IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Briere Sound Ltd. v. Briere,*
2014 BCSC 1385

Date: 20140723
Docket: S063388
Registry: Vancouver

Between:

Briere Sound Ltd.

Plaintiff

And

Christopher John Briere, Natalie Patricia Blomly, Briere Production Group Inc., Denis Robert Briere, 734540 B.C. Ltd., Donald Walter MacKenzie, Westminster Savings Credit Union, Murray Morrison and Morrison & Co. Law Corporation

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff:	G.S. McAlister
Counsel for the Defendant, Christopher Briere, and agent for the other Defendants:	J.S. Adler
Counsel for the Defendants, Murray Morrison and Morrison & Co. Law Corporation:	A.A. MacDonald
Place and Date of Hearing:	Vancouver, B.C. July 6 & September 12, 2012 January 7, 2013 June 19, 20 & 21, 2013 September 11 & 12, 2013 November 12, 2013
Date of Written Submissions:	January 15 and April 30, 2014
Place and Date of Judgment:	Vancouver, B.C. July 23, 2014

INTRODUCTION

[1] This is a derivative action. Several applications were put before the court. The first application was by the defendant Christopher Briere for an order disqualifying Norman Reis from having conduct of the action on behalf of the plaintiff.

[2] The other applications are by the defendants. All of them are made pursuant to Rule 9-7 and seek summary dismissal of the action.

[3] The plaintiff Briere Sound Ltd. (the "Company" or "BSL") is a British Columbia company. It has been in receivership since 2005. Its business was providing sales and rentals of audio, lighting and stage systems.

[4] The defendant Christopher Briere is an officer of the Company and was one of its two shareholders at the time the action was commenced. The other shareholder and officer was Norman Reis.

[5] The defendant Natalie Blomly is married to Christopher Briere and worked for the Company as an administrator.

[6] The defendant Briere Production Group Inc. ("BPG") is a British Columbia company incorporated in 2005. It is in the business of sales and rentals of audio, lighting and stage systems.

[7] The defendant Denis Briere is the father of Christopher Briere and the sole director of BPG.

[8] The defendant 734540 B.C. Ltd. is a British Columbia company incorporated in 2005.

[9] The defendant Donald MacKenzie is the uncle of Ms. Blomly and was the sole director of 734540 B.C. Ltd.

[10] The defendant Westminster Savings Credit Union is no longer a party.

[11] The defendant Murray Morrison is a barrister and solicitor who carries on business through the defendant Morrison & Co. Law Corporation.

[12] The plaintiff alleges that:

(1) Christopher Briere breached the fiduciary duties he owed to the Company as a director and officer;

(2) Natalie Blomly knowingly assisted Mr. Briere in such breaches or, alternatively, breached the fiduciary duties she owed to the Company as a key employee;

(3) 734540 B.C. Ltd., Donald MacKenzie, Briere Production Group Inc., Denis Briere, Murray Morrison and Morrison & Co. knowingly assisted Mr. Briere in effecting the breaches of his fiduciary duties;

(4) Murray Morrison and Morrison & Co. breached its own fiduciary duties to the Company; and

(5) Murray Morrison and Morrison & Co. acted in a conflict of interest by representing both Christopher Briere and the Company.

[13] On March 17, 2014, I published Reasons for Judgment indexed at 2014 BCSC 417 (the "first decision"). I dismissed the application of Mr. Briere to disqualify Mr. Reis from having conduct of the action. I said this about the applications by the defendants seeking summary dismissal:

> [111] I turn to the applications seeking summary dismissal. The applications by the defendants seek summary dismissal pursuant to Rule 9-7 of the *Supreme Court Civil Rules.*
>
> [112] In the course of final argument in this matter, an affidavit of Christopher R. Bacon, sworn November 6, 2013, was proffered by the defendants. I reserved on its admissibility but indicated that if I decided to have regard to it, counsel for the plaintiff would have the right to recall Mr. Reis for further examination in chief and, it follows, cross-examination.
>
> [113] In light of my conclusions concerning the disqualification application, I am going to be examining the merits of this matter. It follows that Mr. Bacon's affidavit is relevant and in the circumstances, I intend to have regard to it.

> [114] In light of that, counsel for the plaintiff should indicate to the registry whether he wishes to call further evidence from Mr. Reis. If so, a short hearing will be convened. If not, I will proceed to decide the remaining issues.

[14] By letter dated April 30, 2014, counsel for the plaintiff advised the court that he would not be calling further evidence from Mr. Reis. I am therefore in a position to address the defendants' applications to dismiss the action.

[15] A description of the background and many findings of fact are set out in the first decision. Paragraphs 4 to 71 of that decision are repeated here verbatim as paragraphs 16 to 83 of this decision.

BACKGROUND

[16] Briere Sound Ltd. ("BSL" or the "Company") was incorporated in 1997 by Mr. Briere. The Company's business was the provision of production services for public events and concerts. It rented and set up audio and visual equipment and staging.

[17] In 1998, Mr. Reis purchased a one-half interest in the Company. Mr. Reis and Mr. Briere operated the Company essentially as a partnership. Mr. Briere handled the clients and Mr. Reis saw to administration and bookkeeping matters. Mr. Reis made some $250,000 in shareholder loans to the Company. Mr. Reis and Mr. Briere were guarantors of the Company's indebtedness to Westminster Savings Credit Union.

[18] Additionally, Mr. Reis' mother, Celina Reis, lent $70,000 to the Company. A promissory note in her favour was signed on behalf of the Company on December 9, 2002.

[19] By 2005, the Company had assets worth approximately $1.2 million and was generating revenue in excess of $700,000 per year.

[20] In early 2005, Mr. Briere's wife, the defendant Natalie Blomly, joined the management of the Company. The banking arrangements were changed to reflect

this: cheques then required two signatures, any two of Mr. Briere, Ms. Blomly and Mr. Reis.

[21] Mr. Reis says that while he was away from Canada, the other signatories took steps to exclude him from management, including cutting off all access to accounting and financial records.

