Date: 19981229
Docket: C944200
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ARTHUR DOIG and ARMA HOLDINGS LTD.

PLAINTIFFS

AND:

LAURAND HOLDINGS LTD., HARRISON DOIG and DOIG, BAILY, McLEAN, GREENBANK AND MURDOCH

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MADAM JUSTICE SINCLAIR PROWSE

Counsel for the Plaintiff: T.J. Delaney

Counsel for the Defendant: P.D. LeDressay
P. George

Place and Date of Hearing: October 26-30, 1998
Vancouver, B.C.

I) NATURE OF PROCEEDING AND RELIEF SOUGHT

[1] The Plaintiff Arma Holdings Ltd. ("Arma") is the personal company of the Plaintiff, Arthur Doig. The Defendant Laurand Holdings Ltd. ("Laurand") is the personal company of the Defendant, Harrison Doig. The Plaintiff, Arthur Doig and the Defendant, Harrison Doig are brothers.

[2] Commencing in 1968, Arthur and Harrison Doig developed various properties as joint ventures through Arma and Laurand - operating these joint ventures under the name of Arma and Laurand Holdings.

[3] In 1985, Arma and Laurand Holdings began the development of some property located in Haney, B.C. which they had jointly purchased in 1974. (The development of this property which Arma and Laurand did as a Joint Venture will be referred to in these reasons as the 1985 Joint Venture).

[4] In most, if not all, of their previous joint ventures, Arma and Laurand had only developed property to the extent of subdividing the land and installing services.

[5] In the 1985 Joint Venture however, Arma and Laurand

went further, not only subdividing the land but also building 60 homes and 30 townhouses on the property. In 1991, the 1985 Joint Venture was fully completed - all of the lots, homes, and townhouses having been sold.

[6] In this action, the Plaintiffs claimed that the Defendants still owed them monies arising from the 1985 Joint Venture.

[7] The Defendants, on the other hand, not only denied that any monies were owed to the Plaintiffs but claimed that the Plaintiffs owed monies to them as a result of that Joint Venture.

[8] Although the Plaintiffs originally made a number of claims against the Defendant Harrison Doig for legal services that he rendered to the 1985 Joint Venture, the Plaintiffs abandoned those claims during the trial.

[9] The specific claims in this trial pertained to an alleged agreement regarding interest to be paid on the disparity between the capital accounts of the Arma and Laurand in the 1985 Joint Venture and further to the loan of monies by the 1985 Joint Venture to a third party - Big West Construction Ltd., ("Big West"). All parties claimed upon a resolution of these issues that monies would be owed by the other to them.

II) THE LAURAND MORTGAGE AGREEMENT AND THE ALLEGED VARIATION OF IT

A) Background and Issues Raised

[10] Two years prior to the development of the Haney property, Laurand, (for its own purposes as opposed to joint venture purposes), borrowed approximately $104,000.00 from the Toronto Dominion Bank using the 1985 Joint Venture property as security (the Laurand mortgage).

[11] Upon the commencement of the 1985 Joint Venture, Arma and Laurand borrowed approximately $650,000.00 from the Bank of British Columbia - the purpose of approximately $550,000.00 of these borrowed monies being to finance the 1985 Joint Venture and the purpose of the remaining $104,000.00 being to pay out the Laurand mortgage. This $650,000.00 loan was secured by a first mortgage on the 1985 Joint Venture property.

[12] There is no dispute that Arma and Laurand agreed that Laurand would assume sole responsibility for the portion of the mortgage used to pay out the Toronto Dominion Bank mortgage, this responsibility to include the repayment of the carrying costs of this portion of the mortgage, namely the interest charged on the $104,000.00 which was calculated at prime plus 2%. (This was the interest rate applied to the $650,000.00 mortgage).

[13] However, one of the primary disputes in this action was whether the Laurand mortgage agreement had been varied.

[14] That is, the Plaintiffs alleged that the Laurand mortgage agreement was varied in 1987 or 1988 to include a provision that in addition to the repayment of the $104,000.00 and carrying costs, Laurand would pay Arma interest on the disparity in their capital accounts in the 1985 Joint Venture. That interest was to be calculated on the basis of the prime interest rate of the Royal Bank of Canada plus 2%.

