

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Betts v. Zienowicz*,
2023 BCSC 328

Date: 20230306
Docket: S2012279
Registry: Vancouver

Between:

Daniel Betts and Yanchao Li

Plaintiffs

And

**Mariusz Zienowicz, Dariusz Zienowicz, 7Green Systems Inc.,
Realize Consulting Ltd., Smart Consulting Group Ltd., 7Green Grows Inc.,
7Green Holdings GP Limited and 7Green Holdings LP through
its general partner 7Green Holdings GP Limited**

Defendants

Before: The Honourable Mr. Justice Macintosh

Reasons for Judgment

Counsel for the Plaintiffs:

D.A. Frenette

Appearing as Representative for the
Defendant, Mariusz Zienowicz,
and on his own behalf:

D. Zienowicz

Place and Dates of Trial:

Vancouver, B.C.
February 6-10, 13 and 14, 2023

Place and Date of Judgment:

Vancouver, B.C.
March 6, 2023

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Introduction

[1] Daniel Betts and his father-in-law, Mr. Li, now sue only the Defendants Mariusz Zienowicz and Dariusz Zienowicz, seeking damages for the breach of a Shareholders Agreement dated April 28, 2017. The Shareholders Agreement was intended to address the relationship among the parties in a venture growing and selling cannabis. Mr. Betts and the two Defendants named above were the main parties to that agreement.

[2] There have been in this dispute four petitions, an arbitration hearing, and the notice of civil claim (S2012279) which pleads this remaining claim.

[3] In all of the proceedings, and in the trial before me, Mr. Betts has been referred to as Daniel, Mariusz Zienowicz as Mark, and Mark's twin brother, Dariusz Zienowicz, as Derek. I will employ the same first names in these reasons.

[4] Both Plaintiffs and Derek testified at trial. No one else did.

The Related Proceedings

[5] On June 3, 2019, the Plaintiffs filed a petition alleging oppression by Mark and Derek. The Plaintiffs claimed that they had been excluded from the cannabis business contrary to their rights as shareholders.

[6] On June 29, 2019, I stayed the petition, finding that an arbitration clause in the Shareholders Agreement necessitated the oppression allegations being heard in arbitration.

[7] The Plaintiffs commenced arbitration proceedings on August 2, 2019. Arbitrator Clemens heard evidence May 19-21, 2020. His Award was dated August 11, 2020. He ruled in the Plaintiffs' favour on numerous issues.

[8] Arbitrator Clemens had earlier made a procedural order that the Defendants produce further documents. Those documents eventually revealed more steps by the Defendants to further impede the Plaintiffs' rights under the Shareholders Agreement. The documents disclosed new entities the Defendants had incorporated

that were previously unknown to the Plaintiffs. However, the Defendants would not consent to adding the new corporate entities to the arbitration proceedings. After the Clemens Award, the Plaintiffs were forced back to this Court, where Justice Mazawa, on November 18, 2020, permitted them to commence the present action, which they did the next day, on November 19, 2020, adding the new corporate entities as parties.

The Admissibility of Facts Found by the Arbitrator

[9] The parties before Arbitrator Clemens were the Plaintiffs, and Mark and Derek, plus the companies contemplated by the Shareholders Agreement. The Clemens Award has not been appealed. It was entered with this Court on November 18, 2020, as part of the Mazawa order, in accordance with s. 29 of the *Arbitration Act*, as it stood at the relevant time, R.S.B.C. 1996, c. 55, s. 29(1):

29 (1) With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

[10] The Plaintiffs ask that I accept as facts, for the purpose of deciding the present claim, the facts as found by Arbitrator Clemens. I am prepared to do so. Our Court of Appeal said the following about the significance of s. 29, in *Bekar v. TD Evergreen*, 2006 BCCA 266, at paras. 37 and 38:

[37] ... In that regard, the submission of counsel for Evergreen that the registration of an award under s. 29 of the CAA amounts to little more than “rubber-stamping” by the court cannot be sustained. The fact that leave is required makes it clear that an award is not entitled to automatic status as a judgment of the court.

[38] In my view, the purpose of the requirement for leave under s. 29 is to permit the court to exercise its supervisory power in determining whether it is appropriate to permit an award to be enforced as a judgment of the court. The authorities to which I earlier referred indicate that leave may be refused, for example, where the award is still subject to appeal (as was the case here), where all matters of importance under the arbitration have not been resolved, or where proper processes were not followed in obtaining the award.

[Emphasis added.]

