IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20151110
Docket: S144379
Registry: Vancouver

Between:

Warren Drew Martin and WDM Enterprises Inc.

Plaintiffs

And

Struan Management Ltd., Excelera Consulting Group Inc., and Douglas M. Robertson

Defendants

Before: The Honourable Madam Justice Gerow

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs:	D.A. Frenette
Counsel for the Defendants:	L.J. Mackoff G. Kim
Place and Date of Hearing:	Vancouver, B.C. November 4-5, 2015
Place and Date of Judgment:	Vancouver, B.C. November 10, 2015

[1] **THE COURT:** Warren Martin and WDM Enterprises Inc., who I will refer to as the plaintiffs, and Douglas Robertson and Struan Management Ltd., who I will refer to as the defendants, entered into a memorandum of agreement dated August 1, 2003, whereby they agreed to work together in an expense reduction consulting business known as Excelera Consulting Group, which I will refer to as Excelera. Expense reduction consultants identify potential savings for clients, assist them in devising and implementing strategies to realize cost savings, and track the savings realized. Consultants are paid a percentage of the savings realized.

[2] In August 2013, Mr. Robertson formed the defendant Excelera Consulting Group Inc., which I will refer to as "the company", with three other individuals, including his son, for the purpose of engaging in the expense reduction consulting business. Mr. Robertson did not disclose the existence of the company to Mr. Martin until October 2013, and did not invite Mr. Martin to participate in the venture as a director or a shareholder.

[3] The plaintiffs commenced this action against the defendants on June 9, 2014, alleging the defendants breached the memorandum of agreement and their partnership duties to the plaintiffs by their conduct, and claim damages.

[4] On this summary trial application, the plaintiffs seek a declaration that the business relationship between the plaintiffs and the defendants is a partnership, and that the defendants breached the partnership agreement. The plaintiffs seek an order that the partnership be dissolved. The plaintiffs also seek orders that the defendants pay damages to the plaintiffs for breach of contract and breach of fiduciary duties, as well as punitive damages. In the alternative, the plaintiffs seek restitution for unjust enrichment.

[5] The defendants take the position that the business relationship between the parties was not a partnership and that they did not breach the contract between the parties or owe any fiduciary duties to the plaintiffs. They submit that the plaintiffs' claim should be dismissed.

[6] These are the reasons on the summary trial application. I reserve the right to edit these reasons by adding to or subtracting from them, including adding citations, but the result will not change.

[7] The application and submissions raise the following issues:

1. Is this matter suitable for determination by way of summary trial?

2. Was the business relationship between the plaintiffs and the defendants a partnership or, alternatively, a joint venture?

3. What duties, if any, did the defendants owe the plaintiffs and did they breach those duties?

4. If there was a breach, what, if any, damages are the plaintiffs entitled to?

5. If the plaintiffs are not entitled to damages for breach of duty, are they entitled to damages for unjust enrichment?

[8] I will first deal with the issue of whether or not this matter is suitable for determination by way of summary trial.

[9] Both parties agree this matter is suitable for determination by summary trial. However, even though both parties agree, a court must still be satisfied that it is suitable. The test for granting summary relief pursuant to a summary trial is set out in Rule 9-7(15) of the *Rules of Court*. The court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues of facts or it would be unjust to decide the issues on the application.

[10] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), a case on the former rule for summary trial, the Court of Appeal set out a number of factors a judge should consider in determining whether a determination by way of summary trial is appropriate. These factors include the

amount involved, the complexity of the matter, the cost of a conventional trial in relation to the amount involved, and the course of the proceedings.

[11] In my view, this matter is relatively straightforward. The parties entered into a memorandum of agreement on August 1, 2003, which governs their relationship. At issue is the interpretation of the memorandum of agreement and the case law as to whether the parties intended to enter into a partnership. Although there is some conflict in the affidavit evidence, the parties have conducted examinations on the affidavits. As a result, I am of the view that I can find the necessary facts to determine the matters in issue. As well, I am of the view that it would not be unjust to determine the matters in issue.

