

CANADA / JUDGMENT

Mand v. Cheema

2025 BCSC 1595

COURT

Supreme Court of British Columbia

DECIDED

19 August 2025

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2025 BCSC 1595 Mand v. Cheema

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mand v. Cheema,

2025 BCSC 1595

Date: 20250819

Docket: S205263

Registry: Vancouver

Between:

Gurdarshan Singh Mand, Jagpal Kaur Mand, Kuldip Singh Gill, and

Sukhminder Kaur Gill

Plaintiffs

And

Harjinder Singh Cheema, Cheema Brothers Trucking Ltd., and

Cheema Bros. Transport Ltd.

Defendants

Corrected Judgment: The headings in the judgment and table of contents have been updated on October 9 and 22 2025.

Before: The Honourable Justice Blake

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

June 12, 13, 15, 16, 19-21, 23, 26-30,

July 4-7, 2023,

January 15, 16, 22, 29, 31,

February 12-16, 20-23, 26-29,

March 1, 4-6,

June 24-28,

July 2-5, 10-12, 15-19, 22-26,

29-31,

August 1, 2, 6-9, 12-16, 19-23, 26-30,

November 18-22, 25, 27, 28, 2024

January 20-24, 27-31

February 3-7, 2025

Written submissions of Plaintiffs:

March 26, 2025

Written submissions of Defendants:

March 26, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2025

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I. OVERVIEW

- [1] This trial is a perfect study of the dangers of entering into oral agreements with close friends. It is also an unfortunate illustration of the dangers of entering into written trust agreements without any dates of execution noted on the document. It is perhaps an even greater example of the difficulty with entering into oral, and then written, trust agreements without a clear understanding of the rights and obligations of the trustee and the beneficiaries of those trust agreements.
- [2] The trial was compounded by serious allegations that all of the parties were fabricating their stories and had fabricated documents to support their version of events. Each side says the others' witnesses lack any credibility or reliability, and have fabricated their stories and certain documents with the clear intention of deceiving this Court.
- [3] There were an untold number of applications during the trial, starting with an application at the commencement of trial by the defendants to withdraw admissions made in their response to civil claim. While the trial was initially estimated to be 25 days, it ultimately resulted in 108 days of trial, spread over almost 19 months. Each side blames the other for the length of this unduly protracted and complicated trial.
- [4] The defendant, Harjinder Cheema, purchased a property in Surrey located at 6728 - 152 St. (the "Property") in the fall of 1996 for \$690,000. The plaintiffs, Gurdarshan Mand and Kuldip Gill, were friends of Mr. Cheema and his realtors for his purchase of the Property. The three men agree that in 1996 they reached an oral agreement that Mr. Cheema would purchase the Property, and that Mr. Mand and Mr. Gill would each have the opportunity to acquire a 10% beneficial interest in the Property. To acquire this beneficial interest, they would each have to pay 10% of the purchase price of the Property, and 10% of all ongoing expenses for the Property. The parties agree that their oral agreement was that Mr. Cheema would hold legal title to the Property as trustee, for the benefit of Mr. Mand, Mr. Gill and Mr. Cheema. While the parties agree that Mr. Gill paid his initial 10% of the purchase price, they disagree on whether Mr. Mand did. While Mr. Mand says he did, Mr. Cheema says he did not.

- [5] The three also agree that, in March 2005, they decided to enter into a written trust agreement to formally document their arrangement. They agree the trust agreement was executed on March 30, 2005. That, however, is the end of their agreement as to what happened. There are two diametrically opposed versions of what happened after that first trust agreement was executed early in the day on March 30, 2005. The evidence adduced by the parties at trial was centered on supporting their respective versions of the narrative.
- [6] The plaintiffs say they fulfilled all of their obligations pursuant to the oral agreement and oral trust, and pursuant to the written trust agreement executed on March 30, 2005. They say a second trust agreement and a modification agreement were later executed, and neither affect their beneficial interest. They say they currently have a beneficial interest in the Property as to a total of 20%. They seek a declaration to that effect, partition and sale of the Property and equitable damages, or alternatively, an accounting of the profits they say Mr. Cheema has received as a result of his use of the Property.
- [7] The defendants, however, say that the second trust agreement and the modification agreement were later executed on the same day as the first written trust agreement (on March 30, 2005). They argue that these two documents, taken together, have the legal consequence of "nullifying" both the oral trust agreement and the subsequent executed written trust agreements. Further, they argue the plaintiffs failed to satisfy either the condition precedent or the condition subsequent of the oral agreement, the oral trust, or the executed written trust agreement, and argue their beneficial interest in the Property was extinguished. They say the plaintiffs no longer have a beneficial interest in the Property and all of their claims should be dismissed.
- [8] Unfortunately, none of the written trust agreements had any indication of the dates they were executed. The witness blocks failed to record when the various parties executed the trust agreements or the modification agreement, and there is no other evidence on their face to record that information. The lawyer's office did not retain their files from March 2005, nor did it retain a copy of the originally executed trust agreements or modification agreement. In fact, only two alleged originals were ultimately produced at trial: a version of Trust Agreement #2 and a version of the Modification Agreement (both defined later in this judgment). I say "alleged originals" as there was no independent evidence to corroborate either was a fully executed original, and the most the witnesses could say was the handwriting felt like original handwriting to them when they ran their hands over the back of the paper. Almost every material fact at issue in this case is in dispute. The fact-finding I must engage in is made difficult by the absence of clear documentary evidence which supports when the respective trust deeds were executed; it is even more so given that credibility and reliability are major obstacles for all of the significant witnesses.

II. APPLICATIONS AT TRIAL

- [9] There were an untold number of applications during the trial. It is not necessary to detail the results of all of the applications; however, it is necessary to briefly summarize those the parties argue may be relevant to my final determination.
- [10] First, the defendants brought an application at the commencement of the trial to withdraw admissions made in their first response to civil claim filed July 2020, and in their first amended response to civil claim filed August 2020. In reasons indexed as *Mand v. Cheema*, 2023 BCSC 1388 ("Admissions RFJ") I granted their application on June 21, 2023. Pursuant to my order the defendants filed a further amended response to third amended notice of civil claim on June 22, 2023, and then filed a further amended response to fourth amended notice of civil claim on June 30, 2023 (the "Amended Response").
- [11] Second, the parties consented to an order on August 28, 2023, declaring that the defendants waived solicitor-client privilege with their lawyers, namely Rajpal Binpal and Jason Sandhu, for all matters in relation to the trust deeds.
- [12] Third, the plaintiffs sought production of records from Canada Post with respect to the employment of Alamjeet Cheema, which production the defendants opposed. On November 3, 2023, I granted the relief sought.
- [13] Fourth, on January 31, 2024, I ordered the defendants produce any and all documents related to requests Mr. Cheema made to either Mr. Raj Binpal or Binpal & Associates, related to instructions to amend trust deeds related to the Property, or to two properties on West 16th Ave., on or before December 31, 2016. I also ordered that Mr. Cheema was to make his best efforts to obtain and produce material documents which may be in the possession or control of his son, Rajpal Cheema, or his wife, Gurdave Cheema. I noted that the document production of all the parties had been significantly deficient in the litigation, and the parties had a highly unsatisfactory approach to document disclosure. I set out a procedure for each party to send to the other a final document request for any material documents that were still missing, and I ordered that all parties were to provide affidavits verifying their lists of documents.
- [14] Then, over the break between March and June of 2024, the plaintiffs obtained two expert medical reports they sought to tender into evidence, which opined on the cognitive abilities of Mr. Mand. They sought to enter these into evidence, and their application was heard over four days in July 2024. In reasons indexed as *Mand v. Cheema*, 2024 BCSC 1701, I dismissed their application.
- [15] Finally, in July 2024, the defendants brought an application to compel Mr. Gill to finish his cross-examination through a translator, which the plaintiffs opposed. I dismissed this application.

III. THE DOCUMENT AGREEMENT

- [16] At the commencement of trial, counsel entered into evidence a common book of documents (three volumes) and a defendants' common book of documents (also three volumes). At the same time, they entered a document agreement to record their agreement that all documents within these six volumes were authentic and admissible at trial. Accordingly, these six volumes and the document agreement were entered as numbered exhibits.
- [17] However, in the third week of trial, Mr. Taylor resiled from the position in the document agreement that all of the documents were agreed to be admissible evidence at trial. After consultation with counsel, I determined the only way to deal with this issue was for counsel to agree, at the end of the evidence, to a list of which documents in either book of documents had not been admitted into evidence during the trial. Counsel followed this direction, and their agreed upon lists were entered as exhibits at the end of the evidence.

