CITATION: Sin v. Kela Medical Inc., 2024 ONSC 6767
COURT FILE NO.: CV-19-00628071-0000
DATE: 20241219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
WAI-CHEONG SIN a.k.a. DANIEL SIN Applicant	Nick Poon, for the Applicant
– and –	
KELA MEDICAL INC., ARJUN KUMAR, NARESH KUMAR and SPQKUMAR INC. Respondents	Barbra Miller and Danielle Muise, for the Respondents
	HEARD: November 20, 21, 23, & 24, 2024, and April 10 & 30, 2024

A.P. RAMSAY J.

I. Overview

[1] The plaintiff, Daniel Sin, joined Kela Medical Inc. in 2009. Mr. Sin was responsible for all technological aspects of Kela, and to continue with progression of the work on the company's portable Smart Card, which was intended to hold patient health records. The defendant, Arjun Kumar, was the principal of Kela. Kela was run on a nominal budget, initially funded by loans from Mr. Kumar personally, and then through loans advanced by Whitby Diagnostics Centre Ltd., a company in which his father, the defendant, Dr. Naresh Kumar, was a majority shareholder. Dr. Kumar expected the loans to be repaid. While at Kela, Mr. Sin's status fluctuated between being a consultant and an employee, the latter evidenced by one-year contracts in writing.

[2] Mr. Kumar subsequently incorporated a second company, Kela Atlantic Inc., operating as KAI Innovations ("KAI") in 2012. Mr. Sin approached Mr. Kumar about acquiring an ownership in KAI and put forward a proposal. The defendants do not dispute those discussions took place about making KAI a subsidiary to Kela, but contend that this option was ultimately rejected for business and tax reasons.

[3] Negotiations of Mr. Sin's compensation for 2013 resulted in an agreement which was reduced to writing (the "2013 Agreement"). The agreement contemplated that certain benefits would be conferred on Mr. Sin for each of four milestones completed. Under the fourth milestone ("Milestone 4"), Mr. Sin would be issued shares in KAI or a profit share upon certain conditions being satisfied. Mr. Sin asserts that the defendants made representations to him that KAI would be made a subsidiary of Kela and maintains that the fourth milestone could be fulfilled at any time.

[4] The defendants deny representing that KAI would be made a subsidiary of Kela and plead that the compensation agreement was terminated by virtue of being renegotiated, or expiry at the end of its term. The defendants say that the plaintiff's claim based on oppression or alternatively breach of contract, is statute-barred.

[5] The parties agree that Dr. Kumar's company advanced the amount of $1,248,566 to Kela as of October 1, 2012. They do not agree that the loan is subject to monthly compound interest at 8% per year, starting on January 1, 2013.

[6] The parties agree that Mr. Sin is a minority shareholder in Kela and holds 8.7% (8,700) of Kela's common shares and 3,333 of Kela's preferred shares.

II. Nature of the relief

[7] Mr. Sin seeks various relief under s. 248(2) of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("*OBCA*"), for alleged oppressive conduct by the defendants, or in the alternative, damages for breach of contract and breach of the duty of good faith. In the further alternative, Mr. Sin seeks an award of 33% of the net proceeds of sale of KAI's shares to WELL Health Technologies Corp. ("WELL Technologies"), which occurred in May 2019 (the "WELL transaction").

[8] In his statement of claim, delivered after the Notice of Application, Mr. Sin expanded the relief sought beyond that originally sought in his Application. He seeks the following relief against the defendants on a joint and several basis:

i. a declaration that he is a shareholder in Kela;

ii. in the alternative, an order directing Kela to issue shares to the plaintiff, in the classes, quantities, or percentages described herein;

iii. an order directing the defendants, or any one or more of them, to purchase the said shares from the plaintiff at fair market value;

iv. an order directing Kela to pay to the plaintiff all accumulated dividends;

v. an order compensating Mr. Sin for 33% of the net proceeds of sale of shares in KAI on account of shares that were to be issued to him subject to Kela's debt obligations;

vi. in lieu of (v), damages for breach of contract up to the amount of $3,600,000 or 33% of the proceeds of the said sale of shares in KAI;

vii. a tracing order of the funds received by the defendants that they should have been distributed to the plaintiff;

viii. if necessary, an order directing a reference.

III. The parties

[9] The following parties and significant individuals are involved in this case.

[10] Mr. Sin is a Professional Engineer (P.Eng.). He is the former Chief Technology Officer (CTO) of Kela and a minority shareholder in Kela. He is a party to a 2010 shareholders' agreement with the defendants, SPQKumar Inc. and Kela.

[11] Kela was founded by Mr. Kumar and was incorporated on August 11, 2009, under the laws of Ontario pursuant to the provisions of the *OBCA*. Kela carries on business in the field of developing personal medical health record technology and had developed a Smart Card, intended to hold a patient's medical records, called the Kela Personal Health Record Card (the "Kela pHR Card").

[12] Mr. Kumar is a direct shareholder of Kela, and through his holding company SPQKumar, is the majority shareholder of Kela.

[13] KAI was co-founded by Mr. Kumar and his business partner, Sara Bond, and incorporated on June 27, 2012, under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 ("*CBCA*"). The shares in KAI were held by Mr. Kumar's holding company, SPQKumar, as trustee.

[14] Dr. Kumar is the father of Mr. Kumar. His company, Whitby Diagnostics, advanced several loans to Kela totaling approximately $1.25 million. Dr. Kumar introduced his son, Mr. Kumar, to the plaintiff, Mr. Sin. Whitby Diagnostics has no affiliation to Kela, KAI, or SPQKumar.

[15] SPQKumar was incorporated on January 20, 2010, under the *CBCA*. It is one of the parties to the shareholders' agreement between the plaintiff, Mr. Sin, and Kela in December 2010. SPQKumar was also the trustee of shares in KAI, to which Mr. Kumar and Ms. Bond were the beneficiaries.

[16] Poonam Kumar is not a party to the proceedings. She is Dr. Kumar's wife, the mother of Mr. Kumar, and the Chief Financial Officer of Kela.

IV. Background

[17] Mr. Sin joined Kela in September 2009. He resigned from the company on July 24, 2014. His title and duties remained the same up to his departure.

[18] After Dr. Kumar introduced Mr. Sin to his son, he agreed to fund Mr. Sin's work on the Kela pHR card, and his company advanced a loan in December 2009.

[19] Between 2009 to 2010, Mr. Sin's status with Kela was as a contractor/consultant with the CTO title.

[20] In 2010, Kela entered into an employment agreement with Mr. Sin as a CTO to work on the Kela pHR Card on a part-time basis.

[21] On December 29, 2010, Mr. Sin, SPQKumar, and Kela entered into the Shareholders' Agreement, whereby Mr. Sin acquired 1% of Kela's common shares.

[22] Kela and Mr. Sin negotiated a one-year employment contract. The contract, dated January 28, 2011, was signed on March 1, 2011, effective for the period December 1, 2010, through to December 31, 2011. Mr. Sin was paid a salary of $108,000.

[23] In the fall of 2011, at the request of Mr. Kumar, Mr. Sin got in touch with McMaster University's Open Source Clinical Application Resource (OSCAR) Electronic Medical Record Inc. ("OSCAR EMR Inc."). Mr. Kumar intended to leverage the meeting as an opportunity to establish a relationship for the potential distribution of the Kela pHR Card.

[24] On December 1, 2011, the Kela Shareholders' Agreement was amended by way of an Addendum, which allowed Mr. Sin to be issued 15 additional common shares, increasing his shareholdings to 2.5% in the company.

[25] In March 2012, Mr. Kumar, Mr. Sin, and Sara Bond, all met with the Executive Director of OSCAR EMR Inc. Mr. Kumar presented Kela's work to the Director, who was not interested in the product, but suggested that Kela become an Oscar Service provider (OSP). Following the meeting, Mr. Kumar and Ms. Bond decided to start a separate company to become one of the OSP businesses. That business is KAI. Mr. Sin admits he had no involvement with the process or incorporation of KAI.

[26] On June 27, 2012, KAI was incorporated by Mr. Kumar. On the same day, SPQKumar became the trustee of 10,000 common shares in KAI for the benefit of Mr. Kumar. A similar trust was set up on the same date for the same number of shares for Sara Bond, with SPQKumar being the trustee. As an OSP, KAI provided installation and non-technical support services to physicians and clinics using the OSCAR EMR software.

[27] In 2012, Mr. Sin's status with Kela was changed to that of a consultant, and his hours were reduced.

[28] KAI became an approved OSP in early September 2012.

[29] In September 2012, Mr. Sin had discussions with Mr. Kumar and others regarding KAI being made a subsidiary of Kela. Mr. Sin subsequently forwarded an email with a proposal.

[30] In September of 2012, at around the same time that KAI became an approved OSP, Mr. Sin approached Mr. Kumar to request an equity stake in KAI. Following a meeting with Mr. Kumar and Mrs. Kumar, the CFO of Kela, Mr. Sin proposed that the three of them share ownership equally in KAI. In a proposal sent to them after the meeting, Mr. Sin indicated that "the best structure should be equal at 1/3 each regardless of how many different types of shares available in the company."

[31] In mid-October, Mr. Kumar sent out an email relaying Dr. Kumar's concern regarding diverting Kela resources. Mr. Sin's evidence is that it related to "Dr. Kumar's requirement of KAI," specifically about "Dr. Kumar's concern, if we transfer or have the resources work on KAI projects or KAI as an OSP then Kela will be starved of its resources, and this will cause Kela to fail and his loan not being able to pay back."

[32] In mid-October, Dr. Kumar asked Mr. Kumar to explore the possibility of having KAI become a wholly owned subsidiary of Kela to ensure that Mr. Sin's efforts remained focused on benefitting Kela and advancing the Kela pHR Card.

[33] On December 1, 2012, Kela entered into a loan agreement with Whitby Diagnostics, regarding a series of loans advanced as of October 1, 2012, in the aggregate amount of $1,248,566. Subparagraph 2(2) of the loan agreement sets out the loans and payment. Paragraph 3 of the loan agreement deals with "Security" and required Kela to execute and deliver a general security agreement. Paragraph 6 of the loan agreement deals with "Negative Covenants of the Borrower," and restricted certain actions on the part of Kela, including changing the nature of the business, acquiring, or creating any affiliate entities, among other things. The relevant provisions read:

> 2. **Loans and Payment**
>
> (1) For the purposes for the purposes of this loan agreement (the "Agreement"), all loans advanced from time to time by the Lender to the Borrower shall be referred to as "Loans", and each of such Loans shall be referred to as a "Loan".
>
> (2) Commencing on January 1, 2013 and at all times thereafter, interest at a rate of eight percent (8%) per annum ("Interest Rate"), calculated and compounded monthly, not in advance, shall apply to the outstanding amount(s) of any and all Loans, and any and all other amounts owing by the Borrower to the Lender from time to time.
>
> …
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> 3. **Security**

> As security for the Borrower's obligations hereunder, the Borrower shall execute and deliver a general security agreement (the "GSA"). The security interests of the Lender will be registered under the Personal Property Security Act (Ontario) and any other similar legislation as necessary or desirable to give full effect to such security interest.
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> …
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> 6. **Negative Covenants of the Borrower**
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> For so long as the Loans (or any part thereof) or any other amounts due hereunder or under any other agreements or documents between the Borrower and the Lender, are outstanding, the Borrower covenants and agrees that, without the prior written consent of the Lender, it will not:
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> …
>
> (g) materially change the nature of the business;
>
> (h) liquidate, wind-up or dissolve itself or enter into any consolidation, amalgamation, merger, partnership, joint venture or other combination with any other person;
>
> …
>
> (m) acquire or create any affiliated entities

[34] In January 2013, Kela's Chief Financial Officer, Mrs. Kumar sent an email to the corporate lawyer regarding taking advantage of the loss carry forward from Kela Medical, which she noted stood at $1,058,322. In the email, she wrote: "David has suggested that the best way to use the tax loss carry forward would be for Kela Atlantic Inc. and Kela Medical to have a Trustee Agreement stating that all work done by KAI Innovations is on behalf of Kela Medical."

[35] The lawyer, Mr. Vin Tsui, responded, in part: "Based on your comments, I trust that the idea of making Kela Atlantic Inc. a subsidiary would not work for your tax purposes. We will prepare the trust documents accordingly." The trust documents were never prepared. Instead, on February 15, 2013, KAI and Kela entered into a Service Agreement. Kela staff was subcontracted to KAI.

[36] Mr. Sin disputes that Mr. Kumar advised him that they were not proceeding with making KAI a subsidiary thereafter. In early March, Mr. Kumar requested a proposal from Mr. Sin.

[37] In March 2013, Kela and Ontario Centres of Excellence ("OCE") had a discussion regarding a loan to Kela. A draft term sheet was sent to Mr. Kumar, dated March 28, 2013. On April 30, 2013, Kela signed a term sheet titled, "Summary of Terms of Investment in Kela Medical Inc.," with the OCE with a closing date of May 31, 2013. The agreement restricted Kela to

proceeding only with transactions contemplated in the agreement, on the conditions set out by the investor.

[38] The 2013 Agreement before the court is not dated. The parties have given various timeframes for when the document was signed but have since settled on March 2013.

