

CANADA / JUDGMENT

Chung v. Chung

2022 BCSC 1592

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Supreme Court of British Columbia

DECIDED

9 September 2022

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2022 BCSC 1592 Chung v. Chung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chung v. Chung,

2022 BCSC 1592

Date: 20220909

Docket: S178422

Registry: Vancouver

Between:

Jae Hoon Chung

Plaintiff

And

Won Sok Chung, Don Won Apartments Limited,

Don Won Apartments (Haro) Limited, Crestview Manor Apartments Ltd.,

Chun Properties Ltd. and Won Holdings Ltd.

Defendants

Before: The Honourable Mr. Justice M. Taylor

Reasons for Judgment

Counsel for the Plaintiff:

K.F. Milinazzo

T. M. Pontin

Counsel for the Defendants:

D.S Penner

Place and Dates of Trial:

Vancouver, B.C.

September 13-17, 2021

February 24, 25, 2022

Place and Date of Judgment:

Vancouver, B.C.

September 9, 2022

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Introduction

- [1] This action involves a dispute between two brothers, the plaintiff Jae Hoon Chung ("Jae") and the defendant Won Sok Chung ("Won"), concerning the alleged misappropriation by Won of certain proceeds from two investment properties in which they both had a beneficial interest. Jae seeks remedies arising from an alleged breach of trust by Won and the companies controlled by Won.

Background

- [2] The Chung family moved from Seoul, Korea to Vancouver, British Columbia in 1995. Jae currently resides in Seoul while Won resides in Vancouver. Both Jae and Won are real estate investors.

The Properties

- [3] In 2006 and 2007, Won proposed to Jae, and Jae agreed, that the brothers would purchase two investment properties (the "Properties"):
1. a two-storey apartment building in the West End of Vancouver with 21 rental units located at 1435 Pendrell Street in Vancouver, B.C. and purchased in 2006 for a price of \$2,850,000 (the "Pendrell Property"); and
 2. a four-storey apartment building in the West End, with 24 rental units located at 1623 Haro Street in Vancouver, B.C. purchased in 2007 for a price of \$3,660,000 (the "Haro Property").
- [4] The purchases were financed principally by leveraging some family property held jointly with their mother in Korea and also through proceeds from mortgages on the Properties themselves. Jae's combined interest in the Properties was just over 45% while Won had the remaining 55% interest.
- [5] The Properties were at all material times beneficially co-owned by Jae and Won but legally owned by corporate trustees (the "Corporate Trustees"). The Corporate Trustees were Don Won Apartments Ltd. ("Don Won"), which owned the Pendrell Property, and Don Won (Haro) Ltd. ("Don Won Haro"), which owned the Haro Property. The Corporate Trustees held the Properties as bare trustees pursuant to written trust agreements, as more particularly described below.
- [6] Jae and Won had no written agreement which stipulated their respective responsibilities with respect to the Properties. However, as their roles developed in practice, Won was the active manager and Jae was a passive investor. In addition, Won was at all relevant times the president, sole director and sole shareholder of the Corporate Trustees, with sole signing authority on the bank accounts for both companies. Won was also responsible for completing the accounting for Don Won and Don Won Haro and instructed the company accountants. Jae did not hold any corporate office with the Corporate Trustees.

- [7] Jae testified, and it was not contested by Won at trial, that Jae and Won had the following understanding with respect to the Properties:
- (a) The Corporate Trustees controlled by Won would be in charge of rental units, maintenance and renovations;
 - (b) in exchange for his efforts, Won would receive a 5% management fee of the gross rental income for the Properties annually;
 - (c) the brothers intended to hold the Properties long term: the purchases were a "generational play" for Won and Jae's children;
 - (d) as the balance of the mortgages was paid off over time, Jae and Won would leverage the Properties to make new real estate investments;
 - (e) Won was not to withdraw funds from the Properties without consent from Jae; and
 - (f) if and when income came available from the Properties, the brothers agreed it would be disbursed in proportion to their interests.

The Trust Agreements

- [8] On May 4, 2006, Don Won, Jae and Won entered into a bare trust agreement (the "Pendrell Trust Agreement"). The Pendrell Trust Agreement provides that:
- (a) Don Won holds legal title to the Pendrell Property as bare trustee; and
 - (b) Jae and Won each hold an undivided 50% interest in the trust as beneficiaries.
- [9] On September 4, 2007, Don Won Haro, Jae and Won entered into a second bare trust agreement (the "Haro Trust Agreement"). The Haro Trust Agreement provides that:
- (a) Don Won Haro holds legal title to the Haro Property as bare trustee; and
 - (b) Won holds a 57% beneficial interest and Jae holds a 43% beneficial interest.
- [10] The evidence at trial was that the split in beneficial interest percentage between the brothers was based upon their relative contributions to the purchase price.
- [11] Clause 2 (c) of the Haro Trust Agreement states:

Any benefit, interest, profit or advantage arising out of or accruing from the Lands is a benefit, interest, profit or advantage of the Owner [Won and Jae], and if received by the Nominee [Don Won Haro], will be received and held by the Nominee for the sole use, benefit and advantage of the Owner and the Nominee will account to the Owner for any money or other consideration paid to or to the order of the Nominee in connection with the Lands as directed by the owner.

- [12] Clauses 1 and 2 of the Pendrell Trust Agreement also stipulated that Don Won was a trustee in respect of the trust assets and held all rights, title and interest in these trust assets as bare trustee on behalf of the beneficiaries (Won and Jae).

[13] Jae testified that he understood that both Properties were held in trust for him and Won, and that any money earned from the Properties would be held in trust for them, in proportion to their interests. This was not seriously disputed at trial by Won.

The Mortgage Proceeds Payments

[14] On August 16, 2012, Won wrote to Jae indicating that the mortgage on the Haro Property needed to be renewed and asked Jae to execute the required documents as soon as possible. Jae testified that he understood the mortgage renewal was routine and that he had no choice but to sign the mortgage documents when they were presented to him. Jae understood at that time that the Haro Property was losing money and any proceeds would be used for the operation and maintenance of the property, not Won's personal use.

[15] Jae and Won both executed documents in furtherance of the refinancing of the Haro Property. On October 12, 2012, security documents were provided to Jae for execution, which indicated the principal amount on the mortgage was \$2.9 million. The Direction to Pay section of the paperwork was left blank, with the result that the documents executed by Jae did not indicate that there would be a payout from the mortgage proceeds. On October 15, 2012, Jae returned signed copies on the documents, which he executed at the Seoul embassy.

[16] The proceeds of the refinancing of the Haro Property were \$1,142,555.49. The agreed statement of facts at trial reflects that Won withdrew a total of \$1,168,131.04 from the accounts of Don Won Haro, which were ultimately deposited in his personal bank account at TD Canada Trust. As reflected in his testimony on discovery, Won did not advise Jae of the proceeds or that he had taken the funds for personal use:

Q When was -- or did you tell Jae that you were going to transfer these funds to yourself?

A No. I didn't need to. I didn't tell him when I was putting money in every time. He didn't have any money to put in.

Q So we'll come back to that. So when was the first time that you told Jae that you had taken the Haro refinance proceeds?

A I didn't tell him.

Q So this happened November 1st, 2012, and we're sitting here at June 18th, 2019, so to date you have never had a direct conversation with him where you told him that you did this?

A No, I don't think so. No.

[17] Won admitted under cross examination that he did not ask for Jae's consent or authorization to take the funds:

Q And you never told Jae that you were transferring those funds -- the 1 million to yourself, did you?

A No.

Q And you never asked him for his consent or authorization to do so?

A No -- correct, yeah.

[18] Won also admitted under cross examination that the transfer of funds was not reflected in the income statements provided to Jae by Won, which were the only form of financial report prepared and presented by Won and the Corporate Trustees to Jae.

[19] On March 20, 2013, Won emailed Jae stating, "Pendrell needs refinancing due May 1st. Just letting you know, you need to sign some mortgage documents soon."

[20] A few days later, Won wrote an email to Jae enclosing documents for his signature. Jae testified that he had no discussions with Won at this time about the mortgage. On July 9, 2013, a law firm retained by Won wrote to Jae attaching additional documents for signature. Jae testified that Won often presented documents to him in a rush with little time to sign and return.

