

CANADA / JUDGMENT

Bronson v. Hewitt

2011 BCSC 102

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 102 Bronson v. Hewitt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bronson v. Hewitt,

2011 BCSC 102

Date: 20110128

Docket: L052583

Registry: Vancouver

Between:

Thomas E. Bronson, J. Tom Bronson, Lee B. Lewis,

Virginia L. Shaffer, H. Davis Lewis, Jr. and Harold D. Lewis, Sr.

Plaintiffs

And

Howard H. Hewitt, A. Eugene Lewis, Jennifer Lewis Browning,

Julie Anne Lewis, William David Tompkins, Trustee of the Graham River Trust,

Graham River Outfitters Ltd., Margaret H. Mason, Bull Housser & Tupper and

Bull, Housser & Tupper LLP

Defendants

And

Thomas E. Bronson

Third Party

Before: The Honourable Mr. Justice Goepel

Supplementary Reasons to: Supreme Court of British Columbia, February 8, 2010, Bronson v. Hewitt, 2010 BCSC 169, Docket # L052583

Supplementary Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

November 29-30, December 1-3, 2010

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2011

INTRODUCTION

- [1] Following a 68-day trial, I delivered judgment in this proceeding on February 8, 2010. The reasons for judgment are found at 2010 BCSC 169 (the "Reasons").
- [2] The defendants Howard H. Hewitt ("Howard") and A. Eugene Lewis ("Eugene") applied to reopen the trial to permit the introduction of new evidence and sought reconsideration of certain parts of the decision (the "Reconsideration Application"). I dismissed that application in reasons found at 2010 BCSC 871.

- [3] The plaintiffs then applied for leave to seek certain remedies (the "Leave Application"). I dismissed the Leave Application regarding the relief sought against the defendants Jennifer Lewis Browning ("Jennifer") and Julie Anne Lewis ("Julie"). I reserved in regard to the balance of the relief sought and allowed full argument on those matters in the course of this most recent hearing. Those reasons are found at 2010 BCSC 1638 (the "Leave Reasons").
- [4] These supplementary reasons deal with aggravated damages, punitive damages, remedies, currency of the judgment and costs. The background to this dispute and my various findings of facts and law are set out in detail in the Reasons and will not be repeated here except as may be necessary to give context to the submissions and my conclusions. These reasons will use the terms as defined in the glossary found at para. 7 of the Reasons.

BACKGROUND

- [5] In 1972, Harold Lewis ("Harold") and his brother Eugene purchased a guide/outfitting business that operated in northern British Columbia. Big Nine Outfitters Ltd. ("Big Nine") was incorporated to operate the business.
- [6] In 1978, Harold and Eugene established the Big Nine Trust (the "BNT") to hold their shares in Big Nine. By the time of the trial, the beneficiaries of the BNT were Eugene's daughters, Jennifer and Julie as to 40% and the plaintiff beneficiaries being Thomas E. Bronson ("Tommy"), and Harold's children, Lee B. Lewis ("Lee"), Virginia L. Shaffer ("Virginia") and H. Davis Lewis, Jr. ("Davis") as to the remaining 60%.
- [7] In December 1981, Harold, Eugene and Tommy entered into an agreement to purchase a second guide/outfitting business. Graham River Outfitters Ltd. ("GRO") was incorporated to complete the sale and acquire the assets. Since its incorporation, the shares of GRO have been held in trust (the "GRT"). A significant part of the litigation concerned determining the beneficial ownership of the GRO shares. The plaintiffs contended that Tommy, Harold and Eugene each owned one-third of the beneficial interest. Howard and Eugene acknowledged that Tommy was entitled to a one-third beneficial interest, but submitted that the BNT beneficially owned the balance of the GRO shares. I ultimately accepted their submission.
- [8] Audrey Tompkins ("Audrey") acted as the sole trustee of the BNT from 1986 until her resignation in September 2002. Upon her resignation, Harold and Eugene were entitled to act as trustees. Eugene renounced his right to be trustee in favour of Howard.
- [9] In the Reasons, I found Harold was not aware in September 2002 of his right to act as co-trustee. I further found that if he had known of his right to be co-trustee, he would have taken up his appointment. I found that Howard and Eugene misled the plaintiffs as to Harold's right to be co-trustee. They did so in the hope that Harold would not become aware of his rights and accept the appointment.
- [10] Subsequent to his appointment, Howard acted as the sole trustee of the BNT. In February 2004, he sold the BNT's shares in Big Nine (the "BNO Share Transaction").

- [11] I found that Howard had a duty to determine whether or not Harold was going to accept his appointment, and having failed to do so and having participated in a course of conduct to keep Harold ignorant of his potential appointment, he did not have the right to act as the sole trustee. In particular, he did not have the right to sell the BNT's shares in Big Nine. I held that the BNO Share Transaction was a breach of trust.
- [12] I found Eugene liable for knowingly assisting in the breach of trust. I dismissed the claim brought against Margaret Mason ("Mason") and her law firm that she too had assisted in the breach of trust.
- [13] I found that Howard had sold the Big Nine shares improvidently. The plaintiff beneficiaries held 60% of the beneficial interest in the BNT. I assessed their damages for the improvident sale of the Big Nine shares at \$350,000 (the "Damage Award").
- [14] Following the BNO Share Transaction, Howard planned to distribute the assets of the BNT and terminate the trust. The BNT assets at that time consisted of the proceeds of the BNO Share Transaction and its beneficial interest in the shares of GRO.
- [15] On February 25, 2004, Howard wrote to the beneficiaries (the "Distribution Letter"). In the Distribution Letter, he provided the beneficiaries an accounting in regard to the BNO Share Transaction and advised that upon receipt of the enclosed releases he would forward to them a cheque which would constitute a complete distribution of their interest in Big Nine. He further advised that he was distributing to the beneficiaries all of the BNT's interest in GRO.
- [16] Jennifer and Julie signed the releases and in March 2004 Howard forwarded to them cheques in the sum of \$132,000 USD. No distribution was made to the plaintiff beneficiaries.
- [17] I found that by paying certain beneficiaries and not others, Howard breached the terms of the BNT. I ordered that he pay the plaintiff beneficiaries \$396,000 USD being their proportionate share of the proceeds (the "Proceeds Award"). I further found that the Distribution Letter had distributed to the beneficiaries their respective interests in GRO (the "Share Distribution").

ORDERS SOUGHT

- [18] The plaintiffs now seek as against Howard and Eugene both aggravated and punitive damages. They also submit that the Damage Award and Proceeds Award should not be paid to the plaintiff beneficiaries personally, but to the BNT, and that the Proceeds Award should be calculated in Canadian currency. The plaintiffs seek special costs against Howard and Eugene and an order that Howard and Eugene pay any costs the plaintiffs are ordered to pay Mason.
- [19] Mason seeks special costs against the plaintiff beneficiaries. She opposes any order which would cause her to have to look to Howard and/or Eugene to collect her costs.

- [20] Howard and Eugene submit that the remedies awarded at trial are appropriate and consistent with the plaintiffs' claims and that the plaintiffs should not now be entitled to seek other relief. While acknowledging their liability for the plaintiffs' costs, they submit those costs should be limited to Scale B or C and reduced to recognize their success on several of the issues argued at trial. They also submit that they should not be responsible for any costs the plaintiff beneficiaries must pay Mason. They further submit that awards of aggravated and punitive damages are not warranted.
- [21] I will first deal with the claims for aggravated and punitive damages. I will then turn to the question of remedies and next determine the currency for the Proceeds Award. Finally, I will turn to the issue of costs and the various claims the parties have made for same.

AGGRAVATED DAMAGES

- [22] Tommy, Lee, Virginia and Davis each seek an award of aggravated damages in the amount of \$100,000 jointly and severally from Howard and Eugene. In support of the award, they submit that the acts of Howard and Eugene have permanently damaged the previously close family relationships between Eugene's family (Mary Lou, Jennifer and Julie), Harold's family (Lee, Virginia and Davis) and Howard's family (Sarah Jane, the sister of Harold and Eugene). They suggest that the plaintiff beneficiaries, since the inception of this matter in March 2004, have suffered stress, humiliation, anguish, wounded pride, damaged self-confidence and self-esteem, and a loss of faith in friends and colleagues.
- [23] Aggravated damages describe an award that aims at compensation, and takes full account of the intangible injuries, such as distress and humiliation, which may have been caused by a defendant's behaviour. Aggravated damages are distinct from punitive damages. Punitive damages are designed to punish the wrongdoer, whereas aggravated damages are compensatory in nature: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at para. 16.
- [24] Aggravated damages are an augmentation of an award of compensatory damages and are measured by the plaintiff's suffering, including such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant that cannot be said to be fully compensated in an award for pecuniary losses. Aggravated damages must be sufficiently significant in depth or duration, or both, that they represent a significant influence on the plaintiff's life. The award is for aggravation of the injury caused by the defendant's high-handed conduct: *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.) at 299.
- [25] True aggravated damages occur out of aggravated circumstances arising as a result of a breach of an independent cause of action. To succeed, the plaintiff must establish mental duress arising from the breach that has given rise to the cause of action: *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 at para. 52.

- [26] In assessing a claim for aggravated damages the focus is on the effect of the wrongful conduct. In this case there is no evidence that any of Tommy, Lee, Virginia or Davis suffered any mental distress as a result of the conduct of Howard or Eugene. While they submit that family relationships have been strained since the inception of this matter, none of the family members so testified. I would note that Eugene and Harold's relationship was poisoned long before Howard became trustee. Further, the suggestion of strain subsequent to the inception of this matter in March 2004 appears to seek aggravated damages not for the harm arising from the breaches of trust but for the ensuing dispute and litigation. Such harm does not give rise to aggravated damages. Aggravated damages are to compensate for increased mental distress resulting from the conduct that amounted to the breach.
- [27] There is no foundation in the evidence for a claim for aggravated mental distress resulting from the BNO Share Transaction. Tommy initially supported the sale and the opposition to the sale from Lee and Davis was directed towards the price, not the sale itself. Further, the BNT Trust Agreement contained a power of sale. The plaintiffs cannot claim aggravated mental distress arising from the sale.
- [28] The claim for aggravated damages is dismissed. I would note that the amount claimed for aggravated damages is far in excess of the range of past awards for such claims. In *Warrington v. Great-West Life Assurance Co.* (1996), 139 D.L.R. (4th) 18 (B.C.C.A.) at para. 25, Newbury J.A. stated "that courts should exercise caution in their awards for mental distress." The Court of Appeal in *Fidler v. Sun Life Assurance Co. of Canada*, 2004 BCCA 273, reviewed several aggravated damage awards and concluded that the amount of \$20,000 awarded in that case could not be considered inordinately high. In contrast, the plaintiffs' request for aggravated damages totalling \$400,000 is well outside the range of previous cases and entirely unsupportable.

