1997 CarswellOnt 3303, 35 O.T.C. 121, 35 O.T.C. 121

1997 CarswellOnt 3303, 35 O.T.C. 121, 35 O.T.C. 121

Nenadic Investments Ltd. v. Dossa

In The Matter of Tasdale Investments Limited, an Ontario corporation with head office in the City of Toronto, Province of Ontario

In The Matter of an Application pursuant to Section 248 of the Business Corporations Act, R.S.O. 1990, c. B.16

Nenadic Investments Limited, Uros Nenadic and Miruka Investments Limited, Plaintiffs and Samsher Dossa, The Estate of Ramzanali Dossa, Zabeen Reality Ltd, Al-Barkat Investments Ltd, Meghji Investments Ltd, Meghji Enterprises Ltd, and Zahra Realty Management Limited, Defendants

Samsher Dossa, The Estate of Ramzanali Dossa, Zabeen Realty Ltd, Al-Barkat Investments Ltd, Meghji Investments Ltd, Meghji Enterprises Ltd, and Zahra Realty Management Limited, Plaintiffs by Counterclaim and Nenadic Investments Limited, Uros Nenadic, Miruka Investments Limited and Marko Nenadic, Defendants to the Counterclaim

Ontario Court of Justice (General Division) [Commercial List]

Spence J.

Heard: December 2-4, 6, 11-13, 16, 1996, March 12-14, 17-21, 25, 26, 1997
Judgment: July 18, 1997
Docket: B331/94

Counsel: *J. David Sloane*, for the Plaintiffs.

David Hager, for the Defendants.

Subject: Corporate and Commercial

Partnership --- Relationship between partners — Fiduciary obligations

Plaintiff breached fiduciary duties by entering into commitment to refinance joint venture's property without authority and by failing to obtain advice from joint venture's lawyer — Defendants' refusal to participate in plaintiff's refinancing efforts con-

stituted reasonable response to plaintiff's actions — Defendants not liable to plaintiff in damages for resulting sale of property under power of sale and joint venture wound up.

The plaintiff U, through the plaintiff N Ltd., participated with the defendant D and the other defendants, in a joint venture: they purchased property which was owned and managed by T Ltd., a bare trustee to hold the property on behalf of the joint venture. All cheques were to be signed by two members of the executive board. U was the president of the joint venture and of T Ltd. Bad feelings arose between the defendants and the plaintiffs. When one member of the D Group wished to sell its investment, U refused to consent to the transfer and then, using information which he obtained as a director of T Ltd., made an offer to acquire the shares. The major disagreement was over refinancing. When U demanded defendants' approval to refinance the property, he was instructed to seek the advice of the joint venture's lawyer. He did not and caused a commitment letter to be delivered. The financing commitment required a commitment fee. U completed a pre-signed cheque in the amount of $54,100, deposited it in his personal account, and arranged to have a bank draft from his personal account made payable for the commitment fee.

A few days later, the defendants discovered this use of joint venture funds. They requested the return of pre-signed cheques. U did not comply. They proposed a buy/sell agreement; the plaintiffs did not respond in a meaningful way. Meanwhile, refinancing attempts were stymied, and the mortgagee sold the property in a power of sale proceeding.

The plaintiffs brought an action against the defendants for damages arising out of the sale of the property. All parties sought to have the joint venture wound up.

Held: The plaintiffs' action was dismissed; the joint venture was wound up.

The parties to a joint venture owe each other duties of the utmost good faith and loyalty to the best interests of the joint venture. While the defendants did take action to thwart the refinancing prospects of the joint venture, they did so in direct response to the actions of U in respect of the financing commitment. U's unauthorized actions constituted a breach of his duty to the joint venture. His conduct gave the defendants good reason to lose trust and confidence in the plaintiffs as partners in the joint venture. As aggrieved joint venturers they were entitled to take reasonable action to protect their interests. It was proper for them to consider a winding up of the joint venture. Where parties to a joint venture are facing a prospective winding up because of disagreement and lack of trust, it would be difficult if not impossible to carry out a satisfactory refinancing, and it would be unreasonable to expect joint venture members in the position of the defendants to take part in refinancing efforts in such circumstances. They were not liable to the plaintiffs.

Cases considered by *Spence, J.*:

Hitchcock v. Sykes (1914), 49 S.C.R. 403, 23 D.L.R. 518 (S.C.C.) — applied

Meinhard v. Salmon (1928), 164 N.E. 545, 62 A.L.R. 1 (U.S. N.Y. Ct. App.) — applied

Wonsch Construction Co. v. National Bank of Canada (1990), 75 D.L.R. (4th) 732, *(*sub nom. *Wonsch Construction Co. v. Danzig Enterprises Ltd.)* 42 O.A.C. 195, *(*sub nom. *Wonsch Construction Co. v. Danzig Enterprises Ltd.)* 1 O.R. (3d) 382, 50 B.L.R. 258 (Ont. C.A.) — applied

1997 CarswellOnt 3303, 35 O.T.C. 121, 35 O.T.C. 121

ACTION for damages for breach of fiduciary duties.

***Spence, J.*:**

Reasons for Decision

1 This is a dispute between the investors in a joint venture which owned and operated an apartment building in Mississauga. The differences of opinion between the principal parties intensified in connection with proposals for the refinancing of the second mortgage on the building following its maturity. In the result the parties failed to make any arrangements for the refinancing and the building was sold under power of sale. The parties claim damages against each other and seek to wind up the venture.

2 The Plaintiffs, Nenadic Investments Limited ("Nenadic") and Miruka Investments Limited ("Miruka") are corporations incorporated under the laws of the Province of British Columbia. The Plaintiff, Uros Nenadic ("Uros") resides in the Province of British Columbia. At all material times he was the President and a shareholder of Nenadic and the company was owned 50% by Uros and 50% by his brother Marko ("Marko"). (Uros and Marko together are referred to as the "Nenadics".)

3 The Defendant, Samsher Dossa ("Samsher" or "Sam") was at all material times a real estate agent and resides in the Province of British Columbia. Ramzanali Dossa passed away in or about November 1994. He was the father of the Defendant, Samsher.

4 The Defendant, Zabeen Realty Ltd., is a corporation incorporated under the laws of British Columbia. At all material times, Zabeen Realty Ltd. was controlled by the Defendant, Samsher. Each of the Defendants, Meghji Investments Ltd., Meghji Enterprises Ltd., Al-Barkat Investments Ltd. and Zahra Realty Management Limited is a corporation incorporated under the laws of British Columbia.

I. Background Facts:

Organization of the Joint Venture:

5 In 1979, Uros was introduced to the apartment building located at 1175 Dundas Street West, Mississauga, Ontario (the "Property"). Uros and Sam agreed to purchase the Property on a 50/50 basis: the Plaintiff, Nenadic Investments Limited, would acquire 50 percent and a group of investors arranged by Sam (the "Dossa Group") would acquire the other 50 percent. The parties agreed to form a joint venture (the "Joint Venture") to own and manage the Property and to use a company, Tasdale Investments Ltd. ("Tasdale"), as a bare trustee to hold the Property on behalf of the participants in the Joint Venture. The Property was acquired for $2 million in 1979.