[12] Accordingly, I conclude this matter is suitable for determination on a summary trial.

[13] I turn then to the issue of what was the business relationship between the plaintiffs and the defendants. As stated earlier, the parties executed the memorandum of agreement in August 2003. At issue is the interpretation of that agreement. The plaintiffs take the position that it is clear from the memorandum of agreement that the parties intended to have a partnership in Excelera. The plaintiffs argue that both the *Partnership Act,* R.S.B.C.1996, c. 348, and case law support a finding of partnership. They say the defendants owed duties to them as partners. In the alternative, the plaintiffs take the position that the business relationship was a joint venture and the defendants owed the same fiduciary duties to the plaintiffs as they would in a partnership.

[14] The defendants take the position that the governing agreement and the independent actions of the parties negate any suggestion of partnership. The defendants also take the position that the parties' business relationship is not a joint venture. They say rather it was two sole proprietorships that worked together.

[15] I turn next to the applicable law. The following provisions of the *Partnership Act* have application to the arguments advanced:

> 2 Partnership is the relation which subsists between persons carrying on business in common with a view of profit.
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> . . .
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> 4 In determining whether a partnership does or does not exist, regard must be had to the following rules:
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> > . . .
> >
> > (c) the receipt by a person of a share of the profits of a business is proof in the absence of evidence to the contrary that he or she is a partner in the business, but the receipt of a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him or her a partner in the business, and in particular . . .
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> . . .
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> 16 (1) A person who, by words spoken or written, or by conduct, represents himself or herself, or who knowingly allows himself or herself to be represented, as a partner in a particular firm is liable as a partner to any one who has, on the faith of any such representation, given credit to the firm.
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> (2) Subsection (1) applies whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or allowing it to be made.
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> . . .
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> 88 (1) A person who is engaged in business for trading, manufacturing or mining purposes and who is not associated in partnership with any other person or persons but who uses as his or her business name some name or designation other than his or her own name or who in his or her business name uses his or her own name with the addition of "and Company" or some other word or phrase indicating a plurality of members in the business, must file with the registrar within 3 months after the day when the business name is first used, a registration statement in the prescribed form.

[16] In *Blue Line Hockey Acquisition v. Orca Bay Hockey Limited Partnership*, 2009 BCCA 34, the court referred to the essential elements of partnership enunciated in *Continental Bank Leasing Corp. v. Canada*, [1998] 2 S.C.R. 298, namely carrying on business in common with a view to profit. Partnerships arise from contract, either express or implied. The intention of the parties and the objective documentary evidence are relevant. Indicia of partnership include the

contribution of money, property, effort, knowledge, skill or other assets to a joint undertaking, the sharing of property, the sharing of profits and losses, a mutual right of control, income tax returns filed as a partnership, and joint bank accounts.

[17] At paragraph 44, the court adopted the comments in *Red Burrito v. Hussain*, 2007 BCSC 1277, that a partnership can exist in the absence of an agreement and it can exist where there is agreement but all the terms have not been completed.

[18] I turn then to the application of the law to the facts. The relevant background facts are as follows:

[19] The parties met in the late 1990s. At that time, Mr. Robertson was a franchisee of Expense Reduction Analysts, which I will refer to as ERA, a Vancouver-based franchise that provided expense reduction consulting. Mr. Martin became a franchisee of ERA around 2003.

[20] In January 2001, Mr. Robertson and Mr. Martin, through their corporations, entered into an agreement with a third ERA franchisee, Andrew Louie, through his company, Whetstone Management, to operate as Expense Reductions Analysis International. The agreement the parties entered into was entitled ERAI Vancouver Partnership Agreement. The January 2001 agreement is four pages long and sets out the parties' intention to form a partnership, the purpose of which was to conduct ERAI business as a team. The agreement clearly sets out that all facets of the business would be within the scope of the partnership. The profits were to be divided equally between the partners. The agreement also dealt with changes to the partnership group.