[39] The defendants contend that towards the end of 2012, Mr. Kumar and Dr. Kumar were concerned with Mr. Sin's lack of progress in delivering a working or marketable version of the Kela pHR Card, and that Mr. Sin had kept all the information, documentation, and contacts that Kela would need to continue the work should he leave the company. Mr. Sin continued to pursue an equity stake in KAI. To incentivize Mr. Sin to deliver on his promises so that Kela could be profitable, Mr. Kumar and Mr. Sin executed the 2013 Agreement, which provided for additional stake in Kela and an equity stake in KAI upon reaching certain milestones.

[40] The first milestone ("Milestone 1") was simply the execution of the 2013 Agreement and Mr. Sin would be issued a total of 1500 or 15% of the then current pool of the preferred shares in Kela.

[41] The second and third milestones ("Milestone 2" and "Milestone 3") required Mr. Sin to complete certain work on another product called Kids Health Record, and to deliver to Kela all information held exclusively by Mr. Sin and which was required to operate Kela, respectively, by specified deadlines. Upon achievement of these two milestones by Mr. Sin, he would be entitled to an additional 1,830 preferred shares, bringing his total preferred shareholdings to 3,330.

[42] The defendants say that the Milestone 4 provided that upon the repayment of Kela's outstanding debt, Mr. Sin would be issued a 33% stake in all available classes of shares in KAI, or, if Kela was not in a position to grant Mr. Sin the 33% stake in KAI upon satisfaction of this milestone, Mr. Sin would then become entitled to a 33% profit share in Kela. Mr. Sin would be required to exchange his common shares held in Kela or pay the fair market value of the 33% shares in KAI at the time of issuance of same, being upon repayment of Kela's debt.

[43] On April 10, 2013, Mr. Sin and other Kela shareholders signed a Special Resolution amending the Articles of the corporation with respect to the share structure.

[44] On July 31, 2013, Mr. Sin and other Kela shareholders signed a further Articles of Amendments.

[45] In July 2014, Mr. Sin resigned from Kela. The defendants say that Kela ceased operating after Mr. Sin's departure.

[46] In May 2019, Mr. Sin learned from a former colleague that KAI was being acquired by WELL Technologies for $10.75 million (the "WELL Transaction"). In June 2019, he learned that KAI was up for sale.

[47] In May 2019, WELL Technologies acquired all of KAI's issued and outstanding shares for the purchase price of $10.75 million, less $100,000 in working capital retained by WELL post-acquisition, for total gross proceeds of $10,650,000.

[48] After the WELL Transaction, Mr. Sin notified KAI and Kela to indicate that he held shares in KAI.

V. Preliminary matters

A. Was the proceeding a hearing of an application or a hybrid trial of an action?

[49] The parties are at odds as to whether this is the trial of an application or an action. At the conclusion of closing submissions, the court raised the issue of whether the case was proceeding as an application or an action, given the interchangeable use of the terms "applicant/respondent" and "plaintiff/defendants" by counsel.

[50] After receiving further submissions from the parties, the court is satisfied that the matter proceeded before the court as an action. The parties jointly brought a motion for a hybrid trial, and by order of Sanderson J. dated October 5, 2021, the motion was granted with a timetable established for the exchange of pleadings, an exchange of affidavits, and schedule for examinations of witnesses. Mr. Sin subsequently delivered a statement of claim, and Kela and the balance of the respondents delivered a statement of defence. The evidence-in-chief of the witnesses was by way of affidavits, with cross-examinations of those witnesses.

[51] Mr. Sin submits that the reference to a hybrid trial in Sanderson J.'s endorsement meant a summary trial process where the affidavits would serve as evidence-in-chief and cross-examinations would take place before the court. Mr. Sin points to the fact that a Trial Record was delivered in accordance with r. 14.03 and r. 18.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, which is not required for an application hearing. Mr. Sin also points to r. 48.02(1), which outlines that transcript of cross-examinations on affidavits be made available at the hearing of an application.

[52] Rule 14.05(3)(d) provides, in part, that a proceeding may be brought by application where the relief claimed is the determination of rights that depend on the interpretation of a contract. In the present case, there are claims for damages advanced by the plaintiff, Mr. Sin, and the defendants have pleaded the affirmative defence: the expiry of a limitation period. In this case, there may involve a determination of whether discoverability is available to the plaintiff to extend the limitation on one or all claims advanced by the plaintiff; that determination is a mixed question of fact and law, and may invite the court to assess the credibility of the witness(es).

[53] Pleadings and *viva voce* evidence at trial are all features of an action. Evidence on an application is governed by r. 30.01 and r. 4.06 of the *Rules*. Under r. 39.01(1), evidence on an application may be given by affidavit unless a statute or the rules provide otherwise. The contents of an affidavit on an application are governed by r. 30.01(5).

[54] However, the court does not agree with the plaintiff's contention that the previous Notice of Application is no longer relevant, as the pleadings have superseded it. Indeed, at the trial, the defendants sought to rely on certain allegations or admissions in the Notice of Application. The defendants argue it is relevant to the extent that it is evidence to establish what Mr. Sin's reasonable expectation was with respect to his alleged interests in KAI at the time that the pleading was drafted, and that it is relevant to undermine his credibility. They point to the fact that it reflects Mr. Sin's understanding that he was to be issued 250 shares in KAI directly. On cross-examination, Mr. Sin indicated that the information in the Notice of Application were mistakes.

[55] The court agrees with the defendants that the Notice of Application is some evidence on what Mr. Sin's understanding was. On cross-examination, it became clear that Mr. Sin confused timelines and the companies, and only learned information about his own shareholding in Kela after the lawsuit started. The statement of claim indicates that the proceeding was commenced by Notice of Application issued on September 26, 2019, and the court should be able to take note of any admissions in the pleadings, which includes the Notice.

B. Submissions on *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc*.

[56] While this matter was under reserve, the Supreme Court of Canada released its decision in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc*., 2024 SCC 20, 50 B.L.R. (6th) 1. The court inquired about whether counsel wished to make submissions on the case as the court may consider it, and counsel indicated that the parties did not wish to make any submissions.

C. Judicial notice of Generally Accepted Accounting Principles

[57] The defendants have asked the court to take judicial notice of the Generally Accepted Accounting Principles ("GAAP") established by the Financial Accounting Standards Board, which require a parent company to identify on its financial statements, among other things, the assets acquired, and liabilities assumed in a subsidiary transaction. The plaintiff, Mr. Sin, objects to the court doing so. I am inclined to take judicial notice of the GAAP. It is well established that courts may take judicial notice of facts which are known to intelligent persons generally: *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 49; *Reference re Alberta Statutes*, [1938] S.C.R. 100, at p. 128; and *Montréal v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368. In *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48, the Supreme Court of Canada set out the guiding principles for a court to consider, when asked to take judicial notice of facts. The Court indicated that judicial notice may apply in instances where the facts have the following characteristics:

> (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[58] In *R. v. J.M.*, 2021 ONCA 150, 154 O.R. (3d) 401, at para. 31, Brown J.A. summarized the general principles drawn from the authority, stating as follows:

> The basic principles regarding the substantive dimension of judicial notice can be summarized as follows:
>
> (i) Judicial notice is the only exception to the general rule that cases must be decided on the evidence presented by the parties in open court: David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed. (Toronto: Irwin Law, 2020) ("Paciocco"), at p. 573;
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> (ii) Judicial notice involves the acceptance of a fact or state of affairs without proof: *R. v. Williams*, [1998] 1 S.C.R. 1128, at para. 54; Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) ("Sopinka") at §19.16;
>
> (iii) Facts judicially noticed are not proved by evidence under oath; nor are they tested by cross-examination: *R. v. Find*, [2001] 1 S.C.R. 863, at para. 48;
>
> (iv) Since judicial notice dispenses with the need for proof of facts, the threshold for judicial notice is strict: *Find* at para. 48; and
>
> (v) Judicial notice applies to two kinds of facts: (a) those that are so notorious or "accepted", either generally or within a particular community, as not to be the subject of dispute among reasonable persons (*R. v. Mabior*, [2012] 2 S.C.R. 584, at para. 71; *Reference Re Alberta Statutes*, [1938] S.C.R. 100, at p. 128; Sopinka, at §19.18); and (b) those that are capable of immediate and accurate demonstration by resorting to readily accessible sources of indisputable accuracy (*Quebec (Attorney General*) *v. A.*, [2013] 1 S.C.R. 61, at para. 238; Sopinka, at §19.16). The sources may include both large bodies of scientific literature and jurisprudence: *R. v. Paszczenko*, 2010 ONCA 615, 103 O.R. (3d) 424, at paras. 65-66.

[59] The court is satisfied that the GAAP are accepted generally within the accounting community, they are not the subject of dispute among reasonable individuals, and they are capable of immediate and accurate demonstration by resorting to accessible sources, some of which counsel for the defendants referred to.

VI. Issues

[60] The issues raised in this case are as follows:

i) Is the action maintainable against Dr. Kumar and Mr. Sin personally?

ii) Was the 2013 Agreement renegotiated?

iii) Did the 2013 Agreement expire at the end of 2013?

iv) Did the defendants breach the 2013 Agreement?

v) Did the defendants make misrepresentations to the plaintiff?

vi) Is the plaintiff entitled to any relief for oppression?

vii) Are the plaintiff's claims statute-barred?

VII. Position of the parties and evidence

[61] The following is a summary of the position and evidence of the respective parties and witnesses.

i. The plaintiff

[62] The plaintiff, Mr. Sin, says that the defendants have oppressed his interest as a shareholder of Kela and have breached the 2013 Agreement by operating a kind of corporate shell game. He contends that the Agreement was made between him and the defendants, Kela, Mr. Kumar, and Dr. Kumar. Mr. Sin says that unbeknownst to him, the defendants had decided to not make KAI a subsidiary of Kela, and that their "main aim" was to be able to file tax returns in the future to make use of Kela's tax losses, rather than repay Dr. Kumar's loan. Mr. Sin says that this is information which they did not disclose to him before or after he signed the 2013 Agreement.

[63] Mr. Sin asserts that he resigned from Kela because his compensation was reduced even further. He argues that he did not pursue any right to his shares in KAI because he had no reason to believe the business was able to repay Dr. Kumar's loan. He argues that he did not know, until these proceedings, that the defendants never made KAI a subsidiary of Kela and had decided to push him out before entering into the 2013 Agreement with him.

[64] Mr. Sin is the Chief Executive Officer of North America Health Investment Group Inc., a company which he co-founded in 2017. It is an investment consulting company in the field of capital, management and technology expertise in health technology, health food and health care industries. He is a licensed professional engineer (P.Eng.), and holds a master's degrees in applied science, amongst other designations. He has held leadership positions in the areas of software architecture, health care technologies, natural health product quality management, and regulatory affairs since 2005.

[65] Mr. Sin's evidence was credible at times, but there are many aspects of his evidence that were not credible and were unreliable. While his evidence at times was contradicted by the documentary evidence, he did not resile from certain positions, preferring his own recollection. It is perhaps not surprising given the passage of time. His evidence was repeatedly contradicted not only by admissions made in his pleadings, both in the Notice of Action and Statement of Claim, but also by documentary evidence and his own evidence at trial, which was at times internally inconsistent.

[66] For instance, Mr. Sin has claimed that he is the cofounder of both Kela and KAI. This evidence is not credible. Kela was founded by Mr. Kumar before Mr. Sin's involvement. KAI was co-founded by Mr. Kumar and Ms. Bond. At the trial, Mr. Sin admitted that he had no involvement in the incorporation or process. He testified that the 8.7% shares in Kela was issued to him after the 2013 Agreement. While he has provided different dates for when that Agreement was entered into, at the trial he said it was after March 11, 2013. However, in his Statement of Claim, Mr. Sin admitted that the 8.7% shares was issued to him in April 2013. The evidence indicates the shares were issued in July 2013.

[67] Mr. Sin also deposed that "On the basis that Dr. Kumar provided financial support, Arjun Kumar business support, and I provided the technological expertise, we agreed that the KAI venture would be owned by the three of us, each holding 33% in KAI." Mr. Sin says that before the Agreement was entered into, he had discussions and exchanged communications with the defendants about him having an ownership interest in KAI. He has given contradictory evidence as to who was involved in the discussions. Dr. Kumar was not involved in the discussions, but rather his meeting and discussions were with Mrs. Kumar, the CFO of Kela. On cross-examination, Mr. Sin conceded that the individuals with whom he had the discussions about the division of shares in KAI in thirds were different.

[68] Mr. Sin testified that they had discussions from June to October about him, Arjun Kumar, and Dr. Kumar each having a 33% ownership interest in KAI. He believes he received an email from Dr. Kumar expressing concerns about the proposed one third each ownership. On cross-examination, Mr. Sin conceded that he sent an email on September 16, 2012, to Mr. Kumar and Mrs. Kumar with a proposal for ownership in KAI in which each of them would have a one third interest. The email was sent on the heels of a meeting. On cross-examination, he admitted that he had three different understandings of what he got in KAI.