PUNITIVE DAMAGES

- [29] The plaintiffs seek an award of punitive damages against Howard and Eugene in the range of \$1 million to \$2 million. They submit that such an award would be within the rational limits within which a jury must be allowed to operate and would not be so disproportionate that it would overshoot its purpose.
- [30] The plaintiffs submit that the actions of Howard, aided by Eugene, were intentional and a breach of fiduciary duty. They submit that the misconduct of Howard and Eugene was planned and deliberate and their intent and motive was to ignore the rights and interests of Harold and the plaintiff beneficiaries. They submit that Howard and Eugene knew what they were doing was wrong. In support of an award of punitive damages, they cite various passages in the Reasons which criticize Howard's and Eugene's conduct.
- [31] The three objects of punitive damages are retribution, deterrence and denunciation. The Supreme Court of Canada has directed trial courts to approach punitive damages with caution and restraint and to resort to them only in exceptional circumstances: *Whiten v.*

Pilot Insurance Co., [2002] 1 S.C.R. 595 at para. 69. An award of punitive damages is rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation: Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd., [2002] 1 S.C.R. 678 at para. 87.

[32] In *Whiten*, the Court at para. 94 set out the factors that should be taken into account when considering an award for punitive damages:

... (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[33] In the circumstances of this case, Hewitt's conduct can rightfully be considered high-handed and worthy of denunciation. It is important, however, to note that his intentions, however misguided, were undertaken in the belief that it was in the beneficiaries' best interests that he act as trustee to the exclusion of Harold.

[34] Howard did not seek out the position. I found that his decision to accept his appointment was made with the best of intentions. I rejected the plaintiffs' submission that Howard's conduct was motivated by a desire to assist Eugene financially (the "Liquidation Plan").

[35] Howard did not act unilaterally in selling the Big Nine shares. He consulted with Tommy and Tommy was in agreement with the proposed sale.

[36] Howard failed to disclose Harold's rights because of his belief that Harold's exclusion was in the best interests of his nieces and nephews. While his motivation does not excuse his conduct, it is an important fact in considering whether or not an award of punitive damages should be made. Howard did not benefit personally and his conduct in concealing Harold's right to act as trustee differs from those cases where a trustee has acted to further his own

self-interest. While Howard's concealment was wrong, I cannot find that it was malicious or vindictive or extreme in the nature that is deserving of additional condemnation and punishment.

- [37] Further, and in any event, I find that the consequences flowing from Howard's misconduct amply achieve the goals of denunciation, deterrence and retribution. Howard has been ordered to pay the Damage Award and the Proceeds Award. He will also be liable for a significant award of costs. He has been refused the protection of s. 96 of the Trustee Act, R.S.B.C. 1996, c. 464. Together with his own legal fees, the personal cost to Howard arising from his decision to accept the unpaid position as trustee will be in excess of \$2 million. That is a large amount of money for any individual to pay. In these circumstances, I find that the objectives of retribution, deterrence and denunciation have been achieved and an award of punitive damages against Howard is not warranted.
- [38] Insofar as Eugene is concerned, there is no basis to award punitive damages. Howard was the trustee and ultimately made all decisions concerning the BNT, including the decision to sell the Big Nine shares. Although Eugene was an important player throughout, and he assisted Howard's breach of trust, he was not the trustee and his conduct was not sufficiently high-handed, malicious, arbitrary or reprehensible to warrant an award of punitive damages. This is particularly so in light of my conclusion that such an award is not warranted against Howard.
- [39] As with the award of aggravated damages, the plaintiffs seek punitive damages well in excess of most past awards. *Jefferlin Investments Ltd. v. Crown Grading & Soding Ltd.*, [2009] O.J. No. 5348 (QL) (Sup. Ct.) concerned an action against a former bookkeeper who while acting in a fiduciary capacity and over a period spanning more than 10 years, defrauded and embezzled in excess of \$700,000. The court noted at para. 32 that it was "hard to imagine a greater breach of trust and position in the financial sphere" and awarded a total of \$75,000 in punitive damages. In *Zielinski v. Brennan*, 2002 O.J. No. 2884 (QL) (Sup. Ct.), the trustee was found to have failed to distribute trust property in accordance with the trust terms and to have appropriated trust property to himself without consulting other beneficiaries. The court ordered punitive damages in the amount of \$15,000. Howard's breach of trust was markedly less serious than the defendants in *Jefferlin* and *Zielinski*.
- [40] In *Whiten*, the Court noted that moderate awards of punitive damages are generally sufficient. The sums sought in this case are far from moderate. If I had concluded that an award of punitive damages was necessary, I would have awarded \$50,000 against Howard and \$15,000 against Eugene.

REMEDIES

A. Overview

- [41] The issues of remedies arose following release of the Reasons. In the Reasons, I found that the BNO Share Transaction was improvident. I found the shortfall to be between \$486,776 and \$653,456. As the plaintiff beneficiaries held 60% of the beneficial interest, I calculated their loss as between \$292,605 and \$392,073 and awarded them damages as against Howard and Eugene arising from the sale at \$350,000. I further found that having paid Jennifer and Julie their proportionate share of the BNO Share Transaction, Howard must pay the Proceeds Award to the plaintiff beneficiaries.
- [42] In their written submissions that were filed in advance of this hearing, the plaintiffs submitted that the Damage Award and Proceeds Award should be paid to the BNT, not the individual plaintiffs. With regard to the BNO Share Transaction, they submit that the judgment payable by Howard and Eugene should be increased from \$350,000 to an amount between \$486,776 and \$653,456. With regard to the Proceeds Award, they submit Howard should repay to the BNT the present Canadian equivalent of \$264,000 USD being the sum paid to Jennifer and Julie, rather than the somewhat larger amount I ordered he pay the plaintiff beneficiaries (\$396,000 USD).
- [43] Howard and Eugene submit that the remedies awarded at trial are appropriate and consistent with the plaintiffs' claims and that the plaintiffs should not now be entitled to seek other relief.

B. Plaintiff's Position on Remedies

- [44] The plaintiffs submit that the remedy they now seek follows as a matter of law from the findings made at trial. They submit that in a trust action, damages should always be paid to the trust, not to the individual beneficiaries and, in the circumstance of this case, the award should be paid to the BNT. They submit that if they are denied leave to argue for their proposed remedies, there would be a miscarriage of justice.
- [45] The plaintiffs submit that notwithstanding the Share Distribution and the Proceeds Award, the BNT continues to exist and will only terminate once all its assets have been distributed in accordance with the provisions of the trust: D. Hayton, P. Matthews and C. Mitchell, Underhill and Hayton Law Relating to Trusts and Trustees, 17 ed. (Markham: LexisNexis Canada, 2007) at p. 385. The plaintiffs submit that in the circumstances of this case, the trust has not been terminated because its assets have not been distributed according to the terms of the BNT Trust Agreement.
- [46] Pursuant to the provisions of the BNT Trust Agreement, the trustees had discretion to distribute or accumulate the income and principal of the BNT. It is only upon the death of both Harold and Eugene that the entirety of the income and principal must be paid to the beneficiaries. The plaintiffs submit that since Howard did not have the authority, as sole trustee, to distribute the assets of the BNT, the assets have not been distributed in accordance with the provisions of the trust. In the circumstances, the plaintiffs submit that

the proper remedy is to reconstitute the trust and to that end Howard should repay to the trust all of the damages suffered as a result of the improvident sale of the Big Nine shares and the amount he paid to Jennifer and Julie.

- [47] In support of their submission, the plaintiffs note that there is evidence that the BNT has an unresolved tax liability. The amount and responsibility for that tax liability is a matter of considerable contention. Although there had been discussions with the taxing authorities, no assessment has been issued. The plaintiffs submit that to bypass the trust and pay the awards directly to the plaintiff beneficiaries would work a fraud on the taxing authority, something the court should not countenance.

C. Position of Howard and Eugene on Remedies

- [48] Howard and Eugene support the remedies set out in the Reasons. They reject the plaintiffs' submission that in trust cases damages are inevitably paid to the trust. They submit that in this case it is appropriate for the damages be paid to the individual beneficiaries, not the BNT.
- [49] In opposing leave, Howard and Eugene submit that the trial should not be reopened to permit arguments that could have been made at trial. They submit that the plaintiffs now wish to take an alternate position in response to the Reasons, contrary to the position taken at trial. In particular, they submit that it was open to the plaintiffs to argue at trial, before the Reasons were delivered, that Howard should pay any damages to the trust as opposed to the plaintiffs personally. They submit that the Amended Amended Statement of Claim does not seek the remedies that the plaintiffs now seek and having elected to cast their case in that way it is now too late for the plaintiffs to seek different relief. They submit that it would be unfair and prejudicial to allow the plaintiffs to now seek different remedies. They submit the remedies set out in the Reasons do not lead to a miscarriage of justice.

D. The Leave Application

- [50] In the Leave Reasons, I reserved decision with regard to whether or not the plaintiffs should be entitled to now apply for the remedies that they submit follow from the Reasons. As noted in the Leave Reasons, prior to the entry of an order, a trial judge has an unfettered discretion to reconsider or revise any aspect of a decision: *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28 (C.A.). A judge may properly reopen if satisfied because of the argument of one of the parties, or on the basis of his own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence or misapplied the law: *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.) at para. 10. A primary consideration for the court to consider in determining whether to reopen is whether a miscarriage of justice would otherwise probably occur: *Harrison v. Harrison*, 2007 BCCA 120 at para. 42.