[21] After entering into the January 2001 agreement, Mr. Martin and Mr. Robertson became dissatisfied with Mr. Louie's performance and the partnership was dissolved by consent in 2002.

[22] In 2003, Mr. Martin and Mr. Robertson began working together and in August 2003, entered into an one-page document entitled "Memorandum of Agreement". The memorandum of agreement provides:

> The purpose of this Memorandum is to document arrangements agreed to by the parties to the Agreement.
>
> It is the intention of the parties to work together, for the mutual benefit of themselves and the other party.
>
> While each party's individual business will remain separate and distinct, there will be considerable overlap of work effort. In those cases, time and effort applied and revenues generated will be apportioned by mutual consent.
>
> Should there be, at any time, circumstances beyond control which preclude either party from concluding their share of the work effort, then the other party will complete that work effort in the best interests and in a manner as would be contemplated by the ordinary course of business of the parties.
>
> Revenues generated as a result of completing the work effort will be shared as before, and the other party's portion will be paid to the other party . . .

[23] On November 18, 2003, following the expiration of his obligation under the ERA franchise, Mr. Robertson's wife registered a sole proprietorship in the name of Excelera Consulting Group. On March 24, 2005, following the expiration of his obligation under the ERA franchise, Mr. Martin also filed a sole proprietorship in the name of Excelera Consulting Group.

[24] Mr. Robertson and Mr. Martin agreed they would share any revenue from the joint projects they undertook on the basis of 65 percent to the party who brought the business in, and 35 percent to the other party.

[25] The plaintiffs take the position that the memorandum of agreement formed a partnership between the parties. They point to emails in which Mr. Robertson uses the word "partnership" to describe their working relationship, and their business cards on which they describe themselves as partners, as confirmation that both parties understood their business relation was that of partners.

[26] While the plaintiffs have pointed to statements made by Mr. Robertson in emails that "we've had a good partnership" and that their business cards identified

them as partners, the fact that the parties hold themselves out as partners is not conclusive: *Surerus v. Rudiger*, 2000 BCSC 1746 at paras. 13 and 33.

[27] Mr. Robertson deposes that the parties had a discussion when they signed the memorandum of agreement about how they would describe their relationship. They talked about VP and president, associate analysts, and partners. According to Mr. Robertson, they settled on partners because it conveyed they had an equal decision-making authority to third parties, and that it was an appropriate term to use when marketing to law firms, which were their target clients.

[28] The memorandum of agreement does not use the word "partnership" in contrast to the January 2001 agreement in which Mr. Martin and Mr. Robertson are clearly identified as partners, and that the parties intended to enter into a partnership. Instead, the memorandum of agreement contemplates the parties will take on certain joint projects or joint ventures, while continuing to work on their own business ventures. The memorandum of agreement states the parties will work both for their own benefit and for the other party's benefit. The memorandum of agreement sets out that each party's business will remain separate and distinct; however, there will be considerable overlap of time and effort.

[29] As well, the circumstances following the signing of the memorandum of agreement do not support the finding of a partnership. The relationship between the parties did not have the common indicia of partnership. For example:

- There was no equal right of control or management of the enterprise, as each party had the right to control its own client relationship with the clients it brought in.
- The parties did not file income tax returns as a partnership.
- There were no financial statements prepared for Excelera.
- The parties did not have a joint ownership in assets or property.

- Excelera did not rent office space and had no equipment.
- The parties did not have a joint bank account in the name of Excelera.
- The parties did not register a partnership; rather, they registered sole proprietorships.

[30] After entering into the memorandum of agreement, Mr. Martin and Mr. Robertson continued to conduct separate business through their respective corporate entities and involved themselves in separate ventures. Since late 2007, with the exception of one account signed in 2008 and 2009, there have been no efforts to market Excelera by either party. By 2013, the only revenue being received through Excelera was trailing revenues from two projects that had been entered into earlier.