6 The written agreements which the parties entered into concerning their investment in the Property are the Joint Venture Agreement dated December 21, 1979 and the Declaration of Beneficial Ownership made as of the 24th day of December, 1980.

7 Those agreements provided for the following arrangements. The role of Tasdale was that of a bare trustee, holding the

Property for the benefit of the participants in the Joint Venture to the extent of their percentage interests in the Joint Venture. The business of the Joint Venture was to invest in, manage and hold the Property. The business of the Joint Venture was to be managed by an executive board of the Joint Venture, to be comprised of four persons. All cheques of the Joint Venture were to be signed by two members of the executive board of the Joint Venture, one of which was to be "from Nenadic and one from the other participants". The directors and officers of Tasdale would be the directors and officers of the Joint Venture. The interests of the participants in the Joint Venture coincided with their share interests in Tasdale.

8 The participants' interests in the Joint Venture and the Property, and their shareholdings in Tasdale, were as follows:

Participant/Shareholder	Percentage Interest in Joint Venture	Shareholding in Tasdale
Nenadic Investments Limited	50.00%	160
Zabeen Realty Ltd.{*}	29.06%	93
Al-Barkat Investments Ltd.{*}	4.06%	13
Meghji Enterprises Ltd.{*}	7.81%	25
Meghji Investments Ltd.{*}	7.81%	25
Miruka Investments Ltd.{*}	0.63%	2
Zahra Realty Management Limited {*}	0.63%	2
TOTAL:	100%	320

Notes:

* Members of the "Dossa Group" referred to below.

9 The Dossa Group, as a group and pursuant to a joint venture agreement, had previously acquired a similar apartment building in Mississauga in 1978. The principals of the Dossa Group were all related to each other. Miruka ceased to operate as a member of the Dossa Group some time in late 1992.

10 At all material times the board of directors of Tasdale and the executive board of the Joint Venture (the "Board") consisted of Uros and Marko, representing Nenadic and Sam and his father ("Ramzan") representing the Dossa Group. (Sam and Ramzan are together referred to as the "Dossas".)

11 From the inception of the Joint Venture Uros was the president of the Joint Venture and Tasdale. On August 22, 1992, Uros purported to resign as president. Sam was the secretary of the Joint Venture and Tasdale for the first few years of the Joint Venture. After that, and until his death in November 1994, Ramzan was the secretary of the Joint Venture and Tasdale.

12 There has never been a meeting of the participants of the Joint Venture or the shareholders of Tasdale, apart from the

disputed Tasdale meeting in late 1992. All of the business of the Joint Venture was conducted by meetings between the Nenadics and the Dossas and all of the decisions with respect to the business of the Joint Venture were reached by consensus and were made unanimously.

13 From 1979 until 1992, the business of the Joint Venture was managed in the following manner. A resident caretaker looked after day-to-day matters at the Property. A property manager, resident in Ontario, generally managed the Property and reported to Uros and Sam at first and then to Uros and Ramzan. Uros and Sam at first, and then Uros and Ramzan together, made most routine decisions as required on behalf of the Joint Venture and co-signed all cheques in relation to the Joint Venture. All four members of the Board met on an informal and irregular basis. The income earned from the Joint Venture was distributed to the participants in accordance with their percentage interests form time to time. The affairs of the Joint Venture were conducted in this manner without serious incident until early 1992.

Initial Differences of Opinion:

14 From 1979 until 1992 Uros was the most active participant of the Board in the management of the Property. Generally, Uros visited the Property a few times a year and reported back to Ramzan with his recommendations concerning management matters. Uros and Ramzan talked to each other frequently, to discuss matters relating to the Property.

15 Meghji Pirani ("Pirani") was appointed as the manager for the Property in about 1990 or 1991. The Dossas were satisfied with the services provided by Pirani and considered him to be trustworthy, efficient and competent. In early 1992, Uros began complaining to the Dossas about Pirani. By 1992, the Property required considerable brickwork repair and other exterior repair work to the building. The Joint Venture had to make a decision as to how much repair work should be done and who should be contracted to do the work. Pirani was to seek out the most competitive quotes for the repair work, for approval by the Board. For whatever reason, no repairs were done. While there was a difference between Uros and the Dossas about Pirani, nothing seems to turn on it. The differences mentioned below are the significant ones.

Refinancing Efforts: April to October 1992:

16 In the spring of 1992, financing of the Property consisted of two mortgages totalling approximately $1.9 million. The second mortgage on the Property, in favour of the Bank of Montreal in the amount of approximately $1.1 million, was due in June 1992.

17 Around April 1992, Sam arranged for mortgage financing with Standard Life Assurance Company ("Standard Life") for the similar apartment building owned by the Dossa Group. Sam advised Uros and Marko of his financing and the Board decided to seek refinancing for the Property in excess of the existing indebtedness and for the maximum amount possible, in order to take advantage of the increase in value of the Property since 1979, so as to provide funds for a significant equity distribution to the participants in the Joint Venture.

18 On August 10, 1992, the Board approved an application for a loan on the Property of $3.2 million to be presented to Standard Life. That application was presented to but rejected by Standard Life. The refinancing efforts continued, with both Sam and Uros pursuing financing options. The Bank of Montreal expressed an interest in refinancing, although at a lower amount than the Joint Venture was seeking.

19 There were some disagreements between the Nenadics and the Dossas about the proposed refinancing. In particular, the Dossas advised the Nenadics that they wanted a 5 year term while the Nenadics advised the Dossas that they wanted a 15 year term. On September 28, 1992, the Board authorized a mortgage broker, Canada Life Mortgage Services ("Canada Life"), as its agent, to procure a loan of $2.8 million. As a concession to the Nenadics, the Dossas agreed that Canada Life could seek such a mortgage on the basis of a 15 year term. Canada Life was unsuccessful in procuring such a loan.

20 Although the Bank of Montreal mortgage had expired in June 1992, the Bank of Montreal was secured and was being paid.

Resignation of Uros:

21 On August 22, 1992, Uros purported to resign as the president of the Joint Venture and Tasdale. His reasons for doing so are not clear. It may have had to do with his frustrations with Pirani and with the lack of resolution of the question of a management fee to be paid to him. Subsequently Uros asserted in communications with the Dossas that his resignation was not effective. No acknowledgement was ever given to Uros by either of the Dossas that his resignation was considered ineffective. The bylaws of Tasdale provide that the president and other officers appointed by the Board shall hold office until their successors are appointed. No resolution appointing a new president was ever approved by the Board. There was no evidence that Uros did not intend to resign when he purported to do so. Apart from the lack of a Board resolution, there is no reason not to give effect to the resignation. The requirement for a Board resolution might well be important with respect to the position of third parties dealing with Uros and Tasdale after the purported resignation but no basis was established for the contention that the resolution should be treated as ineffective as between the Dossas and the Nenadics themselves. On the contrary, the resignation was immediate and unconditional on its face and, as between the four principals, it could not be revoked without the consent of all of them, which was never given.