[69] On cross-examination, Mr. Sin agreed that there was no record provided to him evidencing the agreement regarding a one third ownership share of him, Arjun Kumar, and Dr. Kumar. Mr. Sin testified that in mid-October 1992, Dr. Kumar circulated an email expressing concerns about diverting resources from Kela, and his concern that Kela would fail, and his loan would not be repaid.

ii. <u>The defendants</u>

[70] The defendants say that Mr. Sin never delivered a working and marketable product in respect of the Kela pHR, but rather burned through the limited capital available to Kela without any results. They assert that Mr. Sin withheld key company documentation and contacts, which prevented KELA from continuing to develop or deliver the Kela pHR Card after Mr. Sin's resignation. They assert that the key information was the basis for the establishment of an express milestone in the 2013 Agreement.

[71] The defendants say that the total amount of the Whitby Loan inclusive of accrued interest was $2,124,548.08 as at the date of the WELL Transaction. They say that Mr. Sin completed limited work for KAI, but only as an employee of Kela, which KAI had engaged to provide

consulting services. In turn, Kela compensated Mr. Sin for this work, and Kela was paid by KAI for Mr. Sin's services. The defendants say that Mr. Sin's claim hinges entirely on alleged representations made in the Agreement that KAI was being made Kela's wholly owned subsidiary. They assert that Mr. Sin's claim cannot succeed. The defendants say that the 2013 Agreement was renegotiated because of loan terms imposed on Kela in April 2013 by the startup funder, Ontario Centres of Excellence ("OCE") which, among other things, restricted Kela's ability to issue the shares promised in the Agreement, and in the result, the conditional benefit conferred by Milestone 4 was no longer available to Mr. Sin.

[72] The defendants say that the 2013 Agreement expired on December 31, 2013, and was not renewed. In the result, the conditional benefit conferred by Milestone 4 was not available to Mr. Sin, as he did not satisfy the milestone conditions during the 2013 calendar year. They argue that as the Whitby Loan has not been repaid, the benefits stipulated in Milestone 4 would not be available to Mr. Sin in any event.

[73] The defendants assert that there was no representation or promise in the 2013 Agreement that KAI was or would be made Kela's subsidiary. There was only a possibility of that happening, and in the result, they submit that the failure to do so does not constitute a basis for a finding of oppression or any breach of the Agreement. The defendants say that Mr. Sin was aware that KAI was not made a subsidiary of Kela and therefore could not have any reasonable expectation that that was done. They contend that without any such expectation, Mr. Sin has no basis for a relief in oppression and his claim in contract is statute-barred.

[74] Mr. Kumar's evidence is that he started his career in healthcare in 2003 working as a Cardiac and Vascular Ultrasound Technician. He later came up with the idea of creating a wallet-sized card that would hold a patient's critical medical information and founded Kela in 2009 in order to develop and produce the card. The first product for cardiac patients was successful; however, there were several issues regarding the product's ability to support business in the long term. He next came up with a prototype of a Smart Card with a USB chip to work in tandem with the card. The card was called the Kela Personal Health Record Card (the "Kela pHR Card").

[75] He engaged a UK company to create a prototype but encountered some issues with software. Despite these issues, the card has been successfully marketed to individuals in the electronic medical record field. In September 2009, his father, Dr. Kumar, introduced him to Mr. Sin. At the time, Kela was operating on a nominal budget. Mr. Sin agreed to assist with the work to bring the Kela pHR Card to market. Dr. Kumar arranged for a loan through his company, Whitby Diagnostics, to fund the work with the first advances being made in December 2009. The loan agreement was formalized in December 2012.

[76] Mr. Kumar says that Mr. Sin has worked both as a consultant and an employee for Kela. He did not contribute to or play any role in KAI's incorporation. Mr. Sin is not a co-founder of KAI.

[77] In September of 2012, at or around the same time KAI became an approved OSP, Mr. Sin approached Mr. Kumar to propose a three-way ownership structure, whereby Mr. Kumar, Mrs.

Kumar, and Mr. Sin, would each own one third of KAI. The proposal was rejected, and he told Mr. Sin that he wanted him to remain focused on his work at Kela.

[78] He says that Mr. Sin never delivered a working and marketable product in respect of the Kela pHR Card to a point of marketability. In the five years that Mr. Sin worked for Kela, mostly on a part-time basis, he was compensated $459,216.36, from a company that has never reached profitability, nor had any sustainable revenues. Mr. Sin failed to deliver on his primary contractual objective to complete the development of the Kela pHR Card and bring it to a point of marketability. Mr. Sin's hours, but not his pay, were reduced in 2012.

[79] Mr. Kumar says that KAI was successful from the start, even while Mr. Sin was still at Kela, "because of Ms. Bond's and my experience and understanding of frontline healthcare". He says Mr. Sin was contracted to KAI by Kela and was limited to two defined projects: first, to set up a reference site for the first client; and second, to provide technical advice to an informal Advisory Board, as needed, for which he was compensated by Kela, which was in turn paid by KAI.

[80] Mr. Sin resigned from Kela in July 2014, leaving Kela without a working product, and without the key company documentation and contracts required to continue his work. Even if the Milestone 4 benefit remained available to Mr. Sin, the conditions to obtain that benefit were never satisfied. The Whitby Loan and OCE loan remain outstanding. As at the date of the WELL Transaction, the total amount due in respect of the Whitby Loan and OCE loan was $2,177,344.57 and $397,936.77, respectively, inclusive of interest.

VIII. Analysis

i. Claims against Dr. Kumar

[81] Dr. Kumar, who is a shareholder in Kela only, and the principal of Whitby Diagnostics, a shareholder and creditor of Kela. He was not a party to the 2013 Agreement. The Agreement expressly stated that it is binding as between Mr. Sin and Kela only. The Agreement was drafted by Mr. Kumar and the court accepts that Dr. Kumar was merely a witness to the parties' signatures. There is no action maintainable against him under the contract between Kela and Mr. Sin.

[82] With respect to the claim for remedies for oppression, Dr. Kumar has never held any ownership interest in KAI. His company is a creditor to Kela.

[83] The claim against Dr. Kumar should be dismissed.

ii. Claims against Mr. Kumar

[84] Just as Dr. Kumar was not a party to the 2013 Agreement, neither was Mr. Kumar. Accordingly, for the reasons above, the claim against Mr. Kumar for breach of contract must fail. Mr. Sin also attempted to impose personal liability on Mr. Kumar for breach of the contract on the basis that Mr. Kumar makes all the decisions and is in "control" of the company. In *Rich v. Enns* (1995), 102 Man. R. (2d) 271, (MBCA), Twaddle J.A., speaking for the court, stated at para. 13:

> It is unnecessary to cite authority for the proposition that a corporation is a distinct legal person. Its rights and obligations are its own, not those of its members, and that is so even where it is a corporation owned and controlled by a single shareholder. The corporation and the shareholder are not interchangeable. The shareholder has no right to enforce the corporation's contract. [Emphasis added.]

[85] For completeness only, and not as a basis for the court's decision on whether the claim for breach of contract is maintainable against Mr. Kumar, since neither party addressed it, the court notes that the corporate veil will only be pierced when a corporation is used by those who control it as an instrument of fraud or for some other improper purpose akin to fraud. Refusal to pay a debt, whether through impecuniosity, because it is not seen as due and payable, or for some other business or even perverse reason, does not constitute a basis for piercing the corporate veil: *Northwood Mortgage Ltd. v. Gensol Solutions Inc.* (2005), 3 B.L.R. (4th) 322 (Ont. C.A.). The jurisprudence in Ontario has consistently adopted the same test as to when the corporate veil will be pierced. In *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2, the Supreme Court of Canada noted:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, Modern Company Law (4th ed. 1979) at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice, as was done in *American Indemnity Co. v. Southern Missionary College*, supra, cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.
> [Emphasis added.]

[86] As for personal liability of Mr. Kumar as a director of Kela for oppressive conduct, the court is not satisfied, on the evidence, that he engaged in oppressive conduct which would warrant exposure to personal liability. In *Wilson v. Alharayeri*, 2017 SCC 39, [2017] 1 S.C.R. 1037, the Supreme Court established the test for personal liability of directors in respect of oppression claims as follows:

a) The oppressive conduct at issue must be properly attributable to the director because he or she is implicated in the oppression; and
b) The imposition of personal liability must be fit in all the circumstances. The court can take into consideration a number of factors when deciding what is fit in the circumstances and whether it is fair to impose personal liability, including, whether the director derived a personal benefit from the conduct at

> issue, acted in bad faith, breached a personal duty, or misused a corporate power.

[87] For the reasons discussed below under the heading of "Oppression Remedy," the attempt by Mr. Sin to attach personal liability to Mr. Kumar for alleged oppressive conduct, on the basis that he was the "sole director of each of Kela, SPQKumar and KAI," and the "directing mind of will of the corporations," is also dismissed.

iii. Was the Agreement renegotiated?

[88] The defendants contend that the 2013 Agreement was renegotiated shortly after its execution, because of terms imposed upon Kela by the funder, OCE. The defendants argue that this put an end to Milestone 4, because of restrictions imposed by one of its sources of funding in April 2013. The defendants contend that Mr. Kumar and Mr. Sin had discussed with OCE the possibility of making KAI a subsidiary of Kela in the future and OCE refused to approve any such transaction.

[89] The defendants say that as part of the renegotiation of the 2013 Agreement, Mr. Sin's salary was increased from a cap on hours to a maximum payment of $4,200 monthly plus $5,000 for expenses, to a fixed yearly salary of $55,000, exclusive of expenses, for one to two days of work per week. Mr. Sin was issued 3,333 preferred shares, three more than what was contemplated by Milestones 2 and 3, without having to satisfy the conditions. He was also given an additional 62 common shares in Kela, thereby increasing his common shareholdings from the 250, or 2.5%, to 8.7%. The defendants say that in the result, the potential benefit conferred upon Mr. Sin under Milestone 4 was no longer available. They say that Mr. Sin was issued the shares that would have been provided in Milestones 2 and 3 of the 2013 Agreement and more, before Kela became bound by the OCE requirements and restrictions. They contend that Mr. Sin's compensation was increased to a fixed salary of $55,000 per year, and that Mr. Sin's share in Kela was increased to 8.7% as opposed to the 2.5% contemplated by the 2013 Agreement. Mr. Sin says that Kela had agreed to increase his common shares from 2.5% to 9% in January 2013.

[90] As for the issuance of Kela's preferred shares, Mr. Sin denies there was any renegotiation, but says there was some discussion regarding Kela issuing the shares they had already agreed to before the OCE Loan to avoid any issues.

[91] On cross-examination, Mr. Kumar conceded that the compensation in the 2013 Agreement amounted to $55,400, plus $5,000 in expenses per year, versus $55,000 a year under the new Agreement. There are inconsistencies in Mr. Sin's evidence.

[92] On cross-examination, he agreed with counsel that the reference in item 5 of the December 26, 2012, email from Mr. Kumar related to common shares, which he says he accepted at that time with an additional $5,000 for expenses. He conceded that this was not in the 2013 Agreement. He agreed that he later received up to 8.7% common shares, which he believes occurred before the 2013 Agreement. At paragraph 12 of his statement of claim he pleaded that: "The 2013 Agreement was executed in March of 2013, and the issuance of Kela shares to the plaintiff was completed by

July 31, 2013." This admission is contrary to his evidence at trial that the shares in Kela were received before the Agreement.

[93] Mr. Sin has provided three separate dates and/or times that the Agreement was executed. In his Notice of Application, he indicated that the Agreement was signed in late December 2012 and that the agreement was to run for the 2013 calendar year. In his supplementary affidavit, he deposed that the Agreement was signed after a series of exchanges of emails in January 2013. In his statement of claim, issued after the parties agreed to proceed with a hybrid trial, he stated at paragraph 10 that the Agreement was executed in March of 2013 and that the issuance of Kela shares to him was completed by July 31, 2013. At trial, he testified that the Agreement was executed sometime after March 11, 2013.

[94] There are issues with Mr. Kumar's evidence as well. Mr. Kumar's initial evidence on the timing of when the agreement was reached (January 2013) was based on information from Mr. Sin. The parties have since adjusted that date to March 2013. There is some evidence before the court of further discussions between Mr. Kumar and Mr. Sin regarding his compensation in 2013. The court accepts that there was a renegotiation by the parties, which is denied by Mr. Sin, but that renegotiation appears to have been with respect to the proposal accepted by Mr. Sin at the end of January 2013, and not the written Agreement, which both Mr. Sin and Mr. Kumar now acknowledge was signed in March 2013. The exchange of emails between Mr. Kumar and Mr. Sin between December 26, 2012, and January 29, 2013, resulted in Mr. Kumar providing responses to Mr. Sin on January 2, 2023. One of the responses from Mr. Kumar was the following: "For 2013 we would be willing to increase your stake from 2.5% to 9%."

[95] In his responding email on January 29, 2013, to Mr. Kumar, Mrs. Kumar, and Dr. Kumar, Mr. Sin wrote, in part:

> After a long consideration and as discussed with Arjun [Mr. Kumar] last Friday, I have decided to accept the terms suggested below with request to add $5,000 compensation for expenses….
>
> I will take whatever you think is fair for me in the form of ownership air for me in the form of ownership on Kela Medical as I remember why I started to do this.

