right to management fees. The 2015 general ledger of SMIC continues to show an amount owing to SM of \$515,465. This was not explained by the defendants on the set aside hearing.

[96] The defendants rely on the 2012 and 2013 financial statements of FSJ LP, both of which were produced to the plaintiff before the June hearing. The 2012 financial statements for FSJ LP show an investment by SM in the amount of \$1,000,000 in the years 2010 and 2011. In 2012 a \$50,000 distribution to SM is recorded, reducing SM's investment in FSJ LP to \$950,000. In the 2013 financial statements of FSJ LP there is no longer a record of an investment belonging to SM; rather, the investment in FSJ LP previously in the name of SM has been recharacterized as belonging to SMIC going back to 2011, and the investment of \$950,000 in 2013 is shown as distributed fully to SMIC in the 2013 year. The general ledger of SMIC shows a repayment of \$1,000,000 from FSJ LP in 2013.

[97] It may be that this recharacterization of SM's investment in FSJ LP is evidence supporting the defendants' position that SM reinvested its management fee into SMIC. However, I do not agree that is an inference which obviously flows on the face of the documents, particularly given that SMIC ledgers continued to show a significant amount owing to SM in 2015.

[98] In my view, what the documents do demonstrate is that monies flowed freely between companies controlled by Mr. McKay without any apparent business basis for the transactions disclosed in the documents, significant historical financial transactions were recharacterized after the fact, and Mr. McKay appears to have continued to receive, personally and through Claymore, significant management fees, contrary to the position set out in the defendants' pleadings and the position they took before me on the set aside hearing. No audited financial statements were prepared by SMIC, and therefore there is no third party assessment of the accuracy of the financial records produced.

[99] I am satisfied that the plaintiff did not make any material non-disclosure in relation to the issue of management fees.

#### **4. \$1,024,000 paid to the McKays**

[100] In January and February 2014, Mr. McKay and his wife "warehoused" funds not being otherwise used by SMIC, in the amount of \$1,024,000. The defendants

argue that the plaintiff ought to have advised the court in June that these funds were repaid, and refer to a line entry for September 1, 2014 in the SMIC general ledger which appears to show the funds being returned to SMIC.

[101] The defendants also argue that the plaintiff was obliged to advise the court that in 2015 Mr. McKay deposited a further \$1.37M into SMIC

[102] On the June hearing, the plaintiff pointed out four cheques written on the SMIC account in January and February 2014, payable to Mr. and Mrs. McKay, in the total amount of \$1,024,000. The plaintiff then showed the court the cash ledger for SMIC, which described these funds as “warehousing funds”.

[103] The plaintiff raised questions about the use of these funds, and took the court to the two cheques issued from the McKays joint account to pay LB Chapman in August and early September 2014, suggesting these payments might have been made with the “warehousing funds”. The plaintiff told the court it was not known whether these funds were repaid, noting that she had requested bank statements and cheques for this period, but they had not been provided. The plaintiff highlighted the fact that the full general ledger for 2014 had not been produced, and therefore she could not identify if the funds had been repaid.

[104] In September and October 2020 plaintiff’s counsel expressly raised with defendants’ counsel his concerns regarding the \$1,024,000 payment, and detailed why he sought production of the 2014 full general ledger, bank statements, and cheques, i.e. to allow him to understand the status of this transfer. No explanation for the transfer of the funds was provided in response to counsel’s letter. The full general ledger was clearly available to be produced, as it was referred to by the defendants on the set aside hearing, but it was not provided to the plaintiff.

[105] Because the plaintiff had not been provided with the general ledgers of SMIC for 2014, the plaintiff could not take the court to the 2014 entry which showed the \$1,024,000 being credited to the “bank other” account of SMIC on September 1, 2014. The defendants produced the general ledger for 2014 on the set aside hearing, which showed the credit of these funds. The plaintiff took issue with this line entry as reflecting a repayment, and argued that in fact it represented a withdrawal of cash against the monies held by Mr. McKay. Plaintiff’s counsel referred to a page from the FSJ Final mortgage account in the 2014 general

ledger, which showed a debit of \$1,024,000 in favour of Mr. McKay on September 1, 2014. The plaintiff also pointed to the bank accounts of SMIC for 2014, none of which showed a deposit of \$1,024,000. I am not able to resolve this issue on the evidence before me on the set aside application; however, I note that the answer to what happened to the \$1,024,000 is not obvious on the face of the documents produced on the June application or on the set aside application.