IV. DOCUMENTS IN ALLEGED NATIVE FORMAT

- [18] There were a few sets of documents disclosed, and entered into evidence, which were retrieved by a witness from their computers in electronic format. Notably, these were the files of Manpreet Mand, the files of Mr. Binpal, and certain emails and attachments from Mr. Gill's email account. I will refer to Mr. Mand's daughter Manpreet Mand as Ms. Mand, to make clear that I am not talking of her mother, Mrs. Mand.
- [19] All of those documents were retrieved by way of someone inserting a USB into the witness' computer and copying the documents, in the format they were saved on their computer, onto the USB. The USB sticks were then disclosed and copied to be used at trial.
- [20] All counsel referred to these electronic documents as documents in their "native format", despite my oft-repeated comments that documents in "native format" must be retrieved in a manner that will properly capture and disclose the metadata of the document. It is that metadata which provides the embedded information of the document, and may provide details such as the source, type, owner, and date of creation of the document. See, for example, *Questor Technology Inc. v. Stagg*, 2022 ABQB 578 at para. 114; and *Bard v. Canadian Natural Resources*, 2016 ABQB 267 at para. 78.
- [21] During the testimony of Ms. Mand and Mr. Binpal, counsel objected to questions arising from the properties of each document; that is, the properties of the various Microsoft Word documents. I concluded that none of the witnesses had captured the documents in native format. I also found that none of them had established an evidentiary basis upon which they could give evidence of their personal opinion of what the "properties" of the Word documents disclosed. The difficulties of not producing the proper "native format" of these documents were most clearly illustrated during Ms. Mand's direct evidence, when counsel were surprised that every time they opened a Word document in court, the "total editing time", as set out in the properties, had changed.

- [22] I did not accept the properties of the Word documents as metadata, nor did I accept that any of these sets of documents had been produced in native format.

V. PROPER SCOPE OF REPLY

- [23] At the beginning of the plaintiffs' reply, counsel for the defendants made an unexpected argument that the majority of the reply was inappropriate. I say unexpected as this matter has been diligently case managed since June 2023, and the exchange of written closing submissions, as well as the length of time for oral closing submissions (including reply), were set with counsel. Further to my directions, counsel engaged in an orderly exchange of written closing arguments, including the plaintiffs' reply, well in advance of the oral hearing. No objection to the plaintiffs' written reply was made by the defendants at the start of the three weeks of oral closing argument.
- [24] In the interests of efficiency, I allowed counsel to argue the objection, and I allowed the plaintiffs to argue their reply orally. I noted that I would address the allowable scope of the plaintiffs' reply in my reasons for judgment.
- [25] Counsel for the defendants argues that because this case was judicially managed, and I directed the orderly exchange of written submissions in advance of oral submissions, then the plaintiffs properly ought to have addressed anything arising from the defendants' written submissions in their oral closing submissions. Counsel says they should be limited in their oral and written reply to anything new the defendants addressed orally in closing submissions. They rely upon a decision of the federal court in *Merck-Frosst v. Canada (Health)*, 2009 FC 914 at paras. 29-30. I note that this case deals with a motion to file reply evidence, which is not what I must address.
- [26] The proper scope of reply "is to respond to matters raised by the opposing party, not to produce new arguments or new evidence that should have been raised in first instance": *Deegan v. Canada (Attorney General)*, 2019 FC 960 at para. 121.
- [27] All counsel rely upon the decision of Justice L. Smith (as she then was) in *Carter v. Canada (Attorney General)*, 2012 BCSC 886, *aff'd* 2015 SCC 5 [Carter] at paras. 148-159. Specifically, they agree Justice Smith accurately summarized the proper scope of reply when stating:
- [152] The plaintiffs argue that they anticipated and addressed the defendants' argument to the extent reasonably possible in their detailed argument in chief. However, they submit, they are entitled to reply to Canada's submissions, including the ways in which Canada relies upon and interprets the evidence.
- [28] As in *Carter*, were I to accept the defendants' theory of reply, it would require the plaintiffs to anticipate the defendants' entire theory of the case and rebut it in advance of hearing it, while putting forward their own theory of the case at the same time: at para. 154. That is not necessary, nor appropriate, even for long trials with vigilant case management.

[29] I am satisfied the plaintiffs did not tender any new evidence in their reply submissions; although they did refer to specific evidence that, in their view, responded to the evidence upon which the defendants relied. I am also satisfied they did not advance any new theories of the case, nor any new arguments, that were not responsive to arguments raised by the defendants. I am satisfied that, in the circumstances of this case, the plaintiffs' reply is proper reply under both the Supreme Court Civil Rules and practice of this Court, and I receive their written and oral reply submissions into evidence.

VI. BRIEF BACKGROUND

- [30] The parties are largely in agreement on the events in 1996 surrounding the purchase of the Property. Mr. Mand and Mr. Gill were realtors, and were friends of Mr. Cheema.
- [31] They introduced the Property to Mr. Cheema. The Property was subject to a foreclosure. Ultimately, Mr. Cheema's contract of purchase and sale was accepted for a purchase price of \$690,000.00. Mr. Cheema paid the deposit of \$20,000.00 by way of cheque dated August 6, 1996. A court order approving the sale was made on August 14, 1996, and, subsequently, the vendor removed the subject clause for court approval of the sale.
- [32] Mr. Cheema paid the \$20,000.00 deposit for the Property by way of a cheque made out on his Vancity account #64873 ("Vancity #64873"). On August 14, 1996, his balance in that account was \$8,121.59.
- [33] The parties disagree as to when the idea was raised that Mr. Mand and Mr. Gill would participate as investors in the Property. Mr. Cheema says it was raised before he put forward his offer to purchase the Property, but Mr. Mand and Mr. Gill say it was only raised after the removal of the subject clause requiring court approval of the sale. There is no independent documentary evidence to resolve this dispute. I am satisfied it is not necessary to resolve this dispute to determine the issues that arise in this litigation.
- [34] In any event, the parties do agree that, around the time Mr. Cheema purchased the Property, they reached an oral agreement that Mr. Cheema would hold legal title to the Property in trust for the beneficial owners of the Property, being: Mr. Mand as to a 10% beneficial interest; Mr. Gill as to a 10% beneficial interest; and Mr. Cheema as to an 80% beneficial interest. The parties agree that the terms of that oral agreement were:
- a) Mr. Mand and Mr. Gill were to pay Mr. Cheema their respective 10% capital contribution for the acquisition of the Property;
 - b) Mr. Mand and Mr. Gill were to pay Mr. Cheema their respective 10% of the ongoing expenses related to the Property;
 - c) Mr. Mand and Mr. Gill would be responsible for renting out the small home on the Property (the "Home"); and

- d) Mr. Cheema would hold legal title to the Property pursuant to an oral trust, on the basis of the above terms,
- (collectively, the "Agreement").

While the parties referred to the Agreement in a number of ways, including an oral trust and an oral agreement, I shall refer to it as the Agreement. I note both parties from time to time referred to the "oral trust", which was one term of the Agreement. I will refer as appropriate to the "oral trust", when referring to that term of the Agreement that Mr. Cheema would hold legal title to the Property as Trustee, pursuant to the terms of the Agreement.

- [35] Mr. Cheema's lawyer, Wayne Buckley, provided him with a Statement of Adjustments as of September 19, 1996, which set out the balance required for completion as \$385,376.76. The parties agree that the capital contribution required from Mr. Mand and Mr. Gill for their 10% was \$40,537.67 (being 10% of the total of the amount for completion plus the \$20,000.00 deposit). Mr. Cheema obtained a mortgage from Laurentian Trust in the amount of \$299,282.78. Mr. Cheema also had a bank account in his name at Laurentian Bank associated with the Property (the "Laurentian Account").
- [36] Mr. Cheema acknowledges that Mr. Gill paid him his 10% share for the capital contribution for the purchase of the Property by way of a bank draft dated September 13, 1996 in the amount of \$40,537.67. Mr. Gill has produced a copy of his bank draft which proves this payment. However, while both Mr. Mand and Mr. Gill maintain Mr. Mand also paid the identical amount, he has no documentation to corroborate his evidence. This became a central issue at trial.
- [37] Mr. Cheema's son, Rajpal Cheema, guaranteed the mortgage required for the purchase of the Property. Mr. Buckley's statement of account, dated September 17, 1996, records the specific legal services provided with respect to this guarantee as follows:

LEGAL FEES, for all professional services rendered with respect to the above, including ; receiving mortgage instructions from Laurentian Bank and noting that your son, Rajpal Cheema was to sign as a Covenantor under Independent Legal advice; telephone conversation with Gary Mand who advised that he would arrange the Independent Legal Advice for Rajpal Cheema; letter to Gary Mand enclosing copy of Mortgage and supporting documents for Rajpal Cheema to sign with instructions that the documents be returned to our office as soon as this has been done;

- [38] As noted above, the parties are also in general agreement that, pursuant to the Agreement, Mr. Gill and Mr. Mand were to take care of all of the arrangements for renting out the Home and depositing the rental income in the Property's bank account. They agree Mr. Gill was primarily responsible for depositing these rental cheques. Mr. Gill takes the position that he dutifully deposited all of the rental cheques he obtained, although he acknowledges he has not been able to find a complete record of all of the deposits he made. He initially made the deposits into the Laurentian Account, and after the mortgage was transferred to Vancity in February 2002, into the Vancity #136473 account ("Vancity #136473"). Mr. Cheema says he

gave the Laurentian Account statements to the plaintiffs without looking at them. Mr. Gill and Mr. Mand deny ever receiving these statements.