[15] The Defendants maintained that the Laurand mortgage agreement was never changed. That is, that the agreement was always that Laurand would be solely responsible for the repayment of the $104,000.00 and for all of the carrying cost incurred as a result of that mortgage.

[16] The issues pertaining to the Laurand mortgage agreement and the alleged variation of it were as follows:

1) Did the parties vary the Laurand mortgage agreement to include a provision that Laurand would pay interest on the disparity between its capital account and Arma's capital account in the 1985 Joint Venture?

2) What, if any, monies are owed by either party to the other as result of the agreements between them, including the Laurand mortgage agreement?

B) Did the parties vary the Laurand mortgage agreement to include a provision that Laurand would pay interest on the disparity between its capital account and Arma's capital account in the 1985 Joint Venture?

[17] As was mentioned earlier in this judgment, there was no issue that Laurand and Arma agreed that Laurand alone would repay the Laurand mortgage inclusive of any carrying costs incurred with respect to that mortgage.

[18] Although the parties disagreed on which bank was to set the prime rate (Arthur Doig testified that it was the Royal Bank whereas Harrison Doig attested that it was the actual carrying costs of the mortgage which would mean that the Bank of British Columbia was to set the prime rate as it was the mortgagee), this discrepancy was not important as the evidence did not indicate any difference in the bank rates.

[19] In addition, although the parties disagreed as to whether there was a further agreement that Arma would forgive all interest payments if the principal amount of the Laurand mortgage was repaid in full within the first year, this dispute did not have to be addressed as the full principal was not repaid within that period.

[20] There is no dispute that throughout the 1985 Joint Venture there was a significant discrepancy in the capital accounts of Arma and Laurand - Laurand having withdrawn considerably more than Arma.

[21] Although there were some differences in the balance of the capital accounts in the Joint Ventures that Arma and Laurand had done prior to the 1985 Joint Venture, the disparity had been minimal - that is, usually less than $10,000.00.

[22] The $104,000.00 mortgage was characterized on the financial statements of the 1985 Joint Venture as being a draw on the capital account of Laurand. Therefore from the onset there was a considerable disparity.

[23] However, it was not this explainable disparity that caused the most concern. Rather, in addition to the $104,000.00, the subsequent draws of Laurand from its capital account were significantly more than the draws of Arma.

[24] Although the evidence disclosed that this significant discrepancy caused both Arthur Doig and Arma's accountant concern; that this concern resulted in a meeting of Arthur Doig, Harrison Doig, and the accountant for the 1985 Joint Venture, (a different person than Arma' accountant); and that possible solutions were suggested to address the situation, the evidence did not prove that an agreement was reached. In particular, the evidence did not establish that there was an agreement that Laurand would pay Arma interest on the disparity in the capital accounts.

[25] Specifically, none of the accountants (Arma, Laurand, and the 1985 Joint Venture each had their own individual accountants) were aware of an agreement that Laurand would pay interest on the disparity of the capital accounts. The accountant for Arma testified that although the payment of interest had been discussed as a method of addressing the disparity in the capital accounts, to his knowledge an agreement had never been reached to employ it.

[26] As at the time of this alleged agreement all of these accountants were actively involved in the financial affairs of their respective clients; as such an agreement would have been relevant to the financial role that each of these accountants performed for their clients; and as neither Harrison or Arthur Doig brought this alleged agreement to the attention of any of these accountants, I have concluded that an agreement was never reached to pay interest on the disparity of the capital accounts of Laurand and Arma.

[27] As was mentioned before there was no dispute that

Laurand and Arma had agreed that Laurand would be solely responsible for the repayment of the Laurand mortgage and for any carrying costs associated with it - namely, interest calculated at prime plus 2%. Given these circumstances, I am satisfied that the parties did reach this agreement. For the sake of convenience that interest will be the prime interest rate as set by the Royal Bank of Canada.

[28] However, as this agreement was between the corporate parties - namely, Laurand and Arma, any claims pertaining to the Laurand mortgage between the personal parties is dismissed.