- [51] I have concluded that the plaintiffs are entitled to leave to argue for the remedies they now seek. If, as a matter of law, those remedies follow from the findings made at trial, then there is a potential for a miscarriage of justice if the plaintiffs are denied leave.
- [52] In reaching this decision, I am conscious and have considered the submissions of Howard and Eugene that the plaintiffs by conduct and their pleadings have elected to seek the remedies set out in the Reasons. In *Allnorth Consultants Limited v. Tercon Construction Ltd.*, 2010 BCCA 570, the court had to consider the doctrine of election. At para. 23, they cited with approval the comments of Madam Justice Fruman in *LSI Logic Corp. of Canada, Inc. v. Logani*, 2001 ABQB 710, 204 D.L.R. (4th) 443 at para. 75, where she summarized the three requirements of election in the course of litigation as follows:
- (i) there must be two alternative and mutually exclusive courses of action; (ii) the party that elected must have known of the facts giving rise to a right to elect between them; and (iii) the other party must have relied on the election to its detriment, in that it adopted or persevered in a line of conduct that it otherwise would have abandoned or modified.
- [53] Until the Reasons were delivered, the plaintiffs did not know of all of the facts giving rise to a right of election because they did not know which of their several claims would be accepted by the court. Further, and more significantly on the facts of this case, there is no evidence that Howard or Eugene relied on any election to their detriment or adopted or persevered in a line of conduct that they otherwise would have abandoned or modified. Howard and Eugene throughout denied any liability whatsoever to the plaintiffs. The remedies sought by the plaintiffs were of little moment to them, because they were of the view that the plaintiffs were not entitled to succeed in any fashion whatsoever.
- [54] In these circumstances, it cannot be said that the plaintiffs had, prior to the delivery of the Reasons, elected a particular remedy. This is not to say, however, that the plaintiffs' pleadings and submissions are not relevant in determining which remedies should be granted.

E. Discussion

i. Legal Analysis

- [55] Remedies in a trust action raise difficult and complex questions. The point of departure between the parties in this action is whether or not the awards should be paid to the trust or to the individual beneficiaries. In *Target Holdings Ltd. v. Redfern*, [1995] 3 All E.R. 785 (H.L.) Lord Browne-Wilkinson at 793-794 detailed the competing positions:

The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries having different, usually successive, equitable interests, (e.g. A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving

the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called 'the trust estate', what ought to have been there.

The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. Courts of Equity did not award damages but, acting in personam, ordered the defaulting trustee to restore the trust estate (see *Nocton v Lord Ashburton* [1914] AC 932 at 952, 958, [1914-15] All ER Rep 45 at 51, 55 per Viscount Haldane LC). If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed (see *Caffrey v Darby* (1801) 6 Ves 488, [1775-1802] All ER Rep 507 and *Clough v Bond* (1838) 3 My & Cr 490, 40 ER 1016). Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good that loss to the trust estate if, but for the breach, such loss would not have occurred (see *Underhill and Hayton Law of Trusts and Trustees* (14th edn, 1987) pp 734-736, *Re Dawson* (decd), *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSW 211 and *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] 2 All ER 92, [1980] Ch 515). Thus the common law rules of remoteness of damage and causation do not apply. However, there does have to be some causal connection between the breach of trust and the loss to the trust estate for which compensation is recoverable, viz the fact that the loss would not have occurred but for the breach (see also *Re Miller's Deed Trusts* (1978) 75 LS Gaz 454 and *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260).

Hitherto I have been considering the rights of beneficiaries under traditional trusts where the trusts are still subsisting and therefore the right of each beneficiary, and his only right, is to have the trust fund reconstituted as it should be. But what if at the time of the action claiming compensation for breach of trust those trusts have come to an end? Take as an example again the trust for A for life with remainder to B. During A's lifetime B's only right is to have the trust duly administered and, in the event of a breach, to have the trust fund restored. After A's death, B becomes absolutely entitled. He of course has the right to have the trust assets retained by the trustees until they have fully accounted for them to him. But if the trustees commit a breach of trust, there is no reason for compensating the breach of trust by way of an order for restitution and compensation to the trust fund as opposed to the beneficiary himself. The beneficiary's right is no longer simply to have the trust duly administered: he is, in equity, the sole owner of the trust estate. Nor, for the same reason, is restitution to the trust fund necessary to protect other beneficiaries. Therefore, although I do not wholly rule out the possibility that even in those circumstances an order to reconstitute the fund may be appropriate, in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of such compensation is the same, i e the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust. [Emphasis in original]

- [56] Both parties cite *Potter v. Bank of Canada*, 2007 ONCA 234, 85 O.R. (3d) 9, to support their respective positions. In *Potter*, the beneficiaries under a defined benefit plan, which was in surplus, claimed the right in a class action to have the trustee pay to them directly expense payments paid from the trust fund allegedly in breach of the trust. They sought to have the wrongfully extracted fund equitably allocated and distributed among class members, rather than returned to the plan. The court held that in the circumstances of that case, the claim for direct payments was not available because such relief did not serve the requirements of fairness and justice. In particular, the court held that the claim for direct payment preferred the interest of existing beneficiaries of the plan to the detriment of the interest of contingent beneficiaries who may become members of the plan after the date of certification and as a result fall outside the class.
- [57] The plaintiffs submit that *Potter* supports their submission that the proper remedy is for Howard to restore to the BNT what it lost as a result of the improvident sale. Howard and Eugene submit that *Potter* is an example of a court considering a number of factors in determining how the interests of justice and fairness could be met. They submit in this case, unlike in *Potter*, there are no future beneficiaries that would be adversely affected and direct payment to the beneficiaries would account to them for all losses that they have suffered.
- [58] In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, LaForest J. made clear the court's discretion to adapt equitable remedies to the circumstances of a particular case. He said, at 585-6 and 588:

I agree ... that the maxims of equity can be flexibly adapted to serve the ends of justice as perceived in our days. They are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice. ...

...

Its flexible remedies such as constructive trusts, account, tracing and compensation must continue to be moulded to meet the requirements of fairness and justice in specific situations. ...

- [59] My reading of *Target*, *Canson* and *Potter* leads me to conclude that in determining the appropriate remedy, the court must consider the requirements of fairness and justice in the specific circumstances before it. In particular, the law does not require that the funds be paid back to the trust, if alternative remedies will fully compensate the beneficiaries.

ii. The Proceeds Award

- [60] Following completion of the BNO Share Transaction, the BNT consisted of the proceeds of the sale and the GRO Shares. It was Howard's intent to then terminate the trust by distributing those assets to the beneficiaries. His intention to do so was set out in the Distribution Letter.

[61] I have held that, pursuant to the Distribution Letter, the GRO Shares were distributed to the individual beneficiaries. In due course, Howard paid Jennifer and Julie their share of the sale proceeds. He refused to pay the plaintiff beneficiaries absent a signed release. I held that having paid Jennifer and Julie, Howard's failure to pay the plaintiff beneficiaries their proportionate share of the sale proceeds was a breach of trust and that the proceeds should in fact be paid.

[62] In their pleadings and at trial the plaintiffs did not suggest otherwise. In the Amended Amended Statement of Claim at para. 111.1 they pled:

In the premises, on February 25, 2004, Hewitt distributed the entirety of the property of the BNT to the beneficiaries thereof and thereafter, ceased to have any active trust duties to perform except to convey any remaining trust property in his hands to those Plaintiffs who were beneficiaries of the BNT.

[63] The plaintiffs maintained that position throughout the trial. In their response to a memorandum to counsel sent on November 2, 2009, the plaintiffs argued that they were entitled to payment of their share of the BNO Share Transaction. At paragraphs 82-84 of their submission they wrote:

82. On the other hand, whether Mr. Hewitt occupies the role of sole trustee of the BNT lawfully or not, it is, in the submission of the Plaintiffs, clear that he continues to hold the Plaintiffs' Funds in trust, and it matters not whether the terms of that trust are found in the BNT Trust Agreement or simply a bare trust. Invoking the rule in *Saunders v. Vautier*, the Plaintiffs (whether Lee and Virginia alone or, in the alternative, Lee, Virginia, Davis and Tommy together), all being adults and *suri juris* are absolutely entitled to terminate the trust and direct the payment by Mr. Hewitt of the Plaintiffs' Funds either to themselves or to whom they may direct.

83. In the circumstances that have occurred, including, but not limited to, the Release executed by each of Jennifer and Julie (and absent, in theory, their disclaimer of the Release and their return of \$348,000.00 (Cdn.) to the trust estate) they are certainly in no position to object in this regard.

84. In the result, and again, on this basis, the Plaintiffs are entitled to a direction that Mr. Hewitt pay to them \$522,000.00 (Cdn.) and interest thereon from February 25, 2004, to the date of payment.

[64] In their reply submissions filed on November 27, 2009, they took a similar position at para. 73 where they said:

In the submission of the Plaintiffs, if the Court determines (as they submit it should) that the BNT trust property attributable to the interests of the Plaintiffs became payable to them on February 25, 2004 (or, at a minimum, was simply held under a bare trust by Mr. Hewitt, before Mr. Hewitt began using that trust property to fund his defence in the legal proceedings), the direction should be made that Mr. Hewitt should replace, by paying back to the Plaintiffs, what he wrongfully

took. This is not a question of whether Mr. Hewitt is entitled to look to the trust property (arguably the remaining \$19,000), to indemnify himself against the costs and expenses of legal proceedings brought against him for maladministration of the estate; rather, this is simply a direction by the Court for Mr. Hewitt to pay to the Plaintiffs what he, Mr. Hewitt, should have paid to the Plaintiffs, without more, on February 25, 2004.