[22] On June 17, 2005, Mr. Reis commenced an oppression action against the Company and Mr. Briere (Petition No. L051510), seeking as relief the purchase of his shares by Mr. Briere or, alternatively, the sale of the Company by a receiver.

[23] On July 21, 2005, the parties entered into a consent order to address, among other things, the affairs of the Company and the preservation of assets:

> THIS COURT ORDERS that
>
> 1. the Respondents return to the records office of the Respondent, Briere Sound Ltd., at Suite 300 - 713 Columbia Street, New Westminster, British Columbia, all of the records that must be kept at that office pursuant to section 42 of the *Business Corporations Act*, S.B.C. 2002, c. 57, and that the Respondents permit the Petitioner to inspect the corporate records as a current director of the Company, BY CONSENT;
> 2. the Respondents return to the offices of Mr. Kenneth Y. Lee, C.A., at Jung & Lee, Chartered Accountants, 1800 - 1066 West Hastings Street, Vancouver, British Columbia, V6E 3X2, the accounting records of the Respondent, Briere Sound Ltd., that must be kept at that office pursuant to section 196 of the *Business Corporations Act*, S.B.C. 2002, c. 57, and that the Respondents permit the Petitioner to inspect the accounting books and records of the Company in the Accounting Office or held elsewhere, recorded in whatever format including electronic, as a current director of the Company, BY CONSENT;
> 3. except by the consent of the parties or further Order of this Court, no monies of the Respondent, Briere Sound Ltd., be paid, loaned, taken by or otherwise provided to or for the benefit of the Respondent, Christopher John Briere ("Mr. Briere"), pending the resolution of this proceeding, except for a monthly salary to the Respondent, Mr. Briere, of $3,300, BY CONSENT;
> 4. starting in June 2005, if the Company has sufficient monies to operate to pay Mr. Briere his monthly salary, the Petitioner will also be paid his monthly salary of $3,300 in each month and at the same time as the Respondent, Mr. Briere, receives payment, BY CONSENT;
> 5. except by the consent of the parties or further Order of this Court, no assets of the Respondent, Briere Sound Ltd., be encumbered pending

the resolution of this proceeding, except for reasonable and legitimate operating purposes, and then only if ten (10) days notice is given to all parties hereto, and that the Petitioner and the Respondent, Mr. Briere, have leave, should the parties not agree, to apply to this Court within seven (7) days of his receipt of notice, for further relief from this Court, BY CONSENT;

6. the Respondent, Briere Sound Ltd., provide ten (10) days advance notice to the Petitioner of any equipment or other capital purchases in excess of $3,000, pending the resolution of this proceeding, and that the Petitioner have leave, should he object to such purchase, to apply to this Court within seven (7) days of his receipt of notice, for further relief from this Court, BY CONSENT;

7. the Respondents, Briere Sound Ltd. and/or Mr. Briere, provide to the Petitioner's lawyer, Mr. Edward G. Wong ("Mr. Wong") at his office or at some other location as designated by Mr. Wong, a list of all of the Company's confirmed bookings and signed contracts and confirmations and a copy of each signed contract within seven (7) days of the date of this Order, and continue to do so on a weekly basis on each successive Monday for the past week's activities until the resolution of this proceeding, BY CONSENT;

8. the Respondents, Briere Sound Ltd. and/or Mr. Briere, provide to Mr. Wong at his office, or at some other location as designated by Mr. Wong, a statement of the Company's current cash flow and a statement setting out all of Company's present problems within thirty (30) days of the date of this Order, and continue to do so on a weekly basis on each successive Monday for the past week's activities until the resolution of this proceeding, BY CONSENT;

9. the Respondents, Briere Sound Ltd. and/or Mr. Briere, provide to Mr. Wong at his office, or at some other location as designated by Mr. Wong, a list of all of the Company's assets and inventory including serial numbers of items where applicable within seven (7) days of the date of this Order, BY CONSENT;

10. a certified accountant be appointed by agreement of the parties, or by further order of the Court, and that all sums due to the Petitioner and the Respondent, Mr. Briere, for loans, contributions, salary and wages and sums the Petitioner and the Respondent, Mr. Briere, have incurred on behalf of Briere Sound Ltd., be assessed by the certified accountant by August 31, 2005, or soon thereafter as reasonably possible, BY CONSENT;

11. the Respondents, Briere Sound Ltd. and/or Mr. Briere, will produce all relevant financial and accounting records by July 22, 2005, or at a later date if agreed to by the Petitioner or by further Order of this Court, to the certified accountant appointed in paragraph 10 above, and to Mr. Wong at his office, or at some other location as designated by Mr. Wong, including the report of Mr. Remo Gaita, of Gaita & Associates, setting out his review of the financial transactions of the Respondent, Briere Sound Ltd., from March 1997 to June 2005, and

> continue to do so until the resolution of this proceeding, BY CONSENT; and
>
> 12. all notices required to be given to the Petitioner in this Order shall be made to Mr. Wong at his office, or at some other location as designated by Mr. Wong.

[24] The order was consented to by Eugene Wong, then counsel for Mr. Reis, and by the defendant Murray Morrison, on behalf of the Company and Mr. Briere.

[25] On September 2, 2005, Madam Justice Arnold-Bailey of this Court ordered the Company and Mr. Briere, jointly, to pay Mr. Reis $150,000 in monthly installments of $30,000. This was for partial payment of Mr. Reis' shareholder loans to the Company. It did not represent any part of Mr. Reis' one-half interest in the Company. The value of Mr. Reis' shares was still to be determined. The payment ordered by Madam Justice Arnold-Bailey has not been made.

[26] Previously, in August 2005, Celina Reis obtained judgment against the Company for $69,000 owing to her. On August 31, 2005, she served a garnishing order on Westminster Savings Credit Union, the Company's banker.

[27] This caused the credit union to accelerate the balance due to it on the Company's outstanding loans. The credit union seized approximately $68,000 from the operating account of the Company to reduce its loan to $86,944.