[106] In the absence of the 2014 general ledger, which was not produced to the plaintiff and might have supported a conclusion that the funds were returned, the defendants did not point to any other records which would have allowed the plaintiff to advise the court in June of the defendants' position that the monies were returned.

[107] I am satisfied that the plaintiff did not make any material non-disclosure in relation to the issue of the \$1,024,000 "warehoused" funds.

[108] The defendants also argue that the plaintiff was obliged to advise the court that in 2015 Mr. McKay deposited \$1,370,000 into SMIC, and was obliged to connect the \$1,370,000 payment to the warehousing cheques.

[109] The central securities register showed "JM" as holding preferred shares worth \$1,371,189. It is not clear from the records how the funds related to these preferred shares were deposited into the SMIC accounts. A deposit of \$805,000 is shown in the SMIC general ledger on June 13, 2015, described as "Financing" and "JM deposit". The \$805,000 was then recorded as a loan from Mr. McKay in 2016, increasing the loan payable to Mr. McKay to \$1,950,000.

[110] In September 2015 the SMIC general ledger shows two deposits from Mr. McKay, one in the amount of \$130,000, and one in the amount of \$400,000. The basis for these deposits is not clear.

[111] It is not clear if the three deposits of \$805,000, \$130,000, and \$400,000 are part of the \$1,370,000 Mr. McKay is said to have deposited in 2015. Further, it is not at all clear how any of these amounts related to the \$1,024,000 which the defendants say was returned to SMIC in September 2014.

[112] Given the uncertainty about what amount was transferred from Mr. McKay to SMIC and the basis for this transfer, including any terms for repayment, I do not

find the plaintiff failed to present the court with material information in respect of the \$1,370,000 payment by Mr. McKay into SMIC.

## **5. The plaintiff's connection to Mr. McKay and SMIC**

[113] The defendants argue that the plaintiff did not disclose that she acted as a realtor for SMIC in various foreclosures, and received referral fees and returns on her investments, including her personal investment in the FSJ LP. The plaintiff also did not point out to the court that Mr. McKay denied he was her financial advisor.

[114] The positions the defendants take with respect to the plaintiff, as articulated in their response to civil claim, including that Mr. McKay denied he was her financial advisor, were before the court in June.

[115] On the set aside hearing, the issue is whether the applicant failed to disclose material facts. The issues before me on the June hearing did not engage the knowledge of the plaintiff. Rather, the issues were whether the defendants had withheld relevant documents, and whether their actions were such that a risk arose to the integrity of the requested documents or the dissipation of relevant assets.

[116] I do not agree that the issues of whether the plaintiff acted as a realtor for SMIC in various foreclosures, or received referral fees or returns on her investments, including in the FSJ LP were material on the June hearing, and I do not agree the plaintiff failed to disclose material facts in this respect.

## **6. Regulatory matters**

[117] The defendants argue that the plaintiff improperly referred to Mr. McKay as a “serial regulatory violator”, and failed to bring to the court's attention certain mitigating factors in his matters before the BC Securities Commission and under the *Mortgage Brokers Act*.

[118] The relevancy of the previous interactions between Mr. McKay and the BC Securities Commission and under the *Mortgage Brokers Act*, in my assessment of this case, was really that Mr. McKay was regulated and ought to have been aware of his regulatory obligations. The fact that he entered into consent orders with the regulatory agencies does not change this fact. I do not find the fact that there were mitigating factors in play when Mr. McKay entered into the consent orders to be

material. I agree that the plaintiff used inflammatory language when describing Mr. McKay's regulatory infractions, but this had no bearing on the outcome of the June hearing.

**7. Gratuitous payments to Crofton House, RRSPs and "Christmas Booze"**

[119] The defendants argue that the plaintiff intended to suggest to the court that Mr. McKay misused SMIC funds for his personal advantage. Of the use of funds identified by the plaintiff, the defendants say the plaintiff ought to have told the court that Crofton House was an investor and it was possible the cheques were dividend payments, the Christmas booze payments were nominal and were paid each year, and the RRSP cheque was also nominal (just under \$6,000).

[120] While the plaintiff did mention certain payments were made to Crofton House, and for RRSPs and "Christmas booze", these points were not the focus of the hearing, and had no bearing on the outcome of the hearing. The facts were pointed out, and the nominal value of the payments were there to be seen. I find that these facts were not material to the issues before the court in June.