C) What, if any, monies are owed by either party to the other as result of the agreements between them, including the Laurand mortgage agreements?

[29] With respect to whether there are any monies still owed by Laurand to Arma as a result of this agreement, using the calculations made in Method 1 in the report of PriceWaterhouseCoopers and setting aside any amounts that may be owed to Arma as the result of transaction with Big West, (this will be addressed in the next section of this judgment), as of October 30, 1998, Laurand still owed Arma $25,936.00, ($50,207.00 - $9,008.00 - $15,263.00). Judgment is granted in this amount. (If I have made a mathematical error, the parties are at liberty to correct the calculation as long as they both agree.)

III) THE LOAN BY THE JOINT VENTURE TO BIG WEST CONSTRUCTION LTD. - A THIRD PARTY

A) Background and Issues Raised

[30] Commencing in 1978, Arthur Doig began spending almost half of his time living in the United States. Because of this situation, the day to day management of the 1985 Joint Venture was assigned to Harrison Doig. To compensate for this work, Harrison Doig was paid $10,000.00 by the 1985 Joint Venture. To enable Harrison Doig to perform this function, Arthur Doig provided him with the necessary director's resolution from Arma and with his, (Arthur Doig's), power of attorney.

[31] As of 1989, the 1985 Joint Venture lent Big West (a third party) $41,511.00. There is no dispute that this loan was completely unrelated to the 1985 Joint Venture. (Big West was a company in which Harrison Doig had a significant interest and in which neither Arthur Doig nor Arma had any interest).

[32] Further, there was no dispute that in the previous year, (namely 1988), Big West had loaned the 1985 Joint Venture $52,197.00 (interest free). These monies were used by the 1985 Joint Venture for the project and were repaid within a year.

[33] Within a few years of loaning these monies, Big West went out of business. Consequently, it never repaid these monies.

[34] This outstanding debt of Big West appeared on the 1985 Joint Venture financial statements from 1989 until the end of the project in 1991. Each year this debt was accompanied by the note that it was going to be repaid within the next year. As was mentioned, Big West never repaid these monies.

[35] After 1991, the Defendants repaid this debt on behalf Big West. Harrison Doig testified that this repayment was made by the Defendants not because of any obligation to do so but rather in an effort to make amends with his brother, Arthur Doig. Harrison and Arthur Doig had become estranged as a result of financial issues arising from the 1985 Joint Venture.

[36] In this trial, the Plaintiffs claimed that the Defendants had a legal obligation to pay for any loss arising from this outstanding debt of Big West and further that they were required to pay interest on this debt. The Plaintiffs submitted that the Defendants should pay interest on these monies and that that interest should be calculated at the rate of prime interest plus 2%.

[37] The Defendants, on the other hand, contended that they did not have an obligation to repay this debt of Big West.

That is, they contended that the debt of Big West was simply a bad debt incurred by the 1985 Joint Venture in the ordinary course of business. As such, the Defendants had no obligation to repay these monies and the Plaintiffs therefore owed them money.

[38] The consequent issues were:

1) Do the Defendants have an obligation to repay the debt owed by Big West to the 1985 Joint Venture?

2) If so, are the Plaintiffs entitled to any interest, and if so, what is the appropriate rate for that interest?

B) Do the Defendants have an obligation to repay the debt owed by Big West to the 1985 Joint Venture?

[39] Although Harrison Doig attested that it was Laurand that was authorized to manage the 1985 Joint Venture, the documentation does not support this position. Rather, the director's resolutions of Arma and the power of attorney of Arthur Doig authorize Harrison Doig to manage the 1985 Joint Venture, not Laurand. Moreover, it was Harrison Doig, not Laurand that was compensated for performing this role.

[40] Moveover, the director's resolutions of Arma clearly limited Harrison Doig's authority to bind that company to matters relating to the 1985 Joint Venture. Furthermore, although the power of attorney that Arthur Doig granted Harrison Doig is broader than the resolutions, Arthur Doig testified that it (this power of attorney) was granted to the extent necessary to facilitate the management of the 1985 Joint Venture. As Harrison Doig did not dispute this limitation, I concluded that the power of attorney only extended to the authority needed to facilitate the 1985 Joint Venture.