[31] Having considered all of the circumstances, I conclude the business relationship between the parties was not a partnership. Instead, it was an agreement to carry out joint ventures together.

[32] I turn next to the issue of whether or not the defendants breached the joint venture agreement the parties entered into. The plaintiffs assert that joint venturers owe fiduciary duties to each other, similar to those owed by partners, relying on *Wonsch Construction Co. v. National Bank of Canada*, [1990], O.J. No. 2322 (C.A.).

[33] As set out in *Wonsch Construction Co.*, the parties to a joint venture have obligations of good faith and loyalty with regard to the common interest in the joint venture, which will include a duty of full disclosure, a duty not to make secret profits, and a duty not to compete with the business.

[34] As noted in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2014 BCSC 1688 at paras. 67:

> More recent cases have examined the obligations owed between joint venturers and slightly modified the rather general statement set out in

> *Wonsch Construction*. In *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership,* 2008 BCSC 27, aff'd 2009 BCCA 34, Wedge J. considered whether the relationship between the litigants was fiduciary such that there was a prohibition against self-dealing. She noted that the circumstances under which joint venture agreements are entered into vary greatly. After a review of the jurisprudence, she agreed with the proposition set out in *Citadel v. Bank of Montréal* (2002), 26 B.L.R. (3d) 83 (Ont. S.C.J.) at para. 167:
>
>> Although some cases support the proposition that a joint venture agreement automatically creates fiduciary obligations, the more compelling line of cases require a case specific approach to determining fiduciary duty.

[35] In this case, the defendants argue they did not owe any fiduciary or contractual duties to the plaintiffs because the joint venture projects they had been working on were coming to an end and there were no new joint venture projects contemplated by Excelera.

[36] However, in the context of this case, I think it is clear that during the subsistence of their relationship, both the plaintiffs and defendants owed each other the fiduciary duty not to use Excelera's name or take profits from the joint venture projects for their own use to the exclusion of the other. As well, they owed each other the duty not to compete with the entity they had created for the joint venture projects they were undertaking using the same name, and to make full disclosure of any ventures they were pursuing in Excelera's name.

[37] In my opinion, the defendants breached the duty by incorporating a new company with the name "Excelera Consulting Group Inc.", for the purpose of engaging in the expense reduction consulting business, and by retaining trailing revenues from joint projects the plaintiffs and defendants had done together. The defendants were also in breach by failing to provide the plaintiffs with an accounting of the trailing revenues.

[38] I turn then to what, if any, damages the plaintiffs are entitled to.

[39] The plaintiffs take the position that Excelera should be dissolved as a partnership. As stated, I am of the view that the business relationship between the parties is not a partnership. Rather, I am of the view the relationship between the parties was an agreement to undertake joint ventures together. Insofar as I have found the business relationship between the parties was a joint venture, the evidence is that the parties have not entered into any new joint venture projects since 2009. It is apparent from the evidence that the business relationship between the parties is at an end, except for the sharing of any trailing revenues from the joint venture projects entered into in 2009 or before.

[40] The plaintiffs also seek damages for breach of contract and breach of fiduciary duty owed to them. They say regardless of whether the parties' business relationship is a partnership or a joint venture, they are entitled to their share of the joint venture's capital assets and their share of the trailing revenues, either pursuant to the partnership or as damages at common law or in equity.

[41] I agree that the plaintiffs are entitled to damages for the defendants having taken the name Excelera for their own use to the exclusion of the plaintiffs. Although the defendants assert there is no value associated with the name Excelera Consulting Group in the form of goodwill, their action in taking the name does not support that argument. As well, I am of the view that the plaintiffs are entitled to an accounting for their share of the trailing assets.

[42] The plaintiffs and defendants have provided experts' reports from business valuators regarding the value of Excelera. The plaintiffs seek their proportionate share of the value their expert has ascribed to Excelera of $225,000 for corporate goodwill. However, the plaintiffs' expert's opinion is based on assumptions that have not been established; i.e., that the business relationship between the parties was a partnership and a going concern which would continue to generate the same income in the future as it has in the past.