- [39] Mr. Cheema takes the position that Mr. Gill has failed to keep appropriate records, and he cannot prove that he deposited all of the rental proceeds. Mr. Cheema also has not been able to provide a full set of the relevant bank account records for the period from September 1996 to March 2005, and so, cannot provide a full record of all the funds he received from Mr. Mand and Mr. Gill.
- [40] On February 28, 2002, the mortgage on the Property was transferred from Laurentian Bank to Vancity Bank. At the time, the mortgage balance was \$262,203.98.
- [41] On April 9, 2003, Mr. Cheema granted a second mortgage to Vancity, securing a \$220,000 line of credit. At this time, the principal balance on the mortgage had been reduced to \$247,313.80.
- [42] The plaintiffs say that in approximately 2004 Mr. Cheema ceased to request payments from Mr. Mand and Mr. Gill on account of the net cash flow deficiency, and, instead, told them he had decided to manage the income and expenses of the Property through Vancity #136473 and the line of credit. They say their final payments to the cash flow deficiencies were made on June 30, 2004, in the amount of \$2,500.00 each. Mr. Gill provided a copy of a cheque made out in this amount, and Mr. Mand produced a copy of a cheque register recording a cheque made out in the same amount, on the same day, to Mr. Cheema, with the notation of "6728 - 152 St". The plaintiffs also point to a statement from July 2004 for Vancity #136473 showing a deposit of \$5,000.00 on July 7, 2004.
- [43] Mr. Cheema, however, says that at that approximate time, he began to be concerned that Mr. Gill and Mr. Mand had not paid their proportionate share of the expenses incurred for the Property, nor of the "ongoing shortfall", and he began to undertake a financial investigation to try to determine the Property's "true state of [financial] affairs". He conducted a reconciliation of the funds he said they still owed him. While he testified that he had a page on which these investigations were summarized, he was not able to produce it for the purposes of litigation. However, he testified that according to his reconciliation, Mr. Mand still owed him his capital contribution of \$40,537.67, and each of Mr. Mand and Mr. Gill owed him approximately \$40,000.00 for the ongoing expenses related to the Property. Mr. Cheema testified that he advised Mr. Mand and Mr. Gill of this. Both deny he ever said such a thing.
- [44] In any event, Mr. Cheema testified that in March 2005 he decided it would be prudent to arrange for a written trust agreement to document the Agreement. He discussed this with Mr. Mand and Mr. Gill, and they agreed. He told them that he wanted to add certain beneficiaries to benefit from his 80%. They had no problem with this, but they each wished to add their wives to benefit from their respective 10% shares. Similarly, Mr. Cheema had no problem with this request. Accordingly, Mr. Cheema instructed his lawyer, Mr. Binpal, to prepare such a written trust agreement.

[45] The first trust agreement was executed on March 30, 2005 ("Trust Agreement #1"). It had an effective date as of March 23, 2005. In Trust Agreement #1 Mr. Cheema was defined as the Trustee, and the beneficiaries of the trust were: Mr. Gill (as to a 5% interest); his wife Sukhminder Gill (as to a 5% interest); Mr. Mand (as to a 5% interest); and his wife Jagpal Mand (as to a 5% interest). The remaining 80% beneficial interest in the Property was allocated to Mr. Cheema, his company, and his family members in the following proportions:

- a) Mr. Cheema's son, Rajpal Cheema, as to a 10% interest;
- b) Mr. Cheema's son, Satpal Cheema, as to a 10% interest;
- c) Mr. Cheema's nephew, Alamjit Cheema (improperly spelled in Trust Agreement #1, as it should have been Alamjeet), as to a 10% interest;
- d) Mr. Cheema's company, Cheema Bros. Trucking Ltd. ("Trucking Ltd."), as to a 20% interest; and
- e) Mr. Cheema, as to a 30% interest.

Collectively, all of the beneficiaries of the trust were defined as the "Beneficiary".

[46] As there are a number of men with the last name of "Cheema" I will refer to Rajpal, Satpal and Alamjeet by their first names for clarity, intending no disrespect.

[47] The recitals of Trust Agreement #1 provide:

WHEREAS:

A. The Trustee has acquired an interest in the legal title to those lands and premises (the "Property") situated in Surrey, British Columbia and legally described in Schedule A hereto; and

B. The Trustee has agreed that legal title to the Property has been registered in the name of the Trustee in the New Westminster Land Title Office and that it has acquired legal title in the Property as nominee, agent and bare trustee for the sole benefit and account of the Beneficiary as principal and beneficial owner, in accordance with this Agreement.

THEREFORE in consideration of the premises and the amount of \$1.00 now paid by the Beneficiary to the Trustee, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

[48] Mr. Cheema, as Trustee, made a number of acknowledgments and agreements in clause 2:

- 2. Trustee's Agreements. The Trustee hereby acknowledges and agrees that:
 - (a) the Trustee has acquired the legal title to the Property as nominee, agent and bare trustee for and on behalf of the Beneficiary and the Trustee will have no equitable or beneficial interest therein, and the equitable and beneficial interest in the Property will be vested solely and exclusively in the Beneficiary;

- (b) the Trustee will hold legal title to the Property as nominee, agent and bare trustee for the Beneficiary subject to and in accordance with this Agreement and subject to the terms and conditions of any transfer, deed, lease, sublease, mortgage, debenture, security agreement, easement, right of way, license, restrictive covenant or other instrument, document or encumbrance pertaining to the Property;
- (c) any benefit, interest, profit or advantage arising out of or accruing from the Property is a benefit, interest, profit or advantage of the Beneficiary and if received by the Trustee will be received and held by the Trustee for the sole use, benefit and advantage of the Beneficiary and the Trustee will account to the Beneficiary for any money or other consideration paid to or to the order of the Trustee in connection with the Property as directed in writing by the Beneficiary;
- (d) the Trustee will, upon the written direction of the Beneficiary, deal with the Property and do all acts and things in respect of the Property at the expense of and as directed by the Beneficiary from time to time and will assign, transfer, convey, lease, mortgage, pledge, charge, or otherwise deal with the Property or any portion thereof at any time and from time to time in such manner as the Beneficiary may determine, to the extent permitted under all relevant laws; without limiting the generality of the foregoing, the Trustee will transfer legal title to the Property to or as directed by the Beneficiary forthwith upon the written demand of the Beneficiary;
- (e) the Trustee will, upon and strictly in accordance with the written direction of the Beneficiary, act as the agent of the Beneficiary, as undisclosed principal, in respect of any matter relating to the Property or the performance or observance of any contract or agreement relating to the Property, including, without limitation, making any payment under any mortgage, debenture, security agreement or other instrument, document or encumbrance pertaining to the Property;
- (f) acting under this Agreement at the direction of the Beneficiary, the Trustee will have the full right and power to execute and deliver, under seal and otherwise, any transfer, deed, statement of adjustments, plan, lease, sublease, mortgage, debenture, security agreement, easement, right of way, license, restrictive covenant or other instrument, document or encumbrance pertaining to the Property without delivering proof to any person (including, without limitation, any other party to any such instrument or document or the Registrar of any Land Title Office) of its authority to do so and any person may act in reliance on any such instrument, document or encumbrance and for all such purposes any such instrument, document or encumbrance will be binding on the Beneficiary;
- (g) acting under this Agreement at the written direction of the Beneficiary, the Trustee will have the full right and power to borrow money from time to time and/or covenant to repay money borrowed by the Beneficiary either alone or with others from time to time and to secure the repayment of any and all indebtedness and liabilities with respect to any amounts so borrowed by the grant of any charge or encumbrance (both fixed and floating) on, or

security interest in, the Property or any part thereof, by way of debenture, mortgage, assignment of rents, assignment of sale proceeds, security agreement or other instrument or document without delivering proof to any person (including, without limitation, any other party to any such instrument or document or the Registrar of an Land Title Office) of its authority to do so and any person may act in reliance of any such instrument or document and for all such purposes any such instrument or document will be binding on the Beneficiary;

- (h) the Trustee will not deal with the Property in any way or execute any instrument, document or encumbrance in respect of the Property without the prior written consent or direction of the Beneficiary; and
- (i) the Trustee will notify the Beneficiary forthwith upon receipt by the Trustee of notice of any matter or thing in respect of the Property or any portion thereof, including, without limitation, in respect of any tax, lien, charge or encumbrance in respect of the Property.

[49] Trust Agreement #1 also provided for the reimbursement of expenses in clause 3, in the following manner:

- 3. Reimbursement of Expenses. Any payment or disbursements made by the Trustee in respect of the Property in accordance with this Agreement will be made as the agent of and for the account of the Beneficiary, as principal, and the Beneficiary will reimburse the Trustee for any amount reasonably and properly expended by the Trustee in connection with the Property with the written consent or direction of the Beneficiary. Each party, defined collectively as the Beneficiary, shall be responsible and shall pay its respective share of any reimbursement to the Trustee and each respective share shall be equal to that party's proportionate share of the interest in the Property. All liabilities incurred or outstanding in respect of the Property, including any liability under any mortgage, debenture or security agreement in respect thereof, are the liabilities of the Beneficiary as principal and the Trustee in incurring or granting the same is acting only as agent for the Beneficiary. The Trustee will not be entitled to any remuneration or any revenue or profit in respect of the Property for acting as Trustee, agent and bare trustee under this Agreement.

[50] Trust Agreement #1 also contained a no waiver clause with the following terms:

- 11. No Waiver. No failure or delay on the part of either party in exercising any right, power or privilege under this Agreement will operate as a waiver thereof, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege. Except as may be limited herein, either party may, in its sole discretion, exercise any and all rights, powers, remedies and recourses available to it under this Agreement or any other remedy available to it and such rights, powers, remedies and recourses may be exercised concurrently or individually without the necessity of making any election.