[21] On July 31, 2013, the law firm sent an email to Jae and Won stating the proceeds of the refinancing were \$499,561.15 (Jae received no similar information indicating the payout amount for the Haro Property refinancing). Jae testified that he understood this was a routine refinancing, and that he did not look carefully at the numbers in the documents he received. Although he understood that there might be some funds available, he thought it would go to the operations of the company or be used by the two brothers to re-invest in another venture, in accordance with their agreement to do so. As Jae stated "the plan was always to use any extra equity to find further investments. I would never have agreed to him using this money personally, without a similar payout to me."

[22] Jae testified that, due to prior disputes between the brothers relating to document disclosure and a deteriorating relationship between them, Jae did not ask for further information at that time.

[23] On August 2, 2013, Won transferred a total of \$496,755.20 from the accounts of Don Won to his own account. Won admitted under cross examination that he had once again withdrawn the mortgage proceeds for personal use without Jae's knowledge or consent:

Q Okay. And you're transferring a significant amount of money, almost 500,000, from Don Won to yourself?

A Yes.

Q Okay. Did you tell Jae about this?

A No.

Q Have you ever told Jae about this?

A No.

Q Similarly you never told Jae you were transferring those funds?

A No.

Q And you never asked for his consent?

A No.

[24] As with the reporting for the Haro Property, the income statements prepared for the Pendrell Property did not reflect this payment being made from the company to Won in 2013. The income statements were the only financial reporting provided to Jae.

[25] Won did not disclose to Jae the funds he had withdrawn from the Pendrell Property and the Haro Property and testified on discovery that he viewed it as Jae's responsibility to make the necessary inquiries:

Q Okay. If you and Jae owned the buildings, why didn't you have to consult him about this decision?

A Because he's not involved with it. And why didn't he talk to me when there was a refinancing? Why doesn't he come and help managing the property, come and get the financing?

Q So, according to you, it wasn't on you to let Jae know about the transfers --

A No.

Q -- you were doing? It was for him to come to you and ask?

A Yeah.

Q And you say he didn't do that?

A No.

[26] The total amount of the mortgage proceeds from both Properties deposited by Won to his personal account was \$1,664,966.24 (the "Mortgage Proceeds").

The Purchase of the Marine Drive Property

[27] In 2014, Won used the Mortgage Proceeds to purchase GICs in an account he solely owned and controlled at Prospera Credit Union (the "Prospera Account").

[28] On January 13, 2014, the GICs held in the Prospera Account were cashed and, the same day, a cheque for \$1,581,860 was drawn from the Prospera Account. It was an agreed fact at trial that Won used that cheque to purchase a residential property located at 2065 Marine Drive SW (the "Marine Drive Property").

- [29] It was also an agreed fact that the Marine Drive Property was purchased for \$1.65 million, plus tax (including GST and property transfer tax) and fees, for a total of \$1,682,306.13. Won admitted on examination for discovery that he paid for the Marine Drive Property in cash without other sources of financing.
- [30] Jae testified at trial that when his mother told him Won had purchased a new home, Jae was unaware that the Marine Drive Property was purchased with funds withdrawn from the Corporate Trustees.

Renovations to the Marine Drive Property

- [31] As of the date of trial, Won continues to reside in the Marine Drive Property.
- [32] After the purchase of the Marine Drive Property, Won testified that he spent "a few hundred thousand" dollars on renovations to the property with money from the Prospera Account, although a detailed accounting of these alleged expenses was not put in evidence at trial. Won testified that he wrote cheques from the Prospera Account to various contractors and sub-contractors who provided renovation services on the Marine Drive Property, and also testified that he invested considerable time and energy acting in the capacity of a general contractor.

Discussions between Jae and Won

- [33] In 2015 and 2016, Jae made multiple requests for additional financial disclosure and information concerning the Properties and also made two trips to Vancouver for the purposes of accessing documents in the possession of Jae. Jae also made a request that the brothers consider distributing profits from the Properties. During a 2015 trip Won mentioned to Jae that, rather than distributing profits, there might be a line of credit of approximately \$400,000 available to Jae. This made Jae suspicious because it was the first time Won had mentioned using funds from the Properties for personal purposes.
- [34] Following additional correspondence between the brothers where Jae took the position that Won's financial disclosure continued to be inadequate, on November 30, 2016, Won wrote an email to Jae offering to purchase his beneficial interest in the Properties. He suggested the transaction be concluded as quickly as possible without spending hundreds of thousands on accounting and legal fees, stating "[w]e should settle this matter as cheap and fast as possible and recover brother and family relationship".
- [35] Won admitted on cross examination that his offer did not disclose or account for the fact that that Won had taken over \$1.6 million out of the Corporate Trustee accounts, or that he had used this money to purchase the Marine Drive Property two years earlier. Won also took the position that he had contributed large sums of money to support the Properties, which needed to be accounted for. Won went on to state in an email that Jae "trusted [him] when he made real estate investments" and asked Jae to "trust [him] one more time."

[36] Jae did not accept Won's offer and advised Won that, before considering it, Jae wanted more information about the finances of the companies and to understand whether Won had taken money out of the companies. Throughout 2017, Jae continued to press for more financial disclosure and Won continued to refuse. Accordingly, Jae retained counsel who, on August 25, 2017, wrote a letter to counsel for Won, setting out a number of concerns after a review of the accounting records provided, including the payments made by the Corporate Trustees relating to the Mortgage Proceeds, the overcharging of management fees and the intermingling of personal expenses.

[37] In response to the letter from counsel for Jae, counsel for Won advised for the first time on September 1, 2017 that Won had taken \$1.54 million out of the Corporate Trustee accounts, although he did not admit that the funds had been used to purchase the Marine Drive Property:

With respect to the balance of \$1,540,164.37, I am advised approximately \$300,000 has been spent this year on repairs and maintenance. Copies of receipts for the repairs have been sent to your client by email and I am now obtaining further copies which will be provided to you. I am advised the balance of these funds are held in a savings account.

[38] The above statement made by counsel for Won was not accurate, as the funds had not been used for repairs, the balance was not sitting in a savings account and Jae had not received copies of receipts as indicated in the letter. In fact, the funds had been used to purchase the Marine Drive Property in 2014.

[39] Throughout 2018, Won continued to fail to disclose his use of the proceeds to purchase the Marine Drive Property. In his affidavit sworn in support of a petition for partition and sale of the Properties, Won swore he had not improperly diverted funds from the accounts of Don Won and Don Won Haro or received improper or unauthorized loans or payments and failed to disclose that he used the funds for the purchase of the Marine Drive Property. Won testified on discovery:

Q You understood it was important to be truthful to the court?

A Yeah.

Q When making a sworn statement?

A Yeah.

Q And you understood it is important to be forthright with the court?

A Yeah.

Q You say nothing in this affidavit about the fact that in 2012 and 2013 you had taken 1.6- out of the corporations and used it to buy a house; correct?

A No.

Q You'll agree with me that at the very least you've omitted to advise the court of that fact; correct?

A Yeah.

The Action and Counterclaim

[40] Jae commenced this Action against Won in 2017, in which he sought remedies for alleged improper loans and expenses and management fee overcharges by Jae and also trust remedies in respect of the Marine Drive Property purchase. Won filed a response to civil claim and counterclaim, pursuant to which he sought reimbursement for certain advances and management fees and a finder's fee.

[41] Jae did not learn that the Mortgage Proceeds had been used to purchase the Marine Drive Property until he obtained Won's bank records following document production applications in the litigation. Jae then obtained an accounting in August 2019 which traced the funds to the purchase of Won's Marine Drive Property.

[42] In November 2020, Won amended his response to civil claim to admit that he used the mortgage funds to purchase the Marine Drive Property (at para. 20):

Won admits that a total of approximately \$1.6 million was transferred from the Don Won and Don Won Haro bank accounts to accounts which Won controls. These funds were used (with other funds) to purchase the Marine Drive Property and to fund improvements and renovations to the Marine Drive Property.

The Partial Settlement Agreement

[43] In September 2019, Jae and Won reached a partial settlement in this Action (the "Partial Settlement Agreement"), resolving Jae's claims against Won for improper loans and expenses and management fee overcharges, and Won's counterclaim for a finder's fee and various management fees. As part of the settlement (a) Won caused the Corporate Trustees to pay Jae a total of \$476,330; and (b) the parties agreed an accounting would be conducted by Deloitte LLP to assess any additional amounts owing to Jae and/or Won.

[44] The parties also agreed that this Action would continue but would be limited to Jae's disgorgement, tracing, and constructive trust claims relating to the Marine Drive Property, and other alleged property.