[96] Certainly, there is evidence to indicate that what Mr. Sin agreed to in January 2013 was not what ultimately made it into the 2013 Agreement. Mr. Kumar indicated in his email to Mr. Sin on March 7, 2013 that he would get back to Mr. Sin with an offer in writing, which suggests whatever terms were agreed to in January were off the table. Further evidence of a renegotiation is supported by the fact that in his March 7, 2013 email, Mr. Kumar asked Mr. Sin to reduce to writing what he expected "salary wise," and told him not to rely on previous representations, noting that it was like "walking on eggshells" with him.

[97] At trial, Mr. Sin testified that the Agreement was signed after March 7, 2013. Mr. Sin's evidence at trial was that the 2013 Agreement was signed after March 11 and before the end of March. Mr. Sin indicated that the defendants were careful to document every transaction to protect their interests, and it is not credible that they failed to document any alleged renegotiated terms of

the 2013 Agreement. There is no evidence before the court of any renegotiation of the written contract that the parties agree was signed sometime in March 2013. A party's agreement to perform a duty that they are already obligated to do under contract does not constitute consideration, and additional consideration is required: see Stephen Waddams, The Law of Contracts, 7th ed., (Toronto: Thomson Reuters, 2017) at para. 135; *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 12 O.R. (2d) 19 (Ont. C.A.), at p. 24.

[98] The defendants have not satisfied the court that the 2013 Agreement was renegotiated.

iv. <u>Did the Agreement expire at the end of December 2013?</u>

[99] The defendants say that the 2013 Agreement expired at the end of its terms, and the benefits available under Milestone 4 were no longer available to Mr. Sin.

[100] Mr. Sin contends that the 2013 Agreement continued to apply well into 2014. He says that he resigned because of Mr. Kumar's attempts to reduce the compensation found in the 2013 Agreement. He argues that unlike Milestones 2 and 3, which had deadlines, Milestone 4, when read with the whole agreement and surrounding circumstances, did not have an expiry date. Mr. Sin argues that there was no reasonable expectation that repayment of Dr. Kumar's loan would occur before the end of 2013. Mr. Sin testified that "the Agreement is delivered in 2013, but there is nothing that says that it is only for that year." On cross-examination, Mr. Sin contended that the Agreement would still be in place regardless of whether he achieved the milestones beyond 2013.

[101] The defendants say that Mr. Sin's claim hinges entirely on what he says was a representation made in an agreement between him and the defendants that KAI was being made Kela's wholly owned subsidiary. Specifically, Mr. Sin relies upon a conditional benefit conferred upon Mr. Sin by Milestone 4 contained in the agreement, which states as follows:

> Milestone 4: Return of outstanding debt
>
> Upon repayment of debt, Daniel Sin will be issued a separate 33% stake in all available classes of shares in KAI Innovations. Due to structure at the time of milestone, if shares are unable to be issued a profit share of 33% will go into effect. To ensure no objection from other shareholders at the time, it is agreed that Kela Medical Inc. is compensated. Compensation will occur via exchange of common share currently owned by Daniel Sin (250 shares), or by providing fair market value at the time of issuing. 66% of KAI Innovations will remain under the control of Kela Medical Inc.

[102] The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 57-58; G.H.L. Fridman, The Law of Contract in Canada (Toronto: Carswell, 2011), p. 434.

[103] The Agreement before the court was drafted by Mr. Kumar, without the benefit of a lawyer and consists of two pages (Appendix A, incorporated by reference in these Reasons). As noted,

the Agreement included four milestones with various stages of benefits and compensation to be conferred on Mr. Sin upon him achieving each successive milestone. The agreement is titled "Agreement for 2013 Calendar Year." The second line of the Agreement indicates: "Term: January 2013 1st – December 31st, 2013." The third line of the Agreement indicates: "Renewal: To be negotiated by December 1st December 2013." The first part of the Agreement reads as follows:

Agreement for 2013 Calendar Year

Term: January 2013 1st – December 31st 2013

Renewal: To be negotiated by December 1st 2013

Compensation: Up to $4200/month billable + $5000/annum for expenses

Milestone 1: Signing of Agreement

1. Upon signing, the proposed agreement will take effect with the terms listed
2. Agreement will be redrafted if requested by lawyer, until such time this agreement will be binding between Daniel Sin and Kela Medical Inc.
3. Invoices for January 2013, February 2013, and March 2013 are to be provided to Kela Medical Inc.
4. As previously discussed, a total of 1500 (15%) Preferred shares will be issued in Kela Medical Inc. to Daniel Sin. Preferred Share structure outlined below.

[104] Mr. Sin submits that the title does not mean that the Agreement was just for the year. He points to the fact that there were no dates in Milestones 1 and 4, in contrast with Milestones 2 and 3 which included dates. On cross-examination, Mr. Sin denied that "Renewal: To be negotiated by December 1st December 2013," meant that the Agreement had to be renegotiated by December 1, 2013, otherwise it would come to an end. He testified that the items listed in the Agreement did not have to be renegotiated. For example, he asked if he achieved the second milestone, whether they would take back his shares, and pointed out that there was no timeline on the fourth milestone. Mr. Sin is evidence is that:

> By "repayment of debt," I understood that this meant the investment by Dr. Kumar to be recouped from Kela, including Kela's ownership of its subsidiary, KAI. As stated in the agreement, the repayment of debt would trigger my ownership of 33% of shares in KAI (all classes of shares), or a 33% profit-share, if the transfer of shares was not feasible.

[105] For the reasons below, the court agrees with the defendants' submissions. The Agreement was for a one-year term, despite the date of signing. It expired on December 31, 2013.

[106] The jurisprudence establishes that the object of contractual interpretation is to identify the true intent of the parties as expressed in the contract: *Robichaud et al. v. Pharmacie Acadienne de Beresford Ltée*., 2008 NBCA 12, 328 N.B.R. (2d) 205, at paras. 18-19. The interpretation of a

written contractual provision must always be grounded in the text and read in light of the entire contract: *Sattva Capital Corp.* at paras. 57-58; Fridman, at p. 434.

[107] The goal of contractual interpretation is to determine the objective intentions of the parties to the contract at the time that it was made: see *Sattva*, at para. 55; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co*. of Canada, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27; and *Earthco Soil Mixtures Inc.*, at para. 63.

[108] The intention of the parties is ascertained by reading the contract "as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva*, at paras. 47-48; *Earthco*, at para. 63.

[109] A contract is not made in a vacuum and must be placed in its proper setting. Interpreting a commercial contract requires knowledge of the commercial purpose of the contract, based on "the genesis of the transaction, the background, the context, the market in which the parties are operating": *Sattva,* at para. 47, citing *Reardon Smith Line Ltd*. *v. Hansen-Tangen*; *Hansen-Tangen v. Sanko Steamship Co*., [1976] 3 All E.R. 570 (U.K. H.L.), at p. 574, per Lord Wilberforce. See also *Limited Partnership v. Ontario Lottery and Gaming Corp*., 2021 ONCA 592, at para. 46. Here, the entire agreement related to compensating Mr. Sin for the 2013 fiscal year, as he himself acknowledges.

[110] The Supreme Court expressed this contractual interpretation imperative as follows: "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context": *Tercon Contractors Ltd*. *v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 64. The meaning of words may be derived from several contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement: *Sattva*, at para. 48.

[111] Here, the purpose of the agreement was to compensate Mr. Sin for his employment for the 2013 calendar year. He had previously signed two such one-year agreement with Kela. Mr. Sin would receive the benefits under the milestones provided he achieved the goals specified during the "term," and the agreement itself contemplated that any "Renewal" could be negotiated before the term ended.

[112] The defendants argue that, in any event, the benefits available under Milestone 4 were only available to Mr. Sin under the 2013 Agreement if he achieved the repayment of Kela's debt during the 2013 calendar year before the expiration of the agreement. The 2013 Agreement expressly provides that it is an agreement for the 2013 calendar year, that its term expires on December 31, 2013, and that any renewal must be negotiated by December 1, 2013. Mr. Sin acknowledged in his Notice of Application that the 2013 Agreement was "to run for the 2013 calendar year" only. Mr. Sin did not achieve the repayment of Kela's debt in 2013. The 2013 Agreement, and the obligations and benefits set out therein, was never renewed. The court therefore agrees with the defendants' submissions.

[113] The authors in *Chitty on Contracts*, 30th ed., vol. 1 (London: Sweet & Maxwell, 2008), at p. 839; 12-045 note that:

> The cardinal presumption is that parties have intended what they have in fact said, so that their words must be constructed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself: [o]ne must consider the meaning of the words used, not what one may guess to be the intention of the parties"…. In the modern law, the court will, in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man.

[114] There are three key words used by the parties in the agreement: "Term"; "Renewal"; and "Compensation." It is the first of these three words that both sides focused on.

[115] Mr. Sin acknowledged in his affidavit that the contract was "for the 2013 fiscal year." He stated:

> In order to lock me into these terms and conditions, the Kumars presented me with a contract for the 2013 fiscal year.

[116] The *Merriam-Webster* online dictionary (2025) defines the word "term" in a general context as follows:

> "A fixed or limited period for which something, e.g., office, imprisonment, or investment, lasts or is intended to last."

[117] The *Funk & Wagnalls Standard Dictionary*, 2nd ed. (New York: Harper Paperbacks, a Division of HarperCollinsPublishers, 1993) at p. 834. includes the following definition for the word "term":

> [A] fixed period or definite length of time, as one of the periods in the school year.

[118] The basis of Mr. Sin's position that he has a stake in the proceeds of the sale of KAI to WELLS appears to be that because Milestone 4 had no timeline for the loan to be repaid to Dr. Kumar, it was triggered at any time the loan was repaid, even beyond 2013 and his resignation. Mr. Sin says the provisions in the 2013 Agreement pertaining to the issuance of shares in KAI represented to him that Mr. Kumar and Dr. Kumar, as signatories, and Kela as a party bound by the agreement, all had the power of issuing and transferring shares in KAI in accordance with the agreement.

[119] Mr. Sin also contends that if the agreement was not renewed, it did not mean that the terms and conditions that did not have a specific time limit ceased to have effect unless it said so. He says the express and implied terms of the Agreement, which Kela and the two members of the Kumar family represented to him, were that KAI was a wholly owned subsidiary of Kela, such that 66% would remain under Kela's control after 33% was issued to him. Mr. Sin asserts that even

if the Agreement ceased to be in effect and the debt was not repaid, the representation to him as a Kela shareholder that KAI was its subsidiary meant he had an interest in the sale of such a subsidiary. He asserts that while it may now be impossible to issue 33% in all available classes of shares in KAI to him due to the WELL Transaction, the 2013 Agreement provides for an alternative "profit share of 33%" of the KAI shares after Dr. Kumar's loan is repaid. Mr. Sin says that the "profit share" is understood to be a percentage of the "buy-out" in accordance with Mr. Kumar's exit strategy.

[120] Mr. Kumar says that that there was no agreement to issue Mr. Sin shares in Kela in lieu of 33% of the shares in KAI. The defendants submit that the 2013 Agreement provided that upon satisfaction of the requirements of Milestone 4, Mr. Sin would be issued a 33% stake in all available classes of shares in KAI, or if KAI was no longer under Kela's control, "through me, as the sole director of each of KELA, SPQKumar and KAI, Mr. Sin would then become entitled to a 33% profit share in KELA."

[121] The interpretations by both sides would require the court to imply terms into the agreement. The court will not construct agreements for parties: John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2020), at pp. 729-730. In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 94, the Supreme Court of Canada cited *G. Ford Homes Ltd. v. Draft Masonry (York) Co.*, 43 O.R. (2d) 401 (C.A.), at para. 9, with approval. The Court highlighted that it is a "time-honoured [caution]" that "…the courts will be cautious in their approach to implying terms to contracts. Certainly, a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract."

[122] Mr. Sin submits that a requirement to use the proceeds from a sale of any Kela subsidiary ought to be implied in the 2013 Agreement. He also argues that the agreement does not end at the end of December 2013, and even if it did, Milestone 4 survives beyond the term of the contract, because there are no deadlines in Milestone 4.

[123] The court is being asked to imply terms in the contract. There is a high threshold for the implication of contractual terms and obligations – where that threshold is not met, the loss lies where it falls: see the decision of the Ontario Court of Appeal in *Iroquois Falls Power Corporation v. Ontario Electricity Financial Corp.*, 2016 ONCA 271, 398 D.L.R. (4th) 652. At para. 112, the court cited the following passage from *Attorney General of Belize and Ors v. Belize Telecom Ltd. and Anor* (2009), UKPC 10, [2009] 1 W.L.R. 1988, at paras. 17-21:

> The question of implication arises where an instrument does not expressly provide for what is to happen when an event occurs. In most cases, the usual inference is that nothing is to happen, and the express provisions of the instrument continue to operate undisturbed. If the event causes loss to one of the parties, the loss lies where it falls.

[124] As stated by the Supreme Court of Canada in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, the test to determine whether an implied term exists is an onerous one:

> [T]erms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed: at para. 27. [Citations omitted.]