[11] Justice Mazawa considered ss. 29 and 30 of the *Arbitration Act* when he ordered that the Award be entered. Section 30(3) provided that, except as provided in s. 31 [dealing with appeals], the Court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award. Section 31(1) confined appeals to questions of law. In the result, even when an arbitration award is not entered with the Court under s. 29, findings of fact are to be left alone except in exceptional circumstances which are not present here. The sanctity of the factual findings an arbitrator makes has been addressed in several decisions. In *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, Justice Skolrood, as he then was, wrote as follows at paras. 37 and 38:

[37] The grounds on which a court may interfere with an arbitral award under ss. 30 and 31 have been the subject of considerable judicial consideration and I will address the relevant case law when dealing with the issues raised in the two petitions. At the outset, however, it is useful to note the cautionary approach that the courts typically take in such cases, as well summarized by Madam Justice Dickson, as she then was, in *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834 [*Arbutus Software*] at para. 64:

Public policy requires the court to give substantial deference to decisions made in commercial arbitration. The need for deference arises out of the two principal objectives of arbitration: early finality and a determination made outside the court system.

[38] In addition to the policy objectives identified by Madam Justice Dickson, the deference afforded by the courts reflects the fact that arbitration is a consensual process and the court will not likely interfere in the parties' agreement to resolve their dispute outside of the judicial process.

[Emphasis added.]

[12] In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, the Court found as follows at para. 45:

[45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal

test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[Emphasis added.]

[13] To quote from one further authority on the point, Justice Cohen of this Court wrote as follows in *La Compagnie D'assurance-Vie Manufactures v. B.C. Gas Inc.*, 1998 CanLII 3813 (B.C.S.C.) at para. 7:

[7] In *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 1991 CanLII 5708 (BC CA), 50 B.C.L.R. (2d) 207 (C.A.), Gibbs J.A. comments at length on the policy reasons for judicial restraint in reviewing the decisions of arbitrators, including the need to preserve the autonomy of the forum selected by the parties. The desirability of curial deference to arbitral awards is reflected in the *Act*, which seriously circumscribes the jurisdiction of the court to interfere with arbitrations to which it applies. In this regard section_32 of the *Act* states:

Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

...

[Emphasis added.]

[14] These decisions, speaking to arbitral deference in fact-finding, were addressing arbitration awards that were under appeal. Where, as here, the Award was never appealed, and was entered in this Court for purposes of enforcement, it is all the more necessary to accept the facts as found by the Arbitrator, when the same parties and essentially the same issues were before him. I am mindful as well that Arbitrator Clemens is experienced, with a long history of both litigating and deciding commercial disputes.

[15] As a final point, the Arbitrator's findings of fact in this matter, when tested against the voluminous documentary evidence and the oral evidence at trial, were entirely reasonable.

[16] For all of these reasons, I am treating the Arbitrator's findings of fact as facts to be adopted and employed in reaching my conclusions on the issues before me.

The Arbitrator's Findings of Fact

[17] The Arbitrator's findings of fact undermine several defences Mark and Derek raised before me.

[18] They argued in this trial that Daniel entered with them into, what they termed, the “Business Agreement”, whereby he agreed to move to the site of the growing operation in Kamloops, and that he would cease any “grey market” cultivation of cannabis. (He did not move to Kamloops and did not cease such cultivation.) The Arbitrator found that the alleged Business Agreement was never formed, and that Daniel had no obligation to move to Kamloops or to cease all “grey market” cultivation.

[19] Mark and Derek argued before the Arbitrator, and in this trial, that Daniel repudiated and fundamentally breached the Shareholders Agreement, thus relieving them from having to perform their obligations under the Shareholders Agreement. The Arbitrator found that Daniel complied with the requirements of the Shareholders Agreement and that the Defendants breached the Shareholders Agreement not in response to any breach by Daniel, but instead because Daniel refused to give up what were called his “veto rights”, which he had negotiated as part of the Shareholders Agreement.

[20] The Arbitrator reviewed the evidence of the care that was taken in the negotiation and formation of the Shareholders Agreement upon which Daniel relies.

[21] At para. 71 of his Award, the Arbitrator set out all of the complaints by Derek and Mark of alleged wrongdoing by Daniel in order to constitute Daniel's repudiation or fundamental breach of the Shareholders Agreement:

- (a) Becoming, or staying, involved in at least two illegal cannabis grow-operations;
- (b) Selling/distributing cannabis illegally;

- (c) Becoming, or staying, involved in grey-market growing, selling and/or distribution of cannabis;
- (d) Failing to provide evidence that the funds he provided for the Business were from a legitimate source;
- (e) Being unable to contribute funds from legitimate sources required for the development of the Business;
- (f) Failing to provide other assistance required for the development of the Business;
- (g) Stating he would not be moving to Kamloops; and
- (h) Stating that he would not be involved in the Business.

[22] At para. 72 of the Award, the Arbitrator concluded:

72. Based on the foregoing, I find that Dan did not breach any of the provisions of the Shareholders' Agreement and, as a result, I find that Dan did not repudiate or fundamentally breach the Shareholders' Agreement.

