IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*Navarro v. Aventur Energy Corporation,* 2018 BCSC 1423

Date: 20180823
Docket: S123116
Registry: Vancouver

Between:

Carlos F. Navarro, 856320 B.C. Ltd. and CanadaFirst Environmental Management Limited Partnership

Plaintiffs

And

**Aventur Energy Corporation, Peejay Environmental Ltd. PeeJay Environmental Limited Partnership, Northern Nations Development Limited Partnership,
Terry Aven, and Sicily Candice Aven**

Defendants

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

Counsel for the Plaintiffs:	D. Cowper R. Fleming
Counsel for the Defendants:	D. Yaverbaum J. Vanstone
Place and Dates of Trial:	Vancouver, B.C. May 28-31, June 1, 4-8, 11-15, and 18-20, 2018
Place and Date of Judgment:	Vancouver, B.C. August 23, 2018

Table of Contents

INTRODUCTION

[1] This dispute is between the parties involved in developing a proposed landfill and treatment facility in Northern British Columbia. Terry Aven and his wife Sicily Aven, working through companies that involved the Doig River First Nation (“DRFN”), obtained a lease and permits to develop a landfill (the “Peejay Site”). Subject to further approvals, the permits also contemplated the development of a

treatment facility at the Peejay Site. Dr. Carlos Navarro, through various entities, invested US $1 million to develop this treatment facility.

[2] Neither the landfill nor the treatment facility were fully constructed or operated by the parties. The Peejay Site and related permits were sold by the defendants to Petrowest Ltd. in 2012 for $5 million up front, and up to a further $2.5 million, (based on the volume of soil deposited in the landfill) of which just over $1 million has been paid to the defendants. The issue between the parties is whether Dr. Navarro and the related plaintiff corporate entities are entitled to some of these proceeds of sale on the basis of partnership, unjust enrichment, or oppression.

[3] For the reasons that follow, I find that the parties were not involved in a partnership and the plaintiffs did not oppress the defendants but the plaintiffs are entitled to $882,000 on the basis of unjust enrichment.

FACTS

The Parties

[4] Dr. Navarro invested in the Peejay Site through International Environmental Services Ltd. ("IES"), which was a Texas based company operated by Roger Gaskins. IES incorporated a wholly owned subsidiary, CanadaFirst Environmental Management LLC ("CFEM") in Texas and 856320 B.C. Ltd. formerly named CanadaFirst Environmental Management Peejay Ltd. ("CFP") in British Columbia to facilitate its investment in the Peejay Site.

[5] Mr. Aven is 57 years old and he has worked in the oil and gas industry for most of his working life.

[6] In 2003, Mr. Aven formed a partnership with DRFN to create Doig River Energy Oilfield Services ("DRE Oil"). DRFN had a 70% interest in the partnership and a company controlled by Sicily Aven, Mr. Aven's wife, held a 30% interest in it.

[7] The mandate of DRE was to do environmental economic development, in the oil and gas industry and to employ DRFN members.

[8] Mr. Aven's experience was in building oil and gas facilities and pipelines. He wanted to diversify his business portfolio by working with the DRFN on DRE.

[9] Mr. Aven was the general manager, president and CEO of DRE. He reported to DRE's board of directors.

[10] In addition to being a 30% shareholder of DRE, Mrs. Aven was its office manager and she was responsible for maintaining the books and records of the company.

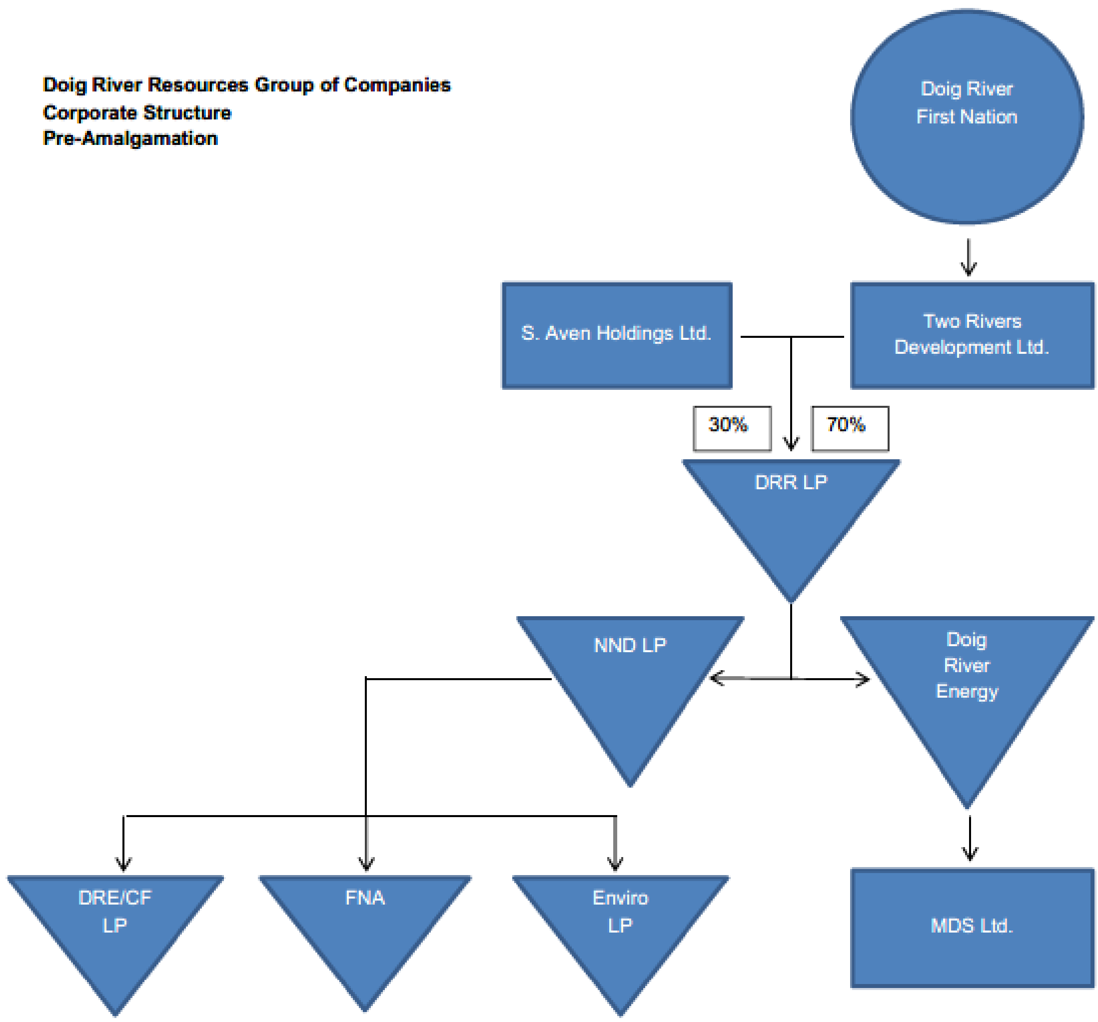
[11] The majority of DRE's board of directors were from the DRFN but they were not involved in the day-to-day operations of the company.

[12] Mr. and Mrs. Aven were married in 1979. She is a member of the Prophet River First Nation. After completing her Grade 12 equivalency exams, Mrs. Aven, at the age of 40, obtained a business degree from Northern Lights College in Fort St. John and a master's degree in project management from the University of Northern British Columbia.

[13] In 2003, she formed a partnership with the DRFN through the corporate entity, S. Avens Holdings Ltd. She was the office administrator for the group of companies associated with this company

[14] As a member of a First Nation, Mrs. Aven attempted to obtain financing for the landfill from Indian and Northern Affairs Canada ("INAC"). She also ensured that expenditures relating to the landfill were kept separate from expenditures for the treatment facility.

[15] The Avens and the DRFN organized their business relationships through a number of entities. During the relevant time period, the structure of the DRE group of companies was as follows:



[16] There are aspects of this case where the difference between the above entities makes a material difference. However, for narrative simplicity, the term “DRE” is used to refer generally to the Doig River companies involved with the Peejay Site and “Environmental Management” is used to refer to the American companies and their affiliates.

[17] The role of the above entities within the DRE group of companies is described below:

1) DRFN: The DRFN holds a 70% interest in the DRE companies and was the controlling shareholder. The DRFN generally had a passive role in management of those companies;

2) S. Aven Holdings Ltd.: A holding company whose shares were owned by Mrs. Aven. S. Aven Holdings Ltd. held a 30% interest in the DRE group of

companies;

3) Two Rivers Development Ltd.: DRFN established a bare trust to hold their interest in the DRE group of companies;

4) Doig River Resources Limited Partnership (“DRR LP”): DRR LP was established as the holding company for entities owned by S. Avens Holdings Ltd. and Two Rivers Development Ltd. It also functioned as the administrative body for the subsidiary companies;

5) Northern Nations Development Limited Partnership (“NND LP”): NND LP was incorporated as a research and development entity. It was incorporated to keep a distinct separation between the oilfield business and other business opportunities the Avens and DRFN wanted to pursue;

6) Doig River Energy Limited Partnership (also known as “DRE Oilfield Services LP”, and “DRE Oil”) operated an oilfield construction and maintenance business;

7) MYCO/DRE Services Ltd. (“MDS Ltd.”): MDS Ltd. was also an oilfield services business. It was used for contracts that required a union signatory;

8) Doig River Environmental Limited Partnership (“DR Enviro LP”): DR Enviro LP was the entity that pursued the Peejay Secure Landfill Project. It held the assets of that project including the lease and the permits;

9) First Nations Alliance (“FNA”): FNA was formed with a view to organizing 35 First Nations bands in Alberta into a business structure for future projects; and

10) DRE/CF LP: The partnership for the (proposed) operation of the treatment facility. NND LP held a 49.5% of the units in that partnership.

Soil Treatment and Pilot Project

[18] In 2002 or 2003, Mr. Aven worked as a site supervisor for Canadian Natural Resources Limited (“CNRL”). In the course of this work, which involved a clean up operation of an oil spill involving 1–1.5 million litres of contaminated soil, Mr. Aven became aware that there was no economically viable solution to remediate the

contamination because the closest landfill was over 200 km away. This experience prompted him to look into developing a landfill and soil treatment business.

[19] Mr. Aven's research led him to an American company called Soil Savers. Tadd Haygood and Ron Bordelon were the principals of this company, which used technology that had been developed by an American named Bill Rippetoe.

[20] Mr. Aven and Mr. Haygood arranged a pilot project with CNRL to use the Soil Savers technology to try to clean 250 tons of contaminated soil. The pilot project failed because although the process removed the hydrocarbons from the soil, the salinity levels in the remaining soil were above the Ministry of Environment ("MoE") standards for clean soil.

[21] Mr. Aven says that Soil Savers was supposed to pay the $198,000 cost of the pilot project but failed to do so and DRE absorbed this cost.

DR Enviro LP Obtains the Lease and Permits

[22] Albert Cook is an oilfield consultant who has worked in the oil industry in Fort St. John for over 27 years. At all relevant times until the spring of 2010, Mr. Cook worked for DRE and reported to Mr. Aven.

[23] CNRL wanted access to a secure landfill but did not want to take on the liability of building it themselves, so in 2006 or 2007 they discussed the idea of developing a secure landfill to store contaminated soil with Mr. Aven and Mr. Cook.

[24] Based on his previous experience working on the CNRL oil spill cleanup, Mr. Aven was interested in the idea of developing a secure landfill. He assigned Mr. Cook to work on obtaining a lease for an appropriate site as well as the necessary environmental permits.

[25] From 2006 to 2008, Mr. Cook's primary responsibility was to obtain the necessary approvals and permits from the Environmental Assessment Office ("EAO") and the MoE. He concurrently applied for a 40 year lease for the land where the project was expected to take place. The identified property was close to several major oil and gas development projects which generated significant quantities of contaminated soil.

[26] The certificate approval process involved conducting hydrological and geological tests on possible sites. He also consulted with various federal and provincial departments and extensively with six communities and the elders from several Treaty 8 First Nations including the DRFN.