The Miruka Transaction:

22 In September 1992, Miruka, then one of the members of the Dossa Group, purported to agree to sell its 0.63 percent interest in the Joint Venture to another member of the Dossa Group, Meghji Investments Ltd. ("Meghji").

23 On October 1, 1992, Miruka offered its shares in Tasdale to all of the shareholders of Tasdale. On October 14, 1992, the Nenadics advised Miruka that Nenadic was interested in acquiring the Miruka shares and was prepared to pay "full market value". The Miruka offer was extended until October 22, 1992. The Nenadics did not make an offer within that period, and on October 22, 1992, Meghji and Miruka entered into a written agreement whereby Meghji would purchase Miruka's two shares in Tasdale for $17,500, subject to the transfer being approved by the board of directors of Tasdale.

24 The consent of the board of directors of Tasdale to the transfer of the two shares was then sought. The Nenadics refused to consent to the transfer of the shares in order to prevent the sale from proceeding. Using information which had come to them as directors of Tasdale, the Nenadics made an offer to Miruka on November 3, 1992 to acquire the shares for $25,625. This offer was an attempt on the part of the Nenadics to induce Miruka to sell to them, for the purpose of gaining control of the Joint Venture. The Dossas requested the Nenadics to change their conduct and approve the transfer to Meghji. The Nenadics refused, and the already strained relationship between the Nenadics and the Dossas worsened.

The Seaboard Life Commitment:

25 On November 10, 1992, Uros met with the Dossas and demanded their approval to enter into a Seaboard Life commitment to refinance the Property for $2.7 million. The Dossas had not reviewed the proposed commitment prior to that meeting. A form of commitment letter was available at the meeting but it was understood that that was not the actual form that was to be used.

26 During the meeting of November 10, 1992 the Dossas advised Uros that they wished to have the Joint Venture's solicitor review the commitment letter beforehand and that they believed that the proposed provisions in the commitment respecting a change of control of Tasdale, and the consequence of a sale of the Property, required clarification or amendment before a commitment was entered into. There is an important dispute between the parties as to whether, by the conclusion of the meeting, Uros had authority to enter into the commitment for the Joint Venture. Uros says that he was satisfied he had authority. Sam says that Uros was told not to enter into any commitment but instead to seek an extension.

27 On or about November 12, 1992, Uros and Marko caused the commitment letter to be delivered and thereby purported to cause the Joint Venture, through Tasdale, to enter into a binding financing commitment with Seaboard Life.

Payment of the Seaboard Life Commitment Fee:

28 The Seaboard Life financing commitment required the payment of a commitment fee of $54,100. This payment was effected in the following manner. On November 10, 1992, no cheques were co-signed by the Nenadics and the Dossas at that time to pay the commitment fees, and it does not appear from the evidence that the matter was discussed between them. At the time, Uros was in possession of several pre-signed Joint Venture cheques made out to himself. As a matter of practice and convenience, Ramzan had provided Uros with these pre-signed cheques on the basis that they were to be used by Uros to reimburse himself for petty cash expenses that he might incur on behalf of the Joint Venture without further authority, or for other approved expenses relating to the Joint Venture. On or about November 12, 1992, Uros completed one of these cheques in the amount of $54,100 and deposited it in his personal account. Either that day or the next, the Nenadics arranged for a bank draft from the personal account of Uros or the Nenadics to be made payable to Seaboard Life for the commitment fee.

29 The Nenadics' use of Joint Venture funds in this way was discovered by the Dossas a few days later. The Dossas immediately advised the Nenadics that they considered this conduct to be outrageous and requested the return of the remaining pre-signed cheques.

30 Subsequent to the notice, Uros engaged in a similar process with two more of the presigned cheques without requesting authority. One cheque was in the amount of $10,700 which Uros endorsed to Canada Life on account of its fee on or about December 31, 1992, and the other cheque was for a "consulting fee" of $2,400 payable to Uros at $300 per day and was cashed in December, 1992. That consulting fee had not been authorized, nor was any approval sought by Uros.

31 As a result of these actions of Uros, Ramzan sent a letter to the Joint Venture's bank on January 6, 1993, instructing the bank not to honour any more of the pre-signed cheques.

Events In Late November and December 1992:

32 After the Dossas ascertained that the Nenadics had purported to enter into a binding commitment with Seaboard Life they requested that the Nenadics provide them with a copy of the signed commitment letter. The Dossas also requested the Nenadics to return the balance of the pre-signed cheques so that they would not be used without the approval of the Dossas. The Nenadics did not provide the Dossas with a copy of the signed commitment letter until about the middle of December 1992 and the remaining pre-signed cheques were never returned by the Nenadics.

33 At the end of November, Uros began demanding a meeting of shareholders of Tasdale. On December 16, 1992, two representatives holding proxies for members of the remaining Dossa Group (i.e., less Miruka), attended at Marko's office for the shareholders meeting called by the Nenadics. The Nenadics refused to commence the meeting and, instead, Uros and the principal of Miruka moved to a private room in Marko's office and purported to conduct a meeting, to the exclusion of the proxy holders. By about the middle of December, 1992, at the latest, the remaining Dossa Group had lost all trust and confidence in the Nenadics as a result of their conduct.

34 The Nenadics and the Dossas met several times in December 1992 to attempt to resolve the outstanding problems. Those meetings were without prejudice, but did not resolve anything. After the without prejudice meetings had failed to resolve the impasse, the Dossa Group concluded that the only realistic options available to the participants in the Joint Venture were that one group would buy the other out or the Property would be sold and the Joint Venture wound up. The Dossa Group sought to have the Bank of Montreal postpone any proceedings under its second mortgage on the Property to allow the two groups to attempt to sort out their impasse.

35 The Dossas proposed that Nenadic and the Dossa Group enter into a buy/sell agreement. On December 23, 1992 the Dossas put forward a buy/sell agreement which proposed that the Nenadics pick a price at which they could either sell their interest in the Joint Venture or buy the interest of the remaining Dossa Group. The Nenadics did not respond in any meaningful way to the proposed buy/sell agreement. The Defendants then insisted that the Nenadics retain a lawyer before negotiating any further with them. Nenadic did so in about April of 1993. On May 28, 1993, the remaining Dossa Group made a written proposal to Nenadic to: (a) sell the interests of the remaining Dossa Group in the Joint Venture to Nenadic for $987,500; or (b) acquire the interests of Nenadic in the Joint Venture for $1 million. The deadline on the proposal was extended at the request of Uros. The extended deadline expired and Nenadic and the Nenadics did not accept the proposal or offer any other alternatives.

Power of Sale Proceeding:

36 By December 1992 the Bank of Montreal had been made aware of the dispute among the participants in the Joint Venture and until June 1993 it waited for possible resolution. In early June 1993 it gave a final deadline of June 18, 1993 and when no resolution was reached by that date, it proceeded to exercise its rights under its security and offered the Property for sale pursuant to a power of sale proceeding.

