

No. VLC-S-S-183355
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ALL CANADIAN INVESTMENT CORPORATION

PLAINTIFF

AND:

BDO CANADA LLP

DEFENDANT

AND:

DONALD BERGMAN

THIRD PARTY

THIRD PARTY NOTICE

Filed by: BDO Canada LLP (the "claiming party", or alternatively "BDO")

To: Donald Bergman
Suite 2 – 781 Marine Park Drive, Salmon Arm, B.C.

THIS ACTION has been brought by the plaintiff against the defendant for the relief as set out in the notice of civil claim filed in this action.

TAKE NOTICE that the claiming party claims against you for the relief set out in Part 2 below.

IF YOU INTEND TO RESPOND TO this claim against you, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST FILE a response to third party notice in Form 6 in the above-named registry of this court within the time for response to third party notice provided for below and SERVE a copy of the filed response to third party notice on the claiming party's address for service.

YOU OR YOUR LAWYER may file the response to third party notice.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to third party notice within the time for response to third party notice described below.

Time for response to third party notice

A response to third party notice must be filed and served on the claiming party,

- (a) if you were served with the third party notice anywhere in Canada, within 21 days after that service,
- (b) if you were served with the third party notice anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the third party notice anywhere else, within 49 days after that service, or
- (d) if the time for response to third party notice has been set by order of the court, within that time.

CLAIM OF THE CLAIMING PARTY

Part 1: STATEMENT OF FACTS

1. The plaintiff All Canadian Investment Corporation (“ACIC”) claims against the Defendant, BDO, as set out in ACIC’s Notice of Civil Claim filed March 1, 2018 (the “Claim”).
2. BDO disputes the Claim on the grounds set out in BDO’s Response to Civil Claim filed March 29, 2018 (the “Response”). However, in the event that BDO is held liable to ACIC, BDO claims and is entitled to contribution from or to be indemnified by the third party, Donald Bergman (“Bergman”).
3. At all material times, Bergman was the controlling shareholder and sole director of ACIC.
4. Bergman has a business address of Suite 2 – 781 Marine Park Drive, Salmon Arm, B.C.
5. At all material times, ACIC represented itself as a Mortgage Investment Corporation (“MIC”), carrying on business in accordance with s. 130 of the *Income Tax Act*.
6. In order to maintain its status as a MIC, it was incumbent upon ACIC to continuously ensure that no less than 50% of its loan portfolio was secured by mortgages on residential property or land intended to be developed as residential property.

7. BDO pleads and relies upon those facts alleged and terms defined in the Response, including as it may be amended from time to time.

Duties owed by Bergman

8. On December 14, 2015, ACIC and BDO entered into a written contract (the "Engagement Letter") pursuant to which BDO agreed to audit and report upon the company's September 30, 2015 financial statements and to prepare the company's corporate tax return, which was due no later than March 31, 2016 pursuant to the *Income Tax Act*. Thereafter, BDO began the necessary preparation and planning for the purposes of carrying out its engagement.
9. It was a term of the Engagement Letter that BDO would carry out the audit in accordance with Canadian generally accepted auditing standards ("GAAS") as issued by the Auditing and Assurance Standards Board of Canada. BDO was also required to perform its services in accordance with the Chartered Professional Accountants of British Columbia ("CPABC") Code of Professional Conduct (the "Code").
10. It was an express term of the Engagement Letter that management and the directors of ACIC, acknowledged and understood that they had a responsibility to provide access to all information and documentation necessary for BDO to complete its audit. As ACIC has no employees, Bergman is both 'management' and the sole director of ACIC.
11. Bergman, as the sole director and controlling mind of ACIC, owed an independent statutory duty to ACIC and to BDO pursuant to s. 217 of the *Business Corporations Act*, S.B.C. 2002, c. 57, as follows:

217 (1) A person who is or who has been a director, officer, employee or agent of a company or of a company's subsidiary or holding corporation must, to the extent that the person is reasonably able to do so, comply with any demand of the auditor of the company to do the following:

- (a) provide to the auditor all of the information and explanations that the auditor considers necessary for the purpose of any

examination or report that the auditor is required or permitted to make under this Act; and

(b) allow the auditor access to all of the company's records, all of the records of the company's subsidiaries, if any, and all of the records of its holding corporation, if any, that the auditor may require for the purpose of an examination or report referred to in paragraph (a) and provide to the auditor copies of those records if and as required by the auditor.