[27] Mr. Cook selected the location for the project in consultation with the DRFN and obtained the approval of DRFN elders for the specific location where the project was to be developed. DRFN approval, support, and participation was vital to the success of the project because it was on land that they consider to be their traditional territory.

[28] Mr. Cook prepared the certificate application that included a proposed landfill as well as a commitment to research soil treatment and undertake this activity, subject to further approvals, if a suitable technology was identified.

[29] The certificate application to construct a secure landfill for the treatment and disposal of contaminated soil at the Peejay Site was approved in September 2008.

[30] The certificate granted to DRE Enviro LP authorized the construction and operation of a secure landfill and the treatment of contaminated soil, subject to the MoE's requirement of a proof of concept with respect to the soil remediation technology.

[31] Two important terms of the certificate are relevant for our purposes:

(i) written consent of the MoE was required prior to disposing legally or beneficially of any interest in the certificate or the approved project, therefore Mr. Aven knew that he could not dispose of an interest in the certificate without this consent; and

(ii) construction of the project had to substantially start within five years of the date of issue of the certificate otherwise the certificate would expire.

[32] In November 2008, DRE Enviro LP leased the land on which the landfill was to be developed from the Province of British Columbia, the Peejay Site.

[33] It took approximately 2.5 years for DRE to obtain the lease and the necessary approvals to build a landfill and treatment facility at the Peejay Site.

[34] According to the plaintiffs' financial records and statements, the cost to obtain the lease and permits was $1,371,843. One of the items included in this amount is the cost of drafting a Confidential Information Memorandum ("CIM"). This document was to be used to raise capital to fund the construction of the project.

[35] DRE Enviro's CIM dated June 3, 2009 states that $900,000 had been spent on obtaining the necessary permits and approvals. It is reasonable to assume that this figure was obtained from DRE Enviro LP and represents the minimum amount that was spent by DRE on the 2.5 year process of obtaining the lease and permits. The higher figure in the financial statements is supported by the business records that were maintained contemporaneously with the leasing and approval process that was undertaken by DRE Enviro LP.

[36] The application for approval to build and operate a secure landfill and treatment facility for contaminated soil in this remote location in Northern British Columbia was a risky and expensive endeavour. Mr. Aven testified that to his knowledge, DRE Enviro LP is the only entity to have successfully obtained a permit to build a secure landfill in BC in the last ten years. He indicated that two other energy companies had made similar applications but they were unsuccessful.

[37] As will be discussed in more detail below, Petrowest ultimately agreed to pay between $5 million and $7.5 million for the Peejay Site and most of this purchase price is attributable to the value of the leased land and permits.

Initial Discussions Between DRE and Environmental Management

[38] Mr. Gaskins was the CEO of IES from 2008 to 2010. This company secured and marketed the technology invented by Mr. Rippetoe that remediated contaminated soil using chemical oxidation. This was the same technology that Soil Savers used in the failed test that had taken place in 2007.

[39] Mr. Aven and Mr. Gaskins met in the fall of 2008 to discuss the possibility of building a treatment facility on the Peejay Site. These discussions became more serious in 2009 and resulted in the parties entering into a "Contract" and Memorandum of Understanding ("MOU"), discussed in more detail below.

[40] From this early stage of their joint venture, Mr. Gaskins and Mr. Aven fundamentally disagree on one essential term of their agreements and purported partnership: the extent of the business that they were going to undertake together.

[41] Mr. Gaskins says that from the outset, the intention of the parties was to create an equal partnership that built and operated the landfill and treatment facility together as one business, and share the profits from both equally. His recollection is that the partnership was supposed to clear the lands and build the treatment facility and that Mr. Aven was responsible for raising the funds to construct the landfill. Mr. Gaskins perceives this as a division of responsibility within the context of a 50/50 partnership.

[42] The defendants say that the landfill and treatment facility were always intended to be two separate businesses.

[43] Mr. Gaskins says that the treatment facility included the scales, scale houses, pads for curing treated soil, and roadways. It was more than just a building.

[44] Mr. Gaskins steadfastly believes that the landfill and treatment facility were intended to be one business, operated by the partnership that started with the intake of contaminated soil to be treated and separated into clean soil, to be resold, and a by-product of the treatment process that was to be disposed of in the landfill. This end-to-end process is what made this opportunity attractive to the DRFN, Dr. Navarro, and IES. He emphasizes that the reason that the soil was handed off to DRE for disposal in the landfill was because DRE held the relevant permit.

[45] The Avens completely disagree. Their view is that the parties were intending to enter into a partnership for the purpose of building and operating the treatment facility and that the construction of the treatment facility was to be funded by CFP.

[46] DRE’s contribution to this proposed partnership was to consist of a right to access the leased land and use a small portion of it to construct a treatment facility. They would also contribute the use of the permits obtained by DRE to facilitate the approval and operation of the treatment facility. They strongly deny that it was ever their intention to contribute the lease and the permits themselves to the proposed partnership.

[47] In their view, the business deal was that in exchange for allowing CFP to set up a treatment facility business on their leased land and make use of their permits and associated landfill, for which they were to be paid reasonable tipping fees, the profits from the treatment facility were to be shared equally by DRE and CFP. The Avens firmly maintain that DRE was to operate the landfill separately from this partnership as its own business.

The "Contract"

[48] Although entitled "Contract", this document contemplates a future document with more specific terms and conditions. This document does not contain a clear offer or acceptance with respect to essential terms such as the parties' respective contributions to the proposed new partnership. In short, it was not a legally binding contract notwithstanding its title.

[49] It refers to commitments between the parties regarding "the initial treatment of contaminated soil and manufacture of beneficial reuse products at a new landfill site …"

[50] One of the DRE representations is that "All local, provincial and federal permitting has been secured for the operation of a landfill, to include the treatment of contaminated soil." This suggests that it was the parties' understanding that there would be both a treatment facility and a landfill operated at the Peejay Site.

[51] This sentence is somewhat ambiguous on whether approvals had been received for only the landfill or for the landfill and the treatment of contaminated soil. This uncertainty is clarified in one of the subsequent CFP's representations in which it commits to securing all of the required permits and licenses to treat and remediate contaminated soil. Taken together, it is clear that DRE had received the approvals to operate a landfill and it was up to CFP to obtain the necessary approvals to treat contaminated soil.

[52] Although this document makes reference to the volumes of soil that would be stored and treated as well as the amount that customers would pay for the treatment of soil, these representations were aspirational. Neither DRE nor CFP entered into contracts with local oil and gas soil waste producers for either the storage or treatment of contaminated soil.

[53] One of DRE's commitments in this document was that it would "allow" the development of a fixed base operation for soil treatment, and before then, "allow" a temporary treatment facility to operate on the Peejay Site. Taken together, this suggests that DRE was permitting part of its leased land to be used for the treatment of soil. It does not suggest that the Peejay Site was to operate as one integrated business consisting of a landfill and treatment facility.

[54] This view is supported by another clause that requires DRE to assign amounts received for the treatment of soil to a partnership to be formed by DRE and CFP. The document suggests that this revenue from the treatment facility would be allocated equally between the two entities. There is no reference in this document to the details of the construction or operation of the landfill nor is there any indication that the revenue from the landfill will be shared.

[55] The document contemplates the completion of a more detailed contract to be completed 90 days prior to treatment operations.

Memorandum of Understanding

[56] The next document the parties entered into was the MOU on June 15, 2009. The MOU provides more detail than the April 18, 2009 "Contract", but this document, which incorporates the Contract, was explicitly not intended to create legal obligations. It was intended to be an agreement in principle with legal obligations to arise upon completion of a Definitive Agreement ("DA") that was to be completed within one month of the execution date of the MOU:

> 12. Legal effect of this MOU. The MOU and the Contract set forth the agreement in principle made between the parties as of the date hereof. This MOU and the Contract do not create legally binding obligations between parties and such obligations will only arise upon the execution of the Definitive Agreement. The parties agree to cooperate and use reasonable commercial efforts to negotiate and settle the terms of the Definitive Agreement within one month of the date hereof.

[57] One of the purposes of the MOU was to set out which costs would be the responsibility of the DRE/CF LP and others that would be the responsibility of each of the partners of the limited partnership.

[58] The MOU contemplated the formation of the DRE/CF LP with each of DRE and CFP as limited partners with a 49.5% interest and a 50% interest in the General Partnership ("GP"). Although Mr. Aven was the only appointed director of

the GP, the MOU specified that two of the directors of the GP were to be appointed by the Navarro family. Dr. Navarro and CFP failed to appoint anyone else as a director of the GP.

[59] Although an earlier draft of the MOU contemplated the contribution by DRE of the lease and permits, this executed version of the MOU explicitly did not require DRE to contribute or assign either the lease or permits to the DRE/CF LP. Instead, it contemplated the parties entering into an operating agreement whereby the DRE/CF LP would be able to make use of the permits. This is consistent with the Avens' evidence that they had no intention, nor authority from the DRFN or the Province of British Columbia, to contribute the permits to DRE/CF LP.

[60] The MOU indicates that DRE/CF LP will be responsible for the cost of construction of the treatment facility. This runs counter to Mr. Aven's evidence that the treatment facility was intended to be CFP's business and that DRE and the DRFN would not be responsible for any of the costs associated with building it. The costs of operating the treatment facility were to be determined by the GP of the DRE/CF LP.

[61] The parties also agreed that DRE/CF LP would pay reasonable tipping fees to DRE for soil delivered to the landfill. This is consistent with the landfill being operated solely by DRE and the treatment facility being a joint venture of both DRE and CFP.

[62] The MOU contemplates a ratable sharing of common costs as between DRE and DRE/CF LP for the construction, maintenance, and use of common areas and services. This also suggests that the parties were going to operate the landfill and the treatment facility as separate businesses otherwise there would be no need to allocate responsibility for common costs as between DRE and CFP.

[63] With respect to the parties' contributions to DRE/CF LP, CFP was to contribute US $1 million to construct the treatment facility and "relevant portion of the landfill". DRE was to provide unrestricted access to the land, use of the permits, and be responsible for the financing, construction, and operation of the "remainder of the landfill".

[64] The profits from the operation of the treatment facility were to be divided equally by DRE and CFP and to the extent that the DRE/CF LP required further

funds, DRE and CFP were to provide them equally.

[65] The clear intention of the MOU is for DRE and CFP to construct and operate a treatment facility business on the land leased by DRE. CFP was to contribute the US $1 million to commence construction of the treatment facility and DRE's contribution was access to the land and use of the permits without actually assigning or contributing them to DRE/CF LP.

[66] DRE's intention appears to have been to provide something akin to a licence to the DRE/CF LP to use its permits for the purpose of operating the treatment facility. By incorporating the contract into the MOU, it is clear that it was CFP's responsibility to obtain the necessary permits, licenses, and approvals to operate the treatment facility.

[67] When read together and in their entire context, it is apparent that the Contract and MOU are intended to describe the creation of a joint venture in the form of a limited partnership of CFP and DRE for the purpose of constructing and operating a treatment facility. I do not read these documents as suggesting that both the treatment facility and landfill are part of the joint venture. On the contrary, it appears that DRE was to operate the landfill and DRE/CF LP was responsible for the treatment facility. DRE was to permit DRE/CF LP to use its land and permits to develop a treatment facility with CFP providing the initial capital to construct it.

Mr. Aven as Director of CFP

[68] Mr. Gaskins asked Mr. Goodrich, DRE's counsel, to incorporate CFP on July 8, 2009. The purpose of incorporating CFP was to hold Environmental Management's interest in the Peejay Site. To expedite matters, Mr. Aven was named as the initial director with the intention that other directors would be named later.

[69] Mr. Gaskins testified that he asked Mr. Goodrich to name further directors but was not sure what happened after that.

[70] In email correspondence, Mr. Goodrich confirmed that Mr. Aven agreed to serve as a nominee director of CFP.

[71] Mr. Aven resigned as a director of CFP on February 16, 2011.

[72] Mr. Aven was a nominee director of CFP and held no interest in the company. It was created at the direction of Mr. Gaskins and its day-to-day function was as the Canadian arm of the Environmental Management companies that invested in the Peejay Site.