37 By Notice of Application issued in the Ontario Court (General Division) Commercial List on November 4, 1993, Nenadic commenced an application for the appointment of a receiver of Tasdale with power to refinance the Property. The Defendants opposed the application and filed an affidavit setting out their position. Nenadic did not prosecute its application

further. The Property was sold by the Bank of Montreal on March 14, 1994 for $4.2 million.

38 Since the sale of the Property attempts have been made to have the net proceeds of the sale and other monies held on behalf of the Joint Ventures paid out to the Joint Venture, but the parties have failed to agree. This has prevented the payment of any money to the Joint Ventures.

39 On November 29, 1994, the Dossa Group commenced a proceeding in British Columbia seeking a winding up of the Joint Venture. That application was stayed by the Supreme Court of British Columbia on January 6, 1995, upon the application of Nenadic, on the basis that the matter was before this Court in Ontario. The Plaintiffs commenced this action on December 8, 1994.

Additional Facts Relating to Liability:

40 From the outset of the Joint Venture, the Nenadics and the Dossas understood that it was to be owned 50/50 by the two groups. No specific agreement was made as to what was required or permitted to happen in the event that (as in fact happened) a member of one group indicated to all members that he was prepared to sell. It was apparent to the Nenadics that there was an offer from another member of the Dossa Group for the interest of Miruka. The appropriate course for them would have been to allow that transaction to go ahead rather than trying to thwart it and buy the shares for themselves, which they sought to do. It is unlikely that the acquisition of the shares of Miruka would have given the Nenadics greater control of the Joint Venture but it appears they were not aware of that and indeed they supposed that the acquisition would enhance their control position as against the Dossas. This view of the Nenadics was apparent to the Dossas. The actions of the Nenadics in this regard gave the Dossas good reason to question the reliability and the intentions of their partners. In their subsequent dealings with the Nenadics, the Dossas were motivated in part by a lack of confidence in the Nenadics and doubt about the prospects of continuing in a satisfactory relationship with them. Their concerns were a reasonable reaction to the Miruka affair.

41 The dispute between the Nenadics and the Dossas about the refinancing the mortgage was principally motivated by economic considerations on each side. Their differing economic views about the most desirable mortgage term were all apparently held in good faith. On the Dossa side, there was also a concern about how the Nenadics might move to alter the control relationship and how long the venture might survive, but I am not able to conclude that those concerns were unwarranted, in the light of the Miruka affair, or that the Dossas were acting in bad faith in seeking a shorter term for the mortgage. Indeed, at one point, they agreed to a 15-year term, in view of the adamant position of the Nenadics and their own desire to have the refinancing move forward.

42 The dispute concerning the refinancing came to a head in consequence of the events which occurred principally on November 10, 11 and 12. The evidence concerning the November 10 meeting was contradictory. Sam said that all that he and Ramzan agreed to was that Uros, while in Toronto, would check with the Joint Venture's lawyer, Jack Greenberg ("Greenberg"), about the adequacy of the refinancing agreement, including certain specific questions the Dossas had identified, and that Uros should seek an extension of time from Seaboard Life for reply. Uros' evidence is that it was agreed he was to consult with Greenberg about the matters mentioned and was to advise Sam about the advice from Greenberg but he said he had no recollection of the Dossas saying that he was to seek an extension. He said that, at the conclusion of the meeting, he felt that he had authority to conclude the refinancing agreement subject only to the advice from Greenberg being satisfactory.

43 The next day, November 11, Uros was in Toronto and he delivered the refinancing commitment to Greenberg's office. It was delivered to Greenberg by a secretary with a note from someone in his office which said that Uros had said he would call about the commitment. Mr. Greenberg testified that Uros never called him. Uros testified that he did talk to Greenberg that day, twice, but after he spoke by phone to Sam and not before. When Uros talked with Sam that day he told Sam he had already talked to Greenberg, which Uros admitted was not true. Uros told Sam that Greenberg had advised that the commitment was satisfactory. That was not true either. Uros testified that when he did speak to Greenberg later, Greenberg advised that the commitment was satisfactory and Uros did not call Sam about it again. As noted above, Greenberg said he never spoke to Uros abut the commitment letter.

44 Uros testified that when he talked to Sam later that day (or perhaps the next day), Sam said that it was in order to proceed with the refinancing commitment. Sam denied saying that. His evidence was that he renewed his advice to Uros that Uros should seek an extension.

45 There was no evidence that the subject of the commitment fee was raised either at the November 10 meeting or in Uros' subsequent telephone conversation with Sam. There was evidence that Sam seemed shocked on learning of the payment and there was no evidence that he had been given any reason to expect such a payment to be made. Subsequent to his conversation with Sam on November 11, Uros proceeded to effect payment of the commitment fee in the manner described above, using a cheque pre-signed by Ramzan to reimburse himself for the amount drawn on his own account to pay the fee. In proceeding in this way, Uros departed from past practice in the Joint Venture. The pre-signed cheques had been used for ordinary and incidental operating expenses of the Joint Venture where the expenses needed to be paid immediately and it therefore made it easier for Uros to pay out of his own resources and then recover by using the cheques. The commitment fee situation seems not to have been at all comparable. Uros knew or had reason to know by November 10 that the commitment fee would have to be paid but it appears nothing was done to raise the matter before he took the steps to make payment. On a previous occasion in 1990 when the Joint Venture had approved a commitment letter, the payment of the commitment fee was expressly approved by the four members of the executive committee.

46 The reaction of the Dossas when they learned that Uros had delivered the refinancing commitment and the commitment fee was immediate and strong. They consulted counsel and a letter went to Uros taking the position that he had acted without authority. From this time on, the Dossas and the Nenadics dealt with each other as adversaries.

47 Reverting to the November 10 meeting, the version of the meeting given by Sam has a greater ring of truth to it than that recalled by Uros. That the meeting was not intended to be conclusive is more consistent with the desire shown by the Dossas on earlier occasions to avoid a commitment for a longer term unless and until it became absolutely necessary. The lack of any evidence that arrangements for the payout of the commitment fee were discussed is consistent with an inconclusive outcome. While there were some inconsistencies in the evidence given by Sam at trial, overall it appeared to me that Uros made more and more seriously inconsistent statements and also contradicted himself a number of times during trial, as well as admitting he had lied to Sam on the important matter of his having talked to Greenberg before calling Sam.

48 On November 10, following the meeting, Uros sent copies to Sam of the documents Sam requested during the meeting when the dispute arose as to whether Uros had the authority to proceed, i.e., without further approval. In his accompanying communication, Uros said, "Also please let me know what is it that you want me to do for Tasdale in Toronto. If nothing it is fine with me but please do not blame me for any loss afterwards. I strongly believe that my action can only benefit all share-

holders ..." This communication is more consistent with the meeting having ended inconclusively, than with the Plaintiff's contentions that subject to the consultations with the solicitor and report back to Sam, the commitment was approved.