[28] The credit union had a general security agreement over the assets of the Company.

[29] In early September 2005, Mr. Morrison learned that the credit union intended to realize on its security. He was of the view that if that occurred, either Mr. Reis or Mr. Briere could purchase the credit union's security and receivership.

[30] Mr. Morrison was on his way out of town on vacation. He therefore contacted a colleague, Sandy McCandless, who was at the time a practicing lawyer.

[31] In a memorandum to Mr. McCandless dated September 13, 2005, Mr. Morrison set out the circumstances of this case from the point of view of his

client, Mr. Briere. Mr. Morrison agreed in cross-examination he had two goals in involving Mr. McCandless: first, to have Mr. McCandless step into Mr. Morrison's shoes while he was away; and second, to (in Mr. Morrison's words) "put [his] considerable legal talents" to Mr. Briere's goal which he expressed the memorandum as follows:

> …[A]s discussed, Mr. Briere's goal is to (in the best of all possible worlds) have the company petitioned into bankruptcy and to "get in on the back side".

Mr. Morrison went on to express these thoughts:

> My further concern is that ultimately the company owes responsibilities to both its shareholders after all other creditors to the degree it can after liquidation and that Mr. Briere be relieved by the court from any obligation to pay Mr. Reis.

[32] Mr. McCandless' subsequent notes of his discussion with Mr. Briere indicate the seeds of the idea: to let the bank appoint a receiver and then to purchase the bank's security.

[33] On September 8, Mr. Briere directed Mr. Morrison to incorporate the defendant 734540 B.C. Ltd. ("734540"). The sole shareholder and director of 734540 was the defendant Donald MacKenzie, the uncle of Ms. Blomly. Mr. Morrison's understanding was that 734540 might be used to purchase the credit union's security and receivership.

[34] On September 16, 2005, the credit union did act on its security and appointed Boale, Wood & Company Ltd. ("Boale Wood") as receiver.

[35] On September 18, 2005, Boale Wood published a report in which the Company's assets were valued at approximately $197,300. That amount included accounts receivable. The appraised value of the inventory, fixed assets and equipment was approximately $161,560.

[36] In late September, Mr. Briere instructed Mr. Morrison to incorporate 736524 B.C. Ltd. ("736524") for Dennis Briere, Mr. Briere's father.

[37] In late September and early October 2005, Mr. Morrison, acting for 734540 and Mr. Briere, arranged for the purchase of the credit union's security and receivership.

[38] There is a dispute on the evidence as to whether Mr. Reis was informed of this transaction.

[39] Reinhart Aulinger is a Vancouver lawyer. He acted for a client who wanted to lend $60,000 to 734540 to help purchase the Company's assets from the credit union.

[40] In this regard, Mr. Aulinger received a letter from the defendant Mr. Morrison, who was still then solicitor for Mr. Briere. The letter dated September 29, 2005, provides, in relevant part:

> Further to our telephone conversation of September 28, 2005, we will now outline the circumstances surrounding the situation whereby your client wishes to advance to 734540 B.C. Ltd. certain funds in which security will be exchanged therefore.
>
> The background of the situation is as follows:
>
> 1. Briere Sound Ltd. is a corporation with two equal shareholders and directors, one being our client Christopher John Briere;
> 2. A dispute arose among the shareholders whereby (on the basis of certain allegations of improper conduct) Mr. Briere barred the other partner from the Company's premises and the other shareholder sought declaratory relief under the *British Columbia Corporations Act*;
> 3. The crux of the matter was that a valuation of the Company was to be obtained, and unfortunately, that didn't happen in timely fashion, such that an order was obtained by the other shareholder against both the Company and Mr. Briere that the sum of $150,000.00 be paid in five monthly installments of $30,000.00 each to the other shareholder;
> 4. Shortly after that order issued, the Company's bankers, Westminster Savings Credit Union placed the Company into receivership on the 16th day of September, 2005, under a general security instrument granted in November 1999;
> 5. Our client through the above noted company owned and operated by his uncle wishes to acquire the Credit Union's security and right to the receivership for the sum of approximately $80,000.00, and we understand that your client is prepared under appropriate circumstances to advance funds in that regard;

> 6. At this stage of the transaction the security that could be granted by 734540 B.C. Ltd. to your client (upon completion of the purchase of this security receivership) would be a form of general security agreement presumably attaching the banks documents and the rights thereunder;
>
> 7. Ultimately, 734540 B.C. Ltd. proposes to sell (in the receivership) the underlying assets to that General Security Agreement to yet another company for fair market value (as determined by the receiver) which approximates the sum of $170,000.00;
>
> 8. We believe that at that time the security could be granted to your client by the second company to replace the security over the Credit Union's instrument thereby granting security over "real assets";
>
> The purchasing Company will however, be seeking a line of credit from a financial institution and at that time there may be some concern about priorities, although the company that will ultimately purchasing [sic] we understand already has significant assets and cash flow and that may or may not be a problem; …

[41] After receiving that letter, Mr. Aulinger wrote to Mr. Morrison and said that his client was prepared to advance the loan upon certain conditions. One of the conditions was as follows:

> (iv) your written advice that the "other shareholder" of [Briere Sound Ltd.] has received notice of the receivership, has made no offer to the receiver, was aware of the balance of [Briere Sound Ltd.] immediately prior to the receivership and has asserted no claims since the receivership…

[42] The following day, October 6, 2005, Mr. Morrison responded. The relevant part of his letter provides as follows:

> 4. … As to our awareness as to whether the outside other shareholder of [Briere Sound Ltd.] has received Notice of the Receivership, we advise that we enclose the correspondence between Mr. Edward Wong, Counsel for the other shareholder and Messrs Boale, Wood, wherein Mr. Wong is advised by Messrs Boale, Wood, wherein Mr. Wong is advised by Messrs Boale, Wood that they were appointed as Receiver.
>
> …
>
> 6. As well, we spoke this day with Mr. Alan Frydenlund, Counsel for Westminster Savings Credit Union and was advised that the "other shareholder" has made no offer to the Receiver, and has asserted no claims since the Receivership to the knowledge of Mr. Frydenlund.
>
> 7. The writer is not aware of any other claims made by the "other shareholder".