- [51] The parties agree that Mr. Cheema, Mr. Gill, Mrs. Gill, and Mr. Mand all met at the Binpal & Associates offices on March 30, 2005. Mr. Sandhu, then an articulated student, witnessed their signatures. Mr. Mand then took Trust Agreement #1 home to his wife, who executed the agreement in front of Daljit Sekhon. He then took it to the offices of Trucking Ltd. where Rajpal, Satpal and Alamjeet executed the trust agreement. Harchet Kaler witnessed Satpal and Rajpal's signatures, and Inder Dhaliwal witnessed Alamjeet's signature.
- [52] Both the plaintiffs and the defendants produced their respective copies of Trust Agreement #1.
- [53] That, however, is the end of their agreement as to what happened. There are two diametrically opposed versions of what happened after Trust Agreement #1 was executed early in the day on March 30, 2005. Unfortunately, there is no independent documentary evidence that clearly identifies when the next deed was executed by the parties. A disproportionate amount of time and energy was spent by the parties at trial attempting to adduce relevant and probative evidence to support their respective versions of the narrative.
- [54] The plaintiffs say they fulfilled all of their obligations pursuant to the Agreement, and pursuant to Trust Agreement #1. They say a second trust agreement and a modification agreement were later executed in 2016, and neither affect their beneficial interest. They say they currently have a 20% beneficial interest in the Property.
- [55] The defendants, however, say that a second trust agreement and a modification agreement were later executed on the same day (being March 30, 2005). They argue the modification agreement has the legal consequence of nullifying Trust Agreement #1. Further, they argue the plaintiffs failed to satisfy either the condition precedent or the condition subsequent in either the Agreement, or Trust Agreement #1 (or the second trust agreement); and so, say the plaintiffs' beneficial interest in the Property has been extinguished.

VII. POSITION OF THE PARTIES

- [56] At this time, I will briefly set out the details of the parties' respective positions on the subsequent events. This will provide the context necessary to set out my analysis of the relevant legal issues I must determine.

A. Position of the plaintiffs

- [57] The plaintiffs say that in approximately 2004, Mr. Cheema decided to manage the income and expenses of the Property through Vancity #136473 and the line of credit associated with the Property and ceased to request any contributions from Mr. Mand and Mr. Gill towards the ongoing expenses of the Property. The plaintiffs characterize the expenses as those incurred "on account of the net cash flow deficiency". They say that their final payments to the expenses of the Property were made on June 30, 2004, in the amount of \$2,500.00 each. Mr. Gill has provided a copy of a cheque made out in this amount, and Mr. Mand has found a copy of a cheque register recording a cheque made out to Mr. Cheema in the same amount,

on the same day, with the notation of "6728 - 152 St". The plaintiffs point to a statement from July 2004 for the bank account showing a deposit of \$5,000.00 on July 7, 2004, and argue it reflects their two payments. I will address this issue further below.

- [58] Further, they say that at no point in the period leading up to the execution of Trust Agreement #1 did Mr. Cheema demand payment from Mr. Mand of his capital contribution in the amount of \$40,537.67, an accounting from Mr. Gill of the rental deposits he had contributed to the Laurentian and Vancity bank accounts, or payment from Mr. Mand and Mr. Gill for any amounts due and owing on account of expenses.
- [59] The plaintiffs agree that they executed Trust Agreement #1 on March 30, 2005. Their position is that the parties did not execute any other trust deeds related to the Property until 2016.
- [60] A long-term tenant of the Home departed in April 2005. After that tenant, the plaintiffs say that Mr. Cheema installed and dealt with the next residential tenants, beginning with a man referred to at trial as the "stone guy" who rented the house until some time in 2007. They argue the Home was then rented until 2009, at which time Mr. Cheema hired a contractor to renovate the Home, which appeared to have damage from being used for a marijuana grow-operation.
- [61] While Mr. Mand and Mr. Gill admit they largely ceased to be involved with renting the Home out, they say they worked extensively with Mr. Cheema towards potential redevelopment and rezoning opportunities available in the East Newton Business Park where the Property was located. This included an opportunity to obtain a more favourable configuration for the Property, with more frontage on the 152 St. thoroughfare, through a land exchange agreement with the City of Surrey. The negotiations for this began in 2010, and concluded with the registration of a new title on October 10, 2013, and a new parcel identifier ("PID"), described as PID 029-176-689 (the "Land Swap").
- [62] Mr. Cheema began to allow large trucks to park on the Property in late 2009, which use has continued to date. The plaintiffs say he used the Vancity line of credit to finance the preparation of the Property for this purpose.
- [63] In fact, unknown to the plaintiffs, Mr. Cheema executed a five-year lease with Cheema Bros. Transport Ltd ("Transport Ltd.") for a rental rate of \$500.00 a month, on a triple-net basis, commencing April 1, 2012 (the "Lease"). This was renewed in 2017 (the "2017 Lease Renewal"), and again in 2022 (the "2022 Lease Renewal"). The plaintiffs say Mr. Cheema did not tell them he had entered into a lease with Transport Ltd.
- [64] As a result of the Land Swap, the plaintiffs say they began discussions with Mr. Cheema regarding modifying Trust Agreement #1 to substitute the new legal description for the Property for the old legal description. They say that Mr. Mand had his daughter, Ms. Mand, a lawyer, prepare a draft addendum for this purpose in 2014 (the "2014 Draft Addendum"). In November 2014, Mr. Mand forwarded the 2014 Draft Addendum to Mr. Cheema. While the plaintiffs acknowledge the 2014 Draft Addendum was never fully executed, they say Mr.

Cheema must have seen the 2014 Draft Addendum, and at some point, elected to transfer the beneficial interests of his sons, nephew and Trucking Ltd. back into his name.

- [65] It was in the timeframe of 2014 to 2016 that the plaintiffs say they requested a reconciliation of all the trucking revenue received by Mr. Cheema, and all the expenses he had incurred for the Property. They say he provided them with some financial documentation in 2015, which did not clearly identify that it was on behalf of Transport Ltd. At this time, they began to discuss a potential buyout of their interests in the Property and, for that purpose, Mr. Cheema retained an appraiser who provided a report on the appraised value of the Property in March 2016.
- [66] The plaintiffs rely heavily on the 2016 legal file from Binpal & Associates (the "Binpal File"). They say on June 3, 2016, Mr. Cheema instructed his lawyers at Binpal & Associates to document the transfers of the beneficial interests of his sons, nephew and Trucking Ltd. to him, so that he regained an 80% beneficial interest in the Property. At the same time, he instructed his lawyer, who at that time was Anurag Saini, to make changes to two other trust deeds (relating to two other investment properties in Surrey on 16th Ave.). The plaintiffs argue that Mr. Cheema falsely advised his lawyers that he wanted to make the changes to Trust Agreement #1 and to the two 16th Ave. trust deeds due to certain errors in the original trust deeds. They allege, in fact, no errors had been made and Mr. Cheema merely wanted to change the beneficiaries. Their theory of these events was summarized in their written submissions:
- 13) On Jun. 3, 2016, Cheema instructed his lawyers to document the transfer from his sons, nephew and Trucking such that Cheema regained an 80% beneficial interest. He simultaneously instructed them to document changes on two other properties on 16th Ave in Surrey, BC. He falsely advised his lawyers that he was making these changes for [both the Property and the two 16th Ave. properties] due to certain errors in the original documentation which had taken place in 2005 and 2007, respectively. The paperwork was prepared without documenting the execution dates, and with the appearance that the transfers to Cheema had taken place in those earlier years. The only logical theory for his having proceeded in this manner is to create a paper trail so as to avoid being assessed by Canada Revenue Agency as a result of the 2016 dispositions. Consistent with this paper trail, Schedule "A" to the new trust agreement bore the legal description of the Original Trust Property.
- 14) In July 2016, Cheema circulated the paperwork on all three properties for execution by the various parties thereto. Two versions of the new trust agreement (variously referred to herein as the "Second TA") were prepared, for the respective purposes of Cheema and the Plaintiffs, the former with the original legal description and the latter with the new legal description. It is readily apparent that Schedule "A" of the latter version was created by integrating the type from the 2014 draft addendum which had been created by Manpreet, and sent to Cheema in MS Word format, in late 2014. Gill and Ms Gill appear to have been the initial signatories, on a version without Schedule "A". It is unknown which, if either,

Schedule "A" was attached when the documents were signed by the other parties. Two substantially executed versions of the Second TA were provided to Gill and Mand, one with the original legal description which Gill emailed to himself, and one with the new legal description which he placed in his file and which was produced early in this action.

[67] The plaintiffs say both versions of the second trust agreement were executed (or created) at an unknown date, after it was prepared by Mr. Saini in June 2016. The only difference to the two versions is in Schedule A: one has the original PID and one has the new PID after the Land Swap. For ease of reference, I will refer to the body of this amended trust deed (excluding Schedule A) as "Trust Agreement #2".