49 I conclude that Sam's evidence as to what happened at the November 10 meeting is more reliable than Uros'. I note that Uros' evidence was *not* that *he was given authority* but that at the conclusion of the meeting *he felt he had authority*. That feeling might well have been a reflection of the view he expressed at trial that he was still president and was the person most closely involved with the financial operations of the Joint Venture and, in his view, he was always acting in the best interests of the Joint Venture. Whether or not that was so, it is probable that he was not given authority at the meeting to conclude the refinancing agreement. Not having been given such authority at that point, he did not have it.

50 As to the disputed discussions with Greenberg, the files kept by Greenberg showed no notes of any review having been conducted by him of the commitment and no notes of any such discussions about it. He said that if he had had such discussions, he would have made such notes in accordance with his usual practice. This evidence is consistent with Greenberg's testimony that no such discussions occurred. Greenberg's evidence appeared straightforward and did not give rise to inadequately answered questions, with the possible exception of his failure to reply to Uros' letter of early January 1993. Uros wrote to Greenberg at that time that he had consulted Greenberg about the commitment. The statement was substantially similar to Uros' evidence at trial about their discussions. Greenberg did not reply to the letter. The only reason he gave for not replying was that the letter was clearly self-serving. That reply leaves me with some discomfort as to whether it is a credible explanation. Also somewhat puzzling is why Uros would tell a secretary that he would call Greenberg about the document and then not do so.

51 However, it is important that Uros lied to Sam about his having consulted Greenberg and this causes more concern than the two troubling facts just mentioned, especially when considered in view of the fact that there is nothing in Greenberg's file to indicate there were any discussions between himself and Uros. On balance, Greenberg's evidence on this point is to be preferred.

52 With respect to the subsequent conversation between Uros and Sam, each of them gave evidence that is consistent with their respective versions of the November 10 meeting. Nothing in their evidence about the discussions leads me to take a different view about the version to be preferred. I note that if Sam did approve the deal in that conversation it was inconsistent for him to dispute the deal only a few days later. No reason was suggested why he would change his mind. There was no evidence of a change in relevant circumstances. On the contrary, insistence on an extension would be consistent both with the Dossas' attitude prior to November 10 and with the subsequent position taken by the Dossas. I note also that if (contrary to my conclusion) Sam did give his approval, it was given on the basis of false and misleading advice from Uros as to his consultations with Greenberg.

53 On the basis of the above analysis, in the course of the events that commenced with the November 10 meeting, Uros did the following things that are relevant to the legal issues in this case concerning breach of duty:

(i) he failed to consult with Greenberg as he acknowledged he was bound to do;

(ii) he falsely told Sam he had spoken to Greenberg and received satisfactory advice from him;

(iii) he caused the refinancing commitment to be delivered without being authorized to do so; and

(iv) he drew funds from the Joint Venture to pay the commitment fee without authority to do so.

54 The mid-November events brought about a climate of adversarial hostility and mistrust between the parties. Efforts were made to persuade the mortgagee to provide more time for a resolution and these efforts were successful up until mid-June 1993. It appears no material efforts were undertaken to find other refinancing opportunities. The Dossa Group moved in the direction of a negotiated sale with the Nenadics but no such transaction was ever completed. These efforts on their part were consistent with the view they seem to have come fairly soon after the November events that the Joint Venture could not continue and a negotiated sale was the best alternative.

55 Uros does not seem to have pursued further refinancing alternatives but under the circumstances of mutual hostility he could reasonably have concluded that any such effort would be futile because the Dossas could not be expected to agree to any proposal.

56 Shortly after the November events, the Nenadics called a shareholders' meeting of Tasdale for the purpose of removing the Dossa Group representatives from the Board. In the course of the meeting, Uros refused to recognize the Dossa Group proxies. He had some basis in corporate law for doing so, at least as a technical matter. In the circumstances of the hostile relations with the Dossa Group, it cannot readily be concluded that Uros acted incompatibly with his duties to the Joint Venture in exercising his shareholder rights to call for the meeting and conduct it the way he did. His actions did nothing to resolve the situation. Indeed, given that Tasdale is, in effect, a corporate instrument for the purposes of the Joint Venture, it is hard to see how any purported changes to Tasdale that were inconsistent with or incompatible with the Joint Venture arrangements (which removal of the Dossa group would be) could have any result other than exacerbating the situation.

57 Whatever outcome Uros hoped to achieve, it does not appear he was disposed to negotiate for it. The holding of the Tasdale meeting is one example of his apparent determination to resolve the matter without a negotiated solution. It is clear that he never sought to advance the first buy/sell negotiations towards a productive result and he did not respond to the second offer. A buy/sell arrangement could have put the Nenadics in a position they would find unacceptable. If they entered such an agreement, they could be forced either to sell, which they apparently did not want to do, or else to buy, which they might well not be able to arrange to do on acceptable financial terms. For whatever reasons, the Nenadics did not engage in effective negotiations with the Dossa Group. With no refinancing alternatives available and no effective negotiations occurring between the parties, a mortgage sale became inevitable, and that is what occurred.

Submissions of the Parties on Liability:

58 For the Plaintiffs, it is urged that the Defendants breached the duty which they owed as joint venturers, a duty which is a fiduciary duty and requires the Joint Venture members to act in the utmost good faith and with loyalty to the common interest of the joint venture. As well, it is contended that the Defendant members of the board of directors of Tasdale breached the duty of care and the duty of loyalty which they owed to the company. It is also contended that the Defendants breached their contract with the Plaintiffs in that they breached section 9 of the Joint Venture Agreement indirectly by making a sale under the power of sale inevitable and thus causing an effective termination of the venture, in contravention of the rule in section 9 that requires a 51 percent vote for a termination. Counsel for the Plaintiffs also submitted that it is open to the Court to find that the Defendants negligently permitted the Joint Venture assets to be sold.

59 The theory of the Plaintiffs' position is that, in unwarranted reaction to the Miruka affair, the Defendants determined to bring the Joint Venture to an end and, for that purpose, they resisted reasonable initiatives and proposals for refinancing, so that the only alternative that would be left would be a sale under power of sale, which would result in an effective termination of the venture.

60 For the Defendants, it is argued that Tasdale is simply a bare trustee for the Joint Venture and the only duty of its directors can be to carry out the orders of the Joint Venture. The Defendants do not appear to take issue with the Plaintiffs' characterization of the duties of Joint Venture members to each other. With respect to the allegation of breach by the Defendants of their duty as Joint Venture members, it is argued that under Clause 7 of the Declaration of Beneficial Ownership the consent of all Joint Venture members was required for any refinancing and all that happened was that this consent was not given and the Nenadics never sought approval for any other financing. Alternatively, it is argued that conduct of Uros constituted breaches of the Joint Venture arrangement that were so important they entitled the Dossa Group to treat those arrangements as repudiated. These breaches were said to have been effected by:

(i) Uros' execution of the commitment letter without consent, in breach of Clause 7 of the Joint Venture Agreement;

(ii) the removal of Sam and Ramzan from the Board at the December 16 shareholders meeting of Tasdale;

(iii) the attempt to acquire the Miruka shares in contravention of the 50/50 ownership arrangement.