[43] Mr. Aulinger deposed that he wanted to confirm the information in Mr. Morrison's letter and therefore called Mr. Wong himself. His notes of that conversation record details of a discussion which took place on October 11, 2005:

> He says he has bombarded the receiver with letters and he has not responded. His position: the valuation is incorrect. The role the receiver played is incorrect (the receiver was initially only appointed to do an appraisal). He has met with Frydenlund (lawyer for Credit Union) in chambers and asked him why his letters are not responded to. Only reason why no actions taken was too busy with another matter until today which is now resolved. Murray Morrison was in a conflict. He cannot act for [Chris] Briere personally and for the Briere Company [not sure he acts for Briere Company]. Says he has asked for info regarding sale and is stonewalled. Why the rush with everything.
>
> Conclusion: we are just buying a lawsuit.

[44] Mr. Aulinger deposed that, based on his recollection and review of the notes, it was clear that Mr. Wong understood his client intended to loan money to "the company" in order to assist it in purchasing the credit union's debt and security in the receivership of Briere Sound Ltd. Mr. Wong expressed his displeasure with Mr. Aulinger's client's intended course of action and said that by so acting, the client would only be "buying a lawsuit".

[45] In light of this discussion, Mr. Aulinger deposed that he called his client and suggested he not make the loan. His client subsequently instructed him to proceed to close on the loan despite Mr. Aulinger's advice.

[46] Mr. Wong has a different recollection of his discussion with Mr. Aulinger.

[47] Mr. Wong deposed that he found the call "unusual". The call came "out of the blue" and Mr. Aulinger provided little context.

[48] Mr. Wong said Mr. Aulinger told him he had a client who was interested in lending money to "the Company". Mr. Wong took this to mean Briere Sound Ltd. Mr. Aulinger made no mention, according to Mr. Wong, of the name of his client or of 734540.

[49] Mr. Wong said that if he had learned from Mr. Aulinger of the plan for a new company to buy the security interest from the credit union, he certainly would have told his client, Mr. Reis. He told him no such thing. Mr. Wong said he only learned of the existence of 734540 a couple weeks later, in the letter from Boale Wood quoted below.

[50] The security interest held by the credit union was assigned to 734540 on October 13, 2005.

[51] On October 21, 2005, Boale Wood wrote to the Company's creditors. This is the letter which came to Mr. Wong's attention and first informed him of the existence of 734540:

> **Re: Briere Sound Ltd.**
> **In Receivership**
>
> We wish to advise you that the security to which Boale, Wood & Company Ltd. was appointed as Receiver of Briere Sound Ltd. was assigned to 0734540 BC Ltd. As such, Boale, Wood & Company Ltd. was discharged as Receiver of Briere Sound and L. Popoff & Associates Inc. was appointed in its place.
>
> All further inquiries regarding Briere Sound Ltd. should be directed to:
>
> Larry Popoff
> L. Popoff & Associates Inc.
> 115 - 15225 104th Avenue
> Surrey, BC V3R 6Y8
>
> Telephone: (604) 584-2129
> Fax: (604) 584-2199

[52] On October 26, 2005, Mr. Morrison ceased acting on behalf of both Mr. Briere and the Company. He took no further action on behalf of any of the defendants with respect to the receivership of the Company.

[53] There is another conflict in the evidence regarding the sale of the assets from the new receiver, Mr. Popoff.

[54] Mr. Popoff was appointed as receiver on October 14, 2005. An appraisal of the company's assets indicated a value of $171,030 on the basis of an "orderly

liquidation" and $123,675 on a "forced liquidation". The appraisal of the previous receiver showed a value of $161,560.

[55] Mr. Popoff testified that he met with Mr. Reis shortly after he was appointed receiver. He said he explained to Mr. Reis that the assets were to be sold through public tender and that he, Mr. Reis, was free to make a bid for the goods.

[56] Mr. Popoff's evidence is that he followed the appropriate steps for the proper sale of the assets: he obtained the necessary appraisals, placed the advertisement in the newspaper and conducted the sale on a sealed tender basis.

[57] The advertisement stated that the sale of the assets could be on either an *en bloc* basis or a lot-by-lot basis. The only offer on an *en bloc* basis was $180,000. This offer was made by 736524 (which eventually became Briere Production Group Inc.). The director of that company is the defendant Denis Briere, the father of Christopher Briere.

[58] According to Mr. Popoff, offers were made on individual lots. The highest of those offers was $105,000. He said that if the highest offer for each lot had been accepted, the maximum realization would have been only $149,000.

[59] Mr. Popoff said the assets were sold to the highest bidder, Denis Briere's company. Mr. Reis did not place any bid.

[60] This evidence is contradicted, in part, by the evidence of Colin McKee. Mr. McKee is an accountant who was acting as agent for a company which was interested in purchasing some of the Company's equipment being sold in the receivership by Mr. Popoff.

[61] Mr. McKee said he viewed the equipment on November 16, 2005. He said he then had a conversation with Mr. Popoff. He deposed as follows in his affidavit of July 3, 2012:

> 2. I spoke by telephone with Mr. Popoff within a day or so of having viewed the Equipment. My purpose in contacting Mr. Popoff was to inquire about the composition of the lots in which the Equipment was

> being sold. This conversation occurred before the cut-off date set for submission of offers to the Receiver. Instead of responding to my question about the lots, Mr. Popoff said words to me to the effect that it was all over and the Equipment had already been sold.
>
> 3. I found Mr. Popoff's statement most unusual, given the public process he had embarked upon to sell the Equipment. It was immediately clear to me that it would be a waste of time and effort for Masterplan to even bid on any of the Equipment although I subsequently became aware that Mr. Sabina put in a very low bid of about $35,000 for the Equipment. At the time I spoke to Mr. Popoff, I had the distinct impression that the fix was in, by which I mean that, notwithstanding the public process by which the Receiver appeared to be selling the Equipment, a decision had already been as to who the successful purchaser was.