**8. Status of document production**

[121] The defendants say the plaintiff ought to have told the court that they objected to the production of Mr. McKay's personal bank statements. The plaintiff did put into evidence correspondence from the defendants' counsel stating this position. In addition, the plaintiff did not apply to obtain the McKays' personal bank statements, and so this information was not material.

[122] The defendants say the plaintiff ought to have told the court that there were no audited financial statements. The plaintiff did put into evidence correspondence from the defendants' counsel stating this position, and did refer in his submissions to the fact SMIC did not have audited financial statements. The plaintiff submitted that SMIC was required to produce audited financial statements, and failed to do so.

[123] The defendants say that there was overlap between the first and second requests for documents issued by the plaintiff and the court should have been advised of this. The plaintiff clearly identified in her notice of application which requests were outstanding after the two requests were made, and included the

two requests in her application material. As such, the plaintiff's disclosure was adequate.

[124] Finally, the defendants say that the plaintiff ought to have advised the court that she had taken the position with the defendants that she would bring a motion for document production.

[125] In an email from counsel for the plaintiff to counsel for the defendants dated August 21, 2020, counsel for the plaintiff advised defendants' counsel that he considers the withholding of key financial information to "relate to a cover up of serious financial misconduct" on the part of the McKays. Counsel for the plaintiff advised that an application will follow the "Rule 7 letter on a time frame that meets the minimum deadlines of the Supreme Court Rules."

[126] Following the August 21, 2020 email, correspondence was exchanged between counsel, including the formal requests for documents by the plaintiff dated September 28, 2020 and December 7, 2020, both of which were provided to the court in June.

[127] In his December 7, 2020 letter, counsel for the plaintiff states that he would apply to have the McKays' personal banking records produced, and would apply for the appropriate order with respect to the corporate banking records. This is the last reference to plaintiff's intention to proceed with any application.

[128] On the set aside application, counsel for the plaintiff provided an affidavit from a legal assistant setting out information she was advised of by counsel, after reviewing his notes. While the use of legal assistants to essentially deliver evidence of counsel is not the best practice, I accept that her affidavit does disclose that conversations between counsel on the issue of the defendants' document production essentially ended in January 2021.

[129] I am not satisfied that the plaintiff was required to advise the court that at one point he considered a document production application, and I do not agree that the evidence discloses any commitment by plaintiff's counsel to proceed with such an application. Rather, the evidence discloses very strong language from plaintiff's counsel setting out in detail why the various documents were required, raising his suspicions about the transactions undertaken by Mr. McKay and what

he considered to be Mr. McKay's attempt to hide relevant documents, and pointing out the defendants' failure to produce relevant documents for key periods of time.

[130] I do not agree that at the June hearing the plaintiff misrepresented any material information relating to document production.

## **9. Conclusion on disclosure on the June hearing**

[131] For the reasons set out above, I am satisfied that there was no material non-disclosure by the plaintiff on the June hearing. Applying the principles set out in *Northwestpharmacy.com Inc.* at para. 15, I find the June order will not be set aside for non-disclosure.

### **B. Should the orders be maintained?**

[132] Having found no material non-disclosure on the June hearing, I must now consider whether the orders should be maintained.

#### **1. Anton Pillar order**

[133] The Anton Pillar order has been performed. The documents have not been produced to either party, and are being held by the supervising solicitor. The question on this set aside hearing, therefore, is whether all of the documents ordered to be produced, should be produced.

[134] The four conditions for the granting of an Anton Pillar order are described in *Celanese Canada v. Murray Demolition Corp.*, 2006 SCC 36 at para. 35 as follows:

- a) The plaintiff must establish a strong *prima facie* case,
- b) The damage to the plaintiff of the defendants' alleged misconduct, potential or actual, must be very serious,
- c) There must be convincing evidence that the defendants have in their possession incriminating documents, and
- d) There is a real possibility that the defendants may destroy such material before the discovery process can do its work.

#### **a) Strong prima facie case**

[135] I am satisfied that the plaintiff has established a strong *prima facie* case that Mr. McKay, personally and through the use of his corporations SM, Claymore, and 0749, has engaged in conduct which puts his interests in conflict with SMIC and the investors in SMIC, has misappropriated funds from SMIC, and has failed to account to investors in SMIC.

[136] These are interlocutory hearings, and to the extent I refer to actions taken by Mr. McKay personally or through his companies, these are not final findings but rather are based on the strong *prima facie* case which I have found the plaintiff has established. The actions described in this judgment are subject to further proof at the trial of this matter, and ought not be taken as final conclusions in any way.