Treatment Facility Construction Begins

[73] In late June or early July 2009, Environmental Management took steps to commence construction of a building for the proposed treatment facility.

[74] Michael Marsolek, an associate of Mr. Gaskins, obtained a bid from Premier Contractors ("Premier"), a company based in Missouri, for the construction of the treatment facility.

[75] The exact date that the Premier bid was provided is unknown. It can be inferred that the bid was provided sometime before July 22, 2009 because a draft of the DRE/CF CIM as of this date included amounts from this bid.

[76] In July 2009, Mr. Aven believed that significant steps needed to be taken before the parties were ready to proceed with construction. He was surprised when he received a call from Peace River Building Supplies informing him that roughly $150,000 of wood had been ordered for the construction of the treatment facility.

[77] At that time, the parties knew: a) there was a $600,000 shortfall between the US $1 million provided by Dr. Navarro and Premier's successful bid for the construction of the treatment facility; b) the partnership agreement had not been signed; c) the DA was a long way from being completed; and d) the technology had not been approved through the MoE permit process.

[78] Notwithstanding these outstanding issues, Mr. Aven assisted Premier in making arrangements to start construction of the proposed treatment facility.

[79] In particular, Mr. Aven arranged for DRE to supply labour and equipment for a twenty-man crew to work on the construction of the treatment facility. DRE obtained those workers from its regular oil-patch construction staff.

[80] Mr. Aven testified that DRE agreed to provide a discount on its normal oil-field labour rates, and that those rates were approved by Environmental Management before men or equipment were put on the job.

[81] Mr. Aven introduced Mr. Brian Nobis from Premier to contractors in the area and established accounts with them for the construction of the treatment facility. As a result, DRE considered itself to be responsible for those accounts. One of the primary suppliers for tools and equipment was CAT Rental Company ("CAT Rental"). Mr. Aven arranged for Mr. Nobis' account at CAT Rental after which Mr. Nobis or one of his staff did most of the ordering of equipment for the construction of the treatment facility.

[82] Mrs. Aven thought it was foolish to commence full scale construction of the treatment facility in the absence of a limited partnership agreement, a DA, adequate financing, and the necessary MoE approvals. She was concerned because the earlier test using the same soil cleaning technology had failed and had cost DRE $190,000 which they had not recovered.

[83] Mrs. Aven confirmed that the technology that was to be used in the treatment facility was the same technology that Soil Savers used in the failed test. She believes that the test failed because the person conducting it made mistakes in the testing process.

[84] Mr. Aven says that Mr. Gaskins proceeded hastily with the construction of the building notwithstanding the $600,000 shortfall between the resources available and the cost of construction of the building. Mr. Aven was also concerned that there was no limited partnership agreement, no DA in place on how the proposed partnership would operate, and no MoE permit to operate a treatment facility. Meanwhile, Mr. Gaskins was charging ahead and ordering significant quantities of supplies from local suppliers such as wood from Peace River Building Supplies, which Mr. Aven agreed to take delivery of.

[85] Mr. Aven described the work that took place on the Peejay Site in the summer and fall of 2009 as a whirlwind. This work happened while he was busy on projects with his two other companies that employed over 175 people and had extensive amounts of equipment in the field. During this period, he was also tying to arrange financing for the landfill.

[86] Mr. Aven says he provided substantial resources to the construction of the treatment facility by providing equipment and a 20–30 person construction crew for which he charged discounted rates to the DRE/CFLP.

[87] Mr. Aven says that he provided the labour rates that DRE would be charging the DRE/CF LP to Mr. Gaskins and Mr. Marsolek before construction began and that they were discussed and agreed to with respect to both time and material. There is evidence that these rates were provided to Dr. Navarro's accountant, John Mills, in December 2009 and again in January 2010 but there were no documents at trial to support Mr. Aven's contention that these rates were provided to Mr. Gaskins, Mr. Marsolek, or anyone else associated with CFP, prior to the start of construction on the treatment facility.

[88] Having obtained the US $1 million in funding from Dr. Navarro, I am left with the impression that Mr. Gaskins wanted to proceed as quickly as possible to construct the treatment facility. The window of time available to do this work is only a few months in Northern British Columbia so he wanted to start immediately. The Avens may have disagreed with this fast-paced approach, but they facilitated it by introducing Mr. Gaskins and Mr. Nobis to various local vendors and by DRE providing significant labour and material to the construction of the project.

[89] The Avens knew that Dr. Navarro's US $1 million was inadequate to complete the construction because both the July 20, 2009 CIM as well as the final version dated August 6, 2009 specifically set out the anticipated cost of construction of the treatment facility at over $1.6 million.

[90] Although the MOU was not legally binding, it contemplated that after the initial contribution by CFP of $1 million, further financing for the DRE/CF LP would be made on a 50/50 basis as between DRE and CFP in the event that other sources of financing were not available.

[91] The Avens therefore knew that they may become responsible for costs associated with constructing the treatment facility that were in excess of $1 million.

[92] All together, the construction over this period contributed the following improvements to the property:

(i) clearing and stripping of the land;

(ii) construction of roads, culverts, and the storm water pond; and

(iii) the partial construction of a 50,000 sq. ft. building to house the treatment facility.

The Limited Partnership

[93] The DRE/CF LP was formed on July 14, 2009 by the filing of the certificate of limited partnership with the Registrar of Companies for British Columbia.

[94] The certificate of limited partnership identifies the business of the partnership, which is a legal requirement of s. 52(2)(b) of the *Partnership Act*, R.S.B.C. 1996, c. 348. The business of the DRE/CF LP provided for in the certificate is the treatment of contaminated soil:

> The business of the Limited Partnership shall be the business of treating or remediating certain hydrocarbon and salt contaminated soil waste products, and the Limited Partnership may exercise powers ancillary thereto.

[95] In or around August 2009, NND LP and CFP entered into a limited partnership agreement (the "LPA"). The date of execution is uncertain, but based on email correspondence adduced at trial, it can be inferred that it was executed after August 4, 2009.

[96] Under the DRE/CF LP, the two limited partners were CFP and NND LP. The general partner was DRE/CF GP.

[97] The partnership business described in Article 2.5 of the LPA is also the treatment of contaminated soil:

> The business of the Limited Partnership shall be the business of treating or remediating certain hydrocarbon and salt contaminated soil waste products, and the Limited Partnership may exercise powers ancillary thereto.

[98] Neither the certificate nor the LPA refer to the business of storing contaminated soil in a landfill.

[99] CFP and NND LP's initial capital contributions to the DRE/CF LP are set out in Article 7.1 of the DRE/CF LP Agreement. That term provides that the initial capital contribution of each was $50.00.

[100] Mr. and Mrs. Aven chose NND LP as the limited partner to this agreement. The reason was to "protect the landfill" by holding their interest in the treatment facility at arm's length from the company that held their interest in the landfill (DRE Enviro LP). Mr. Aven testified that NND LP was the DRE partner to ensure that

there was definite separation between the two DRE entities and to ensure that there was no connection between the treatment facility and the landfill.

[101] Mr. Aven was named as the sole director of the DRE/CF GP. He resigned from this position on February 16, 2011. During his time as a DRE/CF GP director, Mr. Aven took no steps and was not asked by anyone to take any steps in this capacity.

[102] No one gave evidence of any attempt to invoke the terms of the LPA and Mr. Aven could not recall that anyone had ever referred to it after it was executed.

[103] The MOU sets out the issues for further discussion that are to be finalized in the DA which was to supersede and replace the MOU and Contract. Importantly, the LPA does not expand upon or clarify most of these specific issues. Although it sets out the formation of the LP, it does not elaborate in any substantial way on the issues of contributions to the initial operations of the DRE/CF LP, operation of the treatment facility, common costs allocation, or the partners' relative capital contributions to DRE/CF LP, aside from the necessary formalities involved in creating partnership units at nominal capital cost to the parties.

[104] The LPA is a 54 page document that sets out the usual boiler plate provisions contained in these types of agreements but it does not deal with the substance of the business to be operated by the DRE/CF LP. It does not clarify the central issue of the scope of the joint enterprise: treatment facility only, or landfill and treatment facility. As such, it clearly is not the DA contemplated by the parties when they signed the MOU.

[105] The LPA does contain one useful indication of the intention of the DRE companies in entering into this agreement with CFP. The limited partner that entered into this LPA with CFP as the other limited partner was NND LP, not DRE Oil or DRE Enviro LP. This is telling in that DR Enviro LP entered into the lease for the land and held the relevant permits for the operation of the landfill. Mrs. Aven testified that it was her suggestion that NND LP be the entity that entered into the LPA with CFP in order to clearly separate the lease and permits, held by DR Enviro LP, from DRE/CF LP. By using NND LP as the DRE affiliate that entered into the LPA, the Avens believed that they were ensuring that there was no risk of DRE or the DRFN losing, or in any way compromising, the rights associated with the lease and permits.

[106] The LPA is dated July 14, 2009, which is exactly one month after the MOU was executed. The plaintiffs suggest that this timing supports their view that this document was intended to be the DA because the MOU contemplated the finalization of the DA within one month of the signing of the MOU. There is some evidence to suggest that the LPA was executed later than July 15, 2009, but in any event, as discussed above, I do not accept that the LPA was intended to replace or be the DA nor was its execution a waiver of the parties' intention to enter into a DA because it did not address or elaborate on most of the issues described in the MOU.

Lake Louise Meeting

[107] In August 2009, Mr. and Mrs. Aven met with Dr. Navarro in Lake Louise, Alberta.

[108] The subscription agreement that Dr. Navarro signed by which he made his $1 million investment was dated June 19, 2009, but until this meeting he had not met the Avens. Dr. Navarro was impressed with them. He says they discussed the project and he asked the Avens for information about the business potential of soil treatment at the Peejay Site.

[109] Mr. and Mrs. Aven both recall warning Dr. Navarro that his money was being spent quickly and that he should watch his investment. Dr. Navarro replied that he trusted Mr. Gaskins.

[110] Dr. Navarro asked for additional information and Mr. Aven sent the DRE/CF LP CIM, dated August 6, 2009, to him. This version of the CIM had been sent to the Avens by Mr. Gaskins for their final review and approval.

The DRE/CF LP Confidential Information Memorandum

[111] The DRE/CF LP CIM was drafted for the purpose of obtaining additional financing.

[112] An earlier version of this CIM, dated July 20, 2009, defined the "Facility" or "Project" as a "secure waste treatment and landfill facility".

[113] The final version of this document, dated August 6, 2009, which Mr. Gaskins sent to the Avens for their approval and Mr. Aven in turn forwarded to Dr. Navarro,

no longer defined “Project” or “Facility”. Its executive summary states “[DRE/CF LP] is developing a secure hydrocarbon waste treatment facility …” The reference to a landfill had been deleted.

[114] The August 6, 2009 version of the CIM suggests that financing was being sought to develop the “Facility”. Elsewhere in the document there are references to the “Project” however neither of these terms are defined in this later version of the CIM.

[115] The changes to this document suggest that the scope of the LP’s work was intended to be limited to the treatment facility and that the landfill was a separate business to be operated by DRE. These changes were presumably accepted by Mr. Gaskins because he forwarded the version containing this revised language to the Avens for their approval.

[116] At trial, Mr. Gaskins could not explain the changes to the CIM. He said that somehow the reference to the landfill was deleted and it did not make sense to him why that change was made. His evidence was that investors would only be interested in investing in both a treatment facility and landfill. This may be so but aside from Dr. Navarro, there were no other investors that came forward to invest in this project.

[117] The evidence is unclear on whether this CIM was ever used to try to obtain additional funding. However, the CIM is instructive insofar as it is consistent with the MOU on the issue of the scope of DRE/CF LP’s project: it was to build and operate a treatment facility.