[43] While the defendants' expert's opinion may be more accurate regarding the ongoing value of the business of the joint venture, he has not ascribed anything but a nominal value to the trade name Excelera.

[44] Here the conduct of the defendants effectively managed the plaintiffs out of the joint venture business, causing them to lose any right to the goodwill associated with the trade name, while at the same time allowing the defendants to obtain the benefit of the name.

[45] The defendants argue that the trade name had nominal value and point to both their expert report and the fact that the company did not sign any new contracts or earn any revenue after its creation. As noted earlier, the fact that the defendants took the trade name to use for its new company indicates there was some value to the name. The fact they changed the name within six months does not take away from the fact they saw value in the trade name.

[46] As well, the defendants argue that Mr. Robertson had the right to the trade name because he registered a sole proprietorship in Excelera’s name prior to Mr. Martin's registration of a sole proprietorship in Excelera’s name. However, that argument ignores the fact there was an agreement between the parties they would operate their joint ventures under the name of Excelera. The registrations were done for business reasons, apparently so each party could deposit the monies they received for their services in the joint ventures. I note that Mr. Robertson is not named on the sole proprietorship form he allegedly filed. Rather, his wife is shown as the sole proprietor.

[47] Having considered the evidence, it is my view a value should be ascribed to the trade name Excelera Consulting Group. The evidence is that no new venture projects have been entered into since 2009. There was no evidence that the plaintiffs had attempted to market in the name of Excelera prior to the defendants advising them that they had incorporated the company. The only ongoing joint venture projects were nearing the end of the time of the defendants' breach.

Although there is expert evidence regarding its value, the plaintiffs' expert based his opinion on the assumption that the business relationship between the parties was a partnership which would continue to generate the same revenues in the future as it had in the past. The defendants' expert was of the view there was no value in the trade name. However, as noted, the defendants' action in taking the trade name indicates there is some value to it.

[48] The only evidence of the damages suffered by the plaintiffs as a result of the defendants' breach is the plaintiffs' expert's report which is based on the assumption which has not been established; i.e. there was an ongoing partnership. The evidence is that the parties did not market in an attempt to obtain joint venture projects in the name Excelera after approximately 2007. There is no evidence that the defendants obtained projects in the name of the company after it was incorporated it in 2013. Rather, the evidence is that the business plans for the company never materialized and the company never acquired any assets, clients, contracts, or profits. The company was dissolved in July 2015.

[49] Notwithstanding the deficiencies in the evidence, I am of the view that some loss must have been sustained as a result of the defendants' breach. As noted in the case law, the fact that damages cannot be calculated with certainty is no reason why an award should not be made: *Century 21 Canada Limited Partnership v. Rogers*, 2011 BCSC 1196. An award of damages for a breach of contract or fiduciary duty where proof of damages is minimal can be addressed by an award of nominal damages. Such nominal damages need not be small: see *RBC Dominion Securities Inc. v. Merrill Lynch Inc*., 2004 BCSC 1464; and *Green v. Stanton* (1969), 6 D.L.R. (3d) 680 at 691-2 (B.C.C.A.).

[50] In my opinion, the plaintiffs have not proven damages of any substantial nature. However, an award of nominal damages is appropriate. Having considered the circumstances, I am of the view an award in the amount of $7,500 is appropriate.

[51] As well, the plaintiffs are entitled to an accounting and their share of the trailing revenues.

[52] I turn next to the issue of punitive damages. The plaintiffs seek an award of punitive damages. They rely on *Wonsch Construction Co.* where the plaintiff was awarded $70,000 for punitive damages. They say a similar award is appropriate in the circumstances of this case. They point to the fact that the defendants not only conspired with other shareholders in the company to use the corporate name of Excelera, but that Mr. Robertson stopped paying the plaintiffs their proportionate share of the trailing revenues in retaliation for the plaintiffs commencing this lawsuit.