- [65] This submission was consistent with the plaintiffs' submission concerning the GRO Shares. Throughout the proceedings, the plaintiffs submitted that the Distribution Letter had effectively distributed the GRO Shares to the various beneficiaries. They did not suggest then, nor do they suggest now, that those shares should be restored to the trust. Rather, they take the position that although the distribution of shares may well have been a breach of trust, the beneficiaries are entitled to waive that breach and retain the shares.
- [66] A further factor to be taken into account as to the appropriate remedy is the fact that Jennifer and Julie have already received their share of the BNO Share Transaction. The plaintiffs did not claim at trial that Jennifer and Julie should repay those funds to the BNT. Now, the plaintiffs suggest that Howard should repay to the trust the monies that he paid to Jennifer and Julie. It is important to note that Jennifer and Julie were beneficiaries of the trust. The payments to them were not payments made to a stranger in which case other considerations might arise. If those monies are now paid back to the trust the question arises as to who would be entitled to them. Clearly it would not be the plaintiffs as they, like the plaintiffs in Potter, are only entitled to their own 60% share of the sale proceeds. Similarly, Jennifer and Julie would have no claim on those funds as they have already been paid their proportionate share.
- [67] The plaintiffs suggest that the appropriate response to this quandary would be for Howard to bring action against Jennifer and Julie to recover the money that he pays back to the trust. Such a proceeding would be fraught with difficulties. Jennifer and Julie accepted those funds in good faith and released Howard from any claims that they might otherwise have against him. Howard may well not be able to now properly maintain an action against Jennifer and Julie for return of those monies.
- [68] Even if such an action could be brought, the question which arises is why it is necessary to create such a legal quagmire. The Proceeds Award gives the plaintiffs their proportionate share of the BNO Share Transaction. It is consistent with the relief the plaintiffs sought throughout. The plaintiffs did not suggest during the course of the trial that the payment of the proceeds to Jennifer and Julie was a breach of trust. They were content to argue that the monies should be paid to them directly. In the circumstances of this case, fairness and justice dictate that the appropriate remedy is that the plaintiff beneficiaries be paid their proportionate share of the sale proceeds. The currency of the Proceeds Award will be discussed below.

iii. The Damage Award

- [69] Similar considerations arise in relation to the Damage Award. What the plaintiffs now propose is that Howard pay to the trust all that the BNT lost as a result of the improvident sale. This would include not only the plaintiffs share of the loss, but also Jennifer's and Julie's share. Such a remedy is not warranted. Jennifer and Julie have released Howard from all claims and have taken no steps in the six years since that release to resile from it. While Howard's actions may have caused a loss to Jennifer and Julie, it is a loss that only they can pursue.
- [70] The Damage Award fully compensates the plaintiff beneficiaries for their loss. It is consistent with paragraph 131 of their pleadings in which they alleged that as a result of the sale they had suffered damages, being their proportionate share in the difference between the fair market value of the Trust Property in February of 2004 and the value Eugene and Howard agreed to sell it for. The Damage Award compensates them for that loss and I confirm it as the appropriate remedy in this case.

iv. Other Considerations

- [71] The fact that the trust has a potential tax liability is not reason enough to lead to a different conclusion. As previously noted, the tax issues are contentious and difficult. Potential taxable events under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) include a deemed disposition of the Big Nine shares by the BNT in 1999; a deemed disposition of the shares when Howard replaced Audrey in 2002; and the sale of the Big Nine shares in 2004. Determination of the assessment of any actual tax liability depends on a determination of the value of the Big Nine shares in 1999 and 2002 and whether this Court's determination of value in 2004 as set out in the Reasons is correct.
- [72] Pursuant to the provisions of the Income Tax Act, the Minister of National Revenue can collect an unpaid tax from a trustee who made a distribution without paying the trust tax and from beneficiaries who receive such distributions. A trustee who distributes property from a trust without first making payment of tax owed by a trust is jointly and severally liable with the trust for any tax liability of the trust to the extent of the property held by the trustee on behalf of the trust. There is no requirement that a trust continue or that a trustee remain appointed until all tax liabilities are resolved. Nothing in the applicable provisions require continuation or reconstitution of the trust pending the resolution of potential tax liabilities from transactions involving trust property.
- [73] A final consideration in determining the fairness and justice of this situation is that if the awards are paid to the trust, the interminable legal squabbles which have existed in regard to this matter since 2004 will undoubtedly continue. In that regard I would note, as will be further detailed below when I come to discuss costs, that to date the parties to these proceedings have spent more than 145 days in court. Legal costs are well in excess of \$3 million. If the trust is reconstituted, these proceedings will undoubtedly continue and costs will likely continue to incur until the trust is exhausted. Such a result cannot in any way be considered desirable.

CURRENCY OF PROCEEDS AWARD**A. Overview**

- [74] In the Reasons, I ordered that the Proceeds Award of \$396,000 USD be paid to the plaintiff beneficiaries. I ordered that those funds would bear pre-judgment interest from March 3, 2004.
- [75] The plaintiffs submit that the Proceeds Award must be made in Canadian currency. At March 3, 2004, \$396,000 USD converted to \$533,649.60.
- [76] Howard submits this case is governed by the provisions of the Foreign Money Claims Act, R.S.B.C. 1996, c. 155 (the "FMCA"). Pursuant to the FMCA, the conversion is made based on the Canadian dollar equivalent to the other currency on the day prior to payment.
- [77] This is not a matter of little moment. The Canadian and USD dollar are now at par. Assuming that remains the case, Howard will be entitled to satisfy the judgment by paying \$396,000. The difference is more than \$137,000.

B. Discussion

- [78] Until the early 1970s, the Anglo-Canadian law concerning foreign currency claims seemed firmly settled. The fundamental propositions were that the courts had no authority to order a money judgment in terms of a "foreign" currency and in converting from a foreign currency to the currency of the forum, the court should have regard to the exchange rate that prevailed on the date of the breach, that being the date loss was suffered by the plaintiff.
- [79] The date of breach rule was subject to considerable criticism. England ultimately abandoned the rule in *Miliangos v. George Frank (Textiles) Ltd.*, 1976 A.C. 443 (H.L.).
- [80] In 1983, the Law Reform Commission of British Columbia issued a report on foreign money liabilities: Law Reform Commission of British Columbia, Report on Foreign Money Liabilities (Victoria: Queen Printers for British Columbia, 1983). The report recommended a move away from the rigid application of the breach-date rule for currency conversion and proposed that legislation should be enacted to permit the British Columbia courts to adopt a date for currency conversion other than the date of breach with respect to foreign money liabilities. In particular, the Commission recommended that currency conversion be made as of the date of payment.
- [81] The Commission's recommendations were adopted in the FMCA. Section 1 of the FMCA reads as follows:

1 (1) If, before making an order for the payment of money arising out of a claim or loss, the court considers that the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada, the court must order that the money payable under the order will be that amount of Canadian currency that is necessary to purchase the equivalent amount of the

other currency at a chartered bank located in British Columbia at the close of business on the conversion date.

- (2) The conversion date is the last day, before the day on which a payment under the order is made by the judgment debtor to the judgment creditor, that the bank referred to in subsection (1) quotes a Canadian dollar equivalent to the other currency.

[82] In *Litecubes, L.L.C. v. Northern Lights Product, Inc.*, 2009 BCSC 427, 94 B.C.L.R. (4th) 158, which concerned currency conversion in the context of the registration of a foreign judgment, Madam Justice Griffin had the opportunity to interpret the FMCA. After reviewing its background including the report of the Law Reform Commission, she concluded that if the FMCA applies, the conversion into Canadian funds is made as of the date of payment of the judgment. In *Lang v. Lapp*, 2009 BCSC 638, which also concerned the registration and enforcement of a foreign judgment, Pearlman J. adopted and followed the reasoning in *Litecubes*. An appeal of the *Lang* case was ultimately dismissed (2010 BCCA 517). The currency issue was not raised in the appeal.

[83] I agree with Griffin J.'s analysis of the FMCA. When the FMCA applies, the conversion into Canadian funds is made as of the date of payment of the judgment. Currency fluctuations that may have occurred between the date of breach and the date of trial are of no import.

[84] That, however, is not determinative of the question before me. The issue for determination is whether in fact the FMCA applies. By its terms, the FMCA applies when "the court considers the person in whose favour the order will be made will be most truly and exactly compensated if all or part of the money payable under the order is measured in a currency other than the currency of Canada." It is only in those circumstances that the date of conversion is the date of payment.

[85] In the Reasons, I made the Proceeds Award in USD dollars as that was the currency in which Howard had proposed to pay the beneficiaries. In doing so, I did not consider whether or not the plaintiffs would be most truly and exactly compensated if paid in American currency and I overlooked the plaintiffs' submissions reproduced at para. 63 above that the plaintiffs should be paid in Canadian currency. I did not give any consideration as to whether Howard's decision to pay out in American funds should dictate the currency of the judgment or whether the FMCA applied. It is necessary now, however, that I do so.

[86] The BNT was a trust established in British Columbia and governed in all aspects by British Columbia law. Big Nine was a British Columbia incorporated company. Howard entered into an agreement to sell the Big Nine shares for \$889,000. The Damage Award was calculated in Canadian dollars.

- [87] Schedule A to the Distribution Letter set out the distribution of the proceeds in Canadian dollars and then converted that distribution to American currency based on the exchange rate as of February 12, 2004. The Schedule indicates that Jennifer's and Julie's interest were each valued at \$174,000 which was then converted to \$132,000 USD. Lee, Virginia and Davis's interest were each shown to be \$87,000 which converted to \$66,000 USD, while Tommy's interest was \$261,000 which converted to \$198,000 USD.
- [88] The plaintiff beneficiaries did not request or seek that their interest be converted into American dollars. Although the plaintiff beneficiaries are all residents of the United States, residency does not trigger the application of the FMCA. If it did, then the Damage Award should also be converted to USD funds. No one has suggested that that would be appropriate.
- [89] I find that plaintiff beneficiaries were entitled to receive their proportionate share of the sale of a Canadian asset in Canadian currency. Howard's decision to convert the funds into American dollars does not change that fundamental point or lead to the conclusion that the plaintiffs would be most truly and exactly compensated if the award is measured in USD currency. In the circumstances of this case the FMCA does not apply.
- [90] Pursuant to Schedule A the plaintiffs' share of the BNO Share Transaction totalled \$522,000. The finding that I should have made in my Reasons, which I make now, is that the plaintiff beneficiaries are entitled to a judgment of \$522,000 made up of \$87,000 to each of Lee, Virginia and Davis and \$261,000 to Tommy. That is the plaintiff beneficiaries' proportionate share of the sale. Pre-judgment interest will continue to run from March 3, 2004 being the date that Howard paid Jennifer and Julie their share of the proceeds.

COSTS

A. Overview

- [91] Several cost awards are sought. Mason seeks special costs or, alternatively, increased costs against the plaintiffs. She submits the special costs should be assessed summarily. The plaintiffs acknowledge Mason is entitled to costs. They submit those costs should be assessed at Scale C and that they are entitled to an order that any costs they are ordered to pay Mason be paid by Howard and Eugene. The plaintiffs seek special costs or, alternatively, increased costs against Harold and Eugene. They also seek costs orders against William Tompkins ("William"), Jennifer and Julie. Howard and Eugene acknowledge they must pay the plaintiffs' costs and submit that those costs should be assessed at Scale B or C. Further, they submit that those costs should be reduced to account for their success on various matters which were argued at trial. They further submit that they should have no responsibility for costs that the plaintiffs must pay Mason.