[118] Mr. Gaskins’ evidence on this fundamental issue is not credible. He has no explanation for why he would have forwarded the revised CIM to the Avens for their approval when it contained this substantial change in the scope of the project to include only the treatment facility and not the landfill. Mr. Gaskins may have told Dr. Navarro that the project included the landfill in order to entice him to invest, but his explanation that the landfill and treatment facility were intended to be operated as one business is not supported by the MOU, the CIM, or the statement of business on the certificate of LP and the LPA.

The Definitive Agreement

[119] The Avens and Mr. Gaskins testified that they wanted to properly document their agreement by completing the DA that was contemplated in the MOU. A draft of the DA, entitled "Project Agreement" was completed on September 28, 2009 by Bob Goodrich, counsel for the Avens and DRE. This version of the DA contained numerous notes to draft suggesting that there were quite a few issues yet to be resolved by DRE and CFP.

[120] Prior to drafting the DA, Mr. Goodrich took notes of a conference call that included Mr. Aven, Mr. Marsolek, and two accountants. His notes suggest that DRE and CFP contemplated two activities at the Peejay Site: a landfill and a treatment facility with the DRE/CF LP to be involved in the latter not the former.

[121] During this meeting, the participants discussed completing the DA to supersede and replace the MOU so the parties obviously did not treat the LPA as the DA or waive the need for the DA. Mr. Goodrich was probably involved in drafting the LPA and continued to be involved in drafting and reviewing various iterations of the DA.

[122] On the issue of contributions to the LP, one of the accountants was going to allocate an equal amount of contribution by DRE to show in the partnership account to the contribution of the $1 million by CFP. The rationale for DRE's contribution was to be that they had expended a large amount to obtain the permits and they would be making the use of them available to the LP at no cost for an indefinite period. This seems to be an accounting exercise that was being undertaken to justify an equalization of each partner's contribution to the LP as opposed to a detailed valuation and assessment of each parties' relative contributions.

[123] The business deal was intended to be that the LP would pay its expenses from the gross revenue received from the treatment of soil and then DRE and CFP would share the profits equally.

[124] The participants also discussed cost sharing and Mr. Aven and Mr. Marsolek were to meet again in the coming weeks to finalize these details. This cost sharing also points to the operation of two separate businesses at the Peejay Site.

[125] This first draft of the DA provides that CFP Ltd. shall contribute $1 million for the purpose of:

(i) constructing improvements on the land in connection with the treatment facility;

(ii) operating the treatment facility; and

(iii) operating that portion of the landfill related to the treatment facility.

[126] The project agreement also contains a section titled "Operation of the Treatment Facility". That section contains various covenants of NND LP, CFP, DR Enviro LP and DRE. The NND LP covenants include a term that it would:

> Cause DRE (GP) to enter into a sublease agreement with the Limited Partnership. . . . whereby DRE (GP) shall sublease to the Limited Partnership that portion of the Land that the Treatment Facility occupies. Payments by the Limited Partnership to DRE (GP) for the Sublease shall be [%] of the revenue generated by the Limited Partnership, and the Sublease shall terminate when NND LP is no longer a limited partner of the Limited Partnership.

[127] The covenants of CFP include that it would:

> …enter into a sub-license agreement with the Limited Partnership in the form attached as Exhibit 1 hereto (the 'Sub-License Agreement') for nominal consideration pursuant to which (a) CFP or its Affiliate grants, to the extent permitted by the License Agreement the right to use the Licensed Technology anywhere in the world, so long as CFP is limited partner of the Limited Partnership.

[128] In December 2009 and January 2010, Mr. Aven requested that Mr. Bordelon and Mr. Haygood continue work on the Definitive Agreement.

[129] On January 29, 2010, Mr. Goodrich provided comments to Mr. Aven with respect to the new draft prepared by Mr. Bordelon. Those comments were forwarded to Troy Murrell, the lawyer for Dr. Navarro, who provided his own comments on February 5, 2010.

[130] The main substantive difference between the draft prepared in September and the draft circulated in January/February is a change to the limited partnership units. In that draft it was contemplated that NND LP and CFP would each own 41.5% of the partnership units, Dr. Navarro would own 10%, and Engage (Mr. Bordelon and Mr. Haygood's company) would own 6%.

[131] This draft of the DA provides that the parties had entered into the contract and MOU, and desired to enter into a DA to replace the contract and MOU:

> K. DRE LP and CF have entered into a contract dated April 18, 2009 but effective as of November, 2008 (the 'Contract') and a memorandum of understanding dated June 15, 2009 (the 'MOU') setting out in principle the rights and obligations of each Party; and
>
> L. Pursuant to the MOU, the Parties desire to execute a definitive agreement to supersede and replace the MOU.

[132] The draft of the DA circulated in February 2010 was the last draft prepared. The DA was never finalized nor executed.

Treatment Facility Construction Ends

[133] By late October or early November of 2009, construction of the treatment facility ended. The parties agree that bills were not being paid by CFP to DRE and some of the other vendors in Fort St. John who had worked on the Peejay Site but they disagree on why this happened.

[134] Mr. Gaskins says that work on the project concluded in October or November 2009 for two reasons: 1) the weather was getting colder so construction could not continue; and 2) CFP and Mr. Gaskins were asking questions about DRE's billings to the partnership and not receiving satisfactory responses from Mr. Aven.

[135] Although Mr. Gaskins says that these discussions were initially positive, they quickly became contentious with Mr. Aven threatening to put the project into receivership if CFP refused to pay vendors and DRE invoices.

[136] Mr. Gaskins says that CFP slowed down the payment of some of these invoices because he was not receiving sufficient detail regarding the amounts that DRE was billing DRE/CF LP for the project. He says that although they had asked Mr. Aven for supporting information and explanations, they had not received satisfactory responses.

[137] The Avens say that CFP had proceeded with the construction in a haphazard manner, without adequate financing, and had incurred significant bills that they then refused to pay. Mr. Aven recalls that he was receiving daily calls

from vendors and that the situation was serious because most of them were small “mom and pop operations” that needed payment.

[138] When the construction activity began a few months earlier, Mr. Aven helped Mr. Gaskins and Mr. Nobis, from Premier Contracting, set up accounts for the LP with local area vendors. As a result, these vendors looked to Mr. Aven to ensure that their bills were paid. A further complication was that some of these vendors were pressuring the Chief and Council of the DRFN and threatening to sue them for the non-payment of invoices. Mr. Aven had essentially vouched for Mr. Gaskins, Mr. Nobis, and CFP by introducing them to local vendors and he felt immense pressure to have their bills paid.

[139] Both Mr. and Mrs. Aven indicated that although they perceived the costs of construction of the treatment facility to be the responsibility of CFP, they thought that local vendors would hold them responsible for payment. Furthermore, DRE had provided substantial resources to the LP in the form of a 20-30 person labour force as well as various equipment and other services. Mr. Aven was concerned about CFP’s non-payment of DRE’s bills for these services and eventually pulled his resources from the Peejay Site thereby ending the construction of the treatment facility.

[140] The Avens knew that the unpaid bills of DRE/CF LP would become their responsibility. Accordingly, they took steps to shut down construction of the treatment facility as a result of the non-payment of bills by CFP.

The Dallas Meeting

[141] With construction on the treatment facility halted and the spectre of approximately $600,000 in unpaid bills outstanding, Dr. Navarro invited the Avens to come to Dallas for an in-person meeting to discuss these issues.

[142] Mr. and Mrs. Aven attended this meeting along with Dr. Navarro, Mr. Gaskins, and several other people associated with Dr. Navarro and CFP: Mr. Marsolek, Greg Jeffers, John Mills, and Marshall Doody.

[143] The purpose of the meeting was to discuss how to ensure that the project would proceed.

[144] Mr. Aven testified that at the meeting, Environmental Management raised a number of issues with respect to the accounts receivable:

(i) they questioned the amounts invoiced for services provided by Tracy Hunter (Mr. Aven's daughter) through Hunterworks;

(ii) they also took issue with costs associated with a quad ATV trip taken by the Avens, Mr. Gaskins, and Mr. Marsolek;

(iii) Environmental Management believed that the CAT Rental invoices were too high, and advised that they had received a quote from another CAT Rental branch with lower rates; and

(iv) Environmental Management accused Mr. Aven of overcharging for labour costs.

[145] When Dr. Navarro arrived, the conversation shifted to discussion of further funding by Dr. Navarro and possible changes in corporate structure contingent on that funding.

[146] Mr. Aven's priorities remained getting the bills paid and signing the DA. He testified that as a concession and in hopes of clearing the obstacles to getting the bills paid, he agreed at the Dallas meeting not to charge for two disputed items: the amounts invoiced by Ms. Hunter and the quad rentals. Mr. Aven says he did so despite believing that Ms. Hunter had earned the amount billed and that the complaint with respect to the quads was spurious.

[147] Mr. Gaskins, Mr. Marsolek, and others had asked the Avens if they could join them on the quad trip the Avens had planned. The Avens agreed on the condition that all parties bear their own costs for the trip. Despite this agreement, Mr. Gaskins and Mr. Marsolek did not pay any of their costs of the trip, including for food and beer. They then complained of the cost of the rental and repair of the quad ATVs that they used during this trip.

[148] The Avens investigated the quote for lower CAT Rental rates provided by Mr. Marsolek. When Mr. Aven went to the local CAT Rental store and inquired about the lower quote, he was informed that the quote was for an account of a considerably larger size, bearing a 45% discount rate rather than the 25% enjoyed

by Mr. Aven. The quote was therefore not an accurate representation of what appropriate rental rates should be for DRE/CF LP.

[149] Dr. Navarro testified that he was advised of concerns regarding the misuse of funds and that he requested Mr. and Mrs. Aven attend the meeting in Dallas in order to have an open discussion. He felt the tone of the meeting was somewhat hostile as Mr. Gaskins and Mr. Marsolek were aggressive with Mr. and Mrs. Aven. At one point, Mr. and Mrs. Aven left the meeting and Dr. Navarro had to calm them down. He also told Mr. Gaskins that his behavior was not acceptable. Dr. Navarro said that he agreed to provide whatever was needed to ensure the project continued.

[150] John Mills, Dr. Navarro's long time accountant, testified that, at the conclusion of that meeting, the parties agreed to move forward and work together to complete the project. He recalls that Mr. Haygood provided an estimate that approximately $600,000 was needed to complete the construction of the treatment facility. Mr. Mills also recalls that completing the DA was a priority at that time.

[151] Notwithstanding their disagreement with some of the concerns expressed by Mr. Gaskins and Mr. Marsolek, Mr. and Mrs. Aven agreed to provide further information on some of the charges. The Avens say that they left the meeting with the hope that the outstanding bills would be paid.

[152] One of the contentious items discussed in Dallas was the hiring of Ms. Hunter to supervise clearing and earth moving work at the project. Both Mr. Gaskins and Mr. Cook, the project manager at the Peejay Site, believed that Ms. Hunter did not have the requisite experience and background to do this work and she was unaware of the basic safety requirements on a project of this type.

[153] During the Dallas meeting, other issues raised involved inconsistencies in payroll amounts charged by DRE to the DRE/CF LP and personal expenses of Mr. Aven, relating to the repair of his own all terrain vehicles, being charged to the DRE/CF LP.

[154] Mr. Gaskins says that at the conclusion of the meeting, the Avens agreed to resolve all of the items that had been discussed by deducting these expenses from DRE/CF LP and presumably paying them through DRE. They also agreed to

restore access to the accounting software to Mr. Mills, which in his view, had been cut off by the Avens when their disagreements arose.

[155] After the meeting, Mr. Gaskins tried to follow up with Mr. Aven on these items and received no response to either telephone calls or emails. In his words, Mr. Aven "went dark".

[156] The Avens dispute this characterization and pointed out that they gathered information to respond to the information requests made in the Dallas meeting. Examples of the information provided by Mr. Aven include:

(i) On December 15, 2009, Mr. Aven provided rates for the DRE personnel who had worked on the Peejay Site. Mr. Mills requested this same information in January as he had missed seeing Mr. Aven's email in December.

(ii) On December 18, 2009, Mr. Aven emailed a letter provided by CAT Rental that provided a justification for the amounts charged. Mr. Aven's cover email explained that the quote obtained by Mr. Marsolek was not a good comparison because it had been using the name of a CAT Rental customer that did significantly more business than DRE.