It is also claimed that there was no breach by the Defendants of their fiduciary duty, in the form of a refusal to deal. The Defendants also claim the Plaintiffs come to Court with unclean hands by reason of Uros' conduct in the matters said to be breaches of the Joint Venture arrangements.

61 The Plaintiffs dispute the Defendants' characterization of Tasdale saying that the Defendants treat Tasdale as a shell when it in fact has significant operating responsibilities. The point however is not whether it is a "shell" or not. The point is that Tasdale is, by agreement between the Joint Venture members, simply a vehicle or instrument by which the property of the Joint Venture is to be held for the benefit of and under the directions of the Joint Venture. The arrangement between the parties is a joint venture and the company is simply a vehicle for the operation of the business of the Joint Venture. The proper focus of enquiry is on whether any of the Joint Venture members were in breach of their duty to their fellow members. I do not find any basis for liability against Sam and Ramzan in their capacity as directors of Tasdale. No basis for a finding of liability against Uros or Marko as directors of Tasdale was advanced, except for the punitive damages argument dealt with below.

62 The Plaintiffs dispute that their conduct amounted to a repudiation. They question whether the Defendants may properly raise the repudiation argument in the way they do, rather than by way of Notice of Application for a declaration. No authority is cited for that proposition. It appears to me that the pleadings in the Amended Statement of Defence and Counterclaim create a proper basis for the Defendants to raise the issue of repudiation.

63 Based on the above review, the issues of breach of duty of a Joint Venture member and repudiation of contract require consideration. It does not appear to me from the submission of counsel that consideration of negligence is required.

64 This case is a dispute between the members of a Joint Venture. It is well established law that the parties to a joint venture owe each other duties of the utmost good faith and loyalty to the best interests of the Joint Venture. The principle that members of a joint venture owe fiduciary duties to each other is stated vigorously and memorably by Cardozo, J. in *Meinhard v. Salmon*, 62 A.L.R. 1 (U.S. N.Y. Ct. of App. 1928). At pp.4 and 5, Cardozo, J. said:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate.

In *Wonsch Construction Co. v. National Bank of Canada* (1990), 1 O.R. (3d) 382 (Ont. C.A.) at 385 Carthy, J.A. agreed with the trial judge that "a joint venture agreement creates fiduciary duties" and he characterized these duties as "duties of loyalty and good faith." In *Hitchcock v. Sykes* (1914), 49 S.C.R. 403 (S.C.C.), Duff, J. described the relationship of joint venturer as one that "imposes upon the parties to it reciprocal obligations of good faith and loyalty as regard the common interest of the joint venture".

65 It is apparent from the evidence that the actual degree of involvement of the joint venture in the business affairs of the Joint Venture varied. The decisions of the joint venture were taken by the four members of the executive committee, Uros, Marko, Sam and Ramzan. At least in the case of Uros, Marko and Sam they were not themselves members of the Joint Venture; they acted as representatives of their respective corporate entities. This seems also to have been the case with Ramzan; counsel may make submissions about the evidence in this regard if necessary. In any event, the decisions in this case based on breach of fiduciary duty can impose liability only upon persons (natural or incorporated) who were members of the Joint Venture. Except for the issue raised concerning directors' duties as mentioned above, no basis was suggested for imposing liability on individuals who were not themselves members of the Joint Venture and the findings of liability are to be construed accordingly.

66 As among the members of the Dossa Group, it appears that only Sam and Ramzan or the entities they represent took an active role in the business and affairs of the Joint Venture but I was not asked to make any distinction among the members of the Dossa Group on that basis.

Conduct of the Dossas:

67 The theory of the Plaintiffs' position must be tested against the evidence about the conduct of the Dossas in respect of the refinancing needs of the Joint Venture.

68 The dispute about the Miruka shares first arose on October 14, 1992. Prior to that time from as early as May or June of 1992, Sam had been seeking financing on a 5-year term. At the end of July, 1992 the Dossas and the Nenadics agreed to a 10-year term mortgage with Standard Life but Standard Life turned the mortgage down on September 23, 1992. After that Sam again sought a 5-year term mortgage, while Uros again sought a 15-year term. On September 28, the Dossas agreed to a proposal for refinancing for a 15-year term.

69 On October 16, two days after the first dispute concerning the Miruka shares, Canada Life advised that they would require guarantees from Sam and Uros. In some of the previous financing, guarantees had been given by all four of Sam, Ramzan, Uros and Marko. On October 18, Sam said he would not give a guarantee. It appears that this was motivated in some degree by the anger and wariness he felt about Uros in reaction to the Miruka affair. Under the Joint Venture Agreement, there was no obligation on Sam or any other person to give a personal guarantee to assist in financing. Subsequently there was at least one commitment (the Seaboard Life commitment) which did not involve a requirement for personal guarantees. Sam's refusal to provide a personal guarantee cannot be regarded as an act designed to thwart the Joint Venture from arranging adequate refinancing or as a breach of duty to the Joint Venture.

70 The Miruka affair came to a head on October 28, 1992, when Uros refused to consent to the proposed transfer of the Miruka shares to Meghji. The first time the executive committee had to deal with a refinancing commitment after that was at the November 10 meeting. At that meeting, as I have found, Sam indicated that he wanted a 5-year term rather than a 15-year term contemplated in the commitment letter and he wanted an extension so that all matters could be sorted out. In taking this position, he was acting consistently with his approach prior to the Miruka affair. There was no evidence to show that Sam had any reason to believe that asking for an extension would jeopardize the refinancing prospects with Seaboard Life.

71 Accordingly, I conclude that the Dossas, and Sam in particular, did nothing to thwart the refinancing prospects of the Joint Venture until they learned of Uros' conduct following the November 10 meeting.

72 On November 20, counsel for the Dossa Group (except Miruka) wrote to Uros to convey the concerns of the group about the actions Uros had taken. The letter states that the Dossa Group have been advised to consider seeking a winding up of the company and it goes on:

> It is manifestly not in the interests of the company to refinance the property where there is a strong likelihood of proceedings being taken for the winding up.

The letter concludes:

> Under the circumstances, our clients will have to carefully consider their position with respect to the refinancing, and will hold you fully responsible in the event that the commitment and placement fees are forfeited, as well as for any other loss or damages incurred by the Company or our clients as a consequence of your actions.

73 This letter must fairly be regarded as an effort to stop refinancing efforts. It appears that no further refinancing efforts were made, either with Seaboard Life or otherwise. Subsequently, in December of 1992, Seaboard Life appears to have forfeited the commitment fee for lack of further action on the part of the Joint Venture.

74 Based on the foregoing, the Dossa Group did take action to thwart the refinancing prospects of the Joint Venture but they did so only after, and in direct response to, the actions of Uros in respect of the Seaboard Life commitment.