B. History of the Litigation

- [92] To put the costs submissions into context, it is necessary to briefly review the history of the litigation.
- [93] The litigation commenced on July 15, 2004, when the plaintiffs filed a petition seeking a declaration that William held the GRO shares in trust for Tommy, Harold and Eugene and seeking an order that he transfer four of the shares to Tommy and four to Harold (the "GRO Petition"). The respondents to the GRO Petition included William, Jennifer, Julie and Eugene. Howard was served with the GRO Petition but not named as a respondent.
- [94] A flurry of affidavits followed. Eugene took the position that he and Harold had no interest in GRO and that the BNT held two-thirds of the beneficial interest in GRO. He sought an order that the GRO Petition be dismissed or, alternatively, converted to an action.
- [95] On November 10, 2004, William filed a response in which he advised that he was a bare trustee of the GRO shares and sought the directions of the court as to how he should proceed.
- [96] On December 20, 2004, Howard, in his capacity as trustee of the BNT, applied to intervene in the GRO Petition. He claimed that the BNT had an interest in the GRO shares.
- [97] The GRO Petition came on for hearing before Mr. Justice Shabbits on March 10, 2005. He gave oral reasons for judgment in which he adjourned the petition to allow the respondents the opportunity for appropriate discovery of documents and to examine various parties. In a prescient comment he noted at para. 7:
- I am troubled by the opinion of counsel for Mr. Hewitt. Ms. Donaldson's opinion is that a trial of the petition could take three weeks and that there is perhaps no more than 100,000 USD in dispute. It seems to me that a trial would be financially disastrous for all of the parties involved in this proceeding and not in the best interests of any of them.
- [98] On May 17, 2005, Tommy, Lee, Virginia and Davis filed a second petition seeking the removal of Howard as trustee (the "Removal Petition"). In support of the Removal Petition, the petitioners alleged that Howard had failed to provide documents concerning his administration of the BNT, had purported to rescind or withdraw a distribution of the property of the BNT to the petitioners, had wrongfully requested a release as a condition of distributing the remaining property of the BNT to the petitioners, and had without instructions from the petitioners appeared in the GRO Petition to oppose the relief sought therein. The Removal Petition made no allegations against Howard in regard to the sale of the Big Nine shares.
- [99] In due course, Eugene, Jennifer and Julie applied to intervene in the Removal Petition. They opposed Howard's removal as trustee.
- [100] On October 28, 2005, Howard filed a petition in which he sought an order answering certain questions concerning the true construction of the BNT Trust Agreement, including a determination of current beneficiaries and assets of the BNT, whether the sale of the Big

Nine shares was in accordance with his powers and duties under the trust agreement and seeking an order if it was determined that he had breached any duties owing to the BNT beneficiaries, that he be excused from any personal liability arising from such breach pursuant to s. 96 of the Trustee Act, R.S.B.C. 1979, c. 414 (the "Trustee's Petition").

- [101] On November 30, 2005, the petitioners amended the Removal Petition. They now sought an order that Harold be appointed or confirmed as a trustee of the BNT.
- [102] On March 1, 2006, Howard filed an application seeking an order that the GRO Petition, the Removal Petition and the Trustee Petition be tried together.
- [103] On April 7, 2006, the parties appeared before me and by consent agreed that the three petitions would be consolidated and that there would be a trial of the consolidated proceedings. The plaintiffs were to file a statement of claim in the consolidated proceedings within 30 days of the order. I was appointed Case Management Judge on June 12, 2006.
- [104] The initial Statement of Claim was filed on June 26, 2006. Shortly thereafter, the plaintiffs advised of their intention to add Mason, Bull Housser & Tupper and Bull, Housser & Tupper LLP as defendants. Bull Housser had to that time been acting for Howard. Their joinder required Howard to find new counsel.

C. Scale of Costs

- [105] Scale C applies to matters of more than ordinary difficulty. In *Mort v. Br. of Sch. Trustees of Sch. Bd. No. 63 (Saanich)*, 2001 BCSC 1473 at para. 6, the court identified the following criteria for assessing the difficulty of a proceeding:
- (a) the length of the trial;
 - (b) the complexity of the issues involved;
 - (c) the number and complexity of pre-trial applications;
 - (d) whether or not the action was hard fought with little or nothing being conceded along the way;
 - (e) the number and length of Examinations for Discovery;
 - (f) the number and complexity of Experts' Reports; and
 - (g) the extent of the effort required in the collection and proof of facts.
- [106] This litigation involved events that took place over a 30-year period. The plaintiffs' list of documents of August 20, 2007 contained some 4,497 documents containing some 16,430 pages. During the course of the proceedings, 79 interlocutory applications were filed, 144 affidavits prepared, and 48 orders made. There were 23 days of examinations for discovery. Discovery transcripts totalled 3,506 pages. Prior to trial the parties were in court on 66 occasions. The trial, including the five days of this hearing, totalled 73 days. The trial

transcripts contained 3,930 pages. There were 647 exhibits filed. Four expert witnesses testified. The parties' closing submissions exceeded 1,000 pages and referred to over 200 authorities.

- [107] There were numerous complex pre-trial applications. The matter was hard fought throughout, with little if anything being conceded along the way. The length and number of examinations for discovery, the length of trial and the number of documents were all extraordinary. Resolution of the issues raised at trial required making findings of fact concerning events which took place over the course of 30 years. That task was made more challenging because of gaps in the evidence. Some witnesses were dead or otherwise unable to give evidence. Other possible witnesses were not called or chose not to testify. As evidenced by the many authorities filed, the case raised several difficult legal issues. Three experts were called to assist the court in valuing the Big Nine shares.
- [108] In their written submissions, some counsel suggested that the costs that they might have to pay should be set at Scale B. During the course of the hearing, Mr. DeFilippi and Mr. Hunter resiled from that position and acknowledged that Scale C costs were appropriate. Mr. Dives suggested otherwise in regard to Eugene, submitting that the case against his client was in and of itself not a matter of more than ordinary difficulty and that his client should not be punished in costs because of the complex proceedings in which he was ensnared.
- [109] In the circumstances of this case, I do not think it is feasible to distinguish the scale of costs as against one party to another. This action was clearly a matter of more than ordinary difficulty. Subject to the discussion below concerning special costs and increased costs, I find that Scale C is the appropriate scale for the taxation of all bills of costs in this matter.

D. Mason's Costs

i. Position of the Parties

- [110] Mason seeks an order that Tommy, Lee, Virginia and Davis pay her special costs which she submits should be summarily assessed at \$650,000. She submits that special costs should be ordered for the following reasons:
- (a) the allegations against Mason were allegations of fraud and dishonesty. All of the claims made by the plaintiffs were dismissed at trial and no appeal from that dismissal has been taken;
 - (b) the allegations against Mason were, from the outset, obviously unfounded and made recklessly;
 - (c) the allegations against Mason were of a nature that could injure her reputation as a lawyer;
 - (d) throughout, alleged failings on the part of Mason were pursued in the evidence led, and in cross-examination, notwithstanding they were irrelevant to the matters before the Court; and.

(e) in all of the circumstances of this case, the conduct of the plaintiffs in regard to their claims against Mason was reprehensible and should be punished with an award of special costs.

[111] The plaintiffs acknowledge that Mason is entitled to recover costs for her successful defence. They submit that they did not allege Mason's actions were fraudulent or dishonest. They submit that the claims against Mason were not unfounded or made recklessly but rather were based upon the documents disclosed in the proceedings and Mason's own pleadings and evidence, coupled with Howard's evidence. Without acknowledging that the allegations made against Mason were of the nature that might have injured Mason's reputation as a lawyer, they submit that any damage to that reputation arises from the findings made in the Reasons, not from the allegations made by the plaintiffs.

ii. Findings re Special Costs

[112] While the plaintiffs submit that no allegation of fraud, deceit or dishonesty was made against Mason, and I accept that a finding of knowing assistance in a breach of trust could in certain circumstances be made absent such a finding, their submission fails to appreciate the serious nature of the allegations made and the manner in which the plaintiffs attempted to prove same at trial.

[113] The plaintiffs conducted a frontal assault on Mason's honesty and probity. They took the position throughout that she had actual knowledge of Howard's breach of trust. They suggested her motive throughout was to cover up her own alleged misdeeds at the time of the Hall Transaction. They suggested to her that she told Mr. Long in January 2004 that Harold and Eugene had irrevocably announced their appointments in order to mask her prior errors and prevent a more focussed review of whether the trust had been properly administered. In closing submissions, they argued that her conduct was reprehensible and should be subject to an award of special costs.

[114] The test for special costs was set out in *Garcia v. Crestbrook Forest Industries Limited No. 2* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, where Lambert J.A. speaking for the court, after an extensive review of the authorities concluded:

... It is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be characterized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

- [115] I am not critical of the plaintiffs' decision to join Mason in these proceedings. Given the documentation concerning her involvement in the events of 2002 and 2004, a potential claim existed that the plaintiffs were entitled to explore. If the plaintiffs had chosen to discontinue their action against Mason following discoveries, party and party costs would have likely followed: *Doyle Const. Co. v. Carling-O'Keefe Breweries of Can. Ltd.* (1988), 27 B.C.L.R. (2d) 81 (C.A.).
- [116] I do not accept Mason's suggestion that the plaintiffs had a duty to approach her before commencing their action. At that point in time, Bull Housser, the firm at which Ms. Mason was a partner, was acting as counsel for Howard and any meaningful disclosure was unlikely.
- [117] By the time of trial, however, the plaintiffs had examined Mason and the other defendants and were fully aware of Mason's limited role in regard to the BNO Share Transaction and her explanation for her conduct. They had no evidence to the contrary. The plaintiffs knew that they could not succeed against Mason unless they were able to convince the court to reject her evidence concerning her knowledge and the actions she took. Their option was to discontinue the claim against Mason or proceed. The plaintiffs chose the latter course. A party who alleges serious misconduct against another in a civil law suit must be prepared to prove such allegations or reap the consequences in the form of an order for special costs: *Kurtakis v. Canadian Northern Shield Insurance Co.* (1995), 17 B.C.L.R. (3d) 197 (C.A.). The plaintiffs ran the risk that the court would accept that Mason was a truthful witness and the cost consequences of such a finding.
- [118] There is a long line of authorities that establishes that unproven allegations of dishonesty can amount to reprehensible conduct: *Taser International, Inc. v. British Columbia* (Thomas Braidwood, Q.C. Study Commission), 2010 BCSC 623 at para. 68. The allegations against Ms. Mason went to the core of her professional identity. She is an acknowledged expert in the field of trusts. An allegation that she knowingly assisted in a breach of trust was serious and potentially very damaging to her professional standing. Even more so was the suggestion that she deliberately covered up the breach to protect her own reputation. A lawyer relies on her reputation for integrity. When that reputation is falsely assailed, the court's reproof should be felt: *Startup v. Blake*, 2001 BCSC 8 at para. 112.
- [119] The claims against Mason were not based in negligence. They were a direct attack on her honesty and professional integrity. When a party makes such allegations with access to information sufficient to conclude that the other party was not dishonest, special costs are appropriate: *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303 at para. 26. Those are the circumstances in this case. By the time the trial commenced, the plaintiffs had sufficient information to conclude that Mason had acted honestly.