[41] Although there was no formal agreement between the 1985 Joint Venture and Harrison Doig as to his obligations and responsibilities as the manager of that Joint Venture, the evidence established that there was an implied agreement that he would perform this function in a manner that would benefit and further the financial interests of the 1985 Joint Venture.

[42] Given this situation, borrowing money from third parties such as Big West to maintain or further the 1985 Joint Venture would fall within his management mandate.

[43] However, the evidence did not prove that the loan of 1985 Joint Venture monies to Big West ever furthered or benefited the Joint Venture or that this loan was ever intended to further or benefit the Joint Venture. To the contrary, the evidence showed that this loan (which was interest free) was detrimental to the 1985 Joint Venture as it reduced its operating capital and ultimately its profits.

[44] Moreover, the evidence established that Harrison Doig was able to make this loan to Big West because he was the managing director and because he had the director's resolutions of Arma and the power of attorney of Arthur Doig. If he had not had these resolutions and the power of attorney, he would have had to consult with Arthur Doig as the directing mind of Arma. In addition to the evidence of Arthur Doig that he never would have authorized such a loan, the fact that it was not in the financial interests of the 1985 Joint Venture to make such a loan renders it improbable that Harrison Doig would ever have been authorized to make this loan.

[45] Given that the loan to Big West was not made for the financial benefit the 1985 Joint Venture and that it did not financially benefit the 1985 Joint Venture, the authorizing of this loan by Harrison Doig was a breach of his management agreement with the Joint Venture partners - Arma and Laurand. As a consequence, Harrison Doig is responsible for any loss suffered by the 1985 Joint Venture partners as a result of this breach.

[46] Alternatively, given the circumstances in this case, (namely that Harrison Doig had accepted the position as the manager of the 1985 Joint Venture and had been given the

authority to act on behalf of the Joint Venture partners), Harrison Doig had fiduciary duty to act in the best interests of those Joint Venture partners - Arma and Laurand. See: Hodgkinson v. Simms (1994), 97 B.C.L.R. (2d) 1 (S.C.C.).

[47] Given that the loan of these monies was not in the best interests of the Joint Venture partners, Harrison Doig breached his fiduciary obligation to them.

[48] During the trial, it was argued on behalf of the Defendants that as this debt was revealed in the 1985 Joint Venture financial statements, the fact that Arthur Doig did not actively object to this transaction with Big West at the time should be interpreted to mean that Arma, through Arthur Doig, retroactively authorized this transaction.

[49] Arthur Doig testified that when he discovered this transaction he did actively protest. However, even if he did not protest, his silence cannot be interpreted as authorizing Harrison Doig to breach his management agreement or his fiduciary duty. Harrison Doig had an obligation through an implied agreement and through his fiduciary obligation to the Joint Venture partners to secure their authorization to make such a loan before the monies were paid to Big West, because this loan was not in the best interests of the Joint Venture partners.

[50] As he failed to secure this authorization, he breached his agreement with the Joint Venture, Arma and Arthur Doig and further he also breached his fiduciary duty to them.

[51] As a consequence, Harrison Doig is responsible for any loss suffered by the Joint Venture partnership as a result of the unauthorized loan of th 1985 Joint Venture monies to Big West. Aside from any interest that may be owing, Harrison Doig is responsible for the repayment of any outstanding principal on the debt owed by Big West to the Joint Venture partners. It was clear from the evidence that the profit to the Joint Venture partners was reduced by the amount of the loan made to Big West.

[52] As was mentioned earlier, the Defendants repaid these monies in 1991. If necessary adjustments should be made so that that repayment corresponds with this decision.

[53] Arma and Laurand are entitled to each be paid their share (namely 50%) of the monies borrowed by Big West. If either Arma or Laurand have been paid more than this amount, the overpaid partner will forthwith forward the amount of the overpayment the other partner.

[54] Although the evidence established that Harrison Doig made a loan that he was not authorized to make, there was no indication in the evidence that he intentionally set out to defraud the 1985 Joint Venture or to permanently deprive it of funds. Further, there was no indication at the time that he appreciated that he was doing something that he was not authorized to do. (Although it can be argued that he should have appreciated it, the evidence showed that he did not appreciate it.) Moreover, as was disclosed in the evidence, he, (Harrison Doig), always anticipated that the monies would be repaid.