[157] In addition, in furtherance of Dr. Navarro's request, Mr. Aven had a door installed on the treatment facility building (the "Building"). Mr. Cook arranged for the installation of the door at a cost of $9,042.60.

[158] That installation of the overhead door was the last thing constructed on the Building. It was otherwise left unfinished with a large hole on one side that was boarded up with two-by-fours.

[159] Mr. Gaskins became increasingly frustrated with what he perceived as a lack of communication so he and Dr. Navarro asked to meet with Mr. Aven and Chief Norman Davis of the DRFN in the spring of 2010.

March 2010 Meetings

[160] To resolve the outstanding issues, meetings were scheduled in Fort St. John on March 25 and 26, 2010. The March 25 meeting was organized by Mr. Aven. In addition to inviting Dr. Navarro, Mr. Gaskins, and several other people associated with Environmental Management, unbeknownst to them, he also invited several of

the local unpaid vendors who had provided goods and services to the Peejay Site. Mr. Aven admits that he did not tell Mr. Gaskins, Dr. Navarro, and others that the vendors would be at the meeting. Mr. Aven wanted them to feel the full force of resentment and anger that he had been experiencing as a result of the unpaid bills.

[161] Immediately prior to the March 25 meeting, Dr. Navarro and Mr. Gaskins asked to speak with Mr. Aven privately. Their evidence is that they wanted to give Mr. Aven an advance warning that during the main meeting, they would be blaming him for problems on the project and suggesting that he be replaced as the facility manager. Dr. Navarro and Mr. Gaskins testified that at this pre-meeting, Mr. Aven took responsibility for the problems with the project and agreed to step aside in favour of Mr. Cook but then completely reversed his position and became confrontational when the main meeting commenced.

[162] Mr. Aven has a dramatically different recollection of the events. He says that the pre-meeting was very short and nothing substantial was agreed to. He deliberately surprised Mr. Gaskins and Dr. Navarro by inviting the unpaid vendors and this was done to express his frustration over the unpaid bills.

[163] The meeting was unsuccessful and Mr. and Mrs. Aven left it after Dr. Navarro accused them of taking kickbacks from vendors. The Avens say that as of that point, they had no further interest in being involved in the treatment facility.

[164] There are three notable points from the March 25 meeting. First, Dr. Navarro and Mr. Mills made statements transcribed by a note-taker at the meeting that confirmed that they understood that the landfill and the treatment facility were separate projects:

> Terry: we're also working toward the landfill, your plant is extra
>
> Carlos: the building and the land cleaning is altogether different from the landfill
>
> ...
>
> Carlos: accountant John advises that we pay what belongs to the plant project not all the outstanding because landfill is separate from the building

[165] Mr. Mills confirmed that he understood that Dr. Navarro should not be charged for construction of the landfill because they were two separate undertakings.

[166] Second, Mr. Aven clarified again that the lease would stay in the name of DR Enviro LP. Dr. Navarro requested that the land be put in his name in exchange for an additional investment of $1 million. Mr. Aven responded that “the land is leased, it won’t go out of our name”.

[167] Third, Mr. Mills understood that there was approximately $600,000 of outstanding bills of which around $200,000 was disputed.

[168] Dr. Navarro, Mr. Gaskins, and other members of Environmental Management met with Chief Davis and several DRFN representatives on March 26, 2010. Notes of that meeting were taken and at one point during the discussion, on the issue of the payment of invoices, Dr. Navarro is reported to have said “go through the bills divide them into landfill/plant”. This clearly suggests that Dr. Navarro knew that DRE/CF LP’s business was the plant/treatment facility and that the landfill was separate. It otherwise would have been unnecessary to allocate the unpaid invoices between the two.

[169] The participants also agreed that Mr. Aven would be removed as the facility manager and Mr. Cook would replace him. This outcome was communicated to Mr. Aven by the DRFN shortly after this meeting took place.

[170] There was also some discussion about completing the DA, applying to the MoE for approval of the soil treatment technology, and finalizing budgets in order to restart construction of the treatment facility by May of 2010. None of these things happened following the March 2010 meetings.

[171] In the summer of 2010, Dr. Navarro hired Mr. Cook to act as his liaison with the DRFN. Mr. Cook did that and kept in touch with the MoE. Mr. Cook testified that there was nothing to manage on the project because it had come to a “screeching halt” as the parties were “deadlocked”. Mr. Cook said there was “no money, no project, and nothing to do”.

[172] There was no further contact between the Avens and anyone at Environmental Management after the March meetings.

[173] Mr. Aven thinks that the outcome of the March 25 meeting was that Dr. Navarro wanted to deal directly with the DRFN.

[174] There was a DRE Oil board meeting on March 31, 2010 and another one on April 15, 2010 which resulted in the dissolution of Mr. Aven's relationship with the DRFN.

[175] Mr. Aven received a letter dated April 20, 2010 from the DRFN that he understood to mean that he was not to have any further dealings with anyone with respect to any of the DRE companies.

DRFN Sale to S. Aven Holdings Ltd.

[176] At the May 4, 2010 board meeting of DRE, various options were discussed to terminate the relationship between the Avens and the DRFN. Mr. Aven says that initially he wanted to be bought out, but eventually an agreement was reached in February 2011 by which he bought out the DRFN's interest in DRE.

[177] In February 2011, the DRFN sold their interest in the DRE group of companies to S. Aven Holdings Ltd. by way of an asset purchase agreement ("DRFN APA"). The purchase price for the assets was $400,000 and S. Aven Holdings Ltd. Assumed responsibility for an outstanding loan payable to the DRFN in the amount of $600,000.

[178] The deal to buyout the DRFN was finalized on February 10, 2011. Until that time, Mr. Aven remained the corporate general partner and sole director of CFP. He resigned from this role shortly after the buyout deal was agreed to.

[179] Under the DRFN APA, S. Avens Holdings Ltd. purchased Two Rivers Development Ltd.'s interest in the DRR LP and its subsidiary companies, including DRE Oilfield, DR Enviro LP, and DRE/CF LP. The sale transferred the interests of all jointly-owned businesses, including the oilfield-services business.

[180] One of the terms of the sale was that Mr. Aven had to remove "Doig River" from the names of the companies so he amalgamated all of them under "Aventur Energy".

[181] The plaintiffs learned of the sale between S. Aven Holdings Ltd. and Two Rivers Development Ltd. by way of public notice in the spring or summer of 2011.

[182] On December 5, 2011, a meeting of the shareholders of IES was held in Dallas, Texas. The meeting minutes state that Mr. Gaskins had been "dismissed for

ineffectual performance (i.e. no business volume) and dissatisfaction with his management style."

[183] Mr. Gaskins testified that he resigned from his role at IES. He denied being dismissed for ineffectual performance.

Sale to Petrowest

[184] In the spring or early summer of 2011, shortly after S. Aven Holdings bought out the DRFN's interest in the DRE companies, Mr. Aven began to take steps to sell the Peejay Site. Notwithstanding several detailed financing options to finance the construction of the landfill that he described at trial, none of them came to fruition. He did not have the funds to construct the landfill or pay the outstanding obligations arising from the purchase of the DRFN's interest in S. Aven Holdings Ltd.

[185] Mr. Aven knew that a condition of the EAO certificate was that the construction of the landfill had to substantially begin within five years of the date the certificate was issued. There was a little more than two years left in this time period and Mr. Aven believed he had no choice but to sell the Peejay Site.

[186] Mr. Aven had discussions with Secure Energy, Tervita, and Clean Harbors. He received one oral offer from Secure Energy for $1.5 million, which he rejected. Around May 2011, Mr. Aven began discussions with Ken Watson of Integrated Resources Ltd. Those discussions led to negotiations between Mr. Aven and Petrowest, with Petrowest being represented by Mr. Watson.

[187] The negotiations between Petrowest and Mr. Aven lasted about one year and Mr. Aven indicated that he worked on this deal every day during this period. He left the impression that completing the sale of the Peejay Site was the most important thing he was working on. For this reason and as will be discussed later, it does not ring true that once the sale to Petrowest completed, Mr. Aven has only a faint recollection of what happened to the proceeds of sale.

[188] In May 2012, Mr. Aven reached an agreement with Petrowest to sell the Peejay Site for $10 million but the certificate of pending litigation filed by Dr. Navarro scuttled that deal. There were no documents at trial to corroborate this deal and Mr. Watson, whose primary responsibility was to negotiate a purchase

price of the Peejay Site with Mr. Aven, was not asked and did not provide any evidence about this purported $10 million agreement.

[189] The certificate of pending litigation was removed upon the payment of approximately $1.9 million into court and Petrowest agreed to purchase the Peejay Site for $7.5 million. On July 16, 2012, Peejay Environmental Ltd. and Petrowest entered into an asset purchase agreement ["APA"] for the Peejay Site.

[190] The purchase price was $5 million plus an earn-out payment of $2.5 million based on "the amount of soil received at the Landfill after the Closing Date for treatment or disposal at a rate of $4.00 per ton for the first 625,000 tons of soil accepted at the Landfill".

[191] Attached to the APA was a Schedule "A" which contained an allocation of the purchase price. That schedule allocates the $5 million initial purchase price under the APA as follows:

1. Equipment – Scale, pug mill, light tower - $82,500
2. Site Improvements – Road work and access, stripping and storm water pond, and land clearing - $375,000
3. Building - $750,000
4. Permits, Lease, and EAO Certificate - $3,792,500.

[192] Mr. Watson was engaged by Petrowest to negotiate with Mr. Aven and Chief Davis so that Petrowest could acquire the site. Mr. Watson said the critical item that was negotiated was the overall purchase price, which was $7.5 million, comprised of an initial $5 million payment with a $2.5 million earn-out. Mr. Watson also negotiated a $1 per ton payment to the DRFN.

[193] Mr. Watson negotiated the allocation of the purchase price in Schedule "A" of the APA. Mr. Watson's evidence was that the allocation for the equipment was based on fair market value based on the cost to acquire the items. The value to the site improvements was the cost to do the work or "cost to build", which Mr. Watson estimated at $1 million. Mr. Watson estimated these amounts based on his experience operating an earth-works company.

[194] Mr. Aven testified that the allocation for the equipment, site improvements, and buildings was an estimate of the cost to purchase. The remainder was

allocated to the permits. He did not recall any discussion of a $1 million figure for the cost of the Building that Mr. Watson referred to in his evidence.

[195] Mr. Watson said the Building was appropriate for treating contaminated soil and that there was some contemplation that the Building might be used as a treatment facility. However, Petrowest decided to operate the Peejay Site as only a landfill. The Building has never, to date, been used as a treatment facility. Ultimately, it was used by Petrowest as a garage to store equipment.

[196] Mr. Watson also testified that there is no proven cost-effective way to treat salt contaminated soil in British Columbia. His evidence was that even if a treatment facility was to be operational, only about 20% of the soil can be treated and 80% is required to be deposited in a landfill.

Expert Report of Mr. Williamson

[197] The plaintiffs tendered an expert report by a business valuator, Greg Williamson, that addressed two issues:

(i) whether the allocation of the $5 million in the APA reflected a reasonable allocation of the land and permits as compared to the equipment, site improvements, and building; and

(ii) what, if any, portion of the earn out payments of up to $2.5 million should be allocated to the landfill as opposed to the treatment facility?

[198] Mr. Williamson concluded that if the parties were operating at arm's length, nothing more is required for a finding that the allocation in Schedule "A" of the APA is reasonable. He concluded that if CFP had been involved in the negotiation, it was possible that the allocation of the purchase price would have been different.

[199] In analysing the sale by the DRFN of Two Rivers Development Ltd. to S. Aven Holdings as compared to the sale of the Peejay Site to Petrowest, Mr. Williamson was asked to assume that in both, the assets being sold were the landfill and treatment facility. This assumption was incorrect. The former included the sale by the DRFN of all of the DRE affiliate companies, including DRE Oil, which was entirely unrelated to the landfill and treatment facility and had been, according to Mr. Aven, a business that generated $8 million to $10 million in revenue in the years leading up to the DRE's involvement in the Peejay Site. While

Mr. Aven's revenue estimates may not be entirely accurate, it is clear that DRE operated for several years as a construction company that built pipelines as well as other oil and gas plant infrastructure. It is reasonable to assume that the DRFN's sale of its interest in this business had some value that was not accounted for by Mr. Williamson.