[23] The Arbitrator then examined what became another defence presented by Mark and Derek at trial, namely that the Shareholders Agreement was frustrated by the coming into force of the federal cannabis legislation on October 17, 2018. The Arbitrator set out the applicable law of frustration, and his findings of fact on the question of frustration. After an exhaustive review of the evidence, and after making numerous factual findings at paras. 77-102 of his Award, the Arbitrator concluded that nothing in Daniel's conduct throughout resulted in the frustration of the Shareholders Agreement, and that the Shareholders Agreement was not otherwise frustrated.

[24] At paras. 103-107 of the Award, the Arbitrator found that Daniel's wrongful exclusion from the business by Mark and Derek was because the Shareholders Agreement interfered with Mark and Derek's preferred business model. In the result, Mark and Derek abandoned Daniel and the Shareholders Agreement.

[25] The Arbitrator's summary of his decisions in the Award is helpful:

VIII. DECISIONS ON ISSUES POSED BY THE PARTIES

108. I will begin with the issues as posed by the Respondents.

1. In light of the provisions of the Business Agreement and the Shareholders' Agreement, did Mr. Betts require a security clearance under the MMPR or ACMPR?

Answer: For the reasons set out above, Mr. Betts did not require a security clearance under the MMPR or the ACMPR.

2. Is Mr. Betts violating the "Criminal Activities" provisions in the *Cannabis Act*?

Answer: It is unnecessary to decide whether Mr. Betts is violating the "Criminal Activities" provision of the *Cannabis Act* as he, at no relevant time, was required to obtain a security clearance.

3. In light of the provisions of the Business Agreement and the Shareholders' Agreement, did Mr. Betts require a security clearance under the *Cannabis Act* and *Regulations*?

Answer: For the reasons set out above, Mr. Betts did not require a security clearance under the *Cannabis Act* and *Regulations*.

4. Could Mr. Betts have obtained a security clearance under the *Cannabis Act* and *Regulations*?

Answer: It is unnecessary to decide whether Mr. Betts could have obtained a security clearance under the *Cannabis Act* and *Regulations*, as he was not required to do so.

5. Are the Business Agreement and Shareholders' Agreement frustrated?

Answer: The Business Agreement was never made among Dan, Mark and Derek. For the reasons set out above, the Shareholders' Agreement was not frustrated.

6. Were the Business Agreement and Shareholders' Agreement fundamentally breached and/or repudiated?

Answer: The Business Agreement was not proven to exist among Dan, Mark and Derek. The Shareholders' Agreement was not fundamentally breached or repudiated by Dan.

7. Is there a trust agreement between Mark Zienowicz, Derek Zienowicz and Mr. Betts for the Kamloops Property?

Answer: The terms of the Trust Agreement between Mark, Derek and Dan for the Kamloops Property is as set out in the Shareholders' Agreement at Section 17.02 (q).

8. If the Business Agreement and Shareholders' Agreement were fundamentally breached, repudiated and/or frustrated, what is the remedy available to Mr. Betts?

Answer: As neither Agreement was fundamentally breached, repudiated or frustrated the question of remedy does not arise.

1. The issues as posed by the Claimants are answered below:
 - (i) whether Daniel is entitled to a declaration of trust over the Kamloops Property;

Answer: Dan is entitled to a Declaration of Trust over the Kamloops Property in the terms set out in the Shareholders' Agreement at Article 17.02 for the reasons set out above.

- (ii) whether Daniel repudiated and fundamentally breached the Shareholders' Agreement;

Answer: For the reasons set out, Dan did not repudiate or fundamentally breach the Shareholders' Agreement.

- (iii) whether the Shareholders' Agreement was frustrated; and

Answer: For the reasons set out above, the Shareholders' Agreement was not frustrated.

[26] The above findings are devastating to the defence of this action on the question of liability because they serve to negate the defences raised at trial. The Shareholders Agreement remained in place. The Plaintiffs never breached the Shareholders Agreement. The Defendants did breach the Shareholders Agreement, as will be described further below.

The Larger Picture of the Facts

[27] Accepting and summarizing above the Arbitrator's fact-finding has, to some extent, put the cart before the horse.

[28] To back up in the chronology of the case, Daniel met Derek and Mark, either at their birthday party, or at a New Year's Eve party at the house of Daniel's friend, Barry, sometime in 2010, 2011 or 2012, probably in 2012. (The vague memories of where and when the parties met was typical of the poor recollection for details at trial on the part of both Daniel and Derek. On the facts of this case however, the lack of particularity in the trial testimony does not prevent the findings of fact needed to reach the relevant conclusions on liability, particularly when the Court has the benefit of the Arbitrator's findings, above, from the testimony he heard in May 2020.)

[29] Whenever exactly the three met, Daniel told the brothers of his hopes and plans for commercial success in the rapidly-emerging enterprise of lawful cannabis cultivation and sale. Daniel was experienced and adept in growing high quality cannabis. He had the use of a site in Langley he had developed as a “grow room” to grow cannabis under the *Marihuana Medical Access Regulations*, SOR/2001-227 [MMAR], which had come into force in 2001; and under the successor *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [MMPR], which came into force October 1, 2013. Daniel had friends and acquaintances whose health problems had qualified them for licenses to possess cannabis, and use it, under these various regulations. He knew that the market for legally-regulated cannabis was only beginning.