Issues

[45] The issues at trial were:

1. Was there a breach of a fiduciary duty and trust?
2. Should a constructive trust be imposed?

3. Should Won pay occupational rent?
4. What is the legal impact of the Partial Settlement Agreement on any remedy?
5. Should Won pay punitive damages?

Legal Analysis

1. Was there a breach of fiduciary duty and trust?

[46] The defendants do not seriously contest that there was a breach of fiduciary duty and trust by Won, Don Won and Don Won Haro in this case.

[47] Pursuant to the Pendrell Trust Agreement and the Haro Trust Agreement, Don Won and Don Won Haro held legal title to the Pendrell Property and Haro Property respectively as bare trustees on behalf of Jae, who was a beneficiary. In addition, Won was the sole director and shareholder of Don Won and Don Won Haro, was solely responsible for management of the properties, and was clearly the "directing mind" of these corporations.

[48] Jae also established at trial, and Won admitted, that:

- Won arranged for the refinancing of the Properties in 2012 and 2013 resulting in the Mortgage Proceeds;
- Won transferred the Mortgage Proceeds from the Corporate Trustees' accounts to his personal account, purchased GICs with those funds, later sold those GICs, and then used the funds to purchase and renovate the Marine Drive Property, which was his personal residence; and
- Won did not advise the beneficiary Jae in advance (or indeed until 2020 when he amended his pleadings) about the refinancing, the withdrawal of the Mortgage Proceeds from the Corporate Trustees' accounts or his personal use of the funds, nor did he seek the consent of Jae at any time.

[49] In my view there was clearly a breach of a duty of loyalty and trust in this case.

[50] The primary obligation of a trustee is to preserve the property of the trust on behalf of the beneficiaries. Trustees must strictly avoid self-interest wherever their interest could conflict with the interests of those they are bound to protect: *Clock Holdings Ltd. v. Braich*, 2008 BCSC 1697 at para. 183.

[51] Trustees are bound by both the "no conflict" rule and the "no profit" rule, which were explained by the Court of Appeal in *Louie v. Louie*, 2015 BCCA 247 at para. 23:

[23] I start with the two most fundamental and long standing obligations of fiduciaries - the "no conflict" rule and the "no profit" rule. These have been stated on many occasions over several centuries, but this passage from the judgment of the High Court of Australia in *Chan v. Zacharia* (1984) 154 C.L.R. 178, summarizes the historic approach succinctly:

The first is that which appropriates for the benefit of the person to whom the fiduciary is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. [T]he two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. [At 198-9.]

(Quoted with approval by the majority in *Strother v. 3464920 Canada Inc.* 2007 SCC 24 at para. 75; see also the discussion in L.I. Rotman, *Fiduciary Law* (2005) at ch. 6.). An even more succinct statement may be found in the words of Lord Herschell in *Bray v. Ford* [1896] AC 44 (H.L.) at 51: "It is an inflexible rule of a Court of Equity that a person in a fiduciary position is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict."

[52] The Court of Appeal in *Meng Estate v. Liem*, 2019 BCCA 127 explained at para. 35 that a breach of a trustee's duty of loyalty can arise in "circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances." In this case, the first three of these circumstances were clearly established at trial. In addition, Won's failure to disclose his secret profit for years and the misinformation he provided when pressed by Jae did not in my view meet the requisite standards for honesty and good faith.

[53] In *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607 [Panorama], Justice Sewell affirmed the existence of a fiduciary relationship between a bare trustee and the trust's beneficiary, and rejected the argument that a bare trustee could treat the subject matter of the trust as its own property:

[243] The Trustee relied on the fact that 690174 was a bare trustee of Lot 1 and cited a number of cases in support of the proposition that a bare trustee owes only a limited fiduciary duty to the beneficiaries of the trust. However, those cases do not stand for the proposition that the bare trustee may treat the subject matter of the trust as its own property. As pointed out in one of the Trustee's authorities, *Scoretz v. Kensam Enterprises Inc.*, 2018 BCCA 66 at paras. 21-30, at a minimum a bare trustee has the obligation to transfer legal title to the beneficiaries of the trust upon request.

- [244] Despite arguing that 690174 owed only limited fiduciary duties as a bare trustee, the Trustee argues that 690174 had full authority to subdivide Lot 1 and transfer title to the subdivided lots to purchasers. These submissions are inconsistent. More importantly, they ignore the fact that 690174 used its registered title to take steps that profoundly affected the beneficial ownership rights of the 2007 Joint Venturers.
- [245] 690174 not only held title to Lot 1 in trust but also undertook the responsibility to apply for all necessary permits required for the development and subdivision of Lot 1. It is clear that by virtue of holding legal title to Lot 1, 690174 had the ability to affect the rights of all of the 2007 Joint Venturers. This made them vulnerable to the actions of 690174. The elements necessary to establish both an ad hoc fiduciary duty (as set out in more detail at para. 474 of these reasons) and a per se fiduciary duty on 690174 were therefore present in this case.
- [Emphasis added.]
- [54] In *Panorama*, Justice Sewell also found that the director and principal of a corporate trustee pursuant to a bare trust agreement owes the beneficiary a fiduciary duty:
- [241] In this case 690174 held title to Lot 1 in trust for the 2007 Joint Venturers. 690174 agreed that as bare trustee of Lot 1 it was responsible for applying for all necessary permits required for the development and subdivision of Lot 1. The development and subdivision of Lot 1 was the very object of the 2007 Joint Venture. In addition, Jaswant was personally appointed manager of the 2007 Joint Venture project and was the sole director and directing mind of 690174. In my view this gave rise to a per se fiduciary duty on 690174 and Jaswant.
- [55] A trustee's duty of loyalty demands that in the absence of authorization, a trustee is accountable for any right, profit or benefit acquired "by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it": *Donovan Waters*, *Waters' Law of Trusts in Canada*, (2021 Online Edition), Ch. 18 "Duties of Loyalty" at 18.II. A trustee also has a fundamental duty to account for trust property and to report on how it has been dealt with: *N-Krypt International Corp. v. LeVasseur*, 2016 BCSC 1539 at paras. 38-39; rev'd on other grounds 2018 BCCA 20.
- [56] It is clear in my view that Won's withdrawal of the money from the Corporate Trustees' accounts for personal use, without disclosure or authorization from the beneficiary Jae, constituted a breach of both the "no conflict" rule and the "no profit" rule by Won, Don Won and Don Won Haro. It is also clear that this withdrawal constituted a breach of the express terms of the Haro Trust Agreement and Pendrell Trust Agreement, which required Don Won and Don Won Haro to hold any benefit, interest, profit or advantage arising out of the Properties for the sole use, benefit and advantage of the beneficiaries and to account for any money or other consideration paid to them as trustees.
- [57] Indeed, in their closing argument, the defendants admitted that Jae should be legally entitled to a remedy:

- "17. Won does not deny that he used the funds or that there was a benefit.
18. He does not even deny that Jae is entitled to relief as a result (i.e. the opportunity cost to Jae on Won's use of the funds, or a disgorgement of the benefit Won realized)."
- [58] I conclude that there was clearly a breach of the duty of loyalty and trust in this case.
2. What is the appropriate remedy?

Positions of the Parties

- [59] Jae asks the court to impose a 45% constructive trust on the Marine Drive Property, which they argue is a remedy in proportion to Jae's share of the misappropriated funds.
- [60] Won argues that the proper relief is an order for Won to pay interest on Jae's pro rata portion of the Mortgage Proceeds from the date of withdrawal of the funds, to the date that the funds were repaid pursuant to the Settlement Agreement. In the alternative, Won submits that Jae is entitled to interest on the full amount of the Mortgage Proceeds.