[62] Mr. Popoff adamantly denies Mr. McKee's recollection of their conversation. He was cross-examined with respect to this and stated:

> I did not say that. In all my years in practice I have never said to anybody prior to any closing that everything is done and somebody's bought the assets. That's unethical. That's why I get into trouble -- people get into trouble with the Superintendent of Bankruptcy. We've got a date for closing. We wait 'til the closing date. I've never in my life said that to anybody that something is finalized before the day -- the date of the closing. And in this case I did not.

[63] In any event, the result of the transaction was that at the end of 2005 Briere Production Group Inc. acquired the Company's assets for $180,000 and carried on the former business of Briere Sound Ltd.

[64] Mr. Reis asserts that Briere Production Group Inc. is carrying on the same business as the Company did. It operates out of the same premises. Mr. Reis says the new company treats itself as the successor of the old company.

Commencement of Derivative Action

[65] Mr. Reis then applied to the court for leave to commence this derivative action. The application came before Mr. Justice Masuhara: *Norman Reis v. Briere Sound Ltd.* (May 19, 2006), Vancouver S061232 (B.C.S.C.).

[66] Masuhara J. noted that many of the Company's assets appear to have disappeared before the receivership. He stated that Mr. Briere put forward an

explanation for this but agreed with Mr. Reis that this was a matter for trial. His Lordship pointed to these facts and allegations in relation to the derivative action:

> [22] The petitioner says that … Mr. Briere indirectly acquired a secured debt against his own company and forced a sale of assets to a new company that he now operates and which he owns indirectly through his father.
>
> [23] The petitioner points to the following facts around Briere Production. He states that Briere Production carries on the same business as the Company, carries on business on the same premises as the Company, and is managed by Mr. Briere as an operations manager and Ms. Blomly who is in charge of administration and accounting. The Briere Productions Internet website as of February 14, 2006, indicates that it treats itself as the successor of the Company and treats the company's clients and engagements as its own and redirects customers looking for the Company's website to its own website. Briere Productions refers on its website to artists, customers and events for which the Company provided services as its own clients and states on its website that "over 90 percent of our annual business stems from prior relationships." On the same web page Briere Production refers to recent shows which include shows clearly serviced by the Company in 2004 and 2005. It is further pointed out that Briere Production, if it is not already obvious, uses the same name as the Company.
>
> [24] Moreover, the petitioner alleges that Briere Production appears to have inherited inventory never subject to valuation by Boale Wood as it offers used equipment for sale and rental are alleged to have been formerly owned by the Company but never listed as inventory for Boale Wood's valuation.
>
> [25] The petitioner also notes that Mr. Briere does not address the diminished value of the Company's assets in September 2005, and does not contest the key facts underlying the forced sale, indeed the petitioner notes that Mr. Briere admits to many of the key facts. Specifically, Mr. Briere admits to being advised that the credit union would in all likelihood be prepared to sell its security documents. Mr. Briere admits to eliciting the assistance of Mr. Donald MacKenzie to set up a company to take over the security of the credit union, although ostensibly to avoid a sale of the Company's assets. Mr. Briere admits his later intent to liquidate all the Company's assets, and while Mr. Briere reports such a liquidation to be needed to satisfy the indebtedness that was initially outstanding to the Westminster Credit Union, the fact is clear the petitioner says the debt in issue was, in fact, only $87,000, the balance after the credit union had paid off debt from the Company's operating expense. Mr. Briere admits to causing his father to incorporate Newco [Briere Production Group], for the purposes of acquiring the Company's assets upon liquidation and to employ Mr. Briere. Finally, Mr. Briere admits Newco purchased the Company's assets.

[67] The court concluded that Mr. Reis was acting in good faith, the Company's case was not "bound to fail" and the derivative action was in the "best interests" of the Company:

> [28] Further, the petitioner submits that the facts show possible claims that various persons knowingly assisted Mr. Briere in breaches of fiduciary duty. More specifically, that Ms. Blomly may have knowingly assisted Mr. Briere to misappropriate property and make improper payments in the summer of 2005. The credit union may have participated in a scheme to force a buyout using its security interests and by agreeing to demand payment of its entire loan and then reassigning the debt to Holdco [734540]. Mr. MacKenzie and Holdco purchased and enforced the credit union's secured debt against the company. Mr. Denis Briere and Newco purchased the company's assets on a forced sale and now compete in the same business with Mr. Briere at the head of the helm. Mr. Morrison and Morrison & Co. likely incorporated both Holdco and Newco for the purposes of assisting Mr. Briere to carry out the scheme of breaching his fiduciary duties.
>
> [29] In my view, the facts relied upon arguably disclose the possibility of each of these persons acting with a want of probity or the requisite degree of dishonesty to attract liability and equity. Moreover, some of the proposed defendants may hold corporate property as a result of the fiduciary breaches and are properly subject to a remedial constructive trust.
>
> [30] Additionally, there is an arguable case against Morrison & Co and Mr. Morrison who have a fiduciary duty as a legal advisor of the Company. As a fiduciary, Mr. Morrison and the law firm would have had a duty to avoid positioning itself such that its duties to the Company might be in possible or actual conflict with the duties to Mr. Briere and Holdco.
>
> [31] In summary, having regard to the above, I find that the facts alleged in the circumstances disclose arguable causes of action and are not overcome by the materials filed in support of Mr. Briere. I say that arguable causes of action - means causes of action not bound to fail - which if proven would entitle the Company to recover equitable damages or an accounting of profits from Mr. Briere, as well as possible proprietary remedies to recover property forcibly sold only by virtue of the fiduciary breaches.
>
> [32] The efforts by the petitioner, though having a personal interest, are, in my view, *bona fides* in terms of the Company. …
>
> [33] Also, it appears that the best interests of the Company would be served by prosecuting the proposed litigation.