[120] To succeed in their claims against Mason the plaintiffs had to convince the Court that she was not telling the truth. They did not succeed. Although I was critical of certain actions Mason took, I accept without reservation her evidence that she was not aware of Howard's breach of trust, that she did not conceal the breach for reasons of self-interest and that she acted honestly throughout. Mason is entitled to special costs.

iii. Assessment of Special Costs

[121] Mason seeks a summary assessment of special costs in the all inclusive amount of \$650,000. Through to February 9, 2010, the date of the release of the Reasons, Mason's counsel had recorded 2,520.60 hours which billed out at \$527,100.50 before taxes. Taxes on fees totalled \$63,252.06. Disbursements, inclusive of taxes, totalled \$63,165.80, bringing the total account to \$653,518.36. Subsequent to that date, Mason's counsel has incurred additional costs and expense including the time spent preparing and appearing on this application. While the amount of those additional costs is not in evidence, Mason estimated those fees at an additional \$10,000.

[122] In *Buchan v. Moss Management Inc.*, 2010 BCCA 393, the Court of Appeal confirmed that a trial judge has the inherent jurisdiction to determine summarily the amount of special costs. The Court cautioned that it is a power to be exercised sparingly. A judge exercising that jurisdiction should take into account the elements set out in *Yule v. Saskatoon (City)*, (1955) 16 W.W.R. 305 (Sask. Q.B.) as codified in Rule 14-1(3) in determining the amount of special costs.

[123] In most cases it is not appropriate for a trial judge to summarily determine special costs. The judge simply does not have sufficient reference points to determine whether those costs are reasonable. Some of the difficulties were highlighted by Kirkpatrick J. (as she then was) in *Canadian National Railway Company v. A.B.C. Recycling Ltd.*, 2005 BCSC 1559 at paras. 28-29:

[28] ... The simple presentation of the clients' bill to the trial judge (as occurred in *Edwards v. Bell*) combined with counsel's submissions would not adequately allow ABC to challenge the reasonableness of CN's legal costs. Nor would it allow for the objective determination of the reasonableness of CN's legal costs.

[29] Moreover, to accept CN's proposition that the trial judge assess the costs, and bring to that assessment his or her observations of the conduct of counsel at trial, would place the judge in the position of witness. That, in my view, is an untenable proposition.

[124] A further problem with a trial judge summarily assessing costs is that the trial judge is only aware of what occurred in the courtroom. The reasonableness of counsel's fees will often depend upon events that took place outside the courtroom of which the judge has no knowledge.

- [125] Those problems are somewhat less in this case because the plaintiffs do not seriously challenge the reasonableness of Mason's accounts. Given that their own costs are more than three times Mason's, it is understandable that they do not. The difference in those costs can be explained at least in part because of Mason's late joinder in the proceedings and the somewhat limited role that Mason's counsel played at trial. I note in that regard that Mason's counsel absented themselves on several occasions when the evidence did not touch on the case against their client.
- [126] Mason acknowledges that the fees as presented should be subject to some discount. The fees include for example the time spent on Mason's unsuccessful application for security for costs. The trial judge in Buchan noted that in many cases an award for special costs will be made in the range of 75% to 90% of the actual costs (2010 BCSC 121).
- [127] Another factor favouring summary determination of Mason's special costs is the time and expense that the parties would incur if this matter was referred to the registrar. The extraordinary nature of this litigation has been detailed earlier in these reasons. A registrar attempting to assess special costs would by necessity have to be educated as to all that has gone on to date. It would be far from a simple task and one that would undoubtedly come at great expense. Mason, while recognizing that a summary assessment would by necessity contain an element of rough justice, submitted that rough justice would be preferable to a lengthy registrar's hearing.
- [128] Taking all of the above matters into account, I find that this is one of the rare cases where it is appropriate to assess special costs summarily. Rough justice in these circumstances is the preferable course. At the best of times, determining the reasonableness of a legal account is far from an exact science and there are a range of reasonable results.
- [129] In regard to the factors set out in Rule 14-1(3), I have already noted the complexity of the proceedings. The claims against Mason required skilled and knowledgeable counsel. In that regard Mason was well served. The claims had a potential monetary value well in excess of \$1 Million dollars and put Mason's professional reputation at stake. The result was a dismissal of the action and a finding that Mason had acted honestly throughout. Taking all relevant matters into account, I assess Mason's special costs at the all-inclusive sum of \$575,000. This includes disbursements and taxes. It also includes all sums otherwise awarded to and against Mason in relation to the various interlocutory proceedings. Tommy, Lee, Virginia and Davis are jointly and severally liable to pay Mason's costs.

iv. Bullock / Sanderson Order

- [130] Rule 14-1(18) allows the Court to order a successful plaintiff pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant. Such an order is commonly known as a Bullock order. The rule further provides that the Court may, as an alternative, order that an unsuccessful defendant pay the costs of a successful defendant directly. Such order is commonly known as a Sanderson order.

- [131] The plaintiffs seek against Howard and Eugene either a Bullock or a Sanderson order in regard to Mason's costs. Howard and Eugene oppose any such order. Mason opposes a Sanderson order, which would force her to collect her costs from Howard and Eugene, but is indifferent as to whether the Court grants a Bullock order.
- [132] The plaintiffs acknowledge that Howard and Eugene cannot be required to reimburse them for special costs that they are ordered to pay Mason. In the course of oral argument, they submitted that if the plaintiffs were ordered to pay special costs to Mason, the Court could still make a Sanderson or Bullock order against Howard and Eugene, but limit such order to the costs that would have been payable to Mason pursuant to Scale C. The plaintiffs provided no authorities that would justify such an order. I do not believe that it is a proper order to make. In my opinion, if a party is ordered to pay special costs, that party is not entitled to seek indemnity for a portion of those costs from other parties to the litigation. Accordingly, the plaintiffs' application for a Bullock or Sanderson order is dismissed.
- [133] I should note that even if I had limited Mason's costs to Scale C, I would not in the circumstances of this case have made either a Bullock or Sanderson order.
- [134] The party seeking a Bullock or Sanderson order must satisfy a two-part test. It must be reasonable for the plaintiff to have sued the successful defendant and there must be something that the unsuccessful defendant did to warrant being made liable to reimburse the plaintiff for the successful defendant's costs: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376; *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528. In *Grassi*, Southin J.A. articulated at paras. 32-34 the appropriate considerations:
32. Thus, the single issue is whether the respondents Eamor and WIC "ought" to pay the costs to which the respondents Doern and City of Vancouver are entitled as against the appellant.
33. I do not go so far, as some of the cases have suggested, as to say that such an order should be made "whenever it was reasonable for the plaintiff to have sued the successful defendant", if, by "reasonable", one is looking at the matter from the perspective of counsel for the plaintiff. One must bear in mind that the present rule as to joinder of causes of action is so broad that the causes of action alleged against the various defendants may be completely different, even though they arise out of the same transaction. To illustrate the point, in *Can-Dive Services v. Pacific Coast Energy* (1993), 77 B.C.L.R. (2d) 128, the plaintiff, a subcontractor in a construction project, sued the contractor, alleging breach of contract; the owner, alleging breach of a duty of care; and the owner's engineer, alleging a breach of duty of care. To sue the owner and the engineer, although the claims ultimately failed, may well have been reasonable from the point of view of the plaintiff but that would not, in my opinion, have warranted, if the contractual claim had succeeded, the contractor being required to pay the plaintiff the costs which the plaintiff was obliged to pay to the owner and the engineer. There must be something which the unsuccessful defendant did, such as asserting the other defendant was the culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs. That was what happened in *Bullock v. London General*

Omnibus Co. The omnibus company asserted the cart driver was the cause of the accident.

34. But orders under Rule 57(18) are not restricted to cases where the unsuccessful defendant in the course of the litigation has blamed the successful defendant but may extend to acts of the unsuccessful defendant which caused the successful defendant to be brought into the litigation.
- [135] The claim against Mason arose in the factual context of the claims against Howard and Eugene. In the context of this case, I find that if the plaintiffs were going to proceed against Mason, it was reasonable that the claims be tried in one action.
- [136] The more difficult hurdle for the plaintiffs is whether Howard and Eugene did anything to warrant them being made liable to reimburse the plaintiffs for Mason's costs. The plaintiffs acknowledge that at the time they commenced the claim against Mason there was nothing that Howard and Eugene had done to warrant the plaintiffs bringing Mason into the litigation. They submit, however, that this changed when Howard testified at his examination for discovery that Mason had told him in the fall of 2002 that he was entitled to act as the sole trustee. Mason denied this conversation and at trial I did not accept Howard's evidence that such a conversation took place.
- [137] The difficulty with the plaintiffs' reliance on the alleged 2002 conversation is that that conversation did not form any part of the plaintiffs' claim against Mason. Its import in the litigation was that if I had held that Mason had so advised Howard, it might well have strengthened Howard's case that he should be exonerated under the Trustee Act for his breach of trust.
- [138] The plaintiffs did not need to bring an action against Mason or continue their claim against her in order to challenge Howard's assertion. Regardless of whether Mason was a party at the trial, she was clearly going to be a witness. The question of the 2002 conversation could have been resolved in the context of her giving evidence as a witness. It did not necessitate her being a defendant in the litigation or justify the plaintiffs continuing their claim against Mason once examinations for discovery were complete.
- [139] I find that there was nothing that Howard and Eugene did that warrants them being made liable to pay Mason's costs. That finding is fatal to a Bullock or a Sanderson order and I would not have made such an order even if I had limited Mason's costs to Scale C.