**b) Damage to plaintiff**

[137] I am satisfied that documents which are central to the issues in this case are held by Mr. McKay at his office where he runs his businesses. These documents include internal records of SMIC and the companies through which Mr. McKay has transferred funds and assets belonging to SMIC. In particular, I refer to the internal ledgers of the companies, historical banking records, mortgage files, and brokerage account records.

[138] Without access to these documents, the plaintiff will be compromised in her ability to determine how the SMIC monies were used, as directed by Mr. McKay. I find the loss of these documents to be very serious to the prosecution of this case.

**c) Evidence defendant has incriminating documents**

[139] The documents ordered to be seized under the Anton Pillar order are documents which had been repeatedly requested by the plaintiff beginning almost one year before the order was made. The documents are of the same character of other documents produced by the defendants. The issue raised by the plaintiff being that the defendants had selectively produced certain records, and had withheld critical documents.

[140] In the correspondence between counsel, at no point did the defendants' counsel deny the existence of the documents held by the McKays, Claymore, and SM which are the subject of the Anton Pillar order, or state that the documents

were not available to be produced. Rather, the defendants simply withheld the documents. The reason given for the non-production of documents held by Claymore, SM, and the personal accounts of Mr. McKay and his wife, was that the request was an abuse of process and the documents were not relevant. No reason was given for the failure to produce the documents of SMIC. It does not appear that a formal request for documents originating with 0749 was made prior to the June hearing.

[141] With respect to the documents held by Claymore and SM, both these companies were defendants in the proposed amended Notice of Civil Claim, and the defendants consented to the amendment. I was advised in June that the filing of the amended claim was imminent. On the set aside hearing, I was told that the amendments had not yet been made but are still planned. While the amendments have not yet been made, they have been consented to by the defendants. SM and Claymore are closely held companies, controlled by Mr. McKay. The plaintiff alleges that Mr. McKay was engaged in self dealing through the use of these companies, which he controlled. I am satisfied that the banking and accounting records of SM and Claymore are relevant and within the control of Mr. McKay.

[142] I am satisfied that there is convincing evidence that the defendants have in their possession incriminating documents.

**d) Defendants will destroy documents**

[143] The defendants argue that there is no risk the documents will be destroyed. Some documents have already been produced, and there is no reason to think the remaining documents would be withheld. The defendants have been on notice since the fall of 2020 that the plaintiff was seeking the documents; therefore, if there was risk of destruction, that risk has been there since the requests were made.

[144] With respect to the mortgage documents, the defendants say these are available at the land title office, so there is no risk of destruction. Similarly, the brokerage records are available from the brokerage itself and so there is no risk of destruction.

[145] I do not agree with the defendants that the requests made by the plaintiff are limited to records held by other institutions. She sought internal records of the

companies which are not held by third party institutions. She also sought internal mortgage files, which can be expected to be more detailed than documents filed at the land title office. While some documents may be available from third parties, the plaintiff is entitled to get those documents directly from the defendants and related parties which are the subject of the Anton Pillar order.

[146] I am also satisfied that there is a real possibility that documents will be destroyed, given unexplained failure of the defendants to produce the documents requested by the plaintiff, in the face of the detailed explanations provided by her counsel as to the clear relevance of the documents.

[147] The documents show Mr. McKay treating the companies as wholly his own, using SMIC to fund loans for his personal land development project, paying fees to his wholly owned companies without apparent corporate authority to do so, “warehousing” significant funds in the personal accounts of him and his wife, recharacterizing investments in FSJ LP, etc. With no apparent oversight, there is a significant risk that documents could be altered or destroyed.

[148] Counsel for the plaintiff pointed out that on the set aside hearing, the defendants produced a general ledger for the period 01/01/2017 to 12/31/2017 which differed from that produced to the plaintiff earlier. No explanation was given for this discrepancy. The change in the internal ledgers of the companies between the original production and documents produced on the set aside application highlights the risk of destruction of the documents maintained by Mr. McKay.

[149] I remain satisfied that there is a real possibility that the relevant documents may be altered or destroyed before the discovery process can serve its function.