[30] The three men seemed to get on well from the start. The twins, Derek and Mark, knew nothing about growing or selling cannabis, but they were enthusiastic to get into the business. They told Daniel they had a lobbyist in Ottawa, and that they were experienced in dealing with government. They also spoke of having information technology to help sell the product. The brothers had run a business, based in Kamloops, assisting First Nations with implementing tax schemes on reserve lands leased to non-aboriginal businesses. Their contacts in Ottawa, at least with respect to the regulation of cannabis, were, in fact, close to nonexistent.

[31] The brothers offered to contribute by working as needed in the daily operation of the new venture, and in matters of licensing and other regulatory requirements. It was agreed, probably at a meeting in early 2014 in a Kamloops restaurant, that Mark would be the “face” of the venture, and serve as the CEO. The initial equity allocation agreed to in a company, yet to be incorporated for the venture, was 70% to Daniel and 10% each to Derek, Mark and friend Barry, who received his 10% as a finder’s fee for introducing Daniel to the brothers. Barry played no further part.

[32] Paul Pederson, a friend of a friend of Daniel, approached the three men offering to take the venture public. Mr. Pederson and the brothers had seen Daniel’s

Langley site and wanted it to be used as the designated location for the required license application.

[33] Mr. Pederson contributed a shelf company he had, West Coast Acquisitions, to own and run the venture. The group worked to make the Langley site suitable, and raised about \$150,000 for the project from several of Daniel's friends.

[34] However, the Langley site presented problems because, at that time, the local government there was undecided as to whether it would embark upon land-use regulation in this new industry. Ultimately, the *MMPR* license application for the Langley site was denied.

[35] The group were anxious to find a new location, and were able to eventually locate a site in Kamloops. The site was acquired for \$750,000 in the name of Smart Consulting Group ("Smart Consulting"), a company wholly owned by Derek. Daniel and Mr. Pederson had no warning of Smart Consulting becoming the purchaser. West Coast Acquisitions was supposed to be the purchaser. It had made the down payment on the property. However, Derek knew the realtor, and switched the buyer from West Coast Acquisitions to Smart Consulting without the knowledge of Daniel or Mr. Pederson. Learning of the switch, Mr. Pederson was understandably angry, and warned Daniel against carrying on in business with Derek and Mark. Daniel, unfortunately, did not heed that advice. He remained with the brothers because he had been with them from the start. As he put it at trial, he had shaken hands with them on the venture. On April 29, 2015, Mr. Pederson pulled out and took West Coast Acquisitions with him. Daniel and the brothers reimbursed West Coast Acquisitions for the down payment it had made on the Kamloops property. Title in the Kamloops property remained in the name of Derek's company, Smart Consulting.

[36] A second tension arose between Daniel and the brothers about renovating the building on the Kamloops property versus rebuilding at that location from scratch. Daniel favoured the latter approach but the brothers prevailed. The result

was lengthy and costly delay in site completion, and in the licensing process, with what was undoubtedly an inferior site. Daniel was ready to quit.

[37] The three men met in Hope, sometime in 2016, where they agreed to take ownership in the ongoing venture one third each. The license applicant became Realize Consulting, a company wholly owned by Mark.

[38] Daniel by that time was sufficiently concerned about the ability and integrity of the brothers that he would not continue without a proper agreement among the three men. He hired a Vancouver solicitor to create the agreement. After nine drafts, at a cost of \$60,000 in legal fees for Daniel, the Shareholders Agreement at the heart of this dispute was made on April 28, 2017. The new corporate entity for the venture was 7Green Systems, incorporated June 23, 2017.

[39] Mark and Derek demanded initially that Daniel register his shares in 7Green Systems under their names, with Daniel retaining beneficial ownership only. They said that would streamline the application process by circumventing Daniel's history in the unregulated cannabis growing world. Daniel did not want to put his shares in their names, and he saw no reason why he could not be the registered shareholder for his shares. However, to avoid a conflict, by way of compromise, he agreed to place his shares in the name of his father-in-law, the Plaintiff Mr. Li. Mr. Li became the registered owner and Daniel the beneficial owner of one third of the shares in 7Green Systems. Smart Consulting was to hold the Kamloops property in trust for the three shareholders equally, and was to transfer title in the Kamloops property to a wholly-owned subsidiary of 7Green Systems. Realize Consulting was to become a wholly-owned subsidiary of 7Green Systems. Unanimous consent of the three shareholders was required for issuing new shares in the new company, appointing directors and officers in the new company, disposing of shares in the new company and in Realize Consulting and Smart Consulting, and setting the remuneration for employees, officers and directors in the new company.