[68] Westminster Savings Credit Union is no longer a party. It reached a settlement with the plaintiff which the court approved on September 9, 2009.

[69] Mr. Reis is no longer a shareholder or director of the company. On March 18, 2011, the parties to the oppression action agreed to a consent order: Mr. Reis received $150,000 for his shares and resigned as an officer and director of the Company. It was acknowledged that Mr. Reis' shareholder loans are still

outstanding in the amount of $130,000 and that Mr. Briere has no personal liability to him. The Company still owes Celina Reis approximately $70,000 as well.

Factual Disputes

[70] There are two factual disputes to be determined. The first is a conflict between the evidence of Mr. Aulinger and Mr. Wong. Mr. Aulinger recalls telling Mr. Wong of his client's intention to lend $60,000 to 734540 for the purpose of acquiring the security and receivership from the credit union.

[71] Mr. Wong, on the other hand, was adamant that he was not told this. He testified that he understood Mr. Aulinger's client intended to lend money to Briere Sound Ltd. He was unaware of the existence of 734540 at the time.

[72] Frankly, it does not make much sense that Mr. Aulinger's client would lend money to Briere Sound Ltd. Any such funds would go directly through the receiver to the Company's creditors.

[73] On the other hand, if Mr. Wong had learned of 734540's existence at that time and that the overall plan was to acquire the credit union's security interest, he would certainly have told Mr. Reis of this. He did not do so.

[74] I conclude that Mr. Aulinger and Mr. Wong were, in the words of counsel for the plaintiff, "ships passing in the night".

[75] These two lawyers did not know each other. The conversation was not a full discussion of their client's positions.

[76] Mr. Aulinger wanted to ensure that Mr. Reis, Mr. Wong's client and the "other shareholder", was aware of the intended transaction. While I accept Mr. Aulinger's account of the events and although I found him to be a forthright and credible witness, I do not accept that he communicated exactly what he wanted to communicate to Mr. Wong.

[77] Mr. Wong, I conclude, was excitable and leery during this telephone conversation. He likely should have concluded that it made no sense for Mr. Aulinger's client to lend money to Briere Sound Ltd. He should have asked more specific questions and, if he had, he would have learned exactly what Mr. Aulinger wished for him to know. But he did not do so.

[78] I conclude, therefore, that Mr. Reis did not know of the existence of 734540 until he learned of it from Boale Wood's letter regarding the appointment of a new receiver dated October 21, 2005.

[79] I next turn to the question of Mr. Popoff's evidence and that of Mr. McKee. A useful statement of principle for resolving conflicts in the evidence is found in *Faryna v. Chorney* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.). O'Halloran J.A. said the following about credibility at para. 11:

> [11] ... The test [for the credibility of a witness] must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. …

[80] If Mr. McKee's allegation is true, Mr. Popoff was engaged in highly unethical conduct. It is entirely unlikely that a receiver would permit himself or herself to engage in such improper conduct. Moreover, even if a receiver chose to disregard professional standards, it would be highly improbable and unlikely that the receiver would then tell a stranger or potential bidder that he or she was doing that.

[81] To put it another way, there was no reason for Mr. Popoff to say such a thing to Mr. McKee.

[82] I am reinforced in this conclusion by the fact that Mr. McKee did in fact place a bid on certain lots on behalf of his client. It makes no sense for him to have done so if he truly understood and believed that the whole matter was a sham.

[83] Mr. McKee swore his affidavit on July 3, 2012. He was recalling a conversation which occurred over six and a half years earlier. I conclude that he was mistaken in his recollection.

SUMMARY DISMISSAL APPLICATIONS

[84] I now turn to the defendants' applications for summary dismissal pursuant to Rule 9-7 of the *Supreme Court Civil Rules*.

[85] A judge cannot give judgment on a summary trial application unless she or he can find the facts necessary to decide the issues of fact or law. Even if the court can decide the necessary factual and legal issues, the judge may decline to give judgment if he thinks it would be unjust to do so: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). See also: *RC Hotel Ventures Ltd. v. Meristar Sub 2C, L.L.C.*, 2008 BCSC 918.

[86] This case is suitable for summary trial. I am able to find the facts necessary to resolve the factual and legal issues, and it would not otherwise be unjust to determine this matter summarily.

Legal Principles

[87] A fiduciary duty includes the duty of loyalty, which is the obligation to put the plaintiff's interests above all others: *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411 at paras. 37-41.

[88] The tort of knowing assistance requires that there be a fraudulent and dishonest breach of a fiduciary duty; the defendants have knowledge of the fiduciary relationship and the fraudulent and dishonest conduct; and the defendants must have participated in or assisted the fraudulent and dishonest conduct: *Harris v. Leikin Group Inc.*, 2011 ONCA 790 at para. 8; *PricewaterhouseCoopers Inc. v. Flash & The Boys, LLC*, 2014 BCSC 1093 at paras. 10-11. A claim for knowing assistance cannot be maintained where there is no evidence of a breach of trust: *Giles* at para. 32.

[89] A plaintiff asserting a conflict of interest must show that the conflict had some adverse effect on the plaintiff: *Campbell v. Ragona*, 2010 BCSC 1339 at para. 564.

Christopher Briere's Application to Dismiss

[90] The defendants point to the fact that at the time the oppression proceedings were commenced, Messrs. Reis and Briere were the two only shareholders and directors of BSL. Both were also personal guarantors of BSL's indebtedness to the credit union pursuant to a general security agreement.

[91] On September 16, 2005, when the credit union appointed Boale Wood as receiver for BSL, the receiver had the requisite legal authority to conduct all the corporate affairs of the Company until such time as the receivership came to an end.