12. In entering into the engagement to conduct the fiscal 2015 audit, BDO expected and relied on ACIC, through Bergman, to fulfill its duty of honest performance of all of the obligations ACIC owed to BDO. At all material times, Bergman knew, or should reasonably have known, that the audit could not be completed if Bergman failed to deal with BDO honestly and with integrity.
13. In carrying out its auditing procedures, BDO had identified a risk that the 2015 financial statements could be materially misstated and therefore had focused its audit procedures upon the valuation and recoverability of the loan portfolio of ACIC.
14. In December 2015, BDO provided Bergman with valuation templates in which Bergman was requested to provide information necessary to establish the valuation of each of the loans represented on the ACIC balance sheet, together with supporting documentation evidencing the security taken for those loans.
15. On or about December 14, 2015, Bergman provided BDO with a list of "Outstanding Loans Receivable" for ACIC for the year ended September 30, 2015 (the "List"). The List included the following loans as being outstanding and owing to ACIC:
 - a. A loan payable by 'Altezza' in the amount of \$6,415,224 (the "Altezza Loan");
 - b. A loan payable by 'Censorio' in the amount of \$2,065,691 (the "Hastings 4719 Loan"); and

- c. A loan payable by 0911368 B.C. Ltd. in the amount of \$3,389,414 (the "0911 Loan").

(the "Loans Representation").
16. On January 28, 2016, BDO staff attended the business office of ACIC to commence its audit field work. As of that date, BDO observed:
 - a. Bergman had still not completed the loan valuation analysis required of him; and
 - b. Many of the company's loan portfolio supporting documents, including loan agreements and evidence of security, had not been made available to BDO.
17. As a consequence of Bergman's failure to provide access to the documentation necessary to complete its audit, BDO and Bergman agreed that BDO could not continue with the audit engagement until Bergman provided the requisite audit documentation required of him and ACIC.
18. In late February 2016, Bergman represented to BDO that all of the information and documentation ACIC was required to present to the auditors was complete and that BDO could return to ACIC's business premises to complete its audit procedures.
19. BDO recommenced its audit procedures on February 24, 2016, only to discover that the loan documentation requested of ACIC was still incomplete. In fact, Bergman had wrongfully misrepresented that the requisite information and documentation was available to BDO in order for BDO to complete its audit procedures.
20. The financial information that was presented to BDO at that time by Bergman included the representation that the Altezza Loan and the Hastings 4719 Loan were secured by mortgages registered against the related lands. These large residential loans were necessary for maintaining ACIC's MIC status.

21. However, when BDO conducted title searches to verify the existence of the Altezza and Hastings 4719 mortgage security in March 2016, BDO discovered that in both cases, Bergman had caused ACIC to discharge its mortgage security and there were now two other lenders with registered mortgages against title to each of these residential development projects.
22. At all material times, Bergman knew, or should reasonably have known, that in releasing its mortgage security upon the Altezza and Hastings 4719 properties, less than 40% of ACIC's loan portfolio met the requisites necessary to maintain its MIC status, and that the ability of ACIC to carry on business would be in doubt.
23. When asked for an explanation as to why ACIC would release security on more than a third of its MIC-qualifying loan portfolio without obtaining any principal repayment or alternative security, Bergman refused to provide any credible explanation, but instead suggested that BDO permit ACIC to create "temporary security" until the audit was completed to support the company's MIC status and loan values as of September 30, 2015. BDO refused to participate in such unlawful activity.
24. As of March 8, 2016, Bergman had still not provided BDO with access to all of the required loan information in order to complete its audit procedures.
25. In the course of the audit work, Bergman represented to BDO that ACIC had another significant loan, the 0911 Loan, in the amount of \$3,389,414. During that time, BDO repeatedly requested that Bergman provide supporting documentation for the 0911 Loan.
26. Finally, in or about mid-March 2016, in a discussion with BDO, Bergman advised BDO that:
 - a. The 0911 Loan no longer existed;
 - b. Bergman had agreed on behalf of ACIC to forgive the 0911 Loan in exchange for which the principal of 0911368 B.C. Ltd. provided to Bergman

personally a 10% interest in a company controlled by the principal with an estimated value of \$600 million;

- c. One of Bergman's numbered companies would assume the liability to ACIC for the amount of the 0911 Loan; and
 - d. Bergman was aware that this transaction would have to be fully disclosed in the audited financial statements and would likely result in an adverse finding from the British Columbia Securities Commission.
27. On March 21, 2016, BDO met with Bergman to raise its concerns regarding the ongoing failure of Bergman to provide sufficient audit evidence to support the valuation of the ACIC loan portfolio, and to explain Bergman's appropriation of a corporate asset (the 0911 Loan) which represented approximately 10% of the entire ACIC loan portfolio. At that meeting, Bergman confirmed that, contrary to the Loans Representation:
- a. He had agreed to have ACIC forgive the 0911 Loan in exchange for a personal benefit that he estimated was worth \$60 million, with no benefit to ACIC;
 - b. He was willing to risk an adverse finding from the BC Securities Commission that might result in a cease trading order, imperiling the operations of ACIC and its ability to repay its investors; and
 - c. He would "create" whatever agreements BDO required to support the ACIC loan valuations and permit BDO to complete the 2015 audit and deliver a "clean" audit opinion.
28. In the result, the representations made by Bergman on behalf of ACIC regarding:
- a. The existence of mortgage security for the Altezza Loan and the Hastings 4719 Loan; and
 - b. The debt owed to ACIC as a result of the 0911 Loan