Liability:

75 Uros had no authority for the actions he took in mid November in respect of the Seaboard Life commitment: specifically, the delivery of the commitment and the delivery of the commitment fee. I accept the contention that he took these actions for the benefit of the Joint Venture as he perceived it, but that does not make them proper. There was no evidence to suggest that he could not have obtained, or tried to obtain, an extension for the Seaboard Life commitment. In the course of his actions on the Seaboard Life commitment, he failed to obtain advice from Greenberg as he was required to do and he lied to Sam about his having obtained advice from Greenberg that the commitment terms were satisfactory. These actions by Uros constitute a breach of duty to the Joint Venture.

76 Marko appears to have been under the impression at all times that all matters were being attended to in a proper way. It does not seem that he had any reason to believe anything was out of order.

77 In the actions he took in respect of the Joint Venture, Uros was effectively always acting on behalf of the Joint Venture member he represented, Nenadic.

78 While the actions of Uros in respect of the Seaboard Life commitment constituted a breach of duty, they did not thwart the refinancing prospects of the Joint Venture. Indeed if the Dossas had chosen not to object to his actions, the Seaboard Life mortgage might have gone forward.

79 The issue as to the action of the Dossa Group in their counsel's letter of November 20 is whether they were justified in effectively stopping the refinancing on account of Uros' actions. Uros had acted without authority on a matter of fundamental importance to the Joint Venture. His conduct gave them good reason to lose trust and confidence in the Nenadics as their partners in the Joint Venture. As aggrieved members of the Joint Venture they were entitled to take reasonable action to protect their interests. In such circumstances, it was quite proper for them to consider seeking a winding up of the Joint Venture.

80 While no evidence was led on the point, and there were no submissions that help on the question, I think that it is clear enough that where parties to a Joint Venture are facing a prospective winding up because of disagreement and lack of trust, it would be difficult if not impossible to carry out a satisfactory refinancing and it would be unreasonable to expect Joint Venture members in the position of the Dossas to take part in refinancing efforts in such circumstances. It does not seem necessary to put the matter in more specific terms relating to contract law but if that were to be done, I think that the submission that Uros' actions amounted to a repudiation of the contractual arrangement between the Joint Venture members is sound, and that repudiation entitled the other members to seek appropriate relief, which would surely include seeking the termination of the arrangement which had been repudiated.

81 By reason of the sending of the November 20 letter, the parties, while still associated in the Joint Venture, had become adversaries facing the prospect of litigation. This new dimension in their business relationship needs to be borne in mind in considering the actions each of them took after November 20.

82 The Defendants complain about Uros' actions in respect of the calling and conducting of the Tasdale shareholders meeting on December 12, 1992. While the meeting purported to pass a number of resolutions, there is no evidence that these resolutions were ever carried into effect in any way. Nothing in the claims as to liability or damages appears to turn on the meeting events and the purported resolutions, so no findings are needed.

83 There were communications between the parties about a buy/sell arrangement but these communications were unprotective. As in the case of the shareholders' meeting, nothing in the claims as to liability or damages appears to turn on these communications, so no findings are necessary.

84 After the sale of the Property, the parties had disputes about the way the proceeds were to be dealt with. The implications of these disputes are dealt with below.

85 With respect to the claim for loss occasioned by the sale under the power of sale, the events after November 20 are of no consequence to the issue of liability. The events of mid-November, culminating in Dossa's letters of November 20, gave rise to the stalemate which later events did not overcome As at November 20, Uros had acted in breach of duty to the Joint Venture but not in a way that caused the resort to the power of sale. On the other side, the Defendants had acted in a way that effectively ended the prospects for a refinancing and thereby effectively left the Joint Venture vulnerable to a sale under power of sale. However, the Defendants' conduct was a legitimate response to Uros's conduct, so they are not liable for any loss occasioned by the sale.

Plaintiffs' Damages: Sale of the Property:

86 This section deals with the damages which would properly be awardable to the Plaintiffs in respect of loss occasioned by the sale of the Property under power of sale, if liability had been found in that regard. The principal elements in the loss computation are (i) the loss from the sale under power of sale at $4,200,000 compared to the fair market value of the Property at the time of sale; (ii) the loss of profits that would have been earned if the Property had not been sold but had instead been refinanced under the Seaboard Life commitment; and (iii) the loss of management fees that Uros would have received if the Joint Venture ownership of the Property had continued.

87 Prior to selling the Property, the Bank of Montreal obtained two valuations, listed the Property, took steps to expose it to the market and received and negotiated in respect of four offers, including the one from the eventual purchaser Kanata. The appraisals were for $4,376,000 and $4,200,000. The Property was sold for $4,200,000. Based on the evidence, I conclude that the Property was marketed and sold in a manner that complied with the recognized criteria to be considered a sale at fair market value.

88 Counsel for the Defendants submitted that certain adjustments were appropriate in respect of Mr. Pestl's calculations based on a capitalization approach. These are set out at pp. 171 to 175 of counsel's written closing submissions. These matters are addressed in the written reply of counsel for the Plaintiffs at pp. 47 and 48. Based on the evidence and these submissions, I consider that adjustments as proposed would be in order and would result in a range of possible values on a capitalization approach from $4,147,548 to $4,397,800. The mid point of this range is $4,272,674. Mr. Pestl's evaluation also took into account the comparatively lower capitalization rate indicated in the Lincoln North survey. Based on the evidence of Mr. Fish and Mr. Marsiglio, whatever use it may be appropriate to make of the Lincoln North survey, it is doubtful that it should be used to determine the appropriate capitalization rate in the way Mr. Pestl does, by giving it equal status with the capitalization rate determined by a consideration of comparable transactions. Mr. Pestl considers three other methods of determining value. He states that the least reliance is placed on average adjusted unit price (which might in any event require adjustment in respect of certain of the adjustments referred to above). His other two approaches yield values averaging at about $4,790,000. Based on

the evidence it appears to me that the information of greatest significance to investors is that which relates to relevant comparable sales. The other methods mentioned by Mr. Pestl appear to yield amounts significantly higher than the comparables approach, as adjusted above. On the evidence it also appears that an actual sale price in a properly prepared sale transaction, which this one was, is to be given very considerable weight in assessing fair market value. Given the variety of approaches considered in the evidence, and the variety of the amounts yielded by them, it seems fair to infer that fair market value must necessarily be a range of amounts rather than a single amount. In view of all the evidence including the efforts to market the Property, the valuations obtained at the time, the offers received, the price actually obtained, the current valuation considered at trial and the specific consideration addressed above, I am unable to conclude, on a balance of probabilities, that the sale price of $4.2 million was outside the range of fair market value for the Property.

Plaintiffs' Damages for Loss of Profit:

89 Mr. Seigel provided at Exhibit 37 his revision of Mr. Bennett's calculations. His revisions at Schedule "A" to the exhibit reflect adjustments to convert accounting profits to cash flow profits. This adjustment appears to be in order, because the purpose of the Bennett projection is to show projected cash flow from the Property if it had not been sold. At Schedule "A", Mr. Seigel also adjusts interest earned, as set out in his Schedule A-2 to use 30 day time deposits, which appears to be a regular approach for this purpose, and appropriate.