Applicable Law

- [61] Equitable remedies, including equitable remedies available for a breach of fiduciary duty, are subject to the court's discretion: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 74 [Strother]. These remedies are highly fact-specific and flexible, allowing the court to do justice "in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 1997 CanLII 346 (SCC) [Soulos] at para. 34.
- [62] It is well established that a beneficiary may obtain disgorgement of any profit made by the fiduciary as a result of their breach of duty, irrespective of whether the beneficiary suffered harm or loss resulting from the breach. In *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 [Babstock], the Court described disgorgement as an award that is "calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all."
- [63] Where a breach of trust has been found, and where disgorgement is appropriate, a court has a discretion as to whether to impose a monetary remedy or a proprietary remedy in the form of a constructive trust.
- [64] In my view, the conditions for a constructive trust are met in this case. The leading case on constructive trusts is *Soulos*, in which the Supreme Court of Canada built on earlier case law concerning constructive trusts, and held that there are two situations where a constructive trust may be found: (1) where there is unjust enrichment; or (2) where there is wrongful conduct.
- [65] The Court in *Soulos* identified four conditions which should generally be satisfied in order to establish a constructive trust in the context of a breach of fiduciary obligation:

- (a) the defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- (b) the assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
- (c) the plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
- (d) there must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

Analysis

- [66] In this case, it is not disputed that Jae's total share of the funds misappropriated from the Corporate Trustees for the purposes of purchasing the Marine Drive Property was \$750,673.83, which was 45% of the total Mortgage Proceeds taken from the Corporate Trustees.
- [67] In addition, the uncontested evidence of the appraiser Brady Fleguel was that, as of June 15, 2021, the market value of the Marine Drive Property was \$3,600,000, which is a considerable rise in value from the original purchase price of \$1,682,306.13 (including tax) paid in 2014.
- [68] The defendants argue that a monetary award in the amount of the interest on either \$750,673.83 (the 45% of the total funds) or alternatively the full \$1,664,966.24 (total taken from the Corporate Trustees) is appropriate. I disagree. In my view, a constructive trust is the appropriate and fair remedy, taking into account all the circumstances of this case.
- [69] In this case, there has clearly been unjust enrichment and wrongful conduct, as required under the Soulos analysis. In addition, the first two of the four conditions in Soulos are clearly met for reasons already discussed in my analysis of a breach of trust above. There was also no evidence of any factors which would render the imposition of a constructive trust unjust, such as the interests of intervening creditors, and so the fourth condition is met.
- [70] With respect to the third condition, the plaintiff must show a monetary award would be inadequate or inappropriate. In determining whether a monetary award is inadequate the court must consider the probability of recovery and whether there is a reason "to grant the plaintiff the additional rights that flow from recognition of property rights." One of the circumstances that has been identified by the courts as making a monetary award inadequate is where the defendant's enrichment, as in this case, consists of a specific asset that has increased in value and whether the plaintiff ought to enjoy the benefit of the rising market. In *Waters* at 26.III, the authors describe the proper approach to a remedy where land has been purchased with a mixture of funds and there has been an increase in the value of the subject property:

When a mixture of value has been created, if one contributor is a wrongdoer vis-à-vis another, then in determining what is the traceable product of a contribution, the interests of the wrongdoer are subordinated. This principle is evidenced, for example, in the rules that allow an innocent victim to choose between a proportionate share or a charge. Recall the example in which a trustee misappropriates \$10,000 of trust property, combines it with his own \$10,000 and invests the \$20,000 in land. He has wrongfully created a mixture of value. The beneficiary can claim a 50 percent beneficial interest in the land, and if the land has risen in value this is the logical claim to make. If, however, the land has now dropped to a market value of \$14,000, the beneficiary would instead assert a personal claim for recovery of the \$10,000, and to secure that claim by asserting an equitable lien or charge over the whole of the land.

If there is any difficulty tracing the mix of funds as the result of the trustee intermingling funds, and the evidentiary difficulties are caused by wrongdoing, the issue is to be resolved in favour of the innocent party:

The process becomes difficult when value is mixed. The process of tracing, however, is governed by a relatively small number of principles which are easy to state. The principles are shared by the common law and Equity. They apply to genuine physical mixtures of indistinguishable things, like sawlogs or grain. They also apply to notional mixtures that may occur, for example, in bank accounts, as where trust money is mixed with the trustee's own money, or the funds of multiple trusts are improperly mixed. Indeed, the most fundamental principle applies in many cases which have nothing to do with mixtures. This is the principle that if an evidentiary difficulty has been created by an unlawful act, it is to be resolved against the person who created it.

[71] The proprietary remedy of a constructive trust proportionate to the amount of misappropriated funds was the approach affirmed by the Court of Appeal in *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448 [Ruwenzori], which confirmed the decision of the trial judge to grant a proprietary remedy in a hotel purchased in part with funds misappropriated by a fiduciary in breach of fiduciary duty. The Court cited with approval the following passage from the English case of *Foskett v. McKeown* (2000), [2001] 1 A.C. 102 (U.K. H.L.):

[40]

Accordingly, I would state the basic rule as follows. Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money.

[72] Along similar lines, in *Sarzynick v. Skwarchuk*, 2021 BCSC 443, a breach of trust case, Justice Morellato ordered the imposition of a constructive trust in the amount of the originally misappropriated funds, in addition to the appreciated value of the property.

- [73] By contrast, the defendants have provided no persuasive legal authority in support of their argument that Jae should be limited to recovering only the interest on the misappropriated funds. The defendants rely upon *In Re Hallett's Estate*, (1880) 13 Ch D 696 (Eng. C.A.) [Hallett's Case], in support of the proposition that when tracing funds where a defendant has mixed trust funds with his own funds (which was the case here with respect to Won mixing his own funds with the Mortgage Proceeds), the trustee is deemed to have used his own funds for non-trust related expenses and the trust funds for the purpose for which he received them.
- [74] However, the problem with this argument is that both the courts in England, and the Court of Appeal in this province, have declined to follow the reasoning in Hallett's Case in recent years. In *Ruwenzori*, the Court of Appeal quite definitively rejected an argument that a purchase made with mixed funds served as a bar to a proprietary remedy, observing that to allow the defendant to profit from their wrongdoing by retaining the increase in the asset value would be a "strange result to say the least":
- [42] The appellants take the further point that because the assets were purchased out of a mixed fund, a proprietary remedy ought not to be available in law to the respondents. Particular reliance was placed on the trial decision in this jurisdiction of *Betterly*. There, the defendant employee had been guilty of a substantial defalcation from the plaintiff. Some of the stolen money was used, along with legitimate funds, to buy a piece of property. Based on the authority of *In re Hallett's Estate* (1880) 13 Ch.D. 696, Bouck J. held that since the property was purchased from a mixed fund "the plaintiff cannot take the land itself but must be satisfied with a charge on the house". The appellants rely on this statement to submit that the trial judge erred in granting the respondents a proprietary remedy concerning the *Roehampton* and the limited partnership interests. Interestingly, the result of the order in *Betterly* seems to have been equivalent to a proprietary remedy since the plaintiff was found entitled to a share proportional to the stolen money contribution in any profit upon sale, which sale was ordered by the judge.
- [43] The judgment in that case, while not binding on this Court, would of course be of persuasive authority. However, in my view, the case on the particular point argued by the appellants should no longer be considered authoritative. The House of Lords refused to follow Hallett's Estate in the *Foskett* case. Lord Millett said at p. 131:

In *In re Hallett's Estate*; *Knatchbull v Hallett* (1880) 13 Ch D 696, 709 Sir George Jessel MR acknowledged that where an asset was acquired exclusively with trust money, the beneficiary could either assert equitable ownership of the asset or enforce a lien or charge over it to recover the trust money. But he appeared to suggest that in the case of a mixed substitution the beneficiary is confined to a lien. Any authority that this dictum might otherwise have is weakened by the fact that Sir George Jessel MR gave no reason for the existence of any such rule, and none is readily apparent. The dictum was plainly obiter, for the fund was deficient and the plaintiff was only claiming a lien. It has usually been cited only to be explained away: see for example *In re Tilley's Will Trusts* [1967] Ch 1179, 1186, per Ungood-Thomas J; Burrows, *The Law*

of Restitution (1993), p. 368. It was rejected by the High Court of Australia in *Scott v Scott* (1963) 109 CLR 649: see the passage at pp 661-662 cited by Morritt LJ below [1998] Ch 265, 300-301. It has not been adopted in the United States: see the American Law Institute, Restatement of the Law, Trusts, 2d (1959) at section 202(h). In *Primeau v Granfield* (1911) 184 F 480, 482 Learned Hand J expressed himself in forthright terms: "On principle there can be no excuse for such a rule."

In my view the time has come to state unequivocally that English law has no such rule. It conflicts with the rule that a trustee must not benefit from his trust. I agree with Burrows that the beneficiary's right to elect to have a proportionate share of a mixed substitution necessarily follows once one accepts, as English law does, (i) that a claimant can trace in equity into a mixed fund and (ii) that he can trace unmixing money into its proceeds and assert ownership of the proceeds.