[68] The plaintiffs say that, at the same time, the parties signed a modification agreement to document the removal of Rajpal, Satpal, Alamjeet and Trucking Ltd. as beneficiaries (the "Modification Agreement"). The Modification Agreement provided:

WHEREAS:

A. Pursuant to a Declaration of Bare Trust and Agency Agreement dated for reference as of the 30th day of March 2005, a copy of which is attached hereto as Schedule A (the "Original Trust Agreement"), the beneficiaries of the lands and premises located at 6728 - 152 Street, Surrey, BC (the "Lands") were declared to be the Original Beneficiaries;

B. There was an error in the designation of the Original Beneficiaries in the Original Trust Agreement in that it was not intended for the Outgoing Beneficiaries to be the beneficiaries of the Lands and in fact the intention of the parties was for the Incoming Beneficiary to hold the interest of the Outgoing Beneficiaries being collectively an undivided 50/100 interest in the Lands.

C. This Modification Agreement is being prepared to reflect the interest of the Incoming Beneficiary as to an undivided 50/100 interest and to reflect the deletion of the interest of the Outgoing Beneficiaries from having any interest in the Lands.

THEREFORE in consideration of the premises and the amount of \$10.00 now paid by the Incoming Beneficiary to the Outgoing Beneficiaries, the receipt and sufficiency of which are hereby acknowledged by the Outgoing Beneficiaries, the parties agree as follows:

1. The reference to the Beneficiary in the Original Trust Agreement is hereby amended such that the Outgoing Beneficiaries have no interest in the Lands and the parties hereby declare that in place of the Outgoing Beneficiaries, the Incoming Beneficiary holds the Lands as to an undivided 50/100 beneficial interest.
2. This Modification Agreement shall be effective as of March 30, 2005.
3. All the parties will execute a new trust declaration concurrently to reflect the beneficiaries of the Lands as set out in the Original Trust Agreement as amended by this Modification Agreement.

- [69] The Modification Agreement was dated for reference "as of the 30th day of March 2005" and was recorded as "IN WITNESS WHEREOF the parties have executed this Modification Agreement as of the 30th day of March, 2005". It was effective as of the same date. As with all three trust deeds, there is no date recorded for the execution by the parties.
- [70] The plaintiffs' theory is that the Modification Agreement and Trust Agreement #2 (with the old PID) were executed "simultaneously" in June or July 2016. The second Trust Agreement #2 (with the new PID) was created around the same time "by someone acting on Cheema's instructions, by cutting and pasting Schedule A from the 2014 Draft Addendum into the MS Word version of the Second TA, [printing] out the resulting p.7" and attaching it to the Trust Agreement #2 (with the old PID).
- [71] Although at the commencement of the trial the plaintiffs argued that the version of the Trust Agreement #2 (with the old PID) was fabricated, in closing argument, their position became that neither version was fabricated. They made clear that they do not argue that the version of Trust Agreement #2 (with the new PID) was fraudulently created by Mr. Cheema. Rather, they clarified that their position is Mr. Cheema created this version shortly after Trust Agreement #2 (with the old PID) and the Modification Agreement were executed in 2016, and gave it to the plaintiffs shortly after. They no longer allege it was forged or fabricated.
- [72] Notwithstanding some significant irregularities with the proper execution of trust deeds, the plaintiffs clearly stated on the record they do not advance any arguments that the lack of proper compliance with the formalities invalidates any of Trust Agreement #1, Trust Agreement #2 or the Modification Agreement.
- [73] The plaintiffs say that Trust Agreement #2 remains valid, and they are entitled to a declaration of trust in accordance with that trust deed, together with an order for the partition and sale of the Property, and equitable damages, or alternatively, an accounting of all the profits Mr. Cheema received from his use of the Property.

B. Position of the defendants

- [74] There are three named defendants: Mr. Cheema, Transport Ltd., and Trucking Ltd. Counsel for the defendants made clear they represent Mr. Cheema in his personal capacity, in his capacity as an alleged beneficiary of the trust arrangement entered into by the parties, in his capacity as an alleged trustee of the trust arrangement the plaintiffs say exists, and on behalf of his two corporations. No party made any argument that, at this time, there was a conflict in Mr. Cheema's roles. However, ultimately, when it is determined whether the trust continues to exist, he will need separate representation if he is found to be a trustee.
- [75] Mr. Cheema says that, towards 2003, he decided to undertake a careful review of all of the expenses incurred relating to the Property. He testified that he did so to determine if all of the rental payments for the Home had been properly deposited, and to determine the amount that Mr. Mand and Mr. Gill owed in respect of their contributions towards the ongoing expenses of the Property. Mr. Cheema testified that as a result of these calculations

he determined that both Mr. Mand and Mr. Gill owed him what he characterized as "substantial funds". He says each owed him approximately \$40,000 for their respective proportionate shares of unpaid contributions towards the expenses for the Property, and Mr. Mand still owed him the capital contribution amount.

- [76] By 2005, Mr. Cheema had grown tired of the "continual assurances of payment for outstanding financial obligations on the part of Mr. Mand and Mr. Gill". He decided to prepare documentation to set out the Agreement and to clearly identify the financial obligations the parties owed. At the same time, he decided to add his sons, his nephew, and Trucking Ltd. as beneficiaries of the trust arrangement, as detailed above.
- [77] Mr. Cheema says he told Mr. Mand and Mr. Gill he wanted a written agreement to be prepared and signed. He also says, as part of that, he gave each of them, and his family members Rajpal, Satpal and Alamjeet, a handwritten summary of the capital acquisition costs and the approximately \$40,000 in expense obligations for the Property from 1996 to date.
- [78] Mr. Cheema maintains that he told Mr. Mand and Mr. Gill that they had to make all of their payment obligations current, and he also told his family members the same thing. Mr. Cheema's position is that while Mr. Gill had paid his initial capital contribution, Mr. Mand had not. Accordingly, he says that Mr. Gill owed him approximately \$40,000.00, and Mr. Mand, Rajpal, Satpal and Alamjeet each owed him approximately \$80,000.00 to participate in the investment.
- [79] Mr. Cheema acknowledges that he told Binpal & Associates to prepare Trust Agreement #1, and the agreement was fully executed by all of the parties.
- [80] However, almost immediately after the execution, Mr. Cheema says he had separate discussions with each of Rajpal, Satpal and Alamjeet, in which they each advised that they were not able to pay their financial obligations. He says that Mr. Mand and Mr. Gill told him they would pay their financial obligations to him immediately and he accepted the assurances made by Mr. Mand and Mr. Gill because of their friendship.
- [81] Mr. Cheema told Rajpal, Satpal and Alamjeet that, as they could not pay the financial obligations required to participate in the Property, they could no longer participate in the investment opportunity. He then advised Mr. Mand and Mr. Gill that a fresh agreement needed to be prepared. He returned to Binpal & Associates the same day and advised Mr. Sandhu that he required changes to Trust Agreement #1 as Rajpal, Satpal and Alamjeet had advised they would not be able to contribute their necessary funds to participate in the investment opportunity, and he had also decided to removed Trucking Ltd. as a beneficiary. He instructed Mr. Sandhu to transfer their beneficial ownership to him personally, and to prepare the necessary paperwork. Mr. Cheema waited at the Binpal & Associates office for the necessary document to be prepared.

- [82] Mr. Sandhu prepared a subsequent version of Trust Agreement #1, which was identical in all respects to that version, but without Rajpal, Satpal, Alamjeet and Trucking Ltd. as beneficiaries (being Trust Agreement #2). Trust Agreement #2 was also made effective as of March 23, 2005.
- [83] After receiving Trust Agreement #2, Mr. Cheema says he contacted Mr. Gill to come to his business office to collect the trust deed. He says upon Mr. Gill arriving at the office he witnessed Mr. Gill's signature, and then asked him to obtain his wife's signature and those of Mr. Mand and Mrs. Mand.
- [84] After Trust Agreement #2 was fully executed on March 30, 2005, he immediately took it back to Mr. Sandhu. Mr. Cheema says Mr. Sandhu reviewed the document, went and spoke with someone else, and then advised him there was a problem with Trust Agreement #2 in that it could not be reconciled with Trust Agreement #1. Mr. Sandhu advised that it was necessary to prepare a modification agreement that properly removed the four beneficiaries from Trust Agreement #1, and he said he would prepare that document right away. Mr. Cheema testified that, again, he waited to receive the document, and contacted Mr. Gill and Mr. Mand to tell them another document was required. He says he then asked them to meet him at his business office to deal with this new document.
- [85] Mr. Cheema says after he received this document from Mr. Sandhu (the Modification Agreement), he returned to his office, and Mr. Mand and Mr. Gill arrived. He says he then asked everyone present (being everyone except for Mrs. Mand and Mrs. Gill) to execute the Modification Agreement. He then asked Mr. Mand and Mr. Gill to obtain the signatures of their wives, which they did.
- [86] There is no disagreement that the Modification Agreement was ultimately executed by all the parties. Eventually, an alleged original of the executed document was located by Mr. Cheema and disclosed at trial. The Modification Agreement was brief, and is set out at para. [68] above. Mr. Cheema says it was also executed on March 30, 2005, and effective as of the same date.
- [87] The defendants say that the Modification Agreement effectively "nullified" both of the previous trust agreements, such that, as of March 30, 2005, neither Trust Agreement #1 or #2 were of any force or effect. In addition, Mr. Cheema says, shortly after the events of March 30, 2005, he advised both Mr. Mand and Mr. Gill that, as a result of their non-payment of the financial obligations, he was repudiating the agreement, and the trust agreement was no longer in force. The defendants say the plaintiffs' claim must be dismissed.