[200] Mr. Williamson's assumption that the treatment facility and landfill would receive equal volumes of contaminated soil is speculative. Mr. Watson indicated that only 20% of contaminated soil could be treated effectively and he based this estimate on his experience in that industry. The profitability estimates in his report are also speculative. To be clear, I am not criticizing Mr. Williamson's analysis. At trial he acknowledged that his conclusions would change if the assumptions were other than those he was provided with.

[201] Ultimately, Mr. Williamson concluded that he could not provide a definitive opinion on the reasonableness of the allocation of the purchase price and anticipated earn out payments. Instead he provided various scenarios based to varying degrees on the erroneous assumptions described above. I find the analysis in his report to be of limited use based on the mistaken assumptions and the speculative nature of some of the information he was provided with.

Amounts Contributed

[202] The plaintiffs claim to have spent approximately $1.05 million on the Peejay Site. The defendants agree that the plaintiffs spent at least $790,000.

[203] The significant items of disagreement are as follows:

a) $50,228 for equipment for the treatment facility from Quantum Analytics that was ordered, invoiced, but apparently never picked up;

b) $5,250 for Westar Financial paid as an application fee to get financing for the treatment facility;

c) $3,927 for Riverside Environmental Consulting for consultation on acquiring MoE permits for the Treatment Facility;

d) $12,000 for HUB International for insurance on the building. Dr. Navarro was the sole beneficiary of this insurance;

e) $19,710 for living expenses of Environmental Management while they were in Fort. St. John; and

f) $54,750 paid to Mr. Cook. Mr. Cook acted as liaison between Dr. Navarro and the DRFN.

[204] In my view, the above amounts incurred for the treatment facility equipment, the application fee for financing, consultation on the MoE permits, and insurance on the building are attributable to the DRE/CF LP as legitimate expenses relating to the treatment facility. The amount for the living expenses of Environmental Management personnel and the wages paid to Mr. Cook are properly attributable to Environmental Management because they were incurred for its benefit.

[205] The defendants suggest that they paid approximately $550,000 towards the treatment facility. In arriving at this figure, the defendants reduced their claim by 30% during the course of the trial. At the outset, they alleged to have paid over $785,000 towards the treatment facility.

[206] Given my findings below and the state of the evidence before me, it is not necessary to engage in a detailed examination of what the defendants in fact spent on the construction of the treatment facility.

Proceeds of Sale to Petrowest

[207] Following the sale of the Peejay Site to Petrowest, Mr. Aven's evidence on what happened to the $5 million and additional $1 million in royalties is vague and difficult to believe. He suggests that within minutes of this amount being deposited in the corporate bank account of Aventur, it was all used to pay off the debts and liabilities of the company. He agrees that $1 million was used to pay for the buyout of the DRFN's interest in DRE and that another $1 million was placed in trust with the court in order for the certificate of pending litigation to be lifted. He provided no details of what happened to the other $4 million other than to say that it was all spent and that Aventur has no money. This evidence is not credible.

[208] It would have been a simple matter to trace the expenditures relating to this large deposit by reviewing the relevant corporate bank statements. Furthermore, Mr. Aven testified that for over a year leading up to the sale to Petrowest, his daily efforts were directed to finding a purchaser for the Peejay Site. Having found a

willing purchaser from whom he received a lump sum of $5 million, it is not believable that Mr. Aven would be completely unaware of what happened to that money and unable to account for a large majority of it other than to say it is gone.

[209] Mrs. Aven's evidence on what happened to the $5 million and $1 million in royalties is almost as vague as that of Mr. Aven and it is equally unsupported by bank statements or any other objective information other than an undated document that she prepared. Her recollection is that approximately $4.5 million was paid into court and to creditors and vendors. She says that there was nothing left of the $5 million payment, and that when Aventur received the $900,000 that was released from court, it was used to pay Aventur's debts, including its legal bills. The $1 million in earn out payments were received quarterly over a period of time and was used to fund Aventur's day-to-day business. In short, she says that neither she nor Mr. Aven personally received any of the funds from the sale of the Peejay Site.

[210] As an experienced businesswoman with both a bachelor's and master's degree, it is hard to accept that Mrs. Aven is being anything other than deliberately vague about how $2.5 million of the proceeds of sale went into Aventur, which was by all accounts a profitable business, and then somehow disappeared.

THE LEGAL FRAMEWORK

The Existence of a Partnership

[211] Parties to a joint venture only become partners once they have agreed on the nature and scope of the business venture they intend to pursue, then embark on that venture with a view to sharing the profits. The basic rule was stated in *Miah & Ors v. Khan*, [2000] UKHL 55:

> The rule is that persons who agree to carry on a business activity as a joint venture do not become partners until they actually embark on the activity in question. It is necessary to identify the venture in order to decide whether the parties have actually embarked upon it

[212] In *Red Burrito Ltd. v. Hussain*, 2007 BCSC 1277 at paras. 20–21, the Court discussed the legal character of a joint venture and a partnership:

> [20] The definition of joint venture was explained by J. Anthony VanDuzer:
>
> > *The Law of Partnerships and Corporations*, 2d ed. (Toronto: Irwin Law, 2003) at 67:

> Joint ventures are not a distinct form of business organization, nor a relationship that has any precise legal meaning. Functionally, the term “joint venture” is used to describe a relationship among persons who agree to combine their money, property, knowledge, skills, experience, time, or other resources for some common purpose. Usually joint venturers agree to combine their money, property, knowledge, skills, experience, time, or other resources for some common purpose. Usually the joint venturers agree to share the profits and losses from the venture, and each has some degree of control over it. The distinguishing feature of a joint venture is that it is an arrangement set up for a limited time, for a limited purpose, or for both. “Joint venture” is used loosely to refer to all sorts of legal arrangements given effect in corporations and partnerships and in relationships based exclusively on contract.
>
> [21] At common law a partnership is formed if parties to a venture go into business together with a view to sharing the venture’s profits. The partnership exists even in the absence of an express agreement and even where there is an agreement but all of the terms of the agreement have not been completed: see Pitrie v. Racey (1963), 1963 CanLII 522 (BC SC), 37 D.L.R. (2d) 495 (B.C.S.C.); Mathews v. Maurice (1923), 54 O.L.R. 64 (H.C.); and, Khan v. Miah, [2001] 1 All E.R. 20 (U.K.H.L.).

[213] In *Haigh v. Kent*, 2012 BCSC 1361 at para. 101, aff’d 2013 BCCA 380, the Court commented on the necessity of clearly defined business interests:

> Mr. Haigh has not claimed a share of any partnership, and in my view such a claim would not have been tenable. The business of the Resort was intertwined with the Property, and there was never a sufficiently clear demarcation of Mr. Kent’s interests as owner of the Property, and the business interests of the two of them, for the scope of any partnership to be clearly defined.

[214] Consensus on the essential terms of a venture is often evidenced by a contract of some description. The British Columbia Court of Appeal affirmed the essential nature of this consensus and the associated contractual underpinning in *Canlan Investment Corp. v. Gettling* (1997), 37 B.C.L.R. (3d) 140 at paras. 34–35 [*Canlan*].

[215] Although a contractual underpinning of some description is necessary, the court in *Red Burrito Ltd.* emphasized at para. 33 that the central issue is not whether the underlying contract in question constituted a strictly enforceable agreement, but “whether the parties conducted themselves as partners for the purpose of carrying on business together with a view to sharing its profits.” Taken together, these cases suggest that the completion of a binding contract, while not determinative, is strong evidence of a clearly defined joint venture.

[216] Justice Arnold-Bailey described the proper approach for assessing the existence of a contract in *Miller v. Jellybean Park International Inc.*, 2013 BCSC 1237 at paras. 51–55:

> [51] The existence of a contract is assessed objectively to protect the reasonable expectations of the parties: *Hoban Construction Ltd. v. Alexander,* 2012 BCCA 75 (CanLII) [*Hoban*]. If the agreement is in writing, the court should begin its analysis with the text of the agreement. The contract should be read in the context of the agreement as a whole and the words should be given their ordinary, plain meaning; *B.G. Checo International Ltd. v. B.C. Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12.
>
> [52] To be enforceable a contract must have sufficient clarity as to the content of its essential terms: the parties to the transaction, the subject matter, the purchase price and the effective date of the agreement: *Hoban* at para. 41.
>
> [53] However, as stated in *Hoban* at para. 47: “the inquiry is not whether the contracts were competently drafted, but rather whether they disclose the parties’ intention as to the *substance* of the agreement (emphasis in original).” In *Marquest Industries Ltd. v. Willows Poultry Farms Ltd.* (1968), 1968 CanLII 581 (BC CA), 1 D.L.R. (3d) 513 (B.C.C.A.), the Court of Appeal explained the test for upholding contractual rights in para. 12:
>
>> [E]very effort should be made by a Court to find a meaning, looking at substance and not mere form, and that difficulties in interpretation do not make a clause bad as not being capable of interpretation, so long as a definite meaning can properly be extracted... [I]f the real intentions of the parties can be collected from the language within the four corners of the instrument, the Court must give effect to such intentions by supplying anything necessarily to be inferred and rejecting whatever is repugnant to such real intentions so ascertained.
>
> [54] In *Pacific Hunter Resources Inc. v. Moss Management Inc.*, 2008 BCSC 960 (CanLII), the court confirmed a two stage analysis for whether there was a binding contract. First, the court examined the document to determine whether the document suggested the intention of the parties was to create a legally binding agreement. Second, the court considered whether the conduct of the parties was consistent with a contract having been concluded.
>
> [55] S.M. Waddams, in *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010) at p. 45, explains that the parties’ reasonable reliance on the contract is a relevant factor for the courts in enforcing agreements with uncertain terms. The actions of the parties in relation to the agreement are relevant.

[217] Further partnership principles were discussed in *Timberwolf Log Trading Co. Ltd. v. Columbia National Investments Ltd.*, 2011 BCSC 864 at paras. 62–72; in particular, citing *Copcan Contracting Ltd. v. Ashlaur Trading Inc.*, 2010 BCCA 597

at para. 8, the proposition that a contract is enforceable only if it is clear to a reasonable bystander, in light of all of 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.

[218] When the execution of a further contract is a condition or term of the particular agreement being assessed—in other words, when there is only an agreement to agree—there will be no enforceable contract. In *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] S.C.R. 253 at p. 261, the Court adopted the classic statement of the law drawn from *Von Hatzfeldt-Wildenburg v. Alexander*, [1912] 1 Ch. 284 at pp. 288–9:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no unenforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

[219] See also *Berthin v. Berthin*, 2016 BCCA 104 at paras. 46–49.

Unjust Enrichment

[220] Recovery based on the equitable doctrine of unjust enrichment is permitted if a plaintiff can establish that there has been: a) an enrichment or benefit to the defendant; b) a corresponding deprivation of the plaintiff; and c) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

[221] There are two steps at the juristic reason stage of the analysis.

[222] First, a plaintiff must show that no juristic reason from an established category exists to deny recovery. The established categories include a contract, a disposition of law, a donative intent, and other valid common law, equitable, or statutory obligations. If there is no juristic reason from an established category, the plaintiff has made out a *prima facie* case under the juristic reason component: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 44; *Kerr* at para. 43.

[223] Second, if no juristic reason exists to deny recovery, the *prima facie* case may be rebutted if the defendant can show there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to demonstrate why the enrichment should be retained. At this stage, the court may take into account the legitimate expectations of the parties and moral or policy-based arguments about whether particular enrichments are unjust: *Garland* at para. 45; *Kerr* at para. 43.

[224] If unjust enrichment is established, the appropriate remedy must be determined. Remedies for unjust enrichment are restitutionary in nature, and may be monetary or proprietary: *Kerr* at para. 46.