[44] Thus, the circumstance that it may not have been exclusively funds of Nor Sham U.S. that funded the purchase of the Canadian hotel property is no bar to awarding a proprietary remedy to the respondents. I see no principled reason why a person whose monies were in part used to buy an asset cannot obtain a proportional proprietary interest in the asset. In my opinion, Pitfield J. was entitled to make the award he did. I would go further and say that indeed he was almost obligated to make such an order on the facts of this case, for to refuse such an order would amount to allowing wrongdoers to profit from their wrongful conduct, a result a court of equity could not countenance.

[Emphasis added.]

[75] A similar approach was adopted by the Court of Appeal in *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357 at para 31:

[31] This argument seems to combine two points - first, that the subject-matter of the proposed trust, i.e., money, is inappropriate to found a constructive trust; and second, that the connection between the Unlawful Finance Charges and the defendants (or more properly, the Storefront Lenders) was insufficient for that purpose. In my view, the first point must fail: it is clear from the authorities that funds, or accounts, are a proper subject for a constructive trust. As the plaintiffs note, Equity has since at least the 19th century permitted beneficiaries of trusts to assert proprietary interests in respect of funds and any property into which they have been transformed, by means of following (at law) or tracing (in law or in Equity). Recent examples of proprietary remedies granted in respect of funds followed into mixed or "co-mingled" accounts include *Waxman v. Waxman* 2002 CanLII 49644 (ON SC), [2002] O.J. No 2528, 25 B.L.R. (3d) 1 (Ont. S.C.), aff'd. 2004 CanLII 39040 (ON CA), [2004] O.J. No. 1765 (C.A.), which contains an extensive analysis of the Canadian law relating to tracing; supplemental reasons at 2002 O.J. No. 3533, which discuss the timing of discovery and tracing orders; and *Ruwendori Enterprises Ltd. v. Walji*, 2004 BCSC 741, aff'd. 2006 BCCA 448. In the latter case, Hall J.A. for this court noted *Foskett v. McKeown*, [2001] A.C. 102, where the House of Lords rejected the suggestion made in obiter by Sir George Jessel M.R. in *In re Hallett's Estate*; *Knatchbull v. Hallett* (1880) 13 Ch.D. 696 that in cases of a "mixed

substitution", the beneficiary was confined to a lien. Lord Millett stated in *Foskett*:

In my view the time has come to state unequivocally that English law has no such rule. It conflicts with the rule that a trustee must not benefit from his trust. I agree with Burrows that the beneficiary's right to elect to have a proportionate share of a mixed substitution necessarily follows once one accepts, as English law does, (i) that a claimant can trace in equity into a mixed fund and (ii) that he can trace unmixed money into its proceeds and assert ownership of the proceeds. [At 131; emphasis added.]

No principled reason was suggested to us as to why a restitutionary constructive trust should be any different in this regard from other types of trust.

- [76] Although the defendants correctly note that Hallett's Estate was referenced and applied by the British Columbia Supreme Court more recently in *Panorama and 0409725 BC Ltd.* (Bankruptcy of), 2019 BCSC 451, I consider myself to be bound by the Court of Appeal authority on this issue, taking into account the specific facts of this case. I also note that there was no discussion of the reasoning in *Ruwenzori* in these two cases, which leads me to believe that the above passage dealing with Hallett's Estate in that case may not have been brought to the attention of the court in those decisions.
- [77] Further, it is my view that an award of interest only, as asserted by the defendants, would not serve the necessary prophylactic purpose in this context. If I were to grant the remedy sought by the defendants, it would have the effect of allowing Won to benefit from his breach of trust, since the more than doubling in market value of the Marine Drive Property (of just under \$2 million) clearly substantially exceeds the value of any notional interest payments over that same period, with the result that Won would benefit from his breach of trust. Such a result is inconsistent with the policy objective of the disgorgement remedy, which is to deter faithless fiduciaries. The Supreme Court of Canada described this objective in *Strother* as follows:

[77] The concept of the prophylactic purpose is well summarized in the *Davis* factum as follows:

[W]here a conflict or significant possibility of conflict existed between the fiduciary's duty and his or her personal interest in the pursuit or receipt of such profits . . . equity requires disgorgement of any profits received even where the beneficiary has suffered no loss because of the need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship. [Emphasis omitted; para. 152.]

Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying *Strother* profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.

[Emphasis added.]

- [78] In Babstock at para. 23, the Court described disgorgement as an award that is "calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all." The remedy for the breach of fiduciary duty will not necessarily correspond to the loss to the beneficiary, focusing instead on the unjustified gain of the faithless fiduciary.
- [79] That said, there is authority for the proposition that a faithless fiduciary may be able to obtain a "discount" on the plaintiff's interest in land if there is evidence that any increase in value is attributable to the defendant's contribution, not market forces. However, the evidentiary onus is on the defendant to prove that it would be inequitable to order an account of the entire profits and the defendant must prove which profits are attributable to the defendant alone.
- [80] In *Hollett v. Hollett*, 1993 CanLII 8441 (NLSC), the Court found that the defendants had failed to meet the onus of proving that their efforts had increased the market value of the land, entitling them to a discount:
- [143] The defendant also says that the value of the land has increased as a result of his improvements and that it would be inequitable to allow the plaintiff to recover the property in such circumstances. There is, however, no evidence that any increase in value of the land was caused by active contribution by the defendant as opposed to passive appreciation as a result of normal market forces. If any increase had been the result of the former, then the defendant might be entitled to an equitable lien on the plaintiff's interest for the value of that improvement; it would still not, in my view, disentitle the plaintiff to his claim to the land, in light of the non-permanent nature of those improvements. However, as I have said, no evidence of any increase in value or its causal connection to work performed by the defendant has been presented and I am not prepared to infer that the defendant's work or the land necessarily was the cause of any increase in value, even if that increase in value had been established.
- [81] In my view, Won has failed to meet the evidentiary onus in this case that the renovations he undertook increased the value of the Marine Drive Property. Although he did adduce evidence of invoices which he claimed related to renovations totalling \$527,725.96, he tendered no admissible and compelling evidence to establish that these costs actually increased the value of the Marine Drive Property. At trial, the defendants sought to adduce as expert evidence a construction costing report of Mr. Bryan Reid, in which he described the renovations completed by Won to the Marine Drive Property and opined on how much it would have cost a property owner in 2014 to complete these property renovations. I ruled this report to be inadmissible at trial on the basis that it did not comply with Rule 11-6(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009, because it does not set out a description of the factual assumptions on which the opinion is based and also failed to satisfy the common law admissibility requirements for expert opinions.

[82] Absent this report, there was no expert evidence (and very little other evidence at trial) to support the conclusion that the renovations undertaken by Won added much, if any, value to the Marine Drive Property. Rather, the evidence, for four reasons, supports a finding that the increase in value is largely attributable to the value of the land itself, in a rising real estate market. First, the plaintiff's expert Brady Fleguel, a certified appraiser, opined that the funds spent on renovations do not reflect the market value of real estate in Vancouver, B.C. Second, the B.C. assessed value for the Marine Drive Property attributes a very small proportion of the property value to the house (approximately 3%), with the majority attributed to the land (97%). Third, Won admitted that he did not obtain the necessary permits from the City of Vancouver to complete the renovations. There was no evidence to at trial support a conclusion that unpermitted renovations, in particular, add any value to a property. Fourth, the descriptions attached to the invoices were very brief or non-existent in many instances, requiring the court to infer that they were actually related to the renovations and not some other purpose. Such an inference is made more difficult in this case by the fact that some of the invoices had no descriptions and others had descriptions that appeared to indicate purchases which were not obviously renovation-related (for example, a barbeque and a chair). I therefore decline to make that inference, in the absence of other compelling supporting evidence.

[83] I conclude that Jae is entitled to a 45% constructive trust over the Marine Drive Property (equivalent to his interest in the Corporate Trustees and therefore to the Mortgage Proceeds), with no discount attributable to renovations undertaken by Won. The parties have leave to reappear and seek directions and further orders in relation to giving effect to the constructive trust: in *Pirani v. Pirani*, 2020 BCSC 974 at paras. 344-345.

3. What is the impact of the Partial Settlement Agreement on the remedy?

[84] In September 2019, Jae and Won entered into the Partial Settlement Agreement.