[53] The defendants say that an award of punitive damages is not appropriate in the circumstances of this case. The defendants say they were continuing to treat the plaintiffs transparently and in a timely fashion until the last four months before the revenue stream ran out. The defendants say there is no evidence of any conspiracy between Mr. Robertson and his son or the other shareholders in the company.

[54] In *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595 at para. 94, the Supreme Court of Canada stated the following points are important in determining whether an award of punitive damages is appropriate:

> (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an

> amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a “windfall” in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[55] The court in *Whiten* went on to note at para. 95 that what is essential in determining whether an award of punitive damages should be made and the amount of the award are the particular circumstances of the case, the fact that the remedy is exceptional, and fairness to both sides. In determining whether punitive damages should be awarded, the court is to consider whether the conduct of the defendant should be punished over and above the requirement that he pay non-pecuniary and pecuniary damages.

[56] While the defendants rely on *Wonsch Construction Co.*, it is my opinion the facts in that case are distinguishable from this matter. In *Wonsch Construction Co.*, the defendant purchased the plaintiff's debt for the joint venture from the bank and then made immediate demand for payment. When the plaintiff did not pay the debt within five days as demanded, the defendant put in a receiver and seized all of the plaintiff's assets, effectively putting them out of the construction business.

[57] The plaintiffs argue an award of punitive damages is appropriate, because the defendants used the trade name Excelera to their exclusion and because the defendants have failed to provide an accounting for the trailing revenues. The plaintiffs point to the fact that Mr. Robertson conceded that he stopped paying the trailing revenues because the plaintiffs were suing him. They say that amounts to egregious behaviour for which an award of punitive damages should be made.

[58] However, as set out above, the plaintiffs are already being compensated for the defendants' use of the Excelera name. The defendants agree they stopped paying the defendants the trailing revenues. However, they say part of the reason they stopped paying the plaintiffs the trailing revenues was because the plaintiffs were not paying their proportionate share of expenses or taking steps to collect the

trailing revenues as agreed upon. The defendants were of the view that the plaintiffs owed them more money for expenses than they owed to the plaintiffs for their share of the trailing revenues. I have ordered that the defendants provide an accounting of the trailing revenues to the plaintiffs and pay them their proportionate share.

[59] In the circumstances, I am of the view that this is not an appropriate case in which to award punitive damages.

[60] In conclusion, I am making the following orders and declarations:

- A declaration that the business relationship between the parties was an agreement to carry out joint venture projects together from time to time.
- The defendants breached their duties to the plaintiffs by taking the trade name Excelera to their own use to the exclusion of the plaintiffs.
- The defendants will pay to the plaintiffs $7,500 in damages for the breach of their duty.
- The plaintiffs are also entitled to an accounting and their proportionate share of the trailing revenues.
- The plaintiffs are entitled to interest on the trailing revenues pursuant to the *Court Order Interest Act*, R.S.B.C.1996, c. 79.

[61] Finally, the plaintiffs are entitled to their costs at Scale B, subject to submissions.

[62] Anything else, counsel?

[63] MR. MACKOFF: This wasn't relief that was sought, My Lady, but Mr. Martin has taken the trailing revenues from the other Ratcliff & Company account without accounting, that was in the evidence, and so I would seek a mutual accounting on revenues rather than simply unilateral from defendant to plaintiff.

[64] MR. FRENETTE: My Lady, I see no problem with the parties accounting to each other on both trailing revenues.

[65] THE COURT: All right, there will be a mutual accounting by the parties of any trailing revenues they have received from the joint venture projects they undertook up to and including 2013, and each party will be entitled to their proportionate share of those trailing revenues.

[66] Anything else, counsel?

[SUBMISSIONS ON COSTS]

[67] THE COURT: I am going to continue with the order that the plaintiffs are entitled to their costs.

"Gerow J."