[92] The defendants point to s. 34 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which provides that a guarantor who pays the debt of another is entitled to have assigned to him the security that is held by that party's creditor:

> **Surety who discharges liability entitled to assignment of securities**
>
> 34(1) Every person who, being surety for the debt or duty of another or being liable with another for any debt or duty, pays the debt or performs the duty is entitled to have assigned to him or her or to a trustee for him or her every judgment, specialty or other security that is held by the creditor in respect of the debt or duty, whether the judgment, specialty or other security is or is not deemed at law to have been satisfied by the payment of the debt or performance of the duty.
>
> (2) The person who has paid the debt or performed the duty is entitled to stand in the place of the creditor and to use all the remedies and, if necessary and on a proper indemnity, to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor, or a co-surety, co-contractor or co-debtor indemnification for the advances made and loss sustained by the person, and the payment or performance made by the surety is not pleadable in bar of any action or other proceeding by him or her.
>
> (3) A co-surety, co-contractor or co-debtor is not entitled to recover from any other co-surety, co-contractor or co-debtor, by the means referred to in subsections (1) and (2), more than the just proportion to which, as between those parties themselves, the other co-surety, co-contractor or co-debtor is justly liable.

[93] Mr. Briere says that, as a personal guarantor of BSL's indebtedness to the credit union, he was entitled to pay off the debt owed by BSL and, in turn, have the credit union's security and receivership assigned to himself or his nominee. He says that Mr. Reis, the other personal guarantor, had the same opportunity, but chose not to avail himself of it.

[94] To effect this, Mr. Briere and his uncle, Mr. MacKenzie, instructed Mr. Morrison to incorporate 734540 for the purpose of purchasing the credit union's security and receivership. The sale completed on October 17, 2005. Mr. Popoff was subsequently appointed to replace Boale Wood as receiver.

[95] Similarly, Denis Briere, Mr. Briere's father, retained Mr. Morrison to incorporate BPG for the purpose of bidding on BSL's assets once they were put up for public auction during the course of the receivership.

[96] Ultimately, BPG purchased BSL's assets in the public sale for $180,000, the highest offer made for the assets. There is no evidence that BPG paid less than any other party would have paid for BSL's assets.

[97] Further, the defendants say that the plaintiff has not brought any claim against either of BSL's receivers to suggest that the receivers did not act in accordance with their professional obligations or that they breached any duties owed to the Company. In fact, my finding at paras. 79-83 above in relation to the conduct of Mr. Popoff militates against such a proposition.

Murray Morrison's Application to Dismiss

[98] Mr. Morrison acknowledges that, as a result of filing an appearance on behalf of BSL in the oppression proceedings, he owed a professional duty to the plaintiff. However, he denies that he breached any of the duties he owed BSL.

[99] Mr. Morrison argues that he was involved in the transaction, but only after making efforts to settle the matter with Mr. Reis on behalf of Mr. Briere and BSL before a receiver was appointed. These efforts were designed to encourage a

settlement under which BSL could continue to operate its business. However, they were ultimately unsuccessful and the receivership went forward.

[100] The defendants say the proposition that the purchase of the credit union's security occurred behind the back of BSL or that BSL did not consent to the transaction is untenable.

[101] The assets of BSL were sold by the receiver, which was managing the affairs of the Company. Therefore, it was the Company (through the receiver) that approved or ratified the sale of the security interest. There was no conflict of interest because the Company, on the one hand, and Mr. Briere, Mr. McKenzie and 734540, on the other hand, agreed to the same transaction according to the same terms. Therefore, the plaintiff, through the receiver, approved of any dealings with the Company's assets with which Mr. Morrison was involved.

[102] Moreover, a conflict must be shown to have had adversely affected the plaintiff. Mr. Morrison argues that the facts do not support the proposition that Mr. Morrison's actions negatively affected BSL. There is no evidence that he caused the receivership, or that after the receivership he did anything to deprive the Company or its creditors of any monies.

Plaintiff's Position

[103] The plaintiff seeks an order that the defendants breached their duties to BSL and/or are liable for knowing assistance or knowing receipt and dealing. It asks the court to find the defendants liable and determine the quantum of damages.

[104] The plaintiff claims that a plan was formulated to buy the credit union's security and receivership, and then ensure that BPG purchased BSL's assets from the new receiver. The plaintiff argues that this plan was precisely carried out intentionally without Mr. Reis' knowledge. The motivation for doing so was to avoid repaying Mr. Reis' shareholder loans.

[105] The plaintiff says that on September 13, 2005, within two weeks of Madam Justice Arnold-Bailey's order that BSL and Mr. Briere pay $150,000 to Mr. Reis, and within several days of the incorporation of 734540, Mr. Morrison formulated a plan that would see BSL and Mr. Briere avoid paying the $150,000. The plaintiff says that the plan was intended to allow Mr. Briere to obtain BSL's assets and business "on the backside".

[106] BSL asserts that this plan is set out in precise detail in Mr. Morrison's letter to Mr. Aulinger dated September 29, 2005. In that letter, Mr. Morrison recounted what had occurred up to that point in time and outlined what had yet to be done, all of which subsequently did occur. The next day, BPG was incorporated in anticipation of acquiring BSL's assets through public auction.

[107] The plaintiff's case is that the plan suggested by Mr. McCandless was implemented by Mr. Morrison in precisely the manner outlined. The only discrepancy was the exact amount that BPG paid for the Company's assets. The plaintiff put it this way:

> 11. The Defendants have two answers to [the plaintiff's claim]. They say that:
>
> a. Aulinger told Wong "everything" about what was going on regarding the purchase by [734540] of the Credit Union's security interest and that the effect of knowing "everything" was that, Reis passed on doing exactly what Briere did.
>
> b. There was no guarantee that [BPG] would be successful in purchasing the assets and anyone, including Reis, could have been the successful purchaser.

[108] The plaintiff argues that Mr. Reis was kept in the dark. The court should accept Mr. Wong's evidence that he was not told about the scheme. Furthermore, Mr. McKee was told by the receiver, Mr. Popoff, that the equipment had already been sold.

[109] However, the two findings of fact made above at paragraphs 70 to 83 are that, first, Mr. Aulinger attempted to, and believed that he had, explained the transaction to Mr. Wong. Second, I have found that Mr. McKee is mistaken in his

recollection of his conversation with Mr. Popoff. Mr. Reis had the opportunity to purchase the assets.