[85] Pursuant to the Partial Settlement Agreement, the Pendrell and Haro Properties were to be subject to disposition, either through a negotiated transaction or forced sale. The parties also agreed that this Action would continue but be limited to Jae's disgorgement, tracing, and constructive trust claims relating to the Marine Drive Property, and other alleged property. The Partial Settlement Agreement included the following key terms:

- (a) the parties would file a consent dismissal order, dismissing the Counterclaim advanced by Won and the Corporate Trustees. In addition, Won agreed not to seek leave to advance any further counterclaim in the Action, or to commence any separate proceeding dealing with the subject matter of the Action;
- (b) Paragraph 1b. stated as follows:

Jae's proposed disgorgement, tracing and constructive trust claims relating to the Marine Drive Property, and other alleged Property, will continue (the "Disgorgement/Tracing Claim"). Nothing in this agreement shall prevent Won from raising in the Disgorgement/Tracing Claim any matter of fact Won raised or could have raised in the Action and Counterclaim (without seeking any set-off in respect thereof).

The Disgorgement/Tracing Claim was defined to include paragraphs 36, 37(a), 40 and 43 through 51 in the Further Amended Notice of Civil Claim which included material facts and allegations relating to Won's transfer of the \$1.6 Million from the Corporate Trustees to purchase the Marine Drive Property and the alleged breach of trust;

- (d) an accounting will be conducted to assess any additional amounts owing to Jae and/or Won, which will be conducted by an accountant selected by Jae (the "Accounting");
 - (e) Within 7 Business days Won will cause the corporate trustees to pay a total of \$476,330 to Jae's counsel, which he would be entitled to retain regardless of the outcome of the Accounting; and
 - (f) Won represents and warrants that on or before August 28, 2019, a total of \$721,600 was paid by him, or by companies controlled by him, to the Corporate Trustees.
- [86] On September 23, 2021, the Corporate Trustees paid \$476,330 to Jae's counsel in accordance with the Partial Settlement Agreement.
- [87] Deloitte LLP was retained to conduct the Accounting. The Accounting process is ongoing but has not completed.

Positions of the Parties

- [88] The defendants argue that the Partial Settlement Agreement limits the amount Jae can recover in this action to the profits earned from the misappropriated funds, and precludes a claim for return of the principal. They argue that the wording relating to the scope of the Accounting did not expressly carve out an exception for the Mortgage Proceeds paid toward the Marine Drive Property, and was broad in nature (e.g. "to assess any additional amounts owing to Jae and/or Won", the "amounts advanced to each of the Corporate Trustees by each of Jae and Won" and the "amounts paid to each of Jae and Won" by the Corporate Trustees). The defendants further argue that the \$721,600 Won transferred back to the Corporate Trustees and the \$476,330 paid to Jae were intended to be payments on account of the principal, and that an order imposing a constructive trust on the Marine Drive Property would therefore constitute double counting.

[89] Jae argues that the wording relating to the Disgorgement/Tracing Claim in the Partial Settlement Agreement was expressly intended to carve out the money paid toward the Marine Drive Property from the scope of the Accounting, and that the scope of the Accounting was intended to relate solely to Jae's claims against Won for improper loans and expenses and management fee overcharges, and Won's counterclaim for expenses, a finder's fee and various management fees.

Analysis

[90] I note at the outset that the defence on this issue was not pleaded by the defendants in their further amended response to civil claim and, accordingly, they seek leave of the court to amend their pleadings as follows (in accordance with *Batyka v. Barber*, 2014 BCSC 769 at paras. 24-25):

"The Partial Settlement Agreement between the parties limited Jae's claim to disgorgement, tracing and constructive trust claims over any benefit the Defendants received arising out of any breach of trust or fiduciary duty.

Any claim Jae may have in relation to the principal amount of the approximately \$1.6 million he transferred to his personal accounts was extinguished by the Agreement.

Won pleads and relies on the Partial Settlement Agreement."

[91] Jae argues that such an amendment would be prejudicial because Won took the position on discovery that the manner by which the \$476,000 settlement payment was calculated was not relevant to this Action and refused to answer questions on that basis. Jae also argues that if he had been put on notice by the defendants in advance of trial that they would take the position that the \$476,000 represented a repayment of a portion of the misappropriated funds, then counsel would have pursued document production and undertaken a full investigation of how the amount was calculated. Since Jae has had no opportunity to do so, he argues would be highly prejudicial if the defendants are allowed to make such an argument now.

[92] While Jae's arguments do have considerable force, I am prepared to allow the amendment proposed by the defendants because, in my view, it is necessary for the purpose of determining the real issues at trial and, in particular, to give guidance to the parties with respect to the ongoing Accounting. In this respect, the amendment benefits both parties by lending clarity to the Accounting process. I also note that the argument of the defendants was raised in the opening statement at the outset of the trial, and not in closing argument, and therefore would not have materially changed the course of the trial.

[93] However, although I am prepared to allow the amendment to the defendants' pleadings, I also find that I do not accept their contractual interpretation argument. In my view, on a plain reading of the Partial Settlement Agreement as a whole, the amounts implicated in the Disgorgement/Tracing Claim, including the principal, were clearly intended to be excluded from the Accounting.

[94] I have reached this conclusion for five reasons. First, para. 1(b) of the Partial Settlement Agreement specifically referenced the paragraphs in Jae's further amended notice of civil claim that he was entitled to pursue in the Action, stating:

"The factual basis of which is set out in paras. 36, 37(a), 40 through 43 and 51 of the Statement of Facts of Jae's proposed Further Amended Notice of Civil Claim in the Action, appended to his Notice of Application filed August 19, 2019."

[95] This is significant because these paragraphs in the further amended notice of civil claim specifically referenced Jae's claim to both the principal and any profits arising from the purchase of the Marine Drive. For example, the definition of "Diverted Funds" in para. 40 specifically referenced the principal amount of \$1.6 million, and para. 7 of the Relief Sought expressly included a request for an accounting of not just the profits but also the original proceeds and payments (i.e. the principal):

"all proceeds and payments received by Won and Won's Companies improperly loaned, paid, transferred, appropriated, received or converted by the Won and Won's Companies in breach of trust and/or fiduciary duty and all proceeds, profits, value, benefit, or payments received by the Won or Won's Companies arising from such payments, transfers, appropriations, conversions, or receipts "

[Emphasis added.]

[96] I note in particular the use of the word "and" (which I have underlined), which is clearly in my view intended to clarify that both the original payments and any profit were intended to be included in the Disgorgement/Tracing Claim.

[97] Second, para. 1(b) of the Partial Settlement Agreement expressly prevented Won from seeking a "set-off" in the Disgorgement/Tracing Claim with respect to matters of fact he could have raised in the Action and Counterclaim, and yet this is precisely what Won is seeking to do here. If the parties had intended that the \$476,330 payment to Jae referenced in paragraph 3a. of the Partial Settlement Agreement, or any other alleged payment on account of capital, was to be set off against the amounts sought in the Disgorgement/Tracing Claim, they could have made that clear in paragraph 1b. but they did not.

[98] Third, I find it significant that the language in s. 3(b) of the Partial Settlement Agreement, which sets out the scope of the Accounting, makes no reference to the Disgorgement/Tracing Claim and yet does make specific reference to other specific categories of expenses, including management fees, advances and expenses relating to the Corporate Trustees. This is consistent with the conclusion that the scope of the Accounting was intended to relate

solely to the matters set out in s. 3(b), including Jae's claims against Won for improper loans and expenses and management fee overcharges, and Won's counterclaim for expenses, a finder's fee and various management fees, and not the Disgorgement/Tracing Claim referenced in s. 1(b). Thus although the defendants are correct, as referenced above, that the wording in s. 3(b) is broad in nature, I read that language as being broad with respect to the matters referenced in s. 3(b), and not as being intended to encompass the matters referenced in s. 1b. (which are not referenced in s. 3(b)).