[225] Monetary awards are the presumptive choice. If a monetary remedy is sufficient, it may be quantified on either a value received basis (*quantum meruit*), or on a value survived basis (proportionate share): *BCI Bulkhaul Carriers Inc. v. Wallace*, 2017 BCCA 180 at para. 43 [*BCI*]; *Wilson v. Fotsch*, 2010 BCCA 226 at para. 11 [*Wilson BCCA*].

[226] A value received award generally reflects the market value of the monies or services contributed by the claimant, while a value survived award reflects all or part of the current value of the property acquired or preserved by the contribution: *BCI* at para. 35.

[227] Proprietary awards, i.e. the imposition of a constructive trust, are appropriate when monetary awards are insufficient, therefore a plaintiff must also establish that a monetary award would be inadequate in the circumstances: *Kerr* at para. 52.

[228] In order to justify a proprietary remedy a plaintiff must demonstrate “a link or causal connection between his or her contributions and the acquisition, preservation, maintenance, or improvement of the disputed property.” This must be a “sufficiently substantial and direct” link, a “causal connection” or a “nexus” between the plaintiff’s contributions and the property which is the subject matter of the trust claimed: *Kerr* at paras. 50–51.

[229] The reasonable expectations of the parties may be a relevant factor in in determining the appropriate remedy, but they are not determinative: *Haigh v. Kent*, 2013 BCCA 380 at paras. 32 and 34.

[230] In summary, the complete analytical framework for a claim of unjust enrichment was set out in *Wilson BCCA* at para. 11:

> [11] The basic outline for that analysis can be summarized this way:
>
> 1. Benefit/Enrichment
>
> 2. Detriment
>
> 3. Absence of a juristic reason for the enrichment
>
> a. Established categories
>
> i. Contract
>
> ii. Disposition of law
>
> iii. Donative intent
>
> iv. Other valid common law, equitable, or statutory obligations
>
> b. Reason to deny recovery
>
> i. Public policy considerations
>
> ii. Legitimate expectations
>
> iii. Potential new category
>
> Defences
>
> Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible
>
> Choice of Remedy
>
> a. Is a monetary remedy sufficient?
>
> b. Is a constructive trust required (or equitable damages for the value of the trust interest?)
>
> Quantification of the Remedy
>
> a. Value received (*quantum meruit* basis)
>
> b. Value survived (proportionate share basis)
>
> Set-Off (equitable and legal)
>
> Pre-judgment interest

Oppression and Breach of Fiduciary Duty

[231] In *Wilson v. Alharayeri*, 2017 SCC 39 at paras. 23–24 [*Wilson SCC*], the Court described the components of an oppression claim under ss. 241(1) and (2) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, citing *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 [*BCE*]:

> 23 The nature of the oppression remedy is well recognized in our jurisprudence. Section 241 creates an equitable remedy that “seeks to

> ensure fairness — what is 'just and equitable'" (*BCE*, at para. 58). It gives "a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (*ibid.*). Courts considering claims for oppression are therefore instructed to engage in fact-specific, contextual inquiries looking at "business realities, not merely narrow legalities" (*ibid.*).
>
> 24 The two requirements of an oppression claim are equally well known. First, the complainant must "identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held" (*BCE*, at para. 70). Second, the complainant must show that these reasonable expectations were violated by corporate conduct that was oppressive or unfairly prejudicial to or that unfairly disregarded the interests of "any security holder, creditor, director or officer," pursuant to s. 241(2).

[232] A director may be held personally liable for oppressive conduct if the conduct is properly attributable to the director because he or she is implicated in the oppression, and if the imposition of personal liability is fit in all the circumstances: *Wilson SCC* at paras. 47–48.

[233] There are 4 general principles outlined in *Wilson SCC* at paras. 49–57 that should be employed to determine if personal liability is fit in all the circumstances:

1. The oppression remedy must itself be a fair way of dealing with the situation.

2. Any order made should go no further than necessary to rectify the oppression.

3. Any order made may serve only to vindicate the reasonable expectations of security holders, creditors, directors or officers in their capacity as corporate stakeholders.

4. The Court should consider the general corporate law context in exercising its remedial discretion.

[234] Corporate directors owe a fiduciary duty to the corporation imposed by statute and common law. Broadly, this duty requires directors to act in good faith and in the best interests of the corporation: *BCE* at paras. 37–38; *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68 at paras. 35–36.

[235] The general rule is that directors owe their fiduciary duty to the corporation, and not to the shareholders; however, this rule permits exceptions: *Valastiak v. Valastiak*, 2010 BCCA 71 at paras. 46–50, and it may be appropriate to consider

the impact of corporate decisions on shareholders or particular stakeholders. As stated in *BCE* at para. 39:

> [39] In *Peoples Department Stores*, this Court found that although directors *must* consider the best interests of the corporation, it may also be appropriate, although *not mandatory*, to consider the impact of corporate decisions on shareholders or particular groups of stakeholders. As stated by Major and Deschamps JJ., at para. 42:
>
> > We accept as an accurate statement of law that in determining whether they are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment.

ANALYSIS

[236] The parties did not agree on the scope of their joint venture with sufficient clarity for it to be characterized as a partnership. The plaintiffs' view is that the partnership was intended to be the operation of both a landfill <u>and</u> treatment facility at the Peejay Site. The defendants vehemently disagree. Their view, which is largely supported by the available documentary evidence, is that the purpose of the partnership was to operate a treatment facility and that DRE, and not the proposed partnership, was responsible for building and operating a landfill business.

[237] Had the parties concluded a DA, this issue would have been resolved definitively but one was never finalized. The "Contract", MOU, certificate, and LPA all suggest that the intention of the proposed partnership was to operate a treatment facility, which would of course have access to the landfill but would operate separately from it. This view is also supported by the wording of the DRE/CF CIM and the statements of Dr. Navarro at the March 2010 meetings.

[238] The parties embarked on a venture without first agreeing on its nature and scope. There could not have been an agreement to share the profits in the absence of a clear agreement on what exactly the business was to include. I therefore conclude that the parties were not operating as a partnership.

[239] This finding precludes recovery of any profits from the sale of the property on the basis of a partnership interest. However the defendants have not identified any juristic reason for the plaintiffs' financial contributions so a finding of unjust enrichment is unavoidable.

[240] I decline to award any further relief with respect to the plaintiffs' independent claims for oppression and breach of fiduciary duty.

Were the Defendants Unjustly Enriched?

[241] The plaintiffs have established that the defendants were enriched, and that they were correspondingly deprived. Although the amounts are disputed, the defendants concede that the plaintiffs contributed at least $790,000 to the Peejay Site.

[242] Based on the financial documents provided and the parties' submissions, I conclude that the admitted expenditures of the plaintiffs should be assessed at $810,000. Based on the findings I have made regarding the disputed expenses, further expenses of approximately $72,000 are properly compensable. Therefore, $882,000 is the compensable amount that was paid by the plaintiffs towards construction on the property.

[243] This contribution created an asset in the defendants hands, and this is an incontrovertible benefit received by the defendants in the sense discussed in *Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, [1992] 3 S.C.R. 762 at p. 795, and Peter D. Maddaugh & John D. McCamus, *The Law of Restitution*, loose-leaf edition (Toronto: Thomson Reuters, 2017) at 3.200.10:

> In our view, the most useful analytical device for distinguishing cases in which recovery is appropriate from those in which it is not is to ask, in each instance, whether the defendant has been genuinely or, as others have said, "incontrovertibly" benefited by the conferral in question. The defendant will be incontrovertibly benefited, of course, by the receipt of a money payment. As well, however, <u>incontrovertible benefit can be established, in our view, by the conferral of a benefit which represents an expenditure the defendant would otherwise have sustained or, alternatively, even where this is not so, the conferral has created an asset in the defendant's hands which has a value that the defendant has realized, or perhaps has a value that is realizable by the defendant</u>. [Emphasis added.]

[244] In my view, the plaintiffs have also established that there was a lack of juristic reason for the enrichment.

[245] The potential juristic reasons for enrichment in this case are the existence of a valid contract and, by association, the existence of a partnership.

[246] After considering the above legal principles, it is clear that the parties never settled the vital terms of their contractual arrangement and never achieved the requisite consensus regarding the scope of their business operations. In other words, they never embarked on a clearly defined joint venture with a view to profit, i.e. they did not became partners.

[247] The MOU, which incorporated the earlier “Contract”, explicitly states that it does not give rise to legal obligations, and contemplates the execution of a “Definitive Agreement” within one month that would set out the legally binding terms of the arrangement. This is a textbook example of an agreement where the execution of a further contract is a condition or term—an agreement to agree—and cannot be taken as evidence of an intent to initiate a joint venture on the terms set out in the MOU.

[248] As explained earlier, the evidence is clear that the parties’ LPA was not the definitive agreement contemplated in the MOU.

[249] A reasonable bystander viewing this series of negotiations and agreements would not conclude that the parties had actually agreed on all of the essential terms of the DA, or reached consensus on all matters vital to the proposed arrangement; in fact, quite the opposite.

[250] Although the existence of a formally binding contract is not a strict pre-requisite to the existence of a partnership, the existence of some contractual underpinning is strong evidence of an intent to pursue a joint venture. The critical consideration is whether the parties conducted themselves as partners for the purpose of carrying on business together with a view to sharing its profits: *Canlan* at para. 35; *Red Burrito Ltd.* at para. 33.

[251] The parties do not agree, and seemingly never did, on the extent of the venture. The plaintiffs believe that the partnership was intended to operate both the landfill and treatment facility. The Defendants are adamant that at no time did they intend for the partnership to include the operation of the landfill and that the sole purpose of it was to operate a treatment facility.

[252] In addition to the lack of agreement, the property as a whole was leased and controlled solely by the Avens, which is a strong indication that it did not constitute partnership property. As stated in Alison R. Manzer, *A Practical Guide to Canadian*

Partnership Law, loose-leaf (updated to December 2014) (Aurora, Ont.: Canada Law Book, 1994) at pp. 4-17 and 4-18:

> Where land is acquired by one partner, to the exclusion of the others, in the absence of evidence indicating that partner's intention to treat the land as partnership property, the land will not form part of the partnership property.
>
> Mere use of property by all partners for partnership purposes does not necessarily imply that the property is partnership property. If land does not become partnership property, no tenancy in favour of the firm can be inferred. Each partner will have a non-exclusive licence to enter the land for the purposes of carrying on the partnership business. That licence will be a personal right and not an asset of the firm (see *Lindley*, at p. 437).

[253] There is also no evidence indicating that the Avens intended to treat the land as partnership property; rather, their evidence, which I accept, is that they intended to keep the treatment facility operation distinct from their landfill activity on the property.

[254] Absent a clear contractual underpinning, and in light of the fact that the controlling party did not intend the Peejay Site to constitute partnership property, I do not find that the parties embarked on a clearly defined joint venture or that they can properly be considered partners.

[255] Accordingly, I find that the plaintiffs have demonstrated there is no juristic reason for the enrichment of the defendants, and therefore made out a *prima facie* case under the juristic reason component of the analysis.

[256] The defendants raised no additional reasons that recovery should be denied. I therefore conclude that the defendants have been unjustly enriched.

What is the Appropriate Remedy?

[257] If unjust enrichment is established, a plaintiff may be entitled to either a monetary or proprietary remedy.

[258] In this case, I do not consider a proprietary remedy to be appropriate.

[259] The most important factor in imposing a constructive trust is whether the claimant has shown a causal link between his or her contributions and the acquisition, preservation, maintenance, or improvement of the disputed property: *BCI* at para. 62.

[260] Based on the evidence before me, it is not clear that the plaintiffs' contributions played any significant role in the acquisition, preservation, or maintenance of the Peejay Site. The lease commenced in November 2008 and the property was sold in July 2012. The plaintiffs were actively involved in work on the property for approximately four months in 2009, during which time they contributed certain improvements such as the clearing and stripping of the land, construction of roads, culverts, and the storm water pond, and the partial construction of a 50,000 sq. ft. building. This work was done in anticipation of operating the treatment facility, which never happened.