VIII. UNEXPECTED EVENTS AT TRIAL

- [88] There were a number of unexpected events at trial. A few are necessary to mention briefly as they impact my assessment of credibility and reliability.

- [89] First, in February 2024, an anticipated witness for the defendants, Agyapal Grewal, deposed in a filed affidavit that during the last week of January 2024 Mr. Mand called him and suggested he should not testify on behalf of the defendants. After discussion with counsel, I warned all the parties that it is inappropriate for anyone to attempt to either tamper with a witness or to intimidate them, and to do so risks serious consequences. Mr. Grewal unfortunately passed away before he was able to testify.
- [90] Second, at the commencement of Mr. Mand's cross-examination, the sheriffs brought an issue to my attention. They advised that Mr. Cheema had left an envelope on a seat outside the courtroom, which was then taken. After they received a report about the missing envelope, they reviewed the closed-circuit television from outside the courtroom, and observed someone take the envelope. I excused Mr. Mand from the witness stand and relieved him from his cross-examination warning, only for the purposes of permitting him to discuss this issue with both his counsel and Mr. Gill. Ultimately, Mr. Gill advised the Court that he took the envelope home and opened it. Mr. Gill was cross-examined on this issue at the time the envelope was taken, and he advised he did not return the envelope to Mr. Cheema the next day "to have some fun with Mr. Cheema". Mr. Cheema said that Mr. Gill never returned the entire contents of the envelope, while Mr. Gill maintained he did.
- [91] Third, Mr. Mand's cross-examination unexpectedly took approximately 17 days. For the entirety of his testimony he testified through an experienced court-certified translator. His testimony, and in particular his cross-examination, proceeded in an unusual manner. On his direct examination, his evidence at times appeared to be confused, self-contradictory, and on occasion, non-responsive. His evidence on cross-examination became much more problematic. He was frequently completely non-responsive to questions; on occasion, his evidence one moment (sometimes on innocuous matters) appeared in direct contradiction to his evidence given moments before; and when asked about historical documents, he often became confused when comparing objective facts to his testimony.
- [92] Counsel worked cooperatively with me to craft a method to ensure Mr. Mand's cross-examination was completed in a fair, reasonable and somewhat timely manner. It proved difficult. Initially, Mr. Mand's counsel asked for permission to speak to Mr. Mand, notwithstanding he was under cross-examination, to remind him of his responsibility to answer the specific questions being asked. I allowed this, with the agreement of opposing counsel, but it was to no avail.
- [93] Mr. Taylor also helpfully agreed to shorten many of his questions, repeatedly asked Mr. Mand if he understood the questions, and told him to advise him if he did not understand. He frequently advised Mr. Mand he was not being responsive to the questions and asked him to respond again. Much more frequently than is normal during cross-examination, I also advised Mr. Mand he was not being responsive, and asked him to answer the questions asked. I repeatedly warned him that if he failed to respond to the questions being asked, defence counsel may ask me to make a finding that he was intentionally not answering the questions asked and it may impact my determination of his credibility and my assessment of

his evidence. Ultimately, an agreement was reached which counsel characterized as a "protocol": Mr. Taylor would give Mr. Mand the opportunity to answer the question and if the answer was non-responsive, would ask me to direct the witness to answer. If the answer was still not responsive, as appropriate, he would request I again direct Mr. Mand that I may ultimately conclude he was intentionally not answering the question, and then counsel would ask the question one last time. This process unfortunately became necessary to ensure that the defendants had their thorough cross-examination of Mr. Mand, but that it would eventually end.

- [94] His cross-examination was so problematic that on February 23, 2024, during cross-examination, plaintiffs' counsel took the extraordinary step of requesting that Mr. Mand be excused from the courtroom, and advised the Court that they were concerned he may be suffering from a cognitive impairment. At that time, defence counsel advised he did not share the concerns, and said he believed Mr. Mand has "a weak relationship with the truth".
- [95] Fourth, Mr. Gill struggled to control his temper on his cross-examination. Mr. Gill did not testify through a translator. His struggle took many forms, including: anger when Mr. Taylor suggested to him his memory of events in 1996 was not good; insisting the fact that Rajpal was a guarantor on the initial mortgage for the Property was a "benefit" to Rajpal; and struggling to respond to the questions asked. As with Mr. Mand, Mr. Gill struggled to provide relevant, responsive answers to questions. Again, if Mr. Gill refused to provide a substantive response to a question, counsel agreed to use the "protocol" described above. Ultimately, Mr. Taylor brought the application to compel Mr. Gill to testify through a translator, addressed above.
- [96] Unfortunately, Mr. Gill became combative, aggressive and angry with Mr. Taylor. He accused Mr. Taylor of multiple things, including being racist and unethical. Notwithstanding that I repeatedly cautioned him not to cast inappropriate aspersions, he continued. Ultimately, I warned him more than once that if he persisted in his behaviour, he was at risk of being found in contempt of court.

IX. ISSUES

- [97] Shortly before the close of evidence at trial, I held a judicial management conference with counsel, followed by a memorandum to counsel, asking that they agree on a common list of issues to be decided in the case, and a common table of contents. While the parties did reach an agreed-upon common list of issues, they failed to reach an agreed-upon common table of contents, or to agree upon the logical order in which the issues should be determined.
- [98] I have structured these reasons for judgment to address the common list of issues in a logical fashion, eliminating duplication or irrelevant issues.

- [99] As noted above, while the plaintiffs took the position that the version of Trust Agreement #2 (with the old PID) was fabricated by Mr. Cheema during the trial, this claim was abandoned in final argument and so I shall not address it further.
- [100] Further, during final argument, the plaintiffs made clear they do not advance any arguments that any or all of the trust deeds are invalid as a result of a lack of compliance with the proper formalities of execution. This is also an issue I will not address.
- [101] Finally, the defendants initially took the position that because Mr. Mand and Mr. Gill failed to provide written disclosure to the vendor of the Property that they were both the realtors involved in the sale and beneficial owners of the Property, pursuant to s. 28 of the Real Estate Act, R.S.B.C. 1979, c. 356 [Real Estate Act], any trust was invalidated. They abandoned this position in final argument, and, instead, contended that this argument is only relevant to a determination of Mr. Mand and Mr. Gill's credibility. Accordingly, that is the only context in which I shall consider it.
- [102] As noted, almost every fact--material or otherwise--is in dispute between the parties. Although the parties set out a plethora of issues, many of which must be addressed in some manner, I find this matter turns on the following broad issues:
- a) whether the plaintiffs have proven that they entered into the Agreement and paid their required capital contribution;
 - b) whether the plaintiffs have proven that they entered into Trust Agreement #1 on March 30, 2005; and
 - c) if so, whether Mr. Cheema has proven that the beneficial interest of the plaintiffs came to an end shortly after March 30, 2005.
- [103] This last issue turns on whether Mr. Cheema has proven on a balance of probabilities that the parties entered into Trust Agreement #2 on March 30, 2005, and, in particular, whether he has proven that the plaintiffs' status as beneficiaries of Trust Agreement #2 was contingent upon the condition subsequent that they pay their proportionate share of the expenses for the Property. If so, the issue becomes whether he has proven either:
- a) the trust was "nullified" by the execution of the Modification Agreement; or
 - b) the trust was otherwise legally terminated as a result of the plaintiffs' failure to satisfy this condition subsequent.
- [104] If I determine that a valid trust still exists, and that the plaintiffs are entitled to the declaration of trust they seek, then I must consider and determine the appropriate remedy.
- [105] As it is not possible, nor necessary, for me to resolve every factual dispute between the parties, I will limit myself to making those findings of fact necessary to decide these broadly stated issues (while recognizing that there are many sub-issues subsumed within each).

X. ANALYSIS

[106] The parties spent a great deal of time eliciting evidence on many issues they felt were material to their case. However, ultimately much of that evidence is simply not of assistance in resolving the legal issues necessary to address in these reasons for judgment. Accordingly, I will focus my analysis on the legal issues which are necessary to determine, and concentrate only on that evidence which is relevant to my analysis.

A. Applicable Evidentiary Principles

1. The Plaintiffs' Burden of Proof

[107] It is trite to state that the plaintiffs bear the burden to prove their case. In circumstances where a trial judge cannot determine whose version of events is most probably true, then the consideration becomes who has the burden of proof on that specific issue. Counsel are not in disagreement on this proposition.

[108] However, it is important to remember the plaintiffs do not bear the burden of refuting the defendants' version of events. Rather, the defendants bear the burden of proving the events they rely upon to establish a defence on a balance of probabilities. If they are able to do so, then the plaintiffs bear the burden of proving any events they say are relevant in response to the defendants' version of events.

[109] I raise this because who bears the onus of proof is relevant to my analysis, particularly given the serious difficulties Mr. Mand, Mr. Gill and Mr. Cheema all have with their credibility.

[110] In these circumstances, the plaintiffs must prove on a balance of probabilities:

- a) the parties entered into the Agreement in 1996 that Mr. Cheema would hold legal title to the Property in trust for the beneficiaries, which included Mr. Mand and Mr. Cheema;
- b) Mr. Mand and Mr. Cheema satisfied the condition precedent to the Agreement and paid their capital contribution; and
- c) the parties entered into Trust Agreement #1 on March 30, 2005.