- [99] Fourth, Won's proposed interpretation of the Partial Settlement Agreement would render the agreed upon Accounting provisions redundant. In order for this Court to evaluate Won's entitlement to a set-off it would need to review the entire financial history of the Corporate Trustees and assess what amounts if any are owed to Won. However, this is the very process that the parties agreed would not be the subject of this Action, but rather would be assigned to Deloitte LLP in the Accounting and is currently ongoing. Based on the limited accounting evidence proffered at trial, this Court would simply not be in a position to rule globally on this issue.
- [100] Fifth, although Won testified at trial that the \$476,000 payment was on account of principal and adduced into evidence a document (not produced prior to trial to the plaintiff) which he alleged evidenced his calculations in this respect, I note that this testimony was directly contradicted by his testimony on discovery that the payment had nothing to do with the Disgorgement/Tracing Claim. Further, and in any event, as set out in *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at para. 43, the subjective intentions of the parties are not admissible for the purpose of varying, or modifying the terms of a contract:
- [43] Extrinsic evidence to explain the meaning of an unambiguous contractual provision is not admissible. Evidence of a party's subjective intention in executing the contract, or of their understanding of the meaning of the words used in the contract, is not admissible to vary, modify, add to or contradict the express words of the written contract. This is particularly so where a contract contains an "entire agreement" clause. As was noted by the authors of *Cheshire, Fifoot and Furmston's Law of Contract*, 13th ed. (London, UK: Butterworths, 1996) at p. 127, "the court is usually concerned not with the parties' actual intentions but with their manifested intention."
- [101] Won's subjective intentions as to how he calculated the settlement payment cannot be used to modify, vary, add to or contradict the express wording of the Partial Settlement Agreement.
- [102] Thus, I conclude that the Partial Settlement Agreement does not preclude Jae from seeking both the principal and any profits or gains relating to the Marine Drive Property in this Action.
- [103] That said, I am conscious of the concern raised by counsel for Won about the potential for double counting arising during the Accounting. The parties are agreed that any double counting would in principle be incorrect, and counsel for Won has undertaken not to

pursue any amounts in the Accounting which are ordered to be paid or owed in this Disgorgement/Tracing Claim. For clarity during the Accounting process, I reiterate that this decision fully addresses any amounts owing arising from the Disgorgement/Tracing Claim (taking into account principal payments, profits and interest relating to the Marine Drive Property), and that such amounts should therefore not form part of any calculations made during the Accounting process.

- [104] However, if Deloitte LLP were to determine in the Accounting that certain prior payments made by Won or the Corporate Trustees were in respect of principal payments, profits and interest relating to the Marine Drive Property, and not the matters referenced in s. 3b., in my view it is fair that Jae's interest in the Marine Drive Property, pursuant to the constructive trust, should be reduced by that amount to account for any prior reimbursement, and to avoid double counting.
- [105] In reaching this conclusion, I note that there was insufficient evidence adduced at trial to enable me to resolve this accounting issue. In this regard, I note that both parties in their closing arguments presented conflicting alternative theoretical methods by which the \$476,000 settlement amount could be attributable either to the principal amount (Won's argument) or to improper credit card charges, loans and management fees (Jae's argument). However, neither party presented the necessary evidentiary base, including the expert accounting evidence that would be required, to enable this issue to be resolved at trial.
- [106] Further, I find that Won failed to prove at trial that he ever actually repaid the principal he alleges he did. Although Won represented that he paid approximately \$721,000 to the Corporate Trustees, he admitted on discovery that he used the funds to pay the \$476,333 to Jae and then immediately transferred the remainder of the funds back to himself. Thus, the evidence was insufficient at trial to determine whether, and to what extent, the misappropriated funds were ever repaid. Again, this is a matter that is best determined in the Accounting process. To the extent that the Accounting process fails to resolve this issue, and a dispute remains, I am content to remain seized for the limited purpose of resolving this remaining issue.

4. Should Won pay occupational rent?

Positions of the Parties

- [107] Jae seeks occupational rent with respect in proportion to his share of the Marine Drive Property, being 45% of the market value of rent from the date of Won's purchase of the property to the date of trial.
- [108] Won argues that the value of any notional occupational rent is more than offset by the value of the improvements Won made to the Marine Drive Property, and also by the carrying expenses for the property.

Legal Principles

- [109] Occupational rent is an equitable remedy that seeks to compensate a party for the deprivation of use of property which they are entitled to possess and enjoy, where it is just and equitable to do so: In *Dacyshyn v. Semeniuk*, 2007 BCSC 71 at para. 40. In *Royal Trust v. Barter et al*, 2000 BCSC 1842 [Royal Trust] this Court made an award of occupational rent to the trust beneficiary plaintiffs. In *Royal Trust*, a defendant trustee had received a \$100,000 unauthorized loan from a trust to purchase real property in Langley. The plaintiff was awarded occupational rent because the defendant, as a trustee "benefitted from the use of the property" and "that benefit must be disgorged to the benefit of the beneficiaries" of the trustee: *Royal Trust* at paras. 45-47.
- [110] Traditionally, occupational rent awards have been limited to cases where there has been an ouster or where the occupying tenant put forward a claim for expenditures made to the benefit of the property. However, Justice Newbury in *Wang v. Jiang*, 2021 BCCA 132 [Wang] explained at paras. 73-76 that the law has recently evolved to focus more on the deprivation than the ouster:
- [73] The nature of and conditions necessary for the awarding of occupational rent appear to be evolving in the law. In this regard, I note *Re Bankruptcy of Kostiuk* 2002 BCCA 410, in which this court quoted from *Dennis v. MacDonald* [1981] 1 W.L.R. 810 (Fam. Div), aff'd [1981] 2 W.L.R. 275 (C.A.); *L.M.R. v. J.F.R.* 2010 BCSC 363 at paras. 28-9; and *Oyama v. Oyama* 2009 BCCA 114 at para. 34. In *Re Crate Marine Sales Ltd.* 2016 ONCA 433, the Court took a less technical approach than that taken in *Kostiuk* concerning the necessity for a co-owner claiming occupation rent to show that he or she had been "put out of" his or her right of occupation. Mr. Justice Blair reasoned as follows in *Crate Marine*:

As the jurisprudence referred to above establishes, there is a long-standing principle that where a person occupies the property of another, that occupation gives rise to a rebuttable presumption, based on an implied contract, that the occupier will pay rent to the owner for the use of the property. Receivers, liquidators and trustees in bankruptcy and others with similar obligations who occupy the premises of the debtors are bound by that principle: ...

I agree that the jurisprudence does not support the view - to the extent it may have been adopted by the motion judge - that the obligation to pay occupation rent requires "some form of deprivation of use" in addition to occupation of the premises. However, the notion of "deprivation of use" led to considerable discussion on the appeal about the interaction between it and the concepts of "occupation" and "possession" raising several questions. Is deprivation of use the equivalent of occupation, or one of the indicia of occupation, or something in addition to occupation, for these purposes? Is possession the same as occupation for these purposes? Does taking possession constitute a sufficient deprivation of use to constitute occupation for these purposes?

While these questions may generate an interesting debate at a certain esoteric level, they need to be kept in perspective for purposes of determining whether a trustee or receiver has occupied premises in the context of liability for occupation rent. The threshold test for occupation rent is "occupation". It is not deprivation of use or possession. However, deprivation of the right of use, or possession, to the exclusion of the landlord will no doubt - in most cases at least - be tantamount to occupation for these purposes. [At paras. 22, 24-5; emphasis added.]

[74] In the family law context, courts have long taken the view that "the object of an award of occupation rent is to do equity between the parties." (See *Donovan v. Donovan* (1986) 1986 CanLII 774 (BC SC), 7 B.C.L.R. 221 (S.C.), per Paris J.) In *Stasiewski v. Stasiewski* 2007 BCCA 205, Mr. Justice K. Smith quoted with approval the following passage from *Donovan*:

... Furthermore, if the occupying tenant put forward a claim for expenditures made to the benefit of the property (as in the case at bar), [the co-tenant out of possession] was required as a condition of that equitable relief to submit to a claim for occupational rent - and this, apparently, regardless of whether or not the non-resident tenant had vacated the property voluntarily.

Smith J.A. then continued:

Continuing, he [Paris J.] observed that "ouster" would be irrelevant in the case before him, since the husband made a claim for expenditures to the benefit of the property, and that, in any event, the wife's claim for occupation rent was not made as a cause of action under ordinary property law, but rather as a factor to be considered in the division of family assets. He concluded that the claims for expenses and for occupation rent should be considered relevant to the division of family assets.

More recently, in *Dacyshyn v. Semeniuk*, 2007 BCSC 71, a case in which occupation rent was claimed as a cause of action in itself, Humphries J. canvassed the case law on the subject, including *Donovan*. She dismissed the action as unsupported on the evidence but, in her useful review of the law, she came to the same conclusion as had Paris J., that occupation rent is awarded when it is just and equitable to do so. [At paras. 28-30 of *Stasiewski*; emphasis added.]

(See also *Storey v. Terry* 2020 BCCA 30 at paras. 26-8.)