[261] The lease and permits for the Peejay Site authorized the use of the land as a landfill. The lion's share of the property's value is based on the approvals for this particular use. Although the permits allowed for the potential operation of a treatment facility, there were several more approvals required before this would have been permitted.

[262] The unfinished construction of a building and certain improvements for an unapproved treatment facility based on technology that had failed the only other time it had been tested, was speculative at best, and foolhardy at worst. The plaintiffs' construction efforts and the patchwork improvements do not constitute a sufficiently substantial and direct link between their contributions and the Peejay Site's value to warrant a proprietary remedy in the form of a constructive trust.

[263] Reasonable expectations may be a factor in deciding to grant a proprietary remedy, but they are not determinative. It was argued that the plaintiffs have a reasonable expectation to share in the profits of the sale, primarily based on the alleged partnership arrangement.

[264] However, the critical question is the nature of the contribution made to the property, which was not integral in this case for the reasons I have outlined. Furthermore, I have found that no partnership ever existed, and I am not convinced that the expectation described by the plaintiffs—to receive an equity interest in the Peejay Site as a whole, including the lease and permits, by assisting with the construction of a treatment facility—is reasonable.

[265] Finally, the plaintiffs have not demonstrated that a monetary award is insufficient.

[266] Accordingly, a monetary award is the appropriate remedy. The quantum of the award may be calculated on either a value received or a value survived basis.

[267] A monetary award calculated on a value survived basis is similar in character to a proprietary award in that it recognizes any increase in value of a plaintiff's contributions. For this reason, it has been recognized that "Commonly, factors that would permit the imposition of a constructive trust, were it appropriate for the parties to share continuing ownership, will support the value survived approach to quantification of the alternative monetary award": *Wilson BCCA* at para. 51; *BCI* at para. 62.

[268] To be entitled to an interest in the property via the value survived approach there must be a link between the contribution and the increased value of the property. If this link is present, it may be unfair to deprive the contributor of the value or wealth created by his or her labour or financial contribution.

[269] Here, there is no clear evidence that the contribution of the building, which is now apparently being used as a storage facility, increased the value of the property beyond the amounts contributed towards its construction. The suggestion that the expenditure of almost $1 million on a building and infrastructure must have increased the value of the property is conjecture.

[270] The Building was a partially constructed purpose-built structure in a remote location over 100 km from Fort St. John. Mr. Watson, who negotiated the purchase price for the sale to Petrowest, was unable to provide definitive evidence on this point, but did indicate that although there was some contemplation that the building may be used as a treatment facility, there is no proven cost-effective way to treat soil contaminated with salt in British Columbia. He also indicated that the amounts allocated in Schedule "A" of the APA are rough estimates, and he gave uncertain evidence regarding the value of the Building in the context of the purchase of the Peejay Site.

[271] Further, the Court in *BCI* at paras. 64–65 made it clear that a critical prerequisite for calculating a monetary award on a value survived basis is "something in the nature of an investment in the value of the property—something more than a loan—looked at in a holistic manner." Often this will take the form of a joint engagement in a venture characterized by mutual effort, economic integration,

and an intent to work together to ensure the economic success of the enterprise to the benefit of the parties.

[272] The evidence indicates that the parties were not jointly engaged in a venture characterized by mutual effort. CFP dove headfirst into the construction of a large facility without the necessary financing or approvals to complete the construction. DRE was continuing to operate its other businesses while this work was underway. Mr. Aven supplied labour and equipment and reasonably expected to be paid for both, but he was not contributing any financial or other resources to the treatment facility enterprise. There was no economic integration towards this joint purpose. CFP started spending money and charging forward, and while Mr. Aven may have exercised poor judgment in facilitating this construction, he was not financially contributing to it, at least not willingly.

[273] In this case, particularly given the parties' failure to establish the terms of the joint venture with any certainty, it is not obvious that the construction of a purpose-built structure is an investment in a property if the intended use of that building is speculative, and never comes to fruition. Mr. Aven thought that the possibility of receiving 50% of the profits of the treatment facility was a good opportunity; however, there is no evidence to suggest that he believed that this construction was an investment in the property as a whole. The Building was never completed and no treatment facility was ever operated. Unsurprisingly, the portion of the purchase price allocated to the Building was similar to its construction costs.

[274] Accordingly, for the reasons discussed above, I am of the view that a monetary award on a value received or *quantum meruit* basis is appropriate in the circumstances.

[275] The Court in *Wilson BCCA* described the approach to calculating an award on a value received basis at para. 59:

> [59] When an award is made on a value received basis, it should be equal to the benefit received by the defendant. "In order to determine the value of the services rendered ... it is necessary first to determine which of the services provided ... are compensable": *Clarkson* at para. 69. To this inquiry, any agreement of the parties will be relevant, as will be the *Walsh* factors. If the parties had a *de facto* agreement on the amount of their individual contributions to their relationship, or about which services each was to provide for the benefit of both or to the property of one, the court should be careful not to compensate out of proportion to their agreed roles. This factor is not intended to wipe out an award, where unjust enrichment has been found, but to ensure that the amount of the award is

> congruent with the parties' circumstances and expectations. Although there may be additional discounts to factor in (such as equitable set-off, discussed below), there is no assessment of a plaintiff's proportionate share in an asset, or of the increase in value of an asset. Those issues are specific to awards assessed on the value survived approach.

[276] Inflation should be taken into account, but when the award is made on a value received or *quantum meruit* basis, it is logical to compensate for the delay by an award of interest: *Wilson BCCA* at para. 58.

[277] Equitable set-off for reciprocal or mutual benefits conferred may be considered only after a method of calculation has been selected and the value of the claim has been quantified. When the award is calculated on a value received basis, any amount to be set-off will be deducted from the plaintiff's award as a dollar figure after it has been quantified: *Wilson BCCA* at paras. 65 and 88.

[278] The requirements for a claim of equitable set-off were summarized in *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd.* (1985), 65 B.C.L.R. 31 at p. 9–10 (C.A.), and reaffirmed in *Wilson BCCA*:

> 1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands: [*Rawson v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451 (L.C.)].
>
> 2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed: [*Br. Anzani (Felixstowe) Ltd. v. Int. Marine Mgmt. (U.K.) Ltd*., [1980] Q.B. 137, [1979] 3 W.L.R. 451, [1979] 2 All E.R. 1063].
>
> 3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim: [*Fed. Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] Q.B. 927, [1978] 3 W.L.R. 309, [1978] 3 All E.R. 1066].
>
> 4. The plaintiff's claim and the cross-claim need not arise out of the same contract: [*Bankes v. Jarvis*, [1903] 1 K.B. 549 (Div. Ct.); *Br. Anzani*].
>
> 5. Unliquidated claims are on the same footing as liquidated claims: [*Nfld. Govt. v. Nfld. Ry. Co.* (1888), 13 App. Cas. 199 (P.C.)].
>
> [Citations added.]

[279] As stated at the outset of the unjust enrichment analysis, I have determined that the plaintiffs' financial contributions to the building, and land improvements totalled $882,000 and that this constituted an incontrovertible benefit.

[280] The contribution of $882,000 by the plaintiffs placed an asset in the defendants' hands: the building and the land improvements. Although the intended purpose of the proposed joint venture—an operational treatment facility conferring a commensurate increase in value on the land—was never fully realized, the building and land improvements did represent an asset that was acquired by the defendants with a realizable value. That value crystallized in the defendants' favour when the property was sold.

[281] Therefore, $882,000 is the market value of the compensable contributions made by the plaintiffs, and is the proper amount of the value received award.

[282] The defendants have claimed that their contributions to the building and land improvements should be set off against this $882,000 amount. Their estimates of how much they contributed have decreased throughout the history of this litigation, now sitting at approximately $550,000.

[283] As per the comments of the Court in *Coba*, in order for a defendant to be entitled to equitable set-off there must be some equitable ground going to the root of the plaintiff's claim that indicates the defendant should be shielded from the plaintiff obtaining full recovery. It must be manifestly unjust to allow the plaintiff to receive payment without taking the cross-claim into consideration.

[284] As an initial note, given the defendants repeated failure to accurately quantify their contributions I have serious concerns about the accuracy of the set-off amount they have put forward.

[285] The legitimacy of many expenses claimed by the defendants is disputed by the plaintiffs, even after the eventual reduction to approximately $550,000. There are claimed expenses for which no records have been produced and others that are clearly inaccurate. The defendants have admitted that some of the items are not expenses at all but rather represent the expected loss of an opportunity. A number of the expenses were also incurred in the course of self-dealing contracts entered into by Mr. Aven with his group of affiliated companies. While these are not necessarily precluded, they confuse the analysis substantially.

[286] However, and more importantly, I am not persuaded that any equitable set-off is appropriate because the defendants' contributions to the construction of the Building and land improvements were recouped through the sale of the Peejay Site.

[287] Although the defendants may have contributed certain amounts to the construction of the Building and land improvements, they sold the Peejay Site without informing the plaintiffs and clearly received some payment for assets which they did not exclusively develop as set out in Schedule "A" of the APA.

[288] The plaintiffs never received any benefit from the defendants' financial contributions to the construction that might justify set-off. Both the plaintiffs and the defendants contributed a certain amount of funds to the construction, and only the defendants recouped some or all of those funds. The defendants' contributions were made in addition to the plaintiffs' contributions, and are not connected to the plaintiffs' *quantum meruit* entitlement.

[289] The structure of the financial arrangement and the fact that the proceeds of sale went exclusively to the defendants indicates that it would not be manifestly unjust to disregard the defendants' cross-claim in set-off and fully compensate the plaintiffs on a *quantum meruit* basis.

[290] Furthermore, despite this clear financial inequity, the defendants have fought long and hard to avoid paying any portion of the proceeds of sale to the plaintiffs. They have continued to be evasive regarding the proceeds of sale even at trial.

[291] After considering the requirements outlined in *Coba* I do not think that equitable set-off is appropriate in light of the competing equities and the facts before me.

[292] The plaintiffs are entitled to $882,000 on the basis of unjust enrichment.

Oppression and Breach of Fiduciary Duty

[293] The plaintiffs have independently claimed against the defendant Mr. Aven in oppression and breach of fiduciary duty.

[294] They assert that the shareholder of CFP, Dr. Navarro, and the shareholders of the general partner of CFP/DRE LP had reasonable expectations that the sole director of these two companies, Mr. Aven, would act in good faith and in the best interest of the companies while he was director. The plaintiffs say that the termination of work on the project and the subsequent sale of the property without notice and without any attempt to distribute the proceeds, was a breach of his

fiduciary duty, and violated their reasonable expectations justifying an oppression remedy.

[295] Given my finding that a partnership never existed, I am not persuaded that any additional remedy for oppression or breach of fiduciary duty should be granted.

[296] Although Mr. Aven owed a fiduciary duty to CFP as a director to act in good faith and in the best interests of the company, the evidence indicates he was nothing more than a nominee director. He accepted the position as a favour to Mr. Gaskins, took no steps in his capacity as director of CFP, and resigned in February 2011, well before the sale of the Peejay Site to Petrowest in July 2012.

[297] Given his role as a nominee director who never exhibited any intention to actively play a role in the affairs of CFP, and the fact that all of the parties knew this was the case, I do not find that any inaction prior to his resignation as director constituted a breach of fiduciary duty that warrants additional equitable relief beyond that which I have already ordered.

[298] As for oppression, it was clear after the March 25 meeting that Mr. Aven was unwilling to have any further involvement whatsoever with the Environmental Management entities. Therefore, any expectations that the plaintiffs had regarding his conduct past that date were not reasonably held.

[299] As the plaintiffs claim for oppression focuses on the sale of the Peejay Site, which occurred well after March 25, 2010, and the failure to distribute the profits in accordance with a 50% partnership interest that did not exist, they have not shown oppressive conduct that violated their reasonable expectations.

<u>CONCLUSION</u>

[300] The plaintiffs are awarded $882,000 plus pre-judgment interest. They shall have their costs at Scale B.

"Basran J."