PLAINTIFFS' COSTS

A. Cost against Howard/Eugene

i. Position of the Parties

- [140] The plaintiffs seek special costs against Howard and Eugene. In support of that submission, they rely on conduct that took place both before and during the litigation. The pre-litigation conduct they reference embraces the matters raised and discussed earlier in regard to the claim for punitive damages. The plaintiffs again cite various passages in the Reasons critical

of Howard and Eugene's conduct. They submit the misconduct continued through the litigation. They submit Howard wrongfully intervened in the GRO Petition. They submit that it was improper for Howard to raise the BNT interest in the GRO Shares because it mattered not, given the Distribution Letter what interest BNT might have had at one time in those shares. They submit that Howard gave false testimony about the alleged telephone call with Mason in September 2002 and concerning his knowledge as to whether Harold could act as a trustee. The plaintiffs submit that the conduct of Howard and Eugene was dishonest from the outset and continued throughout the trial. They further submit that Howard and Eugene's failure to admit facts or documents prior to trial should be subject to sanction.

[141] Howard and Eugene submit that the plaintiffs should be limited to party and party costs. They submit it is important to distinguish between the type of conduct that can give rise to an award of punitive damages and the type of conduct that can give rise to an award of special costs. They submit that the plaintiffs incorrectly assume that conduct giving rise to the breach can be considered in the cost analysis. In their submission, the only conduct that is relevant for the purpose of the special cost analysis is the conduct of the parties leading up to and in the course of the litigation. They submit that their conduct leading up to and in the course of the litigation does not support an award of special costs and they point out that they were successful in regard to a number of issues raised during the course of the trial.

ii. Discussion

[142] The circumstances in which pre-litigation conduct will lead to an order of special costs is a matter of some contention. In the normal course, special costs are limited to misconduct or reprehensible conduct in the proceedings. As Bauman J.A., as he then was, said in *Evergreen Building Ltd. v. IBI Leasehold Ltd.*, 2009 BCCA 275 at paras. 27 to 29:

[27] The general rule (that special costs are given only with respect to or in situations of misbehaviour in the conduct of the litigation) finds expression in, amongst others, *Nygaard International Ltd. v. Robinson* (1990), 46 B.C.L.R. (2d) 103 (C.A.). At paras. 89 and 90 Levine J.A. summarized the current position in British Columbia:

[89] The respondents point out that in *Nygaard*, the Court said only that "as a general rule" special costs are awarded for conduct in the litigation, and note that Stiles and the decisions adopting Lambert J.A.'s words were decided after *Nygaard*.

[90] The authorities do not establish any rigid rule that would prohibit an award of special costs where pre-litigation conduct is "reprehensible" and warrants rebuke. As Lambert J.A. noted in *Sun Life Assurance* [2000 BCCA 231, 76 B.C.L.R. (3d) 93], however, "special costs are usually awarded only in relation to misconduct during the course of the litigation itself."

[28] The reference to the decision in *Sun Life Assurance Co.* included this quote from Lambert J.A.'s reasons in that case at para. 54:

- [54] Special costs are usually awarded only in relation to misconduct in the course of the litigation itself. However, there may arise circumstances where special costs may be awarded because of reprehensible conduct giving rise to the litigation, particularly where the fruits of the litigation do not provide any appropriate compensation in relation to the reprehensible conduct.
- [29] The state of the law, in light of the conflicting authorities, is as expressed in *Dockside Brewing Co. Ltd.* Any further refinements in the area would require a decision by a five judge panel of this Court.
- [143] I have earlier concluded that Howard and Eugene's pre-litigation conduct does not lead to an award of punitive damages. Similarly, I find that their pre-litigation conduct does not warrant an order for special costs.
- [144] Howard and Eugene's conduct of the litigation cannot be categorized as reprehensible. The mere fact that a party has been unsuccessful in litigation, or that his version of the events has not been accepted by the court, is not sufficient in itself to support an award of special costs: *Creed v. Creed*, 2003 BCSC 1425; *415703 B.C. Ltd. v. JEL Investments Ltd.*, 2011 BCSC 3. In *Creed*, Lowry J. at para. 7 discussed an award of special costs in the context of findings of credibility:
- [7] I do not consider that there is in this case any sound basis on which to award special costs. Very often, conflicts in credibility are what make for a trial. Both parties then mount the best case they can. That may entail challenging the reliability of documentation and certainly the veracity of testimony offered. But it does not follow that the party whose case has been rejected is then necessarily exposed to an order for special costs. Indeed, if it were otherwise, there could be an award of special costs in almost every case where one party's evidence has been preferred over another, on the basis that the unsuccessful party was attempting to mislead the court warranting a sanction for conduct that could be said to be reprehensible.
- [145] A simple finding that a party or witness is untruthful or unreliable is not, in itself, sufficient to found an award for special costs: *Webber v. Canadian Aviation Insurance Managers Ltd.*, 2003 BCSC 274 at para. 14. Special costs require something further. For example, in *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29, the Court of Appeal upheld an award of special costs where the trial judge had concluded that the appellant's conduct was planned and deliberate and intended to mislead the Court. The appellant had contended that it had been condemned for pursuing a defence it was entitled to pursue and that an award of special costs would have a chilling effect on the ability of defendants to advance legitimate defences that are ultimately rejected. The Court concluded that the appellant's concern was misplaced and there was no question that a defendant is entitled to advance defences in good faith.

- [146] This case is clearly distinguishable from *Marchen*. After a thorough analysis of the evidence and documents, I ultimately rejected Howard's evidence that he did not know of Harold's right to be co-trustee. I cannot find, however, that his testimony was planned and deliberate and intended to mislead the Court. Rejection of his evidence is not sufficient in itself to lead to an order for special costs.
- [147] Furthermore, I do not find that the defendants' failure to respond to the plaintiffs' Notices to Admit is conduct deserving of rebuke. This case is clearly distinguishable from a case like *Blake v. Gill* (1997), 35 B.C.L.R. (3d) 34 (S.C.) where the failure to admit certain evidence required the plaintiffs to bring a police witness from Newfoundland to testify at the trial.
- [148] The Notices to Admit in this case were of a much different nature. For example, the Notice to Admit dated September 26, 2008 in relation to GRO and the GRT sought the admission of some 421 facts and 190 documents. The Notice to Admit of October 8, 2008 with regard to the BNO/BNT/Mason sought the admission of a further 328 facts and 254 documents.
- [149] While many of the facts and documents contained in the Notices to Admit ultimately were proven at trial, it is well understandable why the defendants were not prepared to make the admissions when sought. Indeed, if the admissions had been made, the trial, at least from the perspective of the trial judge, would likely have been more difficult than it otherwise was. The Court would have had no context for many of the facts and admissions. The fact that the documents came in through live witnesses who could put the documents in context ultimately made the evidence easier to follow than it would have been if it had simply all come in by way of the Notices to Admit.
- [150] A further difficulty with the Notices to Admit was the intended use of the documents. Many of the documents consisted of memos and letters written in the distant past. The extent to which those documents could be admitted for their truth, in whole or in part, was often a contentious question that had to be addressed in the context of the individual documents.
- [151] While it is likely that the parties could and perhaps should have made some admissions, the forest of material with which they were faced made it difficult, if not impossible, for the defendants to identify those specific trees which properly could have been admitted. In the context of this case, I cannot be critical of the defendants' failure to make the admissions sought.
- [152] Nor can I find that Howard's intervention in the GRO Petition or his submissions that the BNT was the beneficial owner of the GRO shares was in any way improper. Howard's submission that the BNT was the initial beneficial owner of the GRO shares was ultimately successful. That was an issue of some import and could have a significant impact on the BNT's ultimate tax liability. While I did not accept Howard's submission that his distribution of the GRO shares was conditional on all beneficiaries agreeing to terminate the trust, it was not a position devoid of merit or that was clearly bound to fail.

[153] For all of the above reasons, I find that an award of special costs against Howard and Eugene is not warranted.

iii. Increased Costs

[154] Increased costs are governed by Subsections 2(5) and 2(6) of Appendix B of the Supreme Court Civil Rules. Subsection 2(5) provides that if, after the court fixes the scale of costs applicable to a proceeding, the court finds that, as a result of unusual circumstances, an award of costs on that scale would be grossly inadequate or unjust, the court may order that the value of each unit allowed for that proceeding or for any step in that proceeding be 1.5 times the value that would otherwise apply to units in that scale.

[155] Subsection 2(6) provides, however, that for the purposes of subsection (5), an award of costs is not grossly inadequate or unjust merely because there is a difference between the actual legal expenses of a party and the costs to which that party would be entitled under the scale of costs fixed by the court.

[156] The present provision resulted from amendments that came into force on January 1, 2007. Previously, increased costs were set as a proportion of special costs. Cases since the amended provision was introduced have relied upon earlier cases for guidance as to the meaning of the terms "grossly inadequate or unjust" and "unusual circumstances".

[157] In *Bajwa v. British Columbia Veterinary Medical Assoc.*, 2008 BCSC 905, Davies J. at para. 72-73 noted the difference between the two provisions and the continued importance of decisions under the prior enactment :

[72] What is different, however, is that under s. 2(4.1), the concept of "unjustness" is linked to the concept of "gross inadequacy" of the application of the usual principles. In my view, that linkage, coupled with the new requirement for a finding of "unusual circumstances" means that the fact that a cost award will not afford reasonable compensation for the costs actually incurred will not, without some unusual circumstance, be sufficient to ground an order for increased costs.

[73] What constitutes "unusual circumstances" or an award that is "unjust or grossly inadequate" will of necessity remain a fact-based inquiry driven by the nature of the litigation and the conduct of the parties, and remains a determination in respect of which decisions under the old s. 7 will continue to offer assistance.

[158] In 380876 *British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 Allen J. held at para. 37 that the factors which may constitute unusual circumstances and justify increased costs included the following:

- (a) misconduct by the unsuccessful party in the litigation;
- (b) the serious nature of the allegations;
- (c) the complexity or difficulty of the issues in the litigation; and

(d) the importance of the litigation to the parties or to the development of the law.

[159] From March 19, 2004 to February 8, 2010, the plaintiffs incurred billed fees of \$1,834,680.51 and disbursements of \$449,925.43. Total fees, disbursements and taxes are \$2,284,605.94. That figure includes a reduction in the amount of \$454,376.86 from the plaintiffs' actual recorded legal fees and disbursements.