[40] The Shareholders Agreement did not prevent Daniel from becoming or remaining involved in the growing or selling of cannabis.

[41] Daniel's shares in 7Green Systems were issued to Mr. Li.

[42] By early 2018, Mark and Derek communicated less frequently with Daniel. There was communication when the new venture needed money. A friend of Mark and Derek's, Jonathan Flemming, became increasingly involved in the business. Mark and Derek wanted to grant Mr. Flemming a 9.3% equity stake in the business in exchange for him acting as CEO and investing \$250,000. That confused Daniel, as he had been led to understand by the brothers that the business was valued at \$10 million, and that Mark would be the CEO.

[43] Mark and Derek began to complain that the Shareholders Agreement was too restrictive. They tried to get Daniel to agree to a new arrangement more favourable to the brothers. By an email to Daniel on March 6, 2018, the brothers sent Daniel a proposed agreement significantly changing the Shareholders Agreement and placing Daniel's ownership at risk of significant dilution. Daniel did not agree to the proposed changes. Mark and Derek issued an ultimatum; sign the proposed new agreement or else the venture for the three of them acting together was at an end. Daniel sought to find common ground, unsuccessfully. Eventually, Mark and Derek restricted Daniel's access to 7Green Systems' bank account.

[44] The first steps by Mark and Derek clearly in breach of the Shareholders Agreement occurred on July 17, 2018. Unbeknownst to Daniel, the two brothers, with Jonathan Flemming, created new companies to which they transferred all the assets of the venture. Daniel was given no ownership in any of the new companies.

[45] An asset transfer agreement, dated July 17, facilitated the transfer of the Kamloops building and other improvements on the property from Smart Consulting to Realize Consulting in exchange for a \$576,000 promissory note from Realize Consulting. The Kamloops land was leased from Smart Consulting to a new company, 7Green Grows. Approximately a year later, on June 11, 2019 and July 11, 2019, Mark informed Health Canada about the corporate reorganization described above, and replaced Realize Consulting with 7Green Grows as the applicant for the

Health Canada license. That license was issued by Health Canada to 7Green Grows on August 30, 2019.

[46] Also on July 17, 2018, the date cited above for many of the steps taking the venture away from Daniel, 7Green Grows, the new corporate vehicle for the venture, began to take on new investors, most of whom were family or friends of Jonathan Flemming, Mark or Derek. I will return to those investments when damages are discussed below in these reasons.

[47] 7Green Grows was a going concern from 2018 to 2022. It eventually failed. The evidence to explain the failure included that the new business of cannabis growing and selling was overregulated and saturated. On February 1, 2023, 7Green Grows and Smart Consulting, which still owned the Kamloops property, entered bankruptcy proceedings.

[48] During his time as a participant in the venture, up to approximately July 2018, Daniel contributed a total of \$250,000 to the business, including \$75,000 he borrowed from the Plaintiff Li, \$40,000 of his own money, and other money he borrowed from friends. All his contributions were made when 7Green Systems was the corporate vehicle for the venture, as opposed to 7Green Grows, which took over, unbeknownst to Daniel, in July 2018.

[49] As noted above, Derek and Mark breached the Shareholders Agreement beginning no later than July 17, 2018. Counsel for the Plaintiffs, in his written submissions, correctly summarized the breaches by Mark and Derek as follows, at paragraphs 147-150 of his argument:

147. The primary breaches committed by Mark and Derek without the knowledge of Daniel, and which were concealed from Daniel:

- (a) the sale of the building at the Property by Smart to Realize on or about July 23, 2018;
- (b) lease of the Property by Smart to Grows and resulting collection of rent from Grows on July 23, 2018;
- (c) borrowing against the Property through the Royal Bank, and granting a mortgage in the amount of \$2,100,000 to the Royal Bank over the Property on January 14, 2019;

- (d) changing the applicant for the Health Canada license from Realize to Grows, such that the Licence was issued in the name of Grows;
- (e) incorporating the New Entities as new corporate vehicles for the Venture;
- (f) issuing themselves shares in Grows via their holding company and limited partnership, 7Green Holdings LP; and
- (g) selling shares in Grows to the New Investors, at an average corporate valuation of \$6,870,803.40, based on the average amount paid for shares in the Company by the New Investors.

148. While incorporating the New Entities, transferring assets to them, and accepting funds from the New Investors, Mark and Derek refused to respond to Daniel's inquiries, made directly and through legal counsel.

149. Mark and Derek instructed Jonathan to warn Daniel away from the Property, and to physically exclude him from the Property. They removed Daniel's access to Systems' bank accounts, and to any information about the Venture.

150. Many of the initial steps taken by Mark and Derek to exclude Daniel were taken contemporaneously with requests that Daniel continue to deposit money into the Company.