[125] In *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514, 388 D.L.R. (4th) 672, the Ontario Court of Appeal recited the test at paras. 30-31 as follows:

> [A] contractual term may be implied "on the basis of the presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the 'officious bystander test.'" The officious bystander test was most famously articulated in *Shirlaw v. Southern Foundries*:
>
> > *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying. Thus, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course." [Citations omitted.]

[126] In this case, the terms being proposed by the plaintiff, Mr. Sin, would not pass the "officious bystander test." It is not so obvious that just because Milestone 4 does not contain a deadline, it can be triggered after the contract expires, and the benefits stipulated under that milestone can be conferred on Mr. Sin. The interpretation that Mr. Sin urges on the court would require the court to imply terms in the agreement. The contract should be interpreted to give effect to the intention of the parties and produce a fair and commercially sensible result, and which does not defeat the intentions and objectives of the document if construed fairly and broadly in the context of the surrounding circumstances: *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888*; Eli Lilly & Co. v. Novopharm Ltd*., [1998] 2 S.C.R. 129, at para. 56. The court will not construct agreements for parties: John D. McCamus, The Law of Contracts (Toronto: Irwin Law, 2020), at pp. 729-730. In *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, at para. 94, the Supreme Court of Canada cited G. Ford Homes Ltd. *v.* Draft Masonry (York) Co. (1983), 43 O.R. (2d) 401 (C.A.), at para. 9 with approval, to state that it is a "time-honoured [caution]" that "…the courts will be cautious in their approach to implying terms to contracts. Certainly, a court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract."

[127] The Supreme Court has indicated that while "[t]he facts surrounding the formation of a contract are relevant to its interpretation," they "must never be allowed to overwhelm the words of that agreement" or cause courts to create brand new agreements: see *Corner Brook (City) v. Bailey*, 2021 SCC 29, 17 B.L.R. (6th) 1, at paras. 19-20; *Sattva*, at para. 57. As Rothstein J. noted in *Sattva*, this will vary from case to case and has its limits.

[128] The nature of the evidence that may be considered as part of the surrounding circumstances will vary from case to case, but should include only "objective evidence of the background facts at the time of the execution of the contract," that is, "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting": *Sattva*, at para. 58. That determination is inherently fact specific: *Sattva*, at paras. 55, 58; *Corner Brook*, at para. 20.

[129] The surrounding circumstances known to the parties at the time the Agreement was signed in March 2013 are as follows:

i) Mr. Kumar and Ms. Bond co-founded KAI, and the company was incorporated in June 2012. Each own 10,000 in KAI shares.

ii) Kela was struggling financially. To fund its ongoing operations, Kela secured a loan from Dr. Kumar's company, Whitby Diagnostics.

iii) Kela was struggling financially and was being supported by Mr. Kumar's father through loans. Kela's only product was the Kela pHR Card and it was not ready for the market. Mr. Sin had not yet completed the software and was focused on obtaining a stake in KAI. In September 2012, Mr. Sin forwarded a proposal to Mr. Kumar and Mrs. Kumar regarding three-way ownership in KAI.

iv) In October of 2012, Dr. Kumar raised concerns about the recovery of his approximately $1.3 million dollars invested in Kela, if the focus was not 100% on Kela. Mr. Kumar raised concerns about the extent to which Kela resources were being diverted to KAI, including a team he had trained. Mr. Kumar proposed a solution of making KAI a subsidiary to Kela until the loan was paid off and also suggested that Mr. Sin could have a "bigger part in the overall organization." In an email to Mr. Sin, dated October 14, 2012, Mr. Kumar wrote:

> When we decided to launch KAI Innovations, I was under the impression it could be run by you, a developer and the part-time assistance of a sale person. Now I am spending close to 80% of my time over seeing [*sic*] the company, Sara and Kathleen or both focused majority of their time on KAI as well.
>
> This leaves KELA Medical dead in the water.
>
> For KAI to become a profitable company, while Kela sinks deeper into whole because all the quality resources were transfer [*sic*] has made me realize there is a major issue in this situation. My only responsibility right now is to pay off the debt. And I will have to do it by any means necessary. I cannot afford to give myself [*sic*] Sara, Kathleen and Scott to KAI as I have spent years training them to the skill set they have today.

> Without Sara and Scott, Kathleen and myself, I do not think KAI can maximize on the opportunity.
>
> The solution they have proposed until we have paid back every cent to our seed investment, KAI should be a subsidiary of KELA Medical because it is going to use Sheila resources, it has to be for the greater good of Sheila medical. They have discussed making you a bigger part of the overall organization, and if KAI is wholly owned subsidiary of KELA it would only be right if we increase your overall stake in KELA Medical.
>
> As I said this is not set in stone and they want to keep this an open process with you and hear your opinion. We just have to be sure to address 100% of Kela resource is to pay down the current debt.

v) By the fall of 2012, Mr. Kumar, on behalf of KAI Innovations, had applied for funding from the Northumberland Community Futures Development Corporation ("CFDC"). At the end of November 2012, Northumberland requested certain documents in support of applications to the Eastern Ontario Development Program, including Articles of Incorporation or Business Registration, and in support of an application to the Scientists and Engineers in Business Initiative program, evidence of a STEM degree and identification. Mr. Kumar requested information from Mr. Sin to complete the application.

vi) In the fall of 2012, Mr. Kumar investigated making KAI a subsidiary of Kela.

vii) The Whitby loans advanced by Whitby Diagnostics to Kela was reduced to writing on December 1, 2012, totaling $1,248,566. The agreement contemplates interest to be paid on the loan at 8% per annum, compounded monthly. The loan agreement signed in December 2012 to secure the Whitby loan, which stood at over $1.2 million dollars, restricted Kela's ability to restructure or acquire affiliates.

viii) Between December 29, 2012, and January 29, 2013, Mr. Kumar and Mr. Sin negotiated Mr. Sin's compensation for the "2013 Budget" year. In the exchange of emails between Mr. Sin and Mr. Kumar negotiating the terms, Mr. Kumar made it clear that "[t]he primary focus will be Kela at his core business." Elsewhere in his email he indicated, "[m]y dad did not feel it was fair to "reduce" your salary for the hours worked, so he proposed that we take less of your time….100% of your billing will be to Kela as of Jan 1." Mr. Kumar indicated that "for 2013 we would be willing to increase your stake from 2.5% to 9%." On January 29, 2013, Mr. Sin accepted the terms proposed in Mr. Kumar's January 2, 2023 email, but he asked for a $5,000 expense compensation. He stated: "I will take whatever you think is fair for me in the form of ownership on Kela Medical as I remember why I first started this."

ix) In January 2013, Mr. Kumar's lawyer advised of certain potential tax consequences if Kela made KAI a subsidiary. He then abandoned the idea. The parties dispute whether the information was relayed to Mr. Sin.

x) The emails leading up to the parties' final negotiation of Mr. Sin's compensation indicate that the funding for Kela's 2013 budget was in peril. Kela had lost part of its funding from OCE. Mr. Kumar advised Mr. Sin that his parents wanted a proposal on how they planned to fund in 2013. On December 20, 2012, Mr. Kumar sent an email to Mr. Sin entitled "Budget 2013." The email reads:

> Daniel,
>
> We have hit a snag with our budgeting for next year. OCE's commitment is not quite what we thought it would be ($ amount wise) as well as some of their terms are funny. I just got off the phone with OCE and they have had some budgeting issues and have pulled the funding for the second half of the program…That being said they want us to hire the Embedded Executive and use up $54,000 by end of March. This requires us to put out $18,000 a month for this and would eat away at our budget. They will return $9000/month upon completion. When i [*sic*] presented this to my parents, there were not too happy at another salary over $50,000 with such a big loss on the year.
>
> I need to create a proposal for them to see what they will fund next year. They have asked for the following:
>
> i. I would need an estimate of what we think development is going to cost. They want to know to the dollar what they are being expected to put in for next year…
> ii. Where can we reduce costs?...
>
> a) I cut my salary to 35k and they will help me with my bills
> b) Reduce your required commitment during the period Darren is present from M,W,F to Just Monday's and Friday's. I did explain to them that there is too much work for that to be possible, but they have recommended that we have KAI on its feet by January so that between Hagir and Mike the technical operation hat to be covered. Any emergency KAI work will either come from Kela time, or we can work out a model for you to bill hourly.

xi) On December 26, 2012, Mr. Sin wrote to Mr. Kumar to ask five questions; Mr. Kumar responded on December 26, 2012. Mr. Sin's email starts with: "Here are the questions I have on the arrangement for 2013. Feel free to include any conditions on my proposed agreement or terms." He then asked some of the following questions, and received the corresponding indicated responses from Mr. Kumar:

> 2. When do you plan to sing an agreement regarding Kai innovations as discussed in September 2012?
>
> [Response] Lets say January 21st as well.
>
> …
>
> 5. Less cash for my time in 2013 is possible but the value of contribution need to be recognize in shares and will need to understand the offer.
>
> [Response] Agreed. Without our tight cash flow we still need to maximize our SR & ED filings, which drastically reduce when an individual is a >10% owner of the company. For 2013 we would be willing to increase your stake from 2.5% to 9%. Once we start to have cash flow we can discuss beyond this.

xii) In March 2013, Kela was in talks with OCE to secure a loan in the amount of $249,995. Mr. Sin was involved in the process to obtain the investment. The Whitby Loan was disclosed. Kela was restricted from entering into transactions except where set out in their agreement. Mr. Sin was involved in the application process.

xiii) In March 2013, the parties signed the 2013 Agreement for Mr. Sin's compensation for the 2013 calendar year. Mr. Sin had signed two one-year contracts before with Kela.

[130] The surrounding circumstances support the defendants' interpretation that Mr. Sin had to achieve the milestones within the term of the agreement for the benefits to be conferred on him. Commercial contracts must be interpreted in accordance with commercial reasonableness, sound commercial principles, and good business sense, and in a manner that "avoids a commercial absurdity": *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24; *Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONCA 769, 169 O.R. (3d) 109, at para. 21; and *Pinnacle International (One Yonge) Ltd. v. Torstar Corporation*, 2024 ONCA 755, at para. 60.

[131] It would strain commercial reasonableness to construe a one-year employment contract to confer benefits on an employee long after the contract had expired, and even where the events to trigger conferring those benefits had not taken place. Mr. Sin's suggestion that the proceeds of sale from the WELL Transaction, even if KAI had been a subsidiary, should be used to pay off the Whitby loan is not supported by any authority as the two companies are separate legal entities. Again, neither party has addressed any authority that would indicate that KAI is bound by the 2013 Agreement, or that this court may make an order that affects its interest without them being a party to the litigation. The sale proceeds are KAI's sale's proceeds, not Kela's. A decision maker cannot use the surrounding circumstances to deviate from the text of the contract to the point that the court "effectively creates a new agreement": *Sattva*, at para. 57; *Corner Brook*, at para. 20. As discussed, the interpretation of a contract must always be grounded in its text and read in light of the entire contract: *Sattva*, at para. 57.

[132] Both sides have advanced multiple examples of how they interpret certain words and phrases in Milestone 4. Given the court's determination that the contract expired, and Milestone 4 along with it, the court need not canvass any of the other issues.

v. Breach of contract

[133] The court rejects Mr. Sin's claim that the defendants have breached the contract or that the defendants are in breach of their duty of good faith.

[134] Mr. Sin is seeking damages in the amount of $3,583,333.33 against the defendants for breach of contract and breach of the duty of good faith, and what he asserts is expectation and reliance, and in the amount of the value of one third of the KAI shares at the time of the WELL Transaction. He says that the WELL Transaction was for the acquisition of 100% of KAI shares in the amount of $10,750,000 which is an accurate reflection of the market value of the KAI shares at the time of the breach, and he says one third of the KAI shares amount to that figure.

[135] As indicated above, the contract was for a one-year term. It came to an end at the end of December 2013.

[136] Even if Mr. Sin were correct about his interpretation, that Milestone 4 survived the expiry of the contract and his departure from Kela, his claim must fail as his damages have not crystallized until the conditions in Milestone 4 have been met. In the result, Kela would not be able to confer the benefits contemplated under the Agreement. Neither party addressed whether KAI would be bound by the conditions in Milestone 4, even if it had been a subsidiary, but the court rejects Mr. Sin's position for several reasons.

[137] First, Kela and KAI are separate companies. Mr. Sin testified at trial that he did not necessarily mean that KAI would be a "subsidiary" of Kela, but a division. He later testified that Dr. Kumar's requirement was that KAI would be a subsidiary of Kela and therefore by owning Kela shares, and with Kela having control of KAI, his interests would be protected.

[138] The defendants say that Mr. Sin must establish that his alleged expectation that Kela would use the sale proceeds in this hypothetical scenario to pay down its debt is reasonable in order to succeed. They say that his alleged expectation is commercially unreasonable and fails to account for several possible scenarios and outcomes had Kela been the actual recipient of the WELL Transaction sale proceeds. The court focuses on the defendants' underlining of the fact that Kela was not the recipient of the funds. In the court's view, Mr. Sin's argument presumes that had KAI been a subsidiary of Kela, he would automatically have rights in KAI. He has provided no authority for the proposition. Even if KAI had been made a wholly owned subsidiary of Kela, it would still have been a separate legal entity, with assets and liabilities separate and independent from its parent company, Kela: see *BCE Inc. v.* 1976 *Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, at para. 34; *Di Gennaro v. BMO Nesbitt Burns In*c. (2007), 2007 CarswellOnt 6575 (Ont. S.C.J.). KAI is not a party to the 2013 Agreement. The Agreement expressly states that it was between Mr. Sin and Kela.