were false. Bergman knew or ought to have known that the representations regarding the Loans, including the Loan Representation, were false at the time they were made, and he intended that BDO rely on them.

29. As a result of the misconduct of Bergman set out above, BDO concluded that it could not rely upon the integrity of the management of ACIC, and that GAAS and its professional obligations pursuant to the Code required it to withdraw from the audit.
30. At all material times, Bergman as the directing mind and will of ACIC, was fully aware that his misrepresentations and conduct towards the BDO audit team could only result in a complete loss of trust in him as the sole representative of management of ACIC.
31. In accordance with GAAS, on March 29, 2016, BDO advised ACIC and Bergman that because of its loan investment practices, BDO was resigning immediately from its engagement and would not be reporting upon the company's September 30, 2015 financial statements.
32. Bergman's failure to provide truthful information in accordance with s. 217 of the *Business Corporations Act*, and in accordance with his duties pursuant to the Engagement Letter, caused BDO to resign from the engagement.
33. Bergman's continuing misrepresentations that he would provide BDO with the information it required and his misrepresentations regarding the Loans, prevented BDO from completing the audit. Further, the revelation to BDO that Bergman had been making these continuing and false misrepresentations resulted in a loss of confidence in the management of ACIC and thereby caused BDO to have to resign from the audit on short notice, and shortly before the tax deadline.

Part 2: RELIEF SOUGHT

34. A declaration that BDO is entitled to contribution and indemnity for any amount that may be due from BDO to the Plaintiff, including interest pursuant to the *Court*

Order Interest Act, R.S.B.C. 1996, c. 79, and costs that may be ordered to be paid to the Plaintiff, as well as for the amount of BDO's own costs of defending the Claim, including legal fees and expenses on a full indemnity basis.

35. Judgment for any amount that may be found due and owing from BDO to the Plaintiff, including interest pursuant to the *Court Order Interest Act*.
36. Judgment for the amount of any costs that BDO may be adjudged liable to pay the Plaintiff, and for the amount of BDO's own costs of defending the Claim and of the proceedings against Bergman, including full indemnity for legal fees and expenses.
37. Damages.
38. Costs on a full indemnity basis.
39. Interest pursuant to the *Court Order Interest Act*.
40. Such further and other relief as this Court deems just.

Part 3: LEGAL BASIS

41. As the sole voting shareholder, sole director, and controlling mind of ACIC, Bergman owed an independent duty to BDO to provide access to all information necessary for BDO to complete its audit. Bergman owed this independent duty pursuant to s. 217 of the *Business Corporations Act*, and pursuant to the Engagement Letter.
42. Bergman fraudulently, or in the alternative, negligently misrepresented the value of and security for the Loans to BDO.
43. Bergman knew that his statements were false, and intended that BDO would rely on his misstatements.
44. BDO reasonably relied on the fraudulent and/or negligent misrepresentations made by Bergman, which caused BDO's resignation as auditor.

45. In the result BDO suffered loss and damage.
46. Further, Bergman caused the loss and damage suffered by ACIC, and is therefore liable to BDO and is liable to indemnify BDO for any loss it suffers as a result of the Claim by the Plaintiff.
47. If ACIC is found liable to the Plaintiff, which is not admitted but is expressly denied, BDO is entitled to contribution and indemnity from Bergman pursuant to Section 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333.

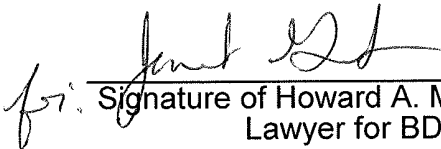
Address for service of the claiming party: Gudmundseth Mickelson LLP
#2525 – 1075 West Georgia Street
Vancouver, B.C. V6C 3C9

Fax number address for service (if any): N/A

E-mail address for service (if any): N/A

The address of the registry is: 800 Smithe Street, Vancouver, B.C.
V6Z 2E1

Date: April 19, 2018

for: 
Signature of Howard A. Mickelson, Q.C.
Lawyer for BDO Canada LLP

Rule 7-1(1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.