[55] As the repayment of the loan monies is a debt owed by Harrison Doig to the Joint Venture partners, any claims made by Arthur Doig personally against the Defendants arising from this loan are dismissed.

C) Are the Plaintiffs entitled to any interest and if so, what is the appropriate rate for that interest?

[56] There was no agreement that Big West would pay interest for the monies that it borrowed from the 1985 Joint Venture. Rather the evidence showed that it was not required to pay any interest.

[57] However, as I have concluded that the loan of these monies constituted a breach of agreement between Harrison Doig and the 1985 Joint Venture or alternatively, a breach of his fiduciary duty to the 1985 Joint Venture, the Joint Venture partners are entitled to be paid interest on this debt pursuant

to the provisions of the Court Order Interest Act.

[58] Specifically, s.1(1) of the Court Order Interest Act provides that:

... a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.

[59] Further, s.2. of the Court Order Interest Act provides that:

The court must not award interest under section 1

a) on that part of an order that represents pecuniary loss arising after the date of the order,

b) if there is an agreement about interest between the parties,

c) on interest or on costs,

d) if the creditor waives in writing the right to an award of interest, or

e) on that part of an order that represents nonpecuniary damages arising from personal injury or death.

[60] Although there are some circumstances in which a party would be excused from paying interest, none of these exclusions apply to the present circumstances.

[61] Consequently, Harrison Doig will pay interest on the debt owed by Big West to the 1985 Joint Venture. This interest will run from April 30, 1989, until the date on which that debt was repaid by the Defendants.

[62] With respect to the rate of interest, the Plaintiffs sought a rate of interest calculated at prime plus 2%. This submission was founded on the premise that they may be entitled to more than a conventional rate of interest because of the circumstances of this case.

[63] As was set out above in s.1 of the Court Order Interest Act, the rate of interest to be used is the "rate the court considers appropriate in the circumstances".

[64] As was touched on earlier, the evidence did not prove any bad faith on the part of Harrison Doig. Given this fact, I have concluded that it is appropriate that the 1985 Joint Venture partners be paid whatever interest rate that Big West would have had to pay had the loan been negotiated with a conventional lending institution. For the sake of convenience, the conventional lending institution to be used in this case will be the Royal Bank of Canada.

[65] Therefore, Harrison Doig will pay the Joint Venture partners whatever interest is owing for this debt from the date of its occurrence, (which I have set as being April 30, 1989), until the date upon which the outstanding principal was fully paid by the Defendants. That interest, is to be divided between the Joint Venture partners equally.

IV) THE COUNTERCLAIM

[66] The success of the counterclaim, in whole or in part, will depend on the amount ultimately owing to Arma. (All of the claims made by Arthur Doig were dismissed.) If upon the completion of the calculations made on the above findings, Arma owes Laurand monies, the Defendants will succeed in their counterclaim. However, if the Defendants still owe monies to Arma, the Defendants' counterclaim will be dismissed.

V) COSTS

[67] Costs are awarded to the successful party.

[68] That is, if after all of the calculations are made there are outstanding monies to be paid by either of the Defendants to either of the Plaintiffs, the Plaintiffs will be awarded the costs of this action, save and except that those costs will be reduced by the amount of any costs that the Defendants incurred to prepare for the claims that the Plaintiffs abandoned at trial. (As was mentioned earlier in these reasons, it was not until after the Plaintiffs had closed their case that they abandoned their claims against Harrison Doig for alleged breaches of his duty as the lawyer to the 1985 Joint Venture.)

[69] If, on the other hand, after the calculations are made there are no monies owed to either of the Plaintiffs and/or there are monies owed by either of the Plaintiffs to either of the Defendants, the Defendants will be awarded the costs of this action including the costs to prepare for the claims that were abandoned during this trial.

[70] Costs will calculated at Scale 3.

"Sinclair Prowse, J."
Sinclair Prowse, J.

Vancouver, B.C.
December 29, 1998