[50] The steps I have summarized above all breached the Shareholders Agreement. Under that agreement, 7Green Systems was incorporated to run the venture and to own or wholly control the entities which owned the land and the license. Mark, Derek and Daniel were to each have a one third beneficial ownership. The steps Derek and Mark took from July 2018 onward, without Daniel's knowledge, and plainly against his interest through the elimination of his share ownership in the venture, render them jointly and severally liable for breach of contract. In addition, they owed Daniel a duty of honest performance in connection with the Shareholders Agreement, in accordance with the principles expressed by Justice Cromwell in *Bhasin v. Hrynew*, 2014 SCC 71, at paras. 73 and 93:

[73] In my view, we should. I would hold that there is a general duty of honesty in contractual performance. This means simply that parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract. This does not impose a duty of loyalty or of disclosure or require a party to forego advantages flowing from the contract; it is a simple requirement not to lie or mislead the other party about one's contractual performance. Recognizing a duty of honest performance flowing directly from the common law organizing principle of good faith is a modest, incremental step. The requirement to act honestly is one of the most widely recognized aspects of the organizing principle of good faith: see Swan and Adamski, at § 8.135; O'Byrne, "Good Faith in Contractual Performance:

Recent Developments”, at p. 78; Belobaba; *Greenberg v. Meffert* (1985), 50 O.R. (2d) 755 (C.A.), at p. 764; *Gateway Realty*, at para. 38, per Kelly J.; *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.), at para. 69. For example, the duty of honesty was a key component of the good faith requirements which have been recognized in relation to termination of employment contracts: *Wallace*, at para. 98; *Honda Canada*, at para. 58.

...

[93] A summary of the principles is in order:

(1) There is a general organizing principle of good faith that underlies many facets of contract law.

(2) In general, the particular implications of the broad principle for particular cases are determined by resorting to the body of doctrine that has developed which gives effect to aspects of that principle in particular types of situations and relationships.

(3) It is appropriate to recognize a new common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.

[Emphasis added.]

Damages

[51] The most difficult task in this case is determining the appropriate damages owing to the Plaintiffs by Derek and Mark for their breaches of the Shareholders Agreement.

[52] Plaintiffs’ counsel cited case law expressing in general terms the tests to be applied in the damages assessment. For example, in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43, Justice Major, writing for the Court, said this, at paras. 25-27:

25 Contract damages are determined in one of two ways. Expectation damages, the usual measure of contract damages, focus on the value which the plaintiff would have received if the contract had been performed. Restitution damages, which are infrequently employed, focus on the advantage gained by the defendant as a result of his or her breach of contract.

(a) *Expectation Damages*

26 Generally, courts employ expectation damages where, if breach is proved, the plaintiff will be entitled to the value of the promised performance (S. M. Waddams, *The Law of Damages* (3rd ed. 1997), at p. 267).

27 See *Haack v. Martin*, [1927] S.C.R. 413, *per* Rinfret J., at p. 416:

The case is governed by the general rule applicable to all breaches of contract, and laid down as follows by Parke B. in *Robinson v. Harman* (1848) [1 Ex. 850, at p. 855].

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[Emphasis added.]

[53] This Court, in *SHH Management Limited v. Philip*, 2020 BCSC 1411, at para. 287, quoted from a Supreme Court of Canada decision in 2006, which in turn relied on the English decision of *Hadley v Baxendale*:

[287] In assessing the quantum of these damages, the general principle is that such damages must be “such as may fairly and reasonably be considered either arising naturally...from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties”: *Fidler [v. Sun Life Assurance Co. of Canada]*, 2006 SCC 30] at para. 27, quoting *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145 at 151.

[Emphasis added.]

[54] The formulations above are unquestionably right, but they can serve only as a general description of a starting place for determining what Derek and Mark owe Daniel.

[55] Daniel and his father-in-law claim damages of \$2,289,903. They say that figure is one third of the value of 7Green Grows at the time of the breach, July 17, 2018. (July 17, 2018, it will be recalled, was the day Derek and Mark implemented their plan to take everything away from 7Green Systems in order to exclude Daniel from any ownership or control of the venture.)

[56] Implicit in the Plaintiffs’ claim is that, but for the breach, the Plaintiffs would have been entitled to, and able to liquidate and obtain, one third of 7Green Grows’ value as of July 17, 2018, and that they would, or at least could, have received that

money at that time, as a matter of law, had the Shareholders Agreement been performed.

[57] I expect the Plaintiffs took that approach to valuing damages because, after approximately July 2018-July 2019, the cannabis industry in Canada generally, and this venture in particular, experienced a marked downturn, such that the value of cannabis businesses, including this one, substantially declined. Overregulation and market saturation were given as two of the reasons for the general decline. Today, 7Green Grows is bankrupt, as is Smart Consulting Group, Derek's company, which still owns the land in Kelowna.

[58] The Plaintiffs called no expert evidence of business valuation to assist in valuing one third of the venture as of July 17, 2018.