[139] Second, Mr. Sin's argument that the loan should be repaid from KAI's sale of its shares in the WELL Transaction again ignores the fact that KAI and Kela are two separate corporate entities. Dr. Kumar testified that it never crossed his mind to require Kela to repay the Whitby Loan using the WELL Transaction sale proceeds because those funds did not belong to Kela. Mr. Sin seeks remedies which affect KAI, which was not a party to the 2013 Agreement. While neither party addressed whether the Agreement is binding on KAI, which is a separate legal entity, the defendants raised the concern that KAI is not a party to the proceedings. The court agrees with the defendants. As Mr. Sin has sought relief that affects KAI's interest, since he seeks to attach a judgment to the proceeds of its sale of its shares to WELL, it ought to have been added to the proceedings. SPQKumar is being sued in its capacity as a corporation which entered into a shareholders' agreement with Mr. Sin, and not in its capacity as the trustee of KAI's shares.

[140] Third, the fourth milestone contemplates that Kela will repay the debt – the loan agreement is between Whitby Diagnostics and Kela. On cross-examination, Mr. Sin testified: "the payment of the loan, from all the evidence, yeah, it never happened." Since Kela has not repaid the Whitby loan, Milestone 4 has not been triggered. The court does reject the defendants' assertion that the reference to debt in Milestone 4 would include all debt that the company currently has. The word "debt" in Milestone 4 is singular. The parties, including Mr. Sin himself, acknowledged that Dr. Kumar was concerned about the repayment of the Whitby debt.

[141] Fourth, Milestone 4 also contemplates that Kela will be compensated. The court agrees with the defendant's argument that in order to obtain the 33% shares in KAI after achieving the repayment of the Whitby Loan by the end of 2013, Milestone 4 required Mr. Sin to either exchange his common shares held in Kela or pay the fair market value of the 33% shares in KAI, at the time of issuance. Neither of these events have taken place to satisfy the further requirements of Milestone 4.

[142] Finally, for completeness, though this does not affect the court's determination of the issues before it because neither party addressed the issue, KAI's shares were being held in trust by SPQKumar at the material time. The trusts were established the same day of incorporation. Pursuant to s. 104(2) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.), a trust is deemed to be an individual: *Fundy Settlement v. Canada*, 2012 SCC 14, [2012] 1 S.C.R. 520, at para. 13. It is not clear to the court, as no submissions were made on this point, whether Kela can be held liable under the 2013 Agreement for actions taken by a nonparty.

vi. Breach of duty of good faith

[143] The duty of good faith requires a party to act honestly in the performance of a contract: *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at paras. 65-66. A party must exercise contractual discretionary powers in good faith and in a manner consistent with the purposes for which the discretion was granted in the contract and not in a capricious fashion: *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage Distric*t, 2021 SCC 7, [2021] 1 S.C.R. 32, at para. 62.

[144] Mr. Sin argues that the defendants were required to exercise their powers or discretion under the 2013 Agreement reasonably and in accordance with the purpose of that agreement. He submits that since the purpose of Milestone 4 was to ensure Dr. Kumar would be repaid his loan prior to Mr. Sin receiving his deferred 33% interest in KAI, it was an unreasonable exercise of the contractual discretion by the defendants to not repay Dr. Kumar's loan with the net sale proceeds of $7.7 million from the WELL Transaction in July 2019.

[145] For their part, the defendants say that the breach of a duty of good faith was part of the pleading, but they did not otherwise deal with the merit in their closing submissions.

[146] In essence, the plaintiff is asking that KAI pay Kela's debts out of the proceeds of sale of its shares. He also says that he is entitled to a 33% profit share in KAI. Mr. Sin has provided no authority for the court to make the order sought or to make an order that affects a non-party. KAI is not a party to these proceedings. KAI and Kela are separate legal persons.

[147] On the evidence, the defendants were honest and forthright with Mr. Sin. He attended Kela board meetings. He had access to Kela's financial statements. Kela not only delivered on the milestones, but they compensated Mr. Sin more than the benefits conferred by the milestones. At the trial, he conceded that it was only after the lawsuit started that he discovered that he actually had more shares in Kela than he initially thought. On the evidence, Mr. Sin was paid close to half a million dollars but did not deliver a marketable product to the defendants. Mr. Sin then abruptly resigned, left with the knowledge of the product, and went to work for a competitor.

[148] Mr. Sin has not established, on a balance of probabilities, that the defendants are in breach of the doctrine of good faith.

vii. Misrepresentations made to Mr. Sin

[149] In his statement of claim, Mr. Sin alleges that there were representations and promises made to him in the 2010, 2011, and 2013 agreements, as well as separate acknowledgements made while he was employed with Kela, which entitles him to the following: (a) an 8.7% share of the undiluted common stock of Kela; (b) a 33% share of the undiluted preferred stock of Kela; and (c) a 33% of the net proceeds of the sale of Kela Atlantic Inc. to WELL Technologies.

[150] Mr. Sin's evidence is that the defendants represented to him that KAI would be made a subsidiary of Kela. He deposed that he "relied on the Kumars' representations to me that ownership of shares in Kela meant I had a stake in the parent company of KAI." By the time of the closing address, the nature of the representation had migrated to fraudulent representation. The statement of claim is grounded in a claim for breach of contract and relief for oppression; the claim does not plead misrepresentation, either negligent or fraudulent.

[151] The defendants point to the language that Mr. Sin says constitutes a representation that KAI was Kela's wholly owned subsidiary, found in the last sentence of Milestone 4, which reads: "66% of KAI Innovations will remain under the control of Kela Medical Inc." They also say that the act of oppression on which Mr. Sin's claim is based is the failure to make KAI a subsidiary of

Kela. It was decided in January of 2013 that KAI would not be made a subsidiary. Mr. Kumar testified that he advised Mr. Sin between January 2013 and February 2013.

[152] On cross-examination, Mr. Sin testified that he did not necessarily mean that KAI would be a "subsidiary" of Kela, but rather a division. He later testified that Dr. Kumar's requirement was that KAI would be a subsidiary of Kela, and therefore by owning Kela shares, and with Kela having control of KAI, his interests would be protected. He relies upon an email that predates, from his own evidence, the signing of the 2013 Agreement as it stated the proposed subsidiary transaction "is not set in stone." There is also no evidence before the court that shares were issued to SPQKumar; rather, the holding company is a trustee for the KAI shares.

[153] Although Mr. Sin says he meant "affiliate" during his testimony, he could not explain what that meant, but resorted to using the term "subsidiary." Mr. Kumar admits that Dr. Kumar asked him to explore the possibility of securing the Whitby loan and to keep Mr. Sin focused. He says it was made clear to Mr. Sin that this was only a possible outcome contingent on legal and accounting due diligence being completed prior to making any decision to proceed with the transaction.

[154] The defendants say that Mr. Sin was aware that KAI was never made Kela's subsidiary, and therefore had no reasonable expectation or understanding that this was the case, as is required to find a claim in oppression or misrepresentation.

[155] The defendants also argue that there was no representation in the 2013 Agreement that KAI was or would be made Kela's subsidiary. They say the wording of Milestone 4 of the 2013 Agreement indicates two scenarios where Mr. Sin could be compensated after fulfilling the milestone: first, where KAI was a subsidiary; and the second, where it was not. While Kela did not have the money to purchase KAI at the time of the 2013 Agreement, it remained a possibility that Kela would acquire KAI once it came into funds – at least until the imposition of the OCE loan terms that required the renegotiation of the 2013 Agreement. This interpretation of Milestone 1 would require the court to imply terms into the agreement, which it cannot, at the risk of remaking the contract.

[156] For the reasons below, the court does not accept that there was any representation by Kela or Mr. Kumar to Mr. Sin, which he relied upon, in entering into the 2013 Agreement. However, the adequacy of the pleadings must be addressed.

[157] Pleadings define the issues in an action and give the other side notice of the case they must meet, setting the parameters and context for effective pre-trial management as well as the parameters of expert opinion: see *Lax Kw'alaams Indian Band* v. *Canada (Attorney General*), 2011 SCC 56, [2011] 3 S.C.R. 535, at para. 43. The failure to plead a cause of action is not a mere technicality. Rule 25.06 (1) of the *Rules of Civil Procedure* provides that:

> Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. [Emphasis added.]

[158] Lawsuits must be decided within the boundaries of the pleadings so as to afford the opposing parties an opportunity to address the issues in evidence presented at trial: *460635 Ontario Ltd v. 1002953 Ontario Inc*, 1999 CanLII 789 (ON CA) at para. 9; *Kalkinis (Litigation Guardian of) v. Allstate Insurance Co. of Canada* (1998), 41 O.R. (3d) 528, at para. 12 (Ont. C.A.); and *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74, at para. 60 (Ont. C.A.).

[159] The court would be inclined to dismiss the claim for misrepresentation on the basis that it is not pleaded. In any event, the court finds no merit to the claim.

[160] In order to establish a claim for negligent misrepresentation, the plaintiffs must establish the following:

i. the existence of a duty of care based on a special relationship between the representor and the representee;
ii. that the representation in question was untrue, inaccurate or misleading;
iii. that the representor must have acted negligently in making the misrepresentation; and
iv. that the representee must have relied, in a reasonable manner, on the negligent misrepresentation.

[161] There are several emails exchanged between Mr. Kumar and Mr. Sin, the last of which was in close proximity to when the agreement was signed and belies Mr. Sin's assertions of any representations regarding making KAI a subsidiary.

[162] On October 14, 2012, Mr. Kumar sent the following email to Mr. Sin:

> When we decided to launch KAI innovations, I was under the impression it could be run by you, a developer and the part time assistance of a salesperson period now I am spending close to 80% of my time overseeing the company, Sara and Kathleen are both focused majority of their time on chi as well.
>
> This leaves Kela Medical dead in the water.
>
> …
>
> The solution they have proposed: <u>until we have paid back every cent to our seed investment, KAI should be a subsidiary of Kela Medical because if it is going to use Kela resources,</u> it has to be for the greater good of Kela Mmedical. They have discussed making you a bigger part of the overall organization, and if KAI is a wholly owned subsidiary of Kela it would only be right if we increase your overall stake in Kela Medical.
>
> <u>As I said this is not set in stone</u> and they want to keep this an open process with you and hear your opinion. We just have to be sure to address 100% of Kela resource is to pay down the current debt. [Emphasis added]

[163] In an email dated March 7, 2013, from Mr. Kumar to Mr. Sin, Mr. Kumar asked Mr. Sin to put together a proposal on what he wants for his salary, and wrote:

> 1. Salary/commitment;
>
> 2.Responsibilities/role;
>
> 3.Expected share compensation for both kela an kai over the next 12 .
>
> Please do not base your proposal on previous conversations as I do not want to end up in the situation again where you act like we are not being fair. Create this from exactly what you think is required. [Emphasis added]

[164] It is clear from Mr. Kumar's email that any discussions before were to be disregarded. At the trial, Mr. Sin testified that the 2013 Agreement was signed after March 7, which is coincidentally the date of this email. There is no evidence before the court of any representation made to Mr. Sin beyond this date and before the Agreement was signed, that Kela would make KAI a subsidiary. In fact, the evidence indicates that Mr. Sin should not rely on previous conversations.

[165] At the trial, the defendants sought to rely on various letters by Mr. Sin's former lawyers as indicia of Mr. Sin's understanding that KAI was not made Kela's subsidiary, including the following:

- The two letters sent by Mr. Sin's lawyer following the WELL Transaction. In the first letter from his lawyer, dated June 14, 2019, Mr. Sin claimed to be the legal and beneficial owner of 250 shares in KAI, and not Kela. The letter stated that as a shareholder of KAI, Mr. Sin had reason to be concerned about the legality of the negotiation with WELL, as he had not authorized Mr. Kumar or KAI to act as his agent in respect of the transaction.

- In response to KAI's lawyer's letter that Mr. Sin was not a shareholder of KAI, Mr. Sin's former lawyer responded by letter, dated June 26, 2019, and the defendants say the response reflected Mr. Sin's understanding that KAI was not currently a subsidiary of KELA. The defendants say that instead, his response reflected his understanding that the satisfaction of Milestone 4 would trigger a subsidiary transaction. The letter reads, in part:

  > The agreement contemplated that, when the loan was repaid, Daniel Sin would be issued a separate 33% stake in KAI Innovations. In the event shares cannot be issued to Mr. Sin, there would be a 33% profit share and a sale of existing 250 shares owned by Mr. Sin to Kela Medical Inc in order to make KAI a subsidiary of Kela Medical Inc.

[166] The court is not inclined to rely on Mr. Sin's former lawyer's letters, sent prior to the commencement of litigation, which are hearsay, in the absence of any agreement between the parties. Certainly, Mr. Sin argued that the correspondence was only evidence of counsel's

posturing and "set up" the litigation in letters, and he explained at trial that he lacked information and documentation at the time because it was withheld from him.