[111] If the plaintiffs establish the above on a balance of probabilities, then the burden shifts to Mr. Cheema to prove that Trust Agreement #2 was also executed on March 30, 2005 and was either "nullified" by the Modification Agreement (allegedly executed on the same day), or was otherwise terminated by Mr. Cheema in a legally enforceable manner.

2. Credibility and Reliability of Witnesses

[112] There is no doubt that credibility is a central issue in this case. Significant credibility issues arose for Mr. Cheema, Mr. Mand and Mr. Gill as a result of changes in their evidence from their examinations for discovery to trial, the nature and manner of their responses to questioning at trial (including but not limited to their demeanour and behaviour in the

courtroom), their clear revision of their testimony to "fit" with newly disclosed documents and new theories of the case, the overall plausibility of their evidence, and the significant conflicts in the evidence of these three men. The assessment of credibility was made even more difficult with the lack of many contemporaneous independent documents, particularly the lack of documents confirming when Trust Agreement #1, Trust Agreement #2 (both with Schedule A with the old PID and Schedule A with the new PID), and the Modification Agreement were fully executed.

- [113] I am conscious of the principles set out in the leading authorities concerning the manner in which a trial judge should assess credibility and reliability, including: *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 [Youyi], appeal dismissed 2020 BCCA 130; *Bradshaw v. Stenner*, 2010 BCSC 1398 [Bradshaw], aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392; and *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.).
- [114] The determination of the credibility and reliability of a witness requires the trial judge to make an assessment of their evidence. It is not an all or nothing proposition, and I may ultimately decide to accept some, all, or none of a witness' evidence. I may attach different weight to different parts of that evidence: *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96. A credibility assessment requires the trial judge to consider the trustworthiness of a witness' testimony, based upon the sincerity of a witness and the accuracy of their evidence. A lack of credibility may be found as a result of a determination that a witness has made a conscious decision not to tell the truth, or for some other reason they are unable to provide an honest account of historic events. A lack of reliability may be found as a result of the conclusion that their evidence is not accurate. Credibility relates to the honesty of the witness, while reliability relates to the accuracy of their evidence, which engages a consideration of their ability to accurately observe, recall and recount the events in issue. A witness who is not credible cannot give reliable evidence, whereas a credible witness may give unreliable evidence. Credibility is not a proxy for reliability: *R. v. H.C.*, 2009 ONCA 56 at para. 41.
- [115] A useful methodology to the assessment of credibility was articulated at paras. 186-187 of *Bradshaw*. First, I am to consider the testimony of a witness on a "stand alone" basis, followed by an analysis of whether their story is inherently believable. If their evidence has survived relatively intact, then I must evaluate their evidence based upon its consistency with other witnesses and documentary evidence, and the testimony of non-party, disinterested witnesses, which may provide a reliable yardstick for comparison. Finally, I must determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.
- [116] A determination of what is "inherently believable" or "reasonable" may, in some circumstances, be a subjective assessment which reflects personal experience. Accordingly, it may be unintentionally informed by implicit bias, and even by inappropriate stereotyping or myths: *Phoenix Homes Limited v. Takhar*, 2023 BCSC 184 [Phoenix Homes] at para. 63.

This may be true in cases involving the testimony of witnesses from different cultures and backgrounds, and witnesses testifying through an interpreter: at para. 63. Special care must be taken to ensure difficulties with providing evidence through an interpreter are not equated with evasiveness: *Fu v. Zhu*, 2018 BCSC 9 at paras. 39-42. However, any such inappropriate stereotyping or inherent difficulties in testifying through an interpreter must be specifically identified by the parties.

[117] While I have taken into account the potential difficulties inherent in testifying through an interpreter, or in testifying in a second language, in assessing the credibility of the party witnesses in this case, counsel provided no argument that any of the party witnesses' substantial difficulties were rooted in these factors. Further, any such difficulties do not provide a license for a witness to lie. This caution cannot diminish a truthful witness, nor elevate an untruthful witness: *Kim v. Choi*, 2019 BCSC 437 at para. 18, *aff'd* 2020 BCCA 98. Neither did counsel identify any specific impermissible myths or stereotypes I should be cautious of in these circumstances.

[118] As noted above, a consideration of credibility involves a consideration of the witness' account of events and its consistency with other admissible evidence from other witnesses or documents, and whether the witness' evidence is reliably corroborated or contradicted by this other evidence. However, in this case, there is a paucity of independent documentary evidence and third-party witnesses.

[119] In *Youyi*, Justice Mayer (as he then was) set out a helpful summary of additional factors which may impact credibility: at para. 92. I find the following are relevant in this matter:

- a) a series of inconsistencies, when considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony;
- b) credibility will be undermined when a party has failed to produce documents;
- c) credibility will be in doubt when a witness' explanation defies business logic or common sense; and
- d) credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions.

[120] On the issue of the impact on the assessment of the credibility of a witness for failing to produce relevant documents, documents created contemporaneously will often provide the most accurate reflection of what occurred, particularly with respect to historic events. Memories can fade with time, become hardened through the adversarial process, or be reconstructed for a variety of reasons and then presented as accurate evidence: *Bradshaw* at para. 188. The plaintiffs argue that *Bradshaw* stands for the proposition that the inability to produce relevant documents is a factor that negatively affects credibility. They rely upon Justice Dillon's comment "[t]he inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility": at para. 188. While the

defendants argue that this statement must be limited to failing to produce only relevant documents that would support one's own case, I cannot agree. In a case such as this, with an unfortunate lack of relevant, contemporaneous documents, I find the inability to produce material documents at one time in a party's care and control that would support the other party's case is also a relevant factor, particularly where a party can inexplicably produce documents to support their own case.

- [121] In a similar manner, the parties agree that a determination that a party produced a falsified document may be severely damaging to the credibility of that party: *Osayande v. Canada* (Minister of Citizenship and Immigration), 2002 FCT 368 at paras. 19-21. While the plaintiffs argue this would hold true if a party merely produces false documents, I am satisfied there must be some evidence that the party either created the false document, or produced it knowing it was falsified, before such a determination is appropriate.
- [122] While the fact that a witness has previously lied, even under oath, does not require a finding that he or she lacks credibility in all respects, the fact that a witness has been found to have lied during trial will be a key consideration: *Virk v. Singh*, 2020 BCSC 225 at para. 67, *aff'd* 2022 BCCA 153 [*Virk BCCA*]. A consideration of the context, and any justification for the false or misleading statements, is required. However, as the Court stated in *Moinzadeh v. Loblaw's Inc.*, 2021 BCSC 793:
- [17] Sometimes, however, witnesses deliberately lie and intend to deceive. When that occurs, it may be impossible to accurately separate truth from falsehood and the court may simply find the witness's testimony wholly unreliable. The more frequently the witness lies, the more likely that will be the case. If as a consequence a truth is not accepted as a fact by the court, the witness has only himself or herself to blame.
- [123] If a party "practises to deceive" the Court, whether it be by lying or gross exaggeration, it causes significant difficulty for the trier of fact to disentangle the truth from the "web of deceit and exaggeration": *Le (Guardian ad litem of) v. Milburn*, [1987] B.C.J. No. 2690, 1987 CarswellBC 1589 (S.C.) [*Milburn*] at 2. Again, if the result is the court casts aside something that was true, the party has only himself to blame.
- [124] Finally, in circumstances where the court is left in the difficult position where no party has been found to be credible, I must still consider whether it is possible to find the necessary facts underlying the plaintiffs' claim. As listed by this Court in *Qi v. Qin*, 2024 BCSC 1830 [*Qi*] that will involve a consideration of the undisputed facts; the objective documentary evidence; an absence of contradictory evidence; common sense and commercial reasonableness; any inferences that are drawn (adverse or reasonable); and the available independent evidence: at para. 63. It will also require a consideration of my assessment of the probabilities affecting the case as a whole: at para. 63.

- [125] If the state of the evidence is such that a finding of fact cannot fairly or properly be made, then the matter may ultimately be determined based on the burden of proof, and the trial judge may determine the plaintiff has failed to discharge their burden: *Phoenix Homes* at para. 68; see also *Silverhill Homes Ltd. v. Borowski*, 2019 BCCA 227 at para. 42.
- [126] The plaintiffs rely heavily on the testimony of Mr. Mand and Mr. Gill, as well as the testimony of their wives and of Ms. Mand. The defendants place significant reliance on the testimony of Mr. Cheema, as well as his family members, and his lawyers Mr. Binpal and Mr. Sandhu.
- [127] In this case, I have significant concerns about the credibility of Mr. Mand, Mr. Gill and Mr. Cheema. I find that all three lacked credibility and reliability. Their evidence on key factual points conflicted, and must be scrutinised with particular care. Their respective testimony was frequently contradictory, problematic, and clearly self-serving. Significant credibility issues arose for each of these three main witnesses, including but not limited to: changes in their evidence both before, and during, trial; the overall plausibility or logic of their testimony; the responsiveness of their answers; and the self-serving nature of their evidence. I find that all three have been untruthful with the Court at various times, and have created a narrative intended to promote their own self-interest.
- [128] I have taken special care to ensure I do not equate any difficulties with providing evidence in this case through either an interpreter (for Mr. Cheema and Mr. Mand), or through a second language (for Mr. Gill), to be conclusive of evasiveness.
- [129] I will address in detail the difficulties inherent in their evidence in due course. At this point, it is enough to say that I cannot accept Mr. Mand's evidence, as I find he lacked credibility and reliability. Further, I accept Mr. Cheema and Mr. Gill's evidence only to the extent that it is corroborated by either independent documentary evidence that is not alleged to be fabricated, or by their own after-the-fact conduct. However, this lack of credibility and reliability from the three main parties is not determinative, as counsel for the defendants suggests. Rather, I must still attempt to ascertain whether I can ascertain the truth despite the lack of credibility and reliability of the parties: *Youyi* at para. 101.