[110] The plaintiff's case, as it was framed in the statement of claim, also included the allegation that Christopher Briere in late 2005 had discussions with the credit union which caused it to accelerate the balance on its loans, leading to the appointment of a receiver.

[111] The plaintiff has since abandoned this argument. The evidence establishes that the credit union called the loans because of the judgment registered against the Company by Celina Reis and the order of Madam Justice Arnold-Bailey against the Company in favour of Mr. Reis.

[112] The plaintiff in fact concedes as much. It has come full circle from the original allegation that Christopher Briere had a part in the credit union's decision to seek repayment of BSL's indebtedness. The plaintiff concedes that the credit union's action upon its security "may well have" been prompted by the judgment and order registered against the Company.

[113] The receivership and subsequent liquidation of BSL was a direct result of the actions of Celina and Norman Reis. As counsel for Mr. Briere pointed out in his written submissions, that "charted the course of the receivership towards final liquidation" of the Company's assets.

DISCUSSION AND ANALYSIS

[114] At the heart of this case lies the fact that Mr. Briere and his father took steps to acquire the assets of BSL. Mr. Reis did not.

[115] The plaintiff argues that BSL went out of business and that the new company, BPG, picked up its business and wrongfully appropriated corporate opportunities from it. It says that this was a result of the plan in place to prevent the payment of $150,000 to Mr. Reis.

[116] Section 105 of the *Business Corporations Act*, S.B.C. 2002, c. 57, provides as follows:

> **Powers of directors and officers**
>
> 105 If a receiver manager is appointed by the court or under an instrument over some or all of the undertaking of a corporation, the powers of the directors and officers of the corporation cease with respect to that part of the undertaking for which the appointment is made until the receiver manager is discharged.

[117] Similarly, *Bennett on Receiverships*, 3d ed. (Toronto: Carswell, 2011) at 22, provides:

> The effect of the [receiver's] appointment suspends the powers of the directors and officers of the debtor corporation with respect to the debtor's property during the currency of the appointment. They have no power to enter into contacts, create debt, or manage the business.

[118] I agree with the defendants' submission that once it entered receivership, BSL was incapable of performing any business as the credit union had seized the cash in its operating account. Once the Company's ability to finance its operations was impaired, the Company could not carry on business. It could have no corporate opportunities after this point. The receiver had the authority to conduct all the affairs of the Company until the receivership came to an end. BSL was out of business and its assets had to be liquidated.

[119] The public tender process was for the purpose of maximizing the return to BSL's creditors. The provision in the *Law and Equity Act* is not a precondition for Mr. Briere, through other companies, to eventually acquire the assets of BSL through BPG. Any party could have exercised this opportunity to purchase the assets of BSL. As long as Mr. Briere did not take advantage of BSL and act contrary to its best interests, he had every right, like any other person, including Mr. Reis, to seek to acquire the assets upon liquidation.

[120] It was suggested by the plaintiff that Mr. Briere should have found a way to borrow money and refinance the Company once it entered receivership in order to pay off its creditors. But, as the defendants point out, because of the order requiring

payment of $150,000 against the Company and Mr. Briere personally, neither he nor BSL had any ability to borrow further funds. However, and in any event, his duties as a director and shareholder do not extend to a duty to rescue the Company from receivership.

[121] Mr. Reis, for his part, suggested in his affidavit material that BPG collected receivables of BSL. However, there is no evidence of this. Not one example of such a receivable was put forward.

[122] The plaintiff says that the Company's assets were worth $872,000 in the context of a continuing business. This is a reference to an appraisal conducted in 2010 by Universal Appraisal Co. Ltd.

[123] The defendants argue that this report was not served as an expert's report and is therefore inadmissible. I make no ruling on that.

[124] The point is that the report says nothing about the value of the same assets after the receivership commenced in September 2005 in the context of a liquidation sale.

[125] On the other hand, the two receivers obtained appraisals during the relevant course of events. The Boale Wood report of September 18, 2005, put the value of the assets at between $161,560 and $197,300. The appraisal of Maynard's Appraisals Ltd. valued the assets at between $123,675 and $171,030 on November 16, 2005.

[126] The evidence does not satisfy me that Christopher Briere's actions were inconsistent with his duties as a director and officer to act in the Company's best interests. Likewise, as the defendants submit, absent a finding that Mr. Briere committed wrongful acts contrary to the best interests of the Company, nothing prevented Mr. Briere from establishing a new business in the same industry. I find no breach of any fiduciary duty owed to the Company on the part of Mr. Briere. I reach a similar conclusion with respect to Ms. Blomly.

[127] According to *Giles*, upon determining that there has not been a breach of a fiduciary duty, it follows that the related claims for knowing assistance against the other defendants must be dismissed.

[128] Further, and in any event, the plaintiff has not proven any damages. There is no evidence that a sale of the assets by Boale Wood on behalf of the credit union, as opposed to Mr. Popoff on behalf of 734540, would have generated any greater return than that which was accomplished. The sale to BPG in the public auction generated more revenue than the other parties biding on the assets collectively brought.

[129] Similarly, I am not persuaded that Mr. Morrison was in breach of his obligations. Whether he was in a position of conflict does not need to be decided. That is because, even if he were, nothing he did caused any damages or financial loss to BSL.

[130] For these reasons, the defendants' applications to dismiss the action succeed.

[131] The sale of BSL's assets brought $180,000, which I note is approximately $100,000 more than the credit union's security interest at the time of receivership. Mr. Reis, as a creditor of BSL, is entitled to his share of the proceeds, if any remain.

COSTS

[132] I turn to costs. There were two different applications, the application to disqualify Mr. Reis from having carriage of the derivative action and the applications to dismiss. Mr. Reis prevailed in the first application and the defendants were successful in the second.

[133] In the circumstances, there will be no order as to costs.

"Kelleher J."