[167] Mr. Sin's evidence demonstrates some confusion about the two companies. Kela and KAI are two separate companies, and the 2013 Agreement clearly stated that "the agreement will be binding between Daniel Sin and Kela Medical Inc." In the Notice of Application, issued September 26, 2019, Mr. Sin claimed to be the holder of 250 shares in KAI, directly. At paragraphs 39 and 41 of his first affidavit, he said that it was only after receiving the June 26, 2019, letter from KAI's lawyer that he understood that "Kela had entered into the agreement with WELL Technologies for the purchase of KAI as Kela's wholly owned subsidiary," and that he had not been issued any shares directly In KAI.

[168] While the court finds that there is a special relationship between Mr. Sin, Mr. Kumar, and Kela, Mr. Sin has failed to establish, on the evidence, that these defendants made representations, or any representation, that was untrue, inaccurate, misleading, or fraudulent, as he later noted in his materials.

viii. Oppression remedy

[169] In his closing submissions, Mr. Sin indicated that he is seeking the sum of $2,151,618.92 from the defendants, Kela, Mr. Kumar, and SPQKumar Inc., jointly and severally, and that he transfers 250 common shares to Kela pursuant to s. 248(3)(j) of the *OBCA*.

[170] Mr. Sin's claim in oppression also hinges on whether the defendants represented to him that KAI would be made a subsidiary of Kela.

[171] Mr. Sin has also raised as oppressive certain actions taken by Mr. Kumar even before any discussion was had about the prospect of him having any stake in KAI or it being made a subsidiary. Some examples are as follows: SPQKumar being the trustee of KAI's shares (the trusts were created the same day the company was incorporated); the loan agreement between Whitby Diagnostics and Kela (executed before the 2013 Agreement); and actions taken by Kela on the advice of its lawyer. He argues that SPQKumar was the controlling body corporate of both Kela and KAI, and thus all three were affiliates.

[172] For the reasons below, the court rejects that there was any oppressive conduct on the part of any of the defendants. While not germane to the court's conclusion, the court also rejects Mr. Sin's argument that he was the co-founder of either Kela or KAI. His own evidence indicates that he joined Kela as a consultant/contractor in 2009, and at trial, he admitted that he was not involved in the incorporation of KAI or the process of KAI.

[173] Mr. Sin says that after he left Kela, he did not expect his shares to pay dividends and did not assume Dr. Kumar's loan would be repaid. Mr. Sin holds no shares in KAI or SPQKumar, nor has he satisfied the court that he is a creditor. Neither KAI nor SPQKumar are privy to the 2013 Agreement.

[174] In his statement of claim, Mr. Sin seeks payment for accumulated dividends from Kela. The defendants acknowledge that he continues to hold shares in Kela. However, the defendants contend that Kela never reached a level of profitability due to its debts and its inability to continue its operation after Mr. Sin resigned in July 2014. They say that no dividends were ever issued. The court accepts, on the evidence, that Kela was not profitable and was never profitable; at the time Mr. Sin left the company, Kela had two significant loans outstanding to Whitby Diagnostics and OCE.

[175] As the evidence before the court indicates that there are no accumulated dividends, none are payable to Mr. Sin. With respect to the balance of the relief claimed by Mr. Sin, there is no dispute that Mr. Sin is a shareholder of Kela and presently holds 3,333 Class A Preferred Shares, and 8,700 Common Shares. Mr. Sin does not appear to challenge Kela's evidence that it has never reached a point of profitability due to its debts, and its inability to continue Mr. Sin's work following his resignation. As no dividends were ever issued, and there are no accumulated dividends to which Mr. Sin is entitled.

[176] In *BCE Inc. v. 1976 Debentureholders*, at para. 58, the Supreme Court of Canada indicated that: "oppression is an equitable remedy. It seeks to ensure fairness — what is 'just and equitable'. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair." In the context of whether it would be "just and equitable" to grant a remedy, the court must determine "whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations": *BCE Inc.*, at para. 62. The Court articulated a two-part test for oppression in the corporate law context. First, the plaintiff must show that there has been a breach of reasonable expectations. Second, the plaintiff must establish that the conduct is oppressive, unfairly prejudicial, or unfairly disregards their interests. At para. 72, the Supreme Court of Canada indicated that to determine whether reasonable expectations exist, courts can consider factors including:

> [G]eneral commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

[177] Mr. Sin says that his reasonable expectation included the following: KAI was a subsidiary of Kela as was represented, which would have protected his deferred 33% interest in KAI; the defendants would cause Dr. Kumar's loan to be repaid from the profit stream of KAI; and the defendants would provide adequate disclosure material information related to Milestone 4. Mr. Sin's reasonable expectations do not align with the terms of the Agreement. He also asserts that if KAI had been made a wholly owned subsidiary of Kela, Kela would receive the net proceeds from the sale as the sole shareholder of KAI and the net sale proceeds of $7,703,412.76 was more than sufficient to repay the Whitby Loan and trigger Milestone 4. For reasons stated above, Mr. Sin's expectation makes no commercial sense.

[178] On the evidence before the court, there was no representation made to the plaintiff that he relied on in entering the 2013 Agreement. The transactions that Mr. Sin complains of all appear to have valid corporate purposes. For example, the idea of a making KAI a subsidiary was abandoned on the advice of Kela's lawyer and other professionals, for tax and business reasons. Moreover, the Whitby loan predated the Agreement, at all times, was one of the significant debts that featured in evidence – Kela's reducing the debt to writing and negotiating terms with Dr. Kumar, including interest on the loan, instead of demanding repayment, meant Kela could continue to operate. There is also no evidence of lack of good faith on the part of the corporation's directors. Despite the fact that Mr. Sin was paid almost $460,000, and the one thing he was engaged to do (bring the smart card to market) did not occur, he was compensated throughout by way of salary, payment of his expense account, and shares in Kela.

ix. Limitation period

[179] Mr. Sin says that he did not know about his claim until he was advised by KAI's lawyer on June 26, 2019, that Kela was not involved in any way in the Well acquisition of KAI, and that Kela was not the vendor of the KAI shares. He asserts that he later learned that Dr. Kumar's loan would not be repaid, as KAI was never made a subsidiary of Kela, as represented in the 2013 Agreement.

[180] The defendants say that the question is when Mr. Sin discovered, or ought to have discovered with reasonable diligence, that KAI was not a subsidiary. They say that Mr. Sin knew that KAI was not made Kela's subsidiary and could have had no reasonable expectation otherwise. The court agrees with the defendants, for the reason below.

[181] Section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B provides that, unless a statute provides otherwise, a proceeding shall not be commenced within two years after the claim was discovered. Section 5(1)(a), which is a codification of the discoverability doctrine, sets out the elements that must be known to a plaintiff for a claim to be discoverable. Section 5(2) provides that a person is presumed to know the factors set out in s. 5(1)(a), the day the act or omission upon which the claim is based occurred, but the presumption is rebuttable. The relevant sections read as follows:

> Basic limitation period
>
> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
>
> Discovery
>
> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,

> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> Presumption
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[182] The limitation period is triggered when the plaintiff has actual knowledge of the material facts that give rise to a claim, or when it ought to have known of those facts through the exercise of reasonable diligence: *Grant Thornton LLP v. New Brunswic*k, 2021 SCC 31, [2021] 2 S.C.R. 704, at para. 29. The jurisprudence establishes that the level of actual or constructive knowledge needed is more than mere suspicion or speculation, but less than perfect knowledge of liability: *Grant Thornton*, at para. 46; *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd*., 2019 ONCA 47, 144 O.R. (3d) 385, at para. 41, leave to appeal refused, [2019] S.C.C.A. No. 91. The case law indicates that it is reasonable discoverability − rather than the mere possibility of discovery − that triggers the limitation period under s. 5(1)(b) of the *Limitations Act*: *Van Allen v. Vos*, 2014 ONCA 552, 121 O.R. (3d) 72, at para. 34.

A. ***Breach of contract***

[183] Mr. Sin's claims are based on breach of contract and oppression under the *OBCA*. In the case of a breach of the Agreement, the two-year limitation clock starts to run when performance under the contract is not completed, that is when Kela has not made KAI a subsidiary. The question is when a reasonable person with the abilities and in the circumstances of Mr. Sin first ought to have known that Kela had not performed under the contract, specifically by failing to make KAI a subsidiary of Kela, and when he ought to have known that a legal proceeding would be an appropriate means to seek a remedy.

[184] Mr. Sin seeks to rely on the letters to his lawyers in 2019 as the date upon which the limitation clock starts to run. He need only prove that his actual discovery of the claim within the meaning of s. 5(1)(a) was not on the date of the events giving rise to the claim to rebut the presumption in s. 5(2): *Fennell v. Deol*, 2016 ONCA 249, 97 M.V.R. (6th) 1, at para. 26; *Morrison v. Barzo*, 2018 ONCA 979, 144 O.R. (3d) 600, at para. 31; and *Ridel v. Goldberg*, 2019 ONCA 636, 147 O.R. (3d) 23, at para. 28.

[185] In his supplementary affidavit, Mr. Sin deposed:

> In response to paragraph 37, I did not know that Mr. Kumar incorporated KAI without making Kela as the parent. His admission that he instead issued all the shares in KAI to the family holding company, SPQKumar, proves that the representation that I should receive a stake in Kela as an indirect stake in KAI was a fraudulent misdirection.

[186] Various appellate courts have endorsed the notion that the term "damages" ought to connote the sum of money payable by way of compensation, while "damage" should be confined to instances where it refers to the injury inflicted by the tort or breach of contract: see *Dass v. Kay*, 2021 ONCA 565, at para. 45; *Brozmanova v. Tarshis*, 2018 ONCA 523, 81 C.C.L.I. (5th) 1, at para. 35; *Smith v. Union of Icelandic Fish Producers Ltd.*, 2005 NSCA 145, 238 N.S.R. (2d) 145, at para. 119; and *Hamilton (City) v. Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156, 347 D.L.R. (4th) 657, at para. 55. As noted by Laforme J.A. in *Metcalfe*, at para. 54:

> *Damage* is the loss needed to make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. *Damages*, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was *damage*. [Emphasis added.]

[187] At common law, discoverability is said to be "a general rule applied to avoid the injustice of precluding an action before the person is able to raise it": *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 36; *Grant Thornton LLP*, at para. 29; and *Sparham-Souter v. Town & Country Developments (Essex) Ltd*., [1976] Q.B. 858 (C.A.), at p. 868. Mr. Sin says that in October, Dr. Kumar wanted to have a subsidiary transaction, and he did not know that this had not occurred.

[188] Discoverability means knowledge of the facts that may give rise to the claim. The knowledge required to start the limitation running is more than suspicion and less than perfect knowledge: *Vu v. Canada (Attorney General)*, 2021 ONCA 574, 495 C.R.R. (2d) 1, at para. 47. In *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, at para. 41, the Court of Appeal cited the following passage from Graeme Mew et al., The Law of Limitations, 3rd ed. (Toronto: LexisNexis, 2016), at §3.50, regarding when a plaintiff first possesses knowledge that an injury, loss or damage had occurred and was caused by an act or omission of the defendant:

> [I]t has been recognized that discoverability means knowledge of the facts that may give rise to the claim. The knowledge required to start the limitation running is more than suspicion and less than perfect knowledge. Or, to put it another way, the plaintiff need not be certain that the defendant's act or omission caused or contributed to the loss in order for the limitation period to begin to run. The limitation begins to run from when the plaintiff had, or ought to have had, sufficient facts to have *prima facie* grounds to infer the defendant's acts or omissions caused

or contributed to the loss. It is reasonable discoverability -- rather than the mere possibility of discovery -- that triggers a limitation period.