**e) Conclusion on Anton Pillar order**

[150] I am satisfied that the Anton Pillar order made June 25, 2021 remains properly granted, with one amendment. The order granted did not place any restrictions on the banking records to be produced by Claymore, SM and 0749. Following the detailed submissions on this set aside hearing, I find that production of these banking records should be restricted to the accounts of these companies only from 2007 to the present

**2. Preservation Order**

[151] The defendants produced sufficient new documents on this set aside hearing to persuade me that it is not just or convenient for the order against 1048 restraining the transfer or encumbrance of the Fort St. John properties to be remain in place. Unlike the hearing in June, where the basis of the transfer of lots from 0749 to 1048 was not clear, on the set aside hearing the defendants were able to provide evidence supporting the role of 0749 as mortgagor and SMIC as mortgagee of the lands. In addition, the defendants produced the purchase and sale agreement between 0749 and 1048, and were able to link the sale proceeds to a partial repayment of the mortgage account.

[152] I am not satisfied that the documents produced as a result of the Anton Pillar order would shed any light on the dealings between 0749 and 1048. No documents relating to 1048 were ordered to be produced, and no sales files of 0749 were ordered to be produced. As such I do not find that the documents seized pursuant to the Anton Pillar order were required before I made my determination in relation to the order against 1048.

[153] While I am satisfied that the plaintiff has established a strong *prima facie* case that Mr. McKay acted improperly vis-à-vis SMIC and 0749, such impropriety including his self-dealing in the creation of the mortgages, I am not satisfied that the plaintiff has established a *prima facie* case vis-à-vis 1048 that would justify the continued injunction over the lands. If Mr. McKay compromised SMIC in the making of the mortgage loan to 0749, it does not flow, on the pleadings or the evidence before me, that SMIC would be entitled to an interest in the lands now held by the purchaser 1048.

[154] The plaintiff has said she will apply to bring a derivative action, and will name 1048 and seek to file a certificate of pending litigation against the 1048 lands. This has not yet been done. My decision to set aside my June order does not impact the plaintiff's ability to proceed with a derivative action and, if the pleadings support it, seek to file a certificate of pending litigation against the lands.

[155] I set aside the order made June 25, 2021 restraining 1048 from transferring or encumbering its lands in the Fort St. John area.

## **V. APPLICATION FOR DIRECTIONS REGARDING DOCUMENTS**

[156] The plaintiff applied for an order seeking access to those documents seized pursuant to the Anton Pillar order. Counsel for the defendants advised that, in relation to the documents held by the supervising solicitor, he was prepared to list and produce all relevant documents in accordance with the Rules.

[157] Plaintiff's counsel sought an order that the defendants list the documents set out in the Order and, if the plaintiff was not satisfied with the listing, plaintiff's counsel would have the right to review all the documents and, following that review, bring on an application, if they deemed it necessary. The plaintiff also argued that the defendant should be ordered to list the documents on the *Peruvian Guano* standard of production.

[158] I am not prepared to make the orders sought by the plaintiff. I have no reason to believe that defendants' counsel will not list the documents described in the Anton Pillar order, as amended in these Reasons, and will not list any other of the seized documents which are relevant to the issues, in accordance with the Rules. To allow plaintiff's counsel to overstep counsel for the defendants and obtain direct access to the defendants' documents which their counsel has determined to be not producible is simply not justified.

[159] With respect to the plaintiff's request to have the defendants list documents at the *Peruvian Guano* standard of production, this is not an appropriate application for such an order. The plaintiff's application related solely to the documents produced pursuant to the Anton Pillar order. Those documents are clearly described in the order itself.

[160] The plaintiff's submissions on the appropriate scope of document production, referencing the *Peruvian Guano* standard of production, would be relevant if this was an application for document production pursuant to Rule 7, which this was not.

[161] I order that the defendants must list all documents described in the Anton Pillar order, as amended in these Reasons, within 45 days of this decision, subject to agreement to the contrary between the parties.

## **VI. COSTS**

[162] The defendants and the plaintiff sought special costs against each other on the set aside application. I do not agree that special costs are appropriate, and I decline to make such an order.

[163] I find that the focus of the parties' submissions on the application was on the alleged non-disclosure by the plaintiff on the June hearing. It was this issue that took up the bulk of the time, and on which the voluminous material was focussed. The plaintiff was successful on this issue. However, the defendants were successful in setting aside the preservation order.

[164] I find that the outcome of the defendants' application was mixed, and I decline to award costs to either party.

[165] On the plaintiff's application for directions regarding the Anton Pillar order, I award costs to the defendants, in the cause.

"W.A. Baker J."