[59] The construct the Plaintiffs' presented for calculating damages was based on determining a share value for 7Green Grows shares based on the amounts apparently contributed, and shares apparently acquired, by friends and family of Mark, Derek and Jonathan Flemming, from July 2018 to July 2019. Below is a chart to show this, taken from the Plaintiffs' closing submissions:

Name	Shares	Date Subscribed	Contribution	Percentage of Shares	Valuation
0746605 B.C. Ltd.	10,000	May 30, 2019	\$100,000	1.4%	\$7,142,857.14 (\$714/share)
1443737 Alberta Ltd.	35,000	October 24, 2018	\$350,000	4.9%	\$7,142,857.14 (\$714/share)
Jonathan Fleming	78,000	July 19, 2018	\$300,480	10.8%	\$2,782,222.22 (\$35.67/share)
Lowen Family Trust	10,000	July 30, 2019	\$200,000	1.4%	\$14,285,714.29 (\$1,428.57/share)
M. Guenter Holdings Ltd.	10,000	May 30, 2019	\$100,000	1.4%	\$7,142,857.14 (\$714/share)
Steven Schaafsma	32,600	May 19, 2019	\$326,000	4.5%	\$7,244,444.44 (\$222.22/share)

Shay Family Trust	10,000	October 1, 2018	\$65,000	1.4%	\$4,642,857.14 (\$464.29/share)
White Creek Enterprises Ltd.	12,600	May 2, 2019	\$276,000	1.7%	\$16,235,294.12 (\$1,288.52/share)
7Green Holdings LP	522,010	July 17, 2018	\$876,010	72.5%	\$1,208,289.66 (\$2.31/share)
Totals:	720,210		\$2,593,490	100%	Average: \$6,869,710.37 (\$9.54/share)

[60] From the data in the chart, the Plaintiffs argue that they are entitled to a one third interest in the venture, in accordance with the Shareholders Agreement, and that the shareholders equity totals \$6,869,710. The claim is one third of that amount, or \$2,289,903.

[61] There are, in my view, concerns arising from employing that approach.

[62] The evidence from Exhibit 6, Tabs 4 and 46, at trial, at least suggests that the share purchases were made as shown in the above chart, except that the Percentage of Shares, and the share Valuation (the two columns on the right of the chart), were derived by Plaintiffs' counsel. So, for example, the evidence indicates that 0746605 B.C. Ltd. subscribed for 10,000 shares on May 30, 2019, for \$100,000. (Even that evidence, however, is equivocal because Exhibit 6, Tab 46, 7Green Grows balance sheet as at July 31, 2021, treats these sums not as equity but instead as "Long-term Liabilities", under which they are described simply as "Contributions". Under "Equity", in the same balance sheet, there are no data linked to the above chart.) But reading the chart even in the way most advantageous to the Plaintiffs, the 10,000 shares purchased for \$100,000 by the numbered company on May 30, 2019 implies a value per share of \$10 rather than the \$714 per share valuation shown in the chart. Similarly, in line 2 of the chart, the value per share would seem to be \$10 (35,000 shares purchased for \$350,000) rather than \$714. Similar downward adjustments would be required on that basis for all of the nine purchases shown.

[63] As I noted above, no expert evidence was tendered to explain these seeming discrepancies, or to support this valuation approach generally. 7Green Grows was not a public company having publicly-traded shares on the market, with available trading data to show the share price or total issued shares day to day. No evidence was led from any of the investors as to (1) why they invested in the amounts they did, (2) whether they paid cash in the stated amounts, or (3) whether they bought shares, made loans, or simply donated the money on some less defined general basis. Such evidence might have helped to reconcile Tabs 4 and 46 from Exhibit 6.

[64] What is known clearly is that the business eventually failed. The investments shown in the chart probably were lost, although that is not revealed in the evidence.

[65] In short, the chart in my view, does not present a reliable basis for concluding that \$2,289,903 was one third of the value of the business at the time the Defendants breached the agreement, July 17, 2018.

[66] Nonetheless, a court's task is to ascertain what, if any, damages for breach of contract a plaintiff did suffer, keeping in mind at the same time a plaintiff's obligation to prove damages on the balance of probabilities.

[67] In this case, Derek and Mark excluded Daniel from the business when he was the only person who knew how to grow high quality cannabis. The business struggled for a few years after he was excluded, and it shut down, I believe in 2022.

[68] Daniel, and Mr. Li, contributed \$250,000 to the business, plus years of Daniel's labour. Derek and Mark paid the Plaintiffs' nothing in the way of compensation when the Plaintiffs were excluded.

[69] Returning to the chart, above, one sees that on July 17, 2018, 7Green Holdings (owned at that time by Derek and Mark alone) invested \$876,010 to purchase shares in 7Green Grows. Derek did not deny at trial that he and Mark caused 7Green Holdings to contribute that money to purchase shares at that time.