[75] In the case at bar, the question of occupational rent arose when it became apparent at trial that the defendants had ceased renting out Sunnymede and moved into it themselves. Mr. Wang sought in his petition an accounting of the joint venture's bank account, the defendants' "TD bank shared bank account", and a summary and proof of "all rent received on the Property and where the money was deposited and withdrawn, and an accounting of what it was used for". He did not claim to have been kept out of possession or occupation of the property, but as I understand it, was seeking to enforce the terms of the joint venture agreement -- in particular the term that all revenues and expenses relating to the property would be accounted for and that withdrawals by Mr. Jiang and his appropriations of rent collected from tenants in the house would be applied against his proportionate share of the profits. (See para. 633.) The trial judge found that Mr. Jiang had "collected rent without

accounting to Mr. Wang for it" (at para. 638) and that Mr. Wang had never agreed that the Jiangs could occupy Sunnymede "for their own benefit". (At para. 671.)

- [76] It seems to me that the plaintiff's claim was not for "occupational rent" per se but for Mr. Jiang's breach of the joint venture agreement, and either damages for loss of rental income resulting from the Jiangs' unauthorized occupation of Sunnymede, or restitution for the unjust enrichment of the defendants. If this is correct, it was not necessary in my view to demonstrate ouster: occupational rent was not claimed as a 'stand-alone' remedy. The defendants were saved the personal expense of providing their own accommodation and the value of that benefit was found to be approximately \$4,000 per month. The equities might have favoured the award of an amount in restitution to account for the Jiangs' occupation -- but only after accounting for mortgage payments or other contributions made during the same period.

Analysis

- [111] In this case, there was no evidence of ouster of Jae from the Marine Drive Property, although under the circumstances this would not be a reasonable prerequisite to impose since Won had taken active steps to conceal from Jae for years that Jae even had an interest in the property (and therefore Jae was not in a position to demand occupancy). However, even absent a formal ouster, there is no question in this case that Jae did suffer a deprivation with respect to the use of the Marine Drive Property (or the receipt of rent with respect to that property), as discussed in Wang. Won also made a claim at trial for expenditures made to the benefit of the property (which the cases have recognized as a basis for a claim for occupational rent) and clearly enjoyed the benefit of the use of the property rent-free. In the alternative, as Justice Newbury reasoned in Wang, Won breached the Trust Agreements, and either damages for loss of rental income resulting from Won's unauthorized occupation of the Marine Drive Property or restitution for the unjust enrichment of Won would be appropriate.
- [112] In my view, Won was enriched by having the use and benefit of the mortgage-free Marine Drive Property. Jae, who as a result of Won's breach of trust has an equitable interest in the Marine Drive Property, was subsequently deprived of the rental income that he would have been entitled to as part owner of the Marine Drive Property. An award of occupational rent up to the date of trial (and beyond to the extent that Won has continued to live at the property) is just and equitable in these circumstances.
- [113] The quantum of occupational rent is determined based on the market value for rent of the property: *Reagh Estate (Re)*, 2021 BCSC 1807, at para. 21. However, the reasonable costs of maintaining the property must be set off against this amount, including taxes, utilities, upkeep and also any improvements made to the property.

- [114] The expert evidence of Mr. Fleguel at trial was that the cumulative fair market value of rent for the Marine Drive Property from January 13, 2014 to June 15, 2021 was \$365,566. Mr. Fleguel calculated the cumulative market value of rent by selecting a mid-point cumulative rent between his calculations of Residential Tenancy Act, S.B.C. 2002, c. 78 [RTA] and Market Rent. Mr. Fleguel identifies the RTA rent as \$3,894 and Market Rent as \$4,700 for the month of June 2021, the last month he provides the calculation for.
- [115] Jae seeks 45% of the market value of rent for the Marine Drive Property from the date of Won's purchase of the property to the date of trial. The plaintiffs' occupational rent claim of \$172,964, represents 45% of \$384,366 calculated below as follows:
- a) From January 13, 2014 to June 15, 2021, fair market rent is \$365,566 (Fleguel report, at p. 58);
 - b) From June 2021 to September 2021 (the date of trial), an additional \$18,800 (adopting the \$4700 per month figure) is sought.
- [116] In my view, the rent calculation should reflect the mid point between RTA rent as \$3,894 and Market Rent as \$4,700, which is \$15,576, which results in \$171,514.
- [117] As discussed above there was no compelling admissible evidence concerning the value of the alleged improvements made to the Marine Drive Property and therefore I am not in a position to offset the value of those amounts. However, Won did adduce evidence of utilities, insurance and property tax payments in the amount of \$91,732, which I will round up to \$96,000 to account for the additional months up to the date of trial. Jae's 45% proportionate share of that would be \$43,200, and accordingly the occupational rent award is reduced to \$128,314.
- [118] I grant the parties leave to appear before me if they are unable to agree on any additional amounts of occupational rent that should be payable between the date of the trial and the date of this decision (and potentially beyond depending upon how the property is ultimately dealt with).
5. Should punitive damages be awarded?
- [119] Jae seeks punitive damages against Won.
- [120] In *Whiten v. Pilot Insurance Co*, 2002 SCC 18, the Supreme Court of Canada set out the factors that must be taken into account when determining whether punitive damages are appropriate. These factors are:
- (a) Punitive damages are very much the exception rather than the rule;
 - (b) 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;

- (c) 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;
- (d) Having regard to any other fines or penalties suffered by the defendant for the misconduct in question;
- (e) Punitive damages are generally awarded 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;
- (f) Their purpose is not to compensate the plaintiff, but 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;
- (g) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives;
- (h) They are given in an amount that is no greater than necessary to rationally accomplish their purpose;
- (i) 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;
- (j) 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.

[121] In my view, an award of punitive damages is not merited in this case for a number of reasons.

[122] First, I am conscious of the fact that punitive damages are considered to be very much the exception rather than the rule.

[123] Second, in my view Won's conduct did not meet the threshold standard for "high-handed, malicious, arbitrary, or highly reprehensible misconduct" required to impose punitive damages. While there is no question that Won breached his fiduciary obligations and concealed this fact from Jae, his behaviour must also be understood in the family context in which it took place. It was Won who first identified the Properties as a business opportunity, and Won who managed all aspects of the business, while Jae remained merely a passive investor. Won made it clear in his testimony that he resented Jae's lack of contribution to the business, and also testified that he regularly made contributions of his own money to keep the business afloat, particularly in the early years. While this does not excuse the breach of trust, his prior intermingling of his own money with corporate money does at least provide an explanation as to why Won also felt comfortable withdrawing money from the corporate accounts, without consulting with Jae. Won also testified that he could have

obtained financing for the purchase of the Marine Drive Property on his own but chose to use the GIC funds because they offered a favourable interest rate advantage (that accrued to both brothers). Thus this was not a situation involving theft, but merely convenience with respect to access to funds.

[124] Third, it is significant in my view that Jae has suffered no losses as a result of Won's actions. To the contrary, Jae has profited handsomely from these investments. The Pendrell Property, originally purchased for \$2,850,000, sold to an unrelated purchaser for \$8,375,000 in 2021 (a gain of \$5,525,000). The Haro Property, originally purchased for \$3,660,000, sold to an unrelated purchaser for \$10,000,000 in 2021 (a gain of \$6,340,000). The Marine Drive Property has also increased in value by over \$2 million. Jae has shared in these profits in proportion to his investment. Thus, ultimately, the harm caused to Jae is minimal under the circumstances, and he will be made whole as a result of my orders in this case.

[125] Fourth, I am conscious of the fact that, as a result of the findings of a constructive trust and occupational rent, Won has already incurred a significant financial cost, which unto itself serves the function of retribution, deterrence and denunciation. In my view, the prophylactic function served by these awards, which is not connected to any actual loss suffered by a plaintiff, serves a function similar to punitive damages. It would be excessive in this context to add a punitive damages award on top, which would run the risk of disproportionately compensating Jae.

Order

[126] On the basis of the foregoing, I order as follows:

- a) A declaration that Jae is entitled to a 45% constructive trust in the Marine Drive Property;
- b) This interest shall be subject to a proportionate reduction if the Accounting determines that Won or the Corporate Trustees have made any prior payments to Jae in respect of the principal, interest and profit at issue in the Disgorgement/Tracing Claim. If the Accounting does not resolve this limited issue, I am prepared to remain seized for the limited purpose of resolving any outstanding disputes;
- c) An order that the parties have leave to reappear and seek directions and further orders in relation to giving effect to the constructive trust;
- d) Occupational rent from the time of the purchase of the Marine Drive Property to the date of trial in the amount of \$128,314;
- e) The punitive damages claim is dismissed;
- f) Interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[127] The parties have leave to make submissions on the issue of costs.

"M. Taylor J."

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Prepared on 26 October 2026 · Esheria