[160] A preliminary estimate of the fees, disbursements and taxes allowable under the tariff at Scale C on a party and party basis ranges from \$367,852.80 to \$476,952.00. That represents a recovery of between 16 to 20%.

[161] The litigation concerned allegations of a serious nature. It concerned complex and difficult issues. The litigation was clearly important to the parties and in some small way may have added to the development of the law. As noted in the comments of Justice Shabbits at the time of the hearing of the GRO petition, it was clear from early on in this proceeding that the costs involved in bringing this case to trial were likely far in excess of any possible recovery. Few plaintiffs could afford the costs of this action. The plaintiffs succeeded in establishing a breach of trust and an improvident sale. For reasons I have set out, the plaintiffs do not meet the test for special costs and cannot recover a complete indemnity. In the unusual circumstances of this case, I find that an award of costs limited to Scale C would be grossly inadequate and unjust.

[162] Subject to the discussion that follows concerning allocation, I find that the plaintiffs are entitled to increased costs for all steps in the action subject to the following exceptions. All interlocutory applications will be taxed on Scale C. That includes applications in which the plaintiffs were successful and those in which some or all of the defendants were successful and awarded costs against the plaintiffs. There will be no costs to the plaintiffs for the Leave Application. Although leave was granted, they were ultimately unsuccessful in obtaining the remedies sought. For the purpose of clarity, the Reconsideration Application was not an interlocutory application and the plaintiffs are entitled to increased costs with respect to that hearing. Similarly, the most recent hearing should not be considered an interlocutory application but a continuation of the trial and the plaintiffs are entitled to increased costs in regard to it.

iv. Apportionment of Costs

[163] Howard and Eugene submit that there should be an apportionment of costs to reflect their success and the failure of the plaintiffs with regard to several matters the plaintiffs raised in the course of the litigation. They note in particular their success with respect to the Liquidation Plan, the power of sale in the BNT Trust Agreement and in establishing that BNT was, at least until the Distribution Letter, the beneficial owner of the majority interest in the GRO shares. They further submit that the plaintiffs' claim against Mason took up a significant portion of the trial and that there should be a deduction from the costs that they must pay to take into account the time spent on the claim against Mason.

[164] Rule 57(15) of the former Supreme Court Rules, B.C. Reg. 221/90, provided that: "The court may award costs that relate to some particular issue or part of the proceeding or may award costs except so far as they relate to some particular issue or part of the proceeding." Under the new Supreme Court Civil Rules, B.C. Reg. 168/2009, the equivalent rule is Rule 14-1(15), which provides:

(15) The court may award costs

- (a) of a proceeding,
- (b) that relate to some particular application, step or matter in or related to the proceeding, or
- (c) except so far as they relate to some particular application, step or matter in or related to the proceeding

and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

[165] There is no material difference between the old Rule 57(15) and the current Rule 14-1(15). Cases under the old rule continue to provide guidance as to how the court should exercise its discretion.

[166] The rule allows the court in appropriate circumstances to award costs to the party who has succeeded on a discrete issue. Applications to apportion costs are not a regular part of litigation. They should be confined to relatively rare cases: *British Columbia v. Worthington (Canada) Inc.* (1988), 29 B.C.L.R. (2d) 145 (C.A.).

[167] In *Sigurdson v. Fidelity Insurance Company of Canada (No. 2)*, [1977] 6 W.W.R. 451 (B.C.S.C.), McKenzie J. drew a distinction between an "event," which he compared to a war, and an "issue," which he compared to a battle in the war. Although the new rule now uses the term "matter" instead of "issue", those comments remain of import.

[168] In *Jacobsen v. Bergman*, [1999] B.C.J. No. 2910 (S.C.) (QL), Burnyeat J. discussed the limited circumstances in which costs should be apportioned at para. 17:

Costs should be apportioned under Rule 57(15) only where separate issues can be delineated clearly: *Haida Inn Partnership v. Touche Ross & Co.* (1991), 48 C.P.C. (2d) 61 (B.C.S.C.). Rule 57(15) was not designed to allow for a minute dissection of the success or failure of litigants on the completion of the trial but rather was envisioned that there would be discreet issues, occupying distinct portions of time in the life of a trial and involving distinct questions of law or fact, upon which an objective observer could say one or other of the parties was successful in the result.

[169] The Court of Appeal in *Sutherland v. The Attorney General of Canada*, 2008 BCCA 27, set out the test for apportionment at para. 31:

The test for the apportionment of costs under Rule 57(15) can be set out as follows:

- (1) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
- (2) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
- (3) it must be shown that apportionment would effect a just result.

[170] While I accept that Howard and Eugene were successful regarding the Liquidation Plan, the power of sale and the initial beneficial ownership of the GRO shares, those were, to use the terminology of McKenzie J. in *Sigurdson*, but battles in a much larger war. The plaintiffs won the war. They established that Howard, in breach of trust, sold the Big Nine shares for less than they were worth. They further succeeded in establishing that Howard had distributed the BNT's interest to the beneficiaries pursuant to the provisions of the Distribution Letter. Neither the Liquidation Plan, the power of sale nor the initial ownership of the GRO shares can be considered a separate and discrete issue which, as set out in *Sutherland*, is the prerequisite for the apportionment of costs.

[171] Different considerations apply with regard to the plaintiffs' unsuccessful claim against Mason. That was a separate war. I accept Howard and Eugene's submission that they should not have to pay any costs arising from that claim. The Mason claim clearly extended the length of the trial. If Mason had not been joined, Mr. MacLeod would not have been at the trial. Approximately four days was spent in final submissions and the submissions on this application on matters involving Mason. Absent the claim against Mason, Ms. Hunter would not have been a witness. Her testimony and the submissions concerning the admission of her report took approximately one and one-half days. Two and one-half were spent reading in evidence from Mason's and Mr. Stout's examinations for discovery. Mason testified for some five days. Regardless of whether a claim had been brought against her, she would, in any event, have been a witness. While one cannot say with precision how long she would have been on the stand, the time clearly would have been less. Similarly, the examination of Barry Tompkins would also have been less absent the claim against Mason. There would have been some, but less evidence, concerning the Hall transaction.

[172] The trial and submissions, including the submissions with regard to this application, lasted 73 days. Although it cannot be determined with absolute certainty, I estimate that absent the claim against Mason, the trial would have lasted 60 days. The plaintiffs' costs against Howard and Eugene will be limited as if the trial consisted of 60 days. In addition, the plaintiffs will not be entitled to recover against Howard and Eugene any disbursements arising from the claim against Mason. This would include the costs of court days 61 to 73, fees paid to Ms. Hunter, and photocopies that were billed to Mason's counsel.

v. Jennifer and Julie

- [173] The plaintiffs submit that Jennifer and Julie were both beneficiaries of the BNT and the GRT and as such were proper parties to the legal proceedings. They submit that Jennifer and Julie did not maintain a passive role in relation to the legal proceedings. They actively intervened in the GRO Petition and supported an order that that petition be converted to an action. They supported William's application to sell the GRT assets. They also intervened in the Removal Petition and opposed Howard's removal as trustee. They initially filed a joint defence along with Eugene supporting Howard's claim that he was entitled to act as the sole trustee of the BNT and opposed the distribution of the GRO shares because it would leave them as minority shareholders. The plaintiffs say that in these circumstances Jennifer and Julie took active steps to oppose the claims of the plaintiffs and the plaintiffs are entitled to costs against them.
- [174] Jennifer and Julie submit that there is no basis for any award of costs against them. They submit that no judgment was granted against them and that they were unwilling and unnecessary parties to the litigation. They note that the plaintiffs unsuccessfully sought an order compelling them to attend in British Columbia for examinations for discovery and that ultimately a separate defence was filed on their behalf. Although ordered to answer certain interrogatories, few of the answers were read in and none were necessary to the case.
- [175] The plaintiffs Amended Amended Statement of Claim did not allege any wrongdoing against Jennifer and Julie. In their Amended Amended Statement of Defence, filed on November 17, 2008, Jennifer and Julie took no position on the plaintiffs' many allegations and agreed to abide by any decision made.
- [176] In the course of the proceedings, there were awards of costs made for and against Jennifer and Julie in relation to certain applications. They were necessary parties to these proceedings and will be bound by the results. They did take some active steps prior to the consolidation order but by the time that the trial commenced they were no longer active antagonists. The plaintiffs sought no relief against them. I find that other than the costs already awarded there should be no additional costs ordered for or against Jennifer and Julie.

vi. William

- [177] The plaintiffs claim special costs against William as to the issues involving the GRO shares and the GRT. As detailed in the Reasons, William became trustee of the GRT at the request of Tommy and Eugene in order to facilitate the pending sale of Jennifer and Julie's GRO shares. After that sale collapsed, William found himself as the legal owner of the GRO shares facing demands from the plaintiffs that he transfer shares directly to Tommy and Harold. He resisted those entreaties and ultimately, based on the findings set out in the Reasons, he was right to do so because Harold did not have any interest in the GRO shares.

[178] As early as November 10, 2004, William filed a response in the GRO Petition acknowledging that he was but a bare trustee of the GRO shares and seeking direction from the Court as to how he should proceed. While he breached his trust obligations by selling the Trapline, there is no evidence the sale of the Trapline was for less than its value. Subsequently, William sought an order from the Court to sell the GRO assets. The Court declined to do so. Thereafter, William took no position and ceased participating in these proceedings.

[179] In the circumstances of this case, I find there should be no costs for or against William.

SUMMARY

[180] In summary therefore, the plaintiffs' claims for aggravated and punitive damages are dismissed. The remedies set out in the Reasons are confirmed, save and except the Proceeds Award is amended and will be in the sum of \$522,000. Mason is entitled to special costs against the plaintiff beneficiaries in the sum of \$575,000. The plaintiffs are entitled to increased costs against Howard and Eugene based on a trial lasting 60 days. The increased costs will apply to all matters except interlocutory applications. There will be no additional costs for or against Jennifer and Julie or William.

[181] To the extent there are any remaining matters necessary to bring this proceeding to a conclusion, counsel should make arrangements at an early date with Supreme Court Scheduling to have such matters heard.

"R.B.T. Goepel J."

The Honourable Mr. Justice Richard B.T. Goepel

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