[70] In my view, the most that the Plaintiffs can receive in damages from Derek and Mark, jointly and severally, (apart from punitive damages, considered below), is one third of \$876,010, as Daniel's share of the total share investment flowing from the old venture (7Green Systems) into the new venture (7Green Grows), which equals \$292,003, PLUS the repayment of the \$250,000 the Defendants took from Daniel and Mr. Li for developing the venture before they kicked the Plaintiffs out, for a total damages award of \$542,003.

Punitive Damages

[71] The Plaintiffs seek an award of \$50,000 as punitive damages.

[72] They advance their claim based on two decisions of the Supreme Court of Canada, decided the same day; *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595; and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] 1 S.C.R. 678. In *Whiten*, the Court upheld an award at trial of \$1 million in punitive damages, which on appeal had been reduced to \$100,000. In *Performance Industries*, the Court found that an award of punitive damages could not be supported.

[73] In *Whiten*, two paragraphs from the reasons of Justice Binnie, writing for the majority, set out the law that needs to be considered for the present case:

36 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

...

67 First, the attempt to limit punitive damages by "categories" does not work and was rightly rejected in Canada in *Vorvis*, supra, at pp. 1104-6. The control mechanism lies not in restricting the category of case but in rationally determining circumstances that warrant the addition of punishment to compensation in a civil action. It is in the nature of the remedy that punitive damages will largely be restricted to intentional torts, as in *Hill*, supra, or breach of fiduciary duty as in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, but *Vorvis*

itself affirmed the availability of punitive damages in the exceptional case in contract. In *Denison v. Fawcett*, [1958] O.R. 312, the Ontario Court of Appeal asserted in obiter that on proper facts punitive damages would be available in negligence and nuisance as well. In *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 124 D.L.R. (3d) 228, the British Columbia Court of Appeal awarded punitive damages in a negligence case on the principle that they ought to be available whenever "the conduct of the defendant [was] such as to merit condemnation by the [c]ourt" (p. 250). This broader approach seems to be in line with most common law jurisdictions apart from England.

[Emphasis added.]

[74] In *Performance Industries*, the Court declined to award punitive damages because doing so would not serve a rational purpose. An award of punitive damages was said to be rational if, but only if, compensatory damages did not adequately achieve the objectives of retribution, deterrence and denunciation.

[75] Mark and Derek's conduct calls for punitive damages. The compensatory damages I have awarded above do not adequately achieve the objectives of retribution, deterrence and denunciation. Mark and Derek did not merely breach the Shareholders Agreement, they essentially tore it up, in secret, and shoved Daniel out the door. Malicious, oppressive, and high-handed are three of the adjectives normally employed for conduct justifying an award of punitive damages, and they readily fit to describe the Defendants' conduct in this case.

[76] I award \$50,000 in punitive damages.

Special Costs

[77] The Plaintiffs seek special costs under Supreme Court Civil Rule 14-1(3).

[78] In assessing any claim for special costs, the first step is to remember that costs awards are based on conduct within the litigation, as opposed to pre-litigation conduct giving rise to a claim, where damages are the normal remedy.

[79] Special costs, like punitive damages, are designed to punish for reprehensible conduct. See, for example, *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.).

[80] Justice Watchuk surveyed the authorities and summarized the principles behind special costs in *Roussy v. Savage*, 2020 BCSC 487, at paras. 13-16. I will not repeat what she said.

[81] In my view, the Plaintiffs are entitled to special costs in this case because the Defendants, having not appealed the Arbitrator's Award, proceeded in this Court for seven days to run the same defences rejected in the arbitration, without adding any new evidence whereby this Court might have come to some different position on one or more of the issues. In other words, the Defendants wasted the Plaintiffs' time and money, and the Court's time, and the related public resources, in this trial. Secondly, although earlier in time, the Defendants held back on key document production time and time again, necessitating an application in this Court for document disclosure after the Plaintiffs had obtained leave to commence this action. Although the Defendants' deliberate delays and omissions in the production of key documents might be enough to trigger an award of special costs, that award in this case rests both on that ground and on the point made earlier, that the Defendants through this action presented no evidence that in any way supplemented or called into question the Arbitrator's findings, or raised any defence to the claims at bar. Justice Williams of this court, in *Webber v. Singh*, 2005 BCSC 224, at paras. 31-32, awarded special costs after a defendant adopted a position of "reckless indifference" to the position of the plaintiffs throughout the proceedings, and pursued defences which lacked any factual or legal merit. That in essence is the case before me.

Summary

[82] The Plaintiffs' claims against Mark and Derek for breaching the Shareholders Agreement are allowed. Damages are awarded in the amount of \$542,003, plus an additional \$50,000 in punitive damages. Special costs are ordered. I also order prejudgment interest from July 17, 2018 under the *Court Order Interest Act*, R.S.B.C.

1996, c. 79. Each of these orders is made against Mark and Derek jointly and severally.

“Macintosh J.”