[189] There is substantial evidence to indicate that Mr. Sin had actual knowledge or constructive knowledge that KAI was not Kela's subsidiary before he resigned from Kela in July 2014, including the following:

i. He attended the Kela Board Meetings, even preparing minutes himself.

ii. Minutes from those meetings indicate there was discussion about KAI.

iii. He was in a management position at Kela, and others reported to him. On August 3, 2012, minutes of a KAI/Kela staff meeting confirmed the hierarchy and reporting structure at KAI as "all report to Daniel as top-level management" and "Arjun will be hands off and focus on Kela/High level." As a part of the top-level management, presumably Mr. Sin would have had access to information regarding KAI's structure. In fact, he participated in putting together required documents for funding for KAI at the end of November 2012 (for the Northumberland Company Futures Development Program), which required corporate documents. In his affidavit, he said he insisted that his stake in KAI be documented. On cross-examination he said he requested the documentation. He admitted that he never received any documentation regarding KAI shares.

iv. Mr. Sin says that in the five years after he left Kela, he did not ask any questions. The evidence indicates that on March 24, 2015, in his role as Chief Technical Advisor at OSCAR EMR, he contacted Arjun Hagir, who was involved in the KAI hierarchy, to indicate: "We have noticed KAI has contributed the MCEDT features change process…." Therefore, he had the opportunity to ask questions about KAI's corporate structure.

v. Before his resignation in July 2014, Mr. Sin also had access to Kela's financials in his management role, obtained copies of the financials to submit with the various grants he applied for on Kela's behalf, and was in a position to request those financial statements.

vi. Before his resignation in July 2014, Mr. Sin had access to Kela's financial statements which did not include any reference to KAI being an asset of Kela, contrary to the Generally Accepted Accounting Principles (GAAP) established by the Financial Accounting Standards Board, which require a parent company to identify on its financial statements, among other things, the assets acquired, and liabilities assumed in a subsidiary transaction.

vii. He received requests from Mr. Kumar to assist him with competing applications, including for the Eastern Ontario Development Program (Northumberland Community Futures Development Corporation) and the Scientists and Engineers in Business Initiative, which required company documents and information such as:

- Articles of incorporation or business registration
- list of board of directors or ownership
- detailed project budget, among other things

viii. He and Mr. Kumar jointly prepared a business plan for Kela in July 2013 to attract investors, and this business plan noted that KAI was a customer of Kela, which provided consulting services to KAI to fund Kela's operations.

ix. In 2013 Kela entered a number of investment arrangements which would have frustrated Mr. Sin's ability to reach Milestone 4, including the following:

a) Kela ran out of funds in June 2013 and on June 30, 2013, Whitby Diagnostics agreed to extend a further loan of $50,000. Paragraph 6(m) of the loan agreement between Kela and Whitby Diagnostics restricted Kela's ability to acquire any "affiliates" (at the trial, Mr. Sin initially used the term "affiliate," but later used "subsidiary").

b) Mr. Sin was involved in Kela's efforts to secure investment from OCE between August 2012 to 2013. Kela would have had to disclose if KAI were a subsidiary to this potential investor.

c) In early August 2013, Kela, OCE, and Whitby Diagnostics entered into an Intercreditor Agreement dated August 6, 2013, with respect to the OCE investment. Mr. Sin was involved in the investment process and was aware or ought to have been aware of its implications. The Intercreditor Agreement prevented Whitby Diagnostics from paying off the Whitby Loan for a period of 12 months from the date of the agreement without the prior written consent of OCE, which effectively meant that Kela would not be able to pay the loan until August 6, 2014, unless OCE consented, thereby preventing Mr. Sin from achieving Milestone 4 during the 2013 calendar year. At minimum, the OCE Agreement would have impacted Kela's ability to perform the terms under the 2013 Agreement.

d) Mr. Sin's evidence is that he did not ask for information after he resigned because he thought Kela and KAI would not be profitable. However, in 2013, while Mr. Sin was still working for Kela, which shared office space with KAI, KAI generated approximately $887,000 in revenue.

e) On June 5, 2014, CRA performed an in-person audit of Kela regarding its application for a SRED tax credit, which was applied for under Mr. Sin's guidance, and Mr. Sin was one of the key contacts with CRA throughout the audit process, also attending the audit meeting. In the result, Mr. Sin had access to Kela's financial statements, including the 2013 year-end financial statements and Balance Sheets, and would have seen that KAI was not listed as a subsidiary of Kela.

f) As a shareholder, Mr. Sin had a right to see Kela's financials, but never asked to see the financials after his resignation.

g) Mr. Sin never asked his lawyer, Mr. Tsui, who was also Kela's lawyer, whether the subsidiary transaction had gone ahead, despite being in contact with Mr. Tsui about his discussions with Mr. Kumar about a potential ownership stake in KAI.

[190] Under s. 5(1)(b), the question is when a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). Mr. Sin has held many leading positions. In his affidavit, he indicated that he was the President of 6815898 Canada Corp. At paragraph 13 of his statement of claim, Mr. Sin pleaded that:

> The plaintiff resigned from Kela in 2014, believing the Kumars' representation that KAI was a subsidiary of Kela. When he left, he harboured no expectation of reward from these entities, received no dividends, and was not privy to any annual meetings.

[191] However, before he resigned, Mr. Sin was privy to meetings and financial information regardless of whether he chose not to ask for information after he left. It is not plausible that Mr. Sin, with his experience and background, including being on the management team at Kela, with access to financial information, would have no knowledge, actual or constructive, that KAI was not a subsidiary of Kela. That information no doubt would likely have had to be disclosed to potential investors. Further, before he left, Mr. Sin was assisting with funding applications, and indeed one of the investors did ask about KAI when doing their due diligence.

[192] As for Mr. Sin's evidence that he did not ask questions in the five years after he left Kela, while the Court of Appeal has noted that a lack of due diligence is not a separate and independent reason for dismissing a plaintiff's claim as statute-barred, the same court has also stated that a plaintiff must act with due diligence in determining if they have a claim: see *Fennell v. Deol*, at paras. 18, 24; *Galota v. Festival Hall Developments Limited*, 2016 ONCA 585, 133 O.R. (3d) 35, at para. 23; and *Cosentino v. Dominaco Developments Inc.*, 2019 ONCA 426, at para. 20. A potential plaintiff must still act with reasonable diligence in investigating the factors set out in s. 5(1)(a). The court noted that "a limitation period will not be tolled while a plaintiff sits idle and takes no steps to investigate the matters in s. 5(1)(a)": *Cosentino*, at para. 20; *Longo v. MacLaren Art Centre*, 2014 ONCA 526, 323 O.A.C. 246, at para. 42.

[193] At the trial, Mr. Sin admitted that he never received any documentation regarding shares in KAI. Despite his evidence, he also had communications with individuals at Kela and KAI after he left Kela's employ, as noted above.

[194] Based on the totality of the evidence, Mr. Sin's position in the company gave him access to information which would have armed him with information to discover KAI's true status before he resigned in July 2014. Mr. Sin has business acumen: he holds three degrees (a Bachelor of Applied Science, a Masters of Applied Science, and an Executive Masters of Business Administration from the University of Western Ontario); he has worked at several start-up companies; and he owns three further corporations.

[195] The court finds that Mr. Sin knew or ought to have discovered, through the exercise of reasonable diligence, the underlying material facts of the claim for breach of contract as late as July 2014 when he resigned from the company. He was assisting Kela with various applications to obtain funding so that Kela could operate. He also assisted Kela with the SHRD tax credit, which involved having access to Kela's financial information, and he participated in the CRA audit. He attended meetings where there was financial disclosure. At trial, he admitted that before the Agreement was given to him, he did not have any shares in KAI and that when he left in 2014, he did not have shares in KAI because the loan had not been paid back. He admitted that after he left in 2014, he never contacted the Kumars to determine whether the loan had been paid back and whether the two companies were successful. The evidence indicates that KAI was actually doing well and was funding Kela by subcontracting resources (workers) from Kela.

[196] The fact that KAI would not be made a subsidiary of Kela should also have been apparent to Mr. Sin as early as August 2013, when the OCE agreement restricted Kela's ability to make KAI a subsidiary for a year. It was also discoverable to Mr. Sin at the end of December 2013 when the Agreement expired and the benefits contemplated by Milestone 4 had not been conferred. It was discoverable when Kela failed to repay the Whitby loan before December 31, 2013, and was discoverable when he resigned from the company in July 2014, without any documents from Kela regarding the significant benefits afforded under Milestone 4. These are all material facts which were discoverable, or reasonably discoverable, years before the date of his former lawyer's letter in June 2019. He need not have suffered damages to appreciate that, as KAI had not been made a subsidiary, as he asserts was represented to him, a proceeding would be an appropriate means to seek a remedy.

[197] In the result, the claim for breach of contract is statute-barred.

B. ***Oppression remedy***

[198] The defendants indicate that the claims for breach of contract and oppression arise out of the same facts. The court agrees.

[199] Mr. Sin argues that the act of oppression giving rise to his claim did not occur until the WELL Transaction in 2019, when SPQKumar sold all its shares in KAI. Mr. Sin says this is when he first learned that KAI was never made a subsidiary of Kela, as was allegedly promised and represented to him. Since Mr. Sin has no shares in either KAI or SPQKumar, the basis of the claim is unclear. To the extent that he relies upon the same material facts to ground the relief under the *OBCA*, that is that Kela did not make KAI a subsidiary, the claim is also statute-barred. Oppression claims are subject to ss. 4 and 5 of the *Limitations Act, 2002*, and must be commenced within two years of when the claims were discovered or reasonably ought to have been discovered through the exercise of reasonable diligence by a reasonable person with the abilities and in the circumstances of the claimant: see *Maurice v. Alles*, 2016 ONCA 287, 130 O.R. (3d) 452, at paras. 3, 43; *Solar Harvest Co. v. Dominion Citrus Ltd.*, 2015 ONSC 1315, 39 B.L.R. (5th) 141, at para. 19.

[200] Mr. Sin argues that that if KAI were a subsidiary of Kela, as represented, it would have protected his deferred 33% interest in KAI. The defendants argue that the Agreement that Mr. Sin relies upon does not indicate that KAI was a subsidiary. The letter from counsel in 2019 providing information about the WELLS transaction does not change the underlying material fact that KAI was not made a subsidiary of Kela. Nor does it change the fact that the Whitby loan has still not been paid and cannot be said to be the trigger for when he knew or ought to have known the material facts underlining his claim for breach of contract or relief under s. 248 of the *OBCA* for oppressive conduct by the defendants.

IX. Disposition

[201] For the reasons above, the action is dismissed against the defendants.

X. Costs

[202] If the parties are not able to agree on costs, the court will consider written submissions based on the following schedule:

i. The applicant shall deliver costs submissions, including a Bill of Costs, Costs Outline, and dockets (or computer-generated dockets) no later than 30 days from the date of these Reasons.

ii. The respondent shall deliver his responding submissions and supporting materials within 30 days thereafter.

iii. There shall be no reply submissions.

iv. The costs submissions, excluding the Costs Outline, Bill of Costs, and offers to settle, must be no longer than five pages, double-spaced. Any authority referred to may be hyperlinked to a free online source for decisions.

v. The costs submissions should also be provided in Word format and emailed to my judicial assistant. All submissions and supporting materials on costs must also be uploaded to Case Center to the trial bundle.

A.P. Ramsay J.

Released: December 19, 2024

Appendix A

Agreement for 2013 Calendar Year

Term: January 2013 1st – December 31st 2013

Renewal: To be negotiated by December 1st 2013

Compensation: Up to $4200/month billable + $5000/annum for expenses

Milestone 1: Signing of Agreement

1. Upon signing, the proposed agreement will take effect with the terms listed
2. Agreement will be redrafted if requested by lawyer, until such time this agreement will be binding between Daniel Sin and Kela Medical Inc.
3. Invoices for January 2013, February 2013, and March 2013 are to be provided to Kela Medical Inc.
4. As previously discussed, a total of 1500 (15%) Preferred shares will be issued in Kela Medical Inc. to Daniel Sin. Preferred Share structure outlined below.

Milestone 2: Delivery of Kid's Health Record on agreed upon deadlines documented (March 28th 2013)

1. Issuance of an additional 1000 Preferred Shares, bringing total to 2500 (25%).

Milestone 3: Annual requirements by December 31st 2013:

1. Delivery of technical manual used to educate future developers or technical employees:
    a. K-Vault
    b. K-Cabinet
    c. Kids Health Record
    d. pHR Cards (manufacturing requirements/process)
    e. Projected Technical plan
    f. SR&ED Report
2. Issuance of an additional 830 Preferred Shares, bringing total to 3300 (33%)

Milestone 4: Return of outstanding debt

1. Upon repayment of debt, Daniel Sin will be issued a separate 33% stake in all available classes of shares in KAI Innovations. Due to structure at the time of milestone, if shares are unable to be issued a profit share of 33% will go into effect. To ensure no objection from other shareholders at the time, it is agreed that Kela Medical Inc. is compensated. Compensation will occur via exchange of common share currently owned by Daniel Sin (250 shares), or by providing fair market value at the time of issuing. 66% of KAI Innovations will remain under the control of Kela Medical Inc.

Note: All shares are to be issued in writing no later than 60 days from reaching of milestone.

Preferred share of Kela Medical Inc. structure:

- As of January 1st 2013, 10,000 shares will be issued
- Non-Voting Shares
- Maximum of 2500 new share to be issued per fiscal year (next issue December 2013)
- 2000 shares will be distributed equally to all employees who meet "qualifying criteria"
    - Employee must be with company for duration of entire colander year
    - Employee must deemed to exceed minimum expectations
    - Employee must not have more than 3 written infractions for the year
- 500 shares will be distributed equally to board members

Dividend Structure:

- Dividends will be paid at the yearend based on the following breakdown of total profit:
    - If total profit is under $999,999, 40% will be paid to shareholders
    - If total profit is between $1,000,000 and $2,999,999, 30% will be paid to shareholders
    - If total profit is between $3,000,000 and $4,999,999 20% will be paid to shareholders
    - If total profit is greater than $5,000,000 15% will be paid to shareholders

The outlines in this document is understood and agreed to on _____ by:

Daniel Sin

Arjun Kumar

Naresh Kumar

CITATION: Sin v. Kela Medical Inc., 2024 ONSC 6767
COURT FILE NO.: CV-19-00628071-0000
DATE: 20241219

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

WAI-CHEONG SIN a.k.a. DANIEL SIN

Applicant

– and –

KELA MEDICAL INC., ARJUN KUMAR, NARESH KUMAR and SPQKUMAR INC.

Respondents

REASONS FOR JUDGMENT

A.P. Ramsay J.

Released: December 19, 2024