90 In his summary of economic loss for the Nenadic company Mr. Seigel deducts interest earned on the joint venture funds and the proceeds of sale as calculated in Schedule A-3. The calculation of this amount appears to be in order and the deduction of this amount for purposes of determining net loss is correct. On this basis, Seigel calculates that the net loss of profit is $2,185.

91 The submission that there should be further adjustments with respect to income tax and mitigation introduces more speculation than is warranted in the circumstances. On the other side, counsel for the Plaintiffs submitted that the deduction of interest earned on the joint venture funds and the proceeds of sale would be appropriate only if there is a finding of a loss on the sale of the Property, which there is not. I do not accept that contention. Whether or not there is a loss on the sale of the Property, the interest earned on the joint venture funds and the sale proceeds is clearly an income benefit which must be applied against the income loss represented by the foregone rents. Accordingly, the net loss of profit to the Joint Venture is $2,185. In view of the finding of no liability, there is no judgment for this amount.

Other Claims by Plaintiffs for Damages:

92 The Plaintiffs also claim damages for interest on proceeds of sale held by Goodman and Goodman and on a bank account at Canada Trust not maximized to market conditions. Seigel has revised these amounts to $7,513 and $11,916 respectively on the same basis as his revision of the lost interest component of lost profits. The revised amounts are acceptable for the periods covered.

93 The Plaintiffs claim that the Dossa Group refused to facilitate the obtaining of a maximum return on funds in these accounts. The reason the funds remained invested through the original accounts and were not moved to higher-yielding accounts is that the parties could not agree on the use of the funds. The Dossas wanted the moneys divided up between the parties. At one stage they proposed that the funds would be held in separate trust accounts pending resolution of the dispute. Uros wanted the moneys to stay in Tasdale accounts, so he could be certain there would be assets available to fund a judgment. The

communications between the parties did not lead to any resolution. These communications all occurred after the Property had been sold and there was no longer any rationale for the Joint Venture. Each side was uncooperative with the other. In the circumstances the lack of cooperation on the part of the Dossas was not so remarkable that they can properly be considered to have been in breach of their duties to the Nenadics in respect of the investment of the of the remaining Tasdale funds. Accordingly, no judgment can be given in favour of the Plaintiffs for the amounts claimed for lost interest on those funds.

94 The Plaintiffs claim $6,500 on account of the forfeited deposit with the City of Mississauga. It has not been established that the Defendants were responsible for this loss. The claim is not allowed.

95 The Nenadic Plaintiffs claim $23,373 for non-recurring expenses occasioned by the power of sale. Counsel for the Defendants argued that part of these expenses would have been incurred in any sale. That may be so, but if the Defendants had been found liable in respect of the sale (which is not the finding here) they would also be liable in respect of the costs incurred by the Joint Venture in respect of the sale, and therefore for the Plaintiffs' share of these costs. Since the Defendants are not liable in respect of the sale, they are not liable in respect of the costs incurred in respect of the sale.

96 As noted above, the claims of the Plaintiffs for lost interest on the remaining Tasdale funds fail, including the claims in this regard by Miruka. If the Miruka claims for lost interest had succeeded, I would have accepted Mr. Seigel's amounts of $454 and $198 for the two claims.

97 Uros claims against the Defendants for estimated management fees if the business had continued, in the amount of $14,038. The amount itself appears to be correct. However, since the Defendants are not liable for the losses incurred by the reason of the sale of the Property and the consequent termination of the business, they are not liable for the loss to Uros of prospective management fees by reason of that termination.

98 Uros also claims unpaid expenses owing by Tasdale. Judgment to go in favour of Uros for the recovery of the amount of $9,247 from the Joint Venture.

The Counterclaim:

99 On the Counterclaim, Uros by his breach of duty, caused a loss to the Joint Venture in the amount of $54,100 in respect of the payment of the commitment fee and $10,700 in respect of the payment of the Canada Life fee. He also paid $2,400 to himself on account of his consulting fee

100 Uros had no authority to pay the commitment fee. Neither did he have any authority for the payments he subsequently made for the Canada Life fee in the amount of $10,700 or his own management fee of $2,400. There was no evidence to show that the Canada Life fee would have been payable even if the Seaboard Life commitment had not been executed on behalf of the Joint Venture. While Uros had charged a management or consulting fee in the past, it was usually on an agreed basis. When he took a management fee unilaterally it was for an amount which was relatively minor in comparison to the amount which he took for himself after notice from the Defendants that no further use of the pre-signed cheques had their approval. Nenadic is party to the joint venture, but Uros is not. While the actions of Nenadic were taken by Uros (with the acquiescence of Marko), they are the actions of Nenadic and the liability must be upon it to the Joint Venture for all of these fees.

101 The Defendants also seek punitive damages against Uros. While his conduct was a breach of duty to the Joint Venture and was highhanded, it appears to me that he acted out of a concern for the best interests of the Joint Venture in respect of its refinancing needs in respect of the payment of the $54,100 and the $10,700 amounts. The payment by Uros to himself of the $2,400 consulting fee was for his own benefit or that of the Nenadic company. That might warrant punitive damages. However, Uros probably thought he was entitled to the amount, even though he was not, and it seems to me possible that, if matters had not deteriorated into open hostility between the parties, the other side might have agreed to the fee as fair compensation. Accordingly, I think it would not be appropriate in this case to order punitive damages.

102 For the reason given earlier, Marko is not liable. On the evidence, Miruka has no liability under the Counterclaim.

103 The Joint Venture still owes $5,500 to the estate of Ramzan. Order to go that this amount is to be paid from the funds being held at the Goodman firm.

Winding-Up:

104 While the Joint Venture is probably a partnership, I am not persuaded that it is necessary for me to so find, in order to make the orders that will bring this matter to a conclusion. It is beyond argument that the Joint Venture has ceased to exist in any operational way. It exists as a contractual arrangement between the parties whose sole significance now is for the determination of the issues in this case and for the distribution of the remaining funds to the parties. Tasdale is, as described above, simply an entity for the business and affairs of the Joint Venture, and it accordingly no longer has any *raison d'etre.* For these reasons the corporation and the Joint Venture are to be wound up and the remaining funds are to be paid first to meet their liabilities and then to the members of the Joint Venture in accordance with their interests, subject to such adjustments as may be appropriate in the payments to reflect this judgment.

105 Subject to any arrangements between the parties or to submission of counsel, it would be reasonable to allocate and deal with the remaining funds as follows:

(1) allocate the following amounts owing by the Joint Venture;

(a) to Uros, $9,247 on account of unpaid expenses;

(b) to the estate of Ramzan, $5,500.

(2) determine the net amount available after the allocations in (1) above;

(3) determine the total amount owed by Nenadic Investments Limited to the Joint Venture on account of unauthorized payment of fees, as decided above i.e. ($54,100 plus $10,700 and $2,400);

(4) adjust the respective shares of the Plaintiffs as a group and the Defendants as a group vis-a-vis each other, in respect of the remaining funds, based on the above amounts.

106 Counsel may make submissions to me about the terms of the judgment and orders, including costs, if necessary.

Action dismissed.

END OF DOCUMENT