3. Inferences--Reasonable and Adverse

- [130] A party is not limited to proving his or her case with oral and documentary evidence. They may also be able to do so with a reasonable factual inference made upon circumstantial evidence, or by an adverse inference.
- [131] Turning first to the approach required to draw a reasonable inference on the basis of circumstantial evidence, Justice Williams set out a helpful summary of the proper approach in *Paguio v. Fraser*, 2011 BCSC 1519 [Paguio] at para. 61, which I would summarize as:
- a) where a case is not proven by direct evidence, the court is to carefully examine and consider the relevant circumstantial evidence;

- b) reasonable inferences may be made from circumstantial evidence, where a trial judge determines that a logical conclusion can be drawn from certain facts that have been proven;
- c) a reasonable inference must not be mere conjecture or guess work, no matter "how shrewd or plausible that guess might be";
- d) a reasonable inference must give rise to reasonable conviction in the mind of the trial judge "that the element of which proof is necessary is at least more likely than not"; and
- e) a plaintiff can succeed in proving her case on the strength of a reasonable inference.

[132] Drawing a reasonable inference "is the process of reasoning from a proven fact or facts to a reasonable, rational and logically legitimate conclusion": Paguio at para. 61(b). The decision of whether it is appropriate to make such an inference is governed by the application of logic, common sense and experience to the totality of the evidence: *British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.*, 2023 BCCA 70 [Angel Acres] at para. 172. It cannot be mere speculation or conjecture. If the inference does not flow logically and reasonably from established facts, it cannot be drawn: at para. 172. However, as the Court of Appeal makes clear, if evidence may support more than one inference, the trial judge must determine whether the evidence establishes particular factual inferences on a balance of probabilities: at para. 174. It "is only in the case of inconsistency between such available inferences - namely, where the two inferences cannot both be true - that the trier of fact must determine which is more probable": at para. 174. The Court goes on to clarify:

[176] By contrast, in a civil case, "a judge may choose among any number of available reasonable inferences": *Rain Coast Water Corp.* at para. 69. As the defendants acknowledge, it would be an error for a trial judge in a civil case to require a party to disprove all other rational inferences arising from circumstantial evidence (assuming of course that those other inferences are not inconsistent with the invited inference). That would be tantamount to applying the criminal standard of proof.

[177] In a civil case, circumstantial evidence is treated like any other piece of evidence; "[t]he weight accorded to it depends on the strength of the inference that can be drawn from it": *Sidney Lederman, Michelle Fuerst & Hamish Stewart, eds., Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at 82.

[178] The fact that a party adduces evidence from which the judge is invited to draw an inference does not shift the burden of proof to the opposing party: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 219 - 330, 1990 CanLII 70. The opposing party has a choice. It may choose to adduce its own evidence on the point, but it is not obliged to do so. It is for that party to assess its risk in deciding whether or not to adduce evidence. Once all the evidence is in, the trier of fact will weigh it and determine whether to draw the invited inference. In doing so, a judge will ordinarily consider alternative available inferences before deciding whether to draw the invited inference.

[133] Where I make a reasonable inference I will explain the basis upon which I do so at the appropriate place in my analysis.

[134] By contrast, an adverse inference is a factual determination drawn against a party on the basis that a party has undermined the opposing party's ability to adduce relevant evidence or failed to provide evidence over which it had exclusive control, without sufficient explanation: *Angel Acres* at para. 180. The plaintiffs ask that I draw a number of adverse inferences, arising out of the defendants' failure to call and adduce evidence from:

- a) Harchet Kaler and Inder Dhaliwal, both of whom are alleged to have been present and to have witnessed documents at Mr. Cheema's office on March 30, 2005;
- b) Sandeep Jawandha, a friend of Mr. Cheema's, allegedly involved in transactions related to the 16th Ave. Properties (addressed below);
- c) Mr. Cheema's appraiser Henry Wang, who prepared appraisal reports for Mr. Cheema in 2016 and 2020;
- d) Anurag Saini, a paralegal (now lawyer) who acted for Mr. Cheema in 2016; and
- e) Mr. Cheema's former counsel in 2020, whom Mr. Cheema says misconstrued his instructions when making critical admissions in the defendants' first response to civil claim filed July 2020, and in their first amended response to civil claim filed August 2020.

[135] The adverse inference rule is a discretionary rule of evidence that permits the Court to draw an adverse inference against a party by reason of his or her failure to call a witness who could be expected to give material evidence in their favour at trial: *Angel Acres* at para. 182; *Singh v. Reddy*, 2019 BCCA 79 at para. 1 [Singh]. The adverse inference rule is discretionary, and a trial judge is not obliged to draw an adverse inference: *Singh* at para. 9.

[136] At para. 183 of *Angel Acres*, the Court of Appeal noted that the process of drawing an adverse inference requires the trial judge to consider the following factors from *Singh*:

- whether there is a legitimate explanation for the failure to call the witness;
- whether the witness is within the "exclusive control" of the party, or was equally available to both parties; and
- whether the witness has key evidence to provide or is the best person to provide the evidence in question.

[137] Of further importance, the Court clarified the requirement that an adverse inference is not to be drawn unless a *prima facie* case is established: see *Thomasson v. Moeller*, 2016 BCCA 14 at para. 35. Specifically, the Court in *Angel Acres* made clear:

[184] If a party has not adduced sufficient evidence to support an invited adverse inference, no adverse inference will be drawn even if the opposing party has not called a material witness under its control. For example, a judge will refuse to draw an adverse inference

against a party for failing to call evidence if that party did not need to call evidence to meet the case against it: see, for example, *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242 at para. 101. This is because one party's failure to adduce sufficient evidence to support the adverse inference is a "sufficient explanation" for the opposing party's failure to adduce responsive rebuttal evidence.

[185] On the other hand, if a party has adduced sufficient evidence to support an adverse inference and the opposing party does not call a material witness under its control, the court will consider whether to draw the adverse inference after weighing the factors stated in *Singh*. Although this has been described as creating a provisional or tactical burden on the opposing party, "this is not a true burden of proof". It is simply the case that the opposing party runs the risk of an adverse inference being drawn in the absence of evidence to the contrary: *Mehat* at para. 88, citing *Benhaim* at para. 51.

[138] I do not consider it appropriate to rule on the adverse inferences the plaintiffs seek at this point. Rather, where I have drawn an adverse inference, or declined the invitation to do so, I will explain my rationale at the appropriate place in my analysis.

4. Problematic Document Disclosure

[139] There is no doubt that document disclosure has been a significant issue for the parties throughout this proceeding.

[140] The plaintiffs argue that Mr. Cheema has "demonstrated a wholesale disdain" for his document production obligations, which I should take into account in the fact-finding process. They seek an adverse inference due to what they say is the defendants' "active concealment of, and failure to produce, documents relating to material issues" which they say the defendants, on the evidence, clearly have in their possession or control and ought to have produced in the litigation.

[141] The plaintiffs ask that I draw the inference that Mr. Cheema in fact did retain the September and October 1996 Vancity account statements for Vancity #64873, but elected to withhold them from production as he knew they would provide documentary proof of Mr. Mand's payment being deposited into his account in September 1996.

[142] In response, the defendants say they have been "forthright in their production of documents and have made their best efforts to acquire and produce all relevant documents in their power and control". They say the plaintiffs have proffered no "reliable evidence" that the defendants are intentionally concealing documents.

[143] The defendants argue that if I make an adverse inference against the defendants for failing to produce certain documents, then I should draw the following adverse inferences:

a) against Mr. Mand that he did not make his capital contribution;

- b) against Mr. Mand and Mr. Gill that they did not pay their proportionate share of the 10% of the ongoing expenses for the Property; and
- c) against Mr. Gill that he failed to deposit all of the rental moneys into Vancity #136473, but rather converted the funds to his personal use.

[144] In his first affidavit sworn April 15, 2021, Mr. Cheema deposed:

- 4. I do not have any further documents which may relate to this case.
- 5. The Defendants have listed a great many documents and they, as far as I know, have no more other than those which are in the process of being listed and which will be produced by my new counsel. I expect that many of those documents will have already been listed.
- 6. I have reviewed all the places where such documents would have been kept, including my home and office.

[145] Notwithstanding this sworn statement, the defendants produced a large number of documents in April 2023, right before trial began, and throughout the remainder of 2023 and into early 2024. This production included producing in April 2023:

- a) Def. 12A - Trust Agreement #1;
- b) Def. 12B - Trust Agreement #2 (old PID); and
- c) Def. 12C - Modification Agreement.

[146] At that time, the defendants also produced documents dating back to 1996 from Mr. Cheema's lawyers relating to the Property, and the mortgage account statements from Laurentian Bank from 1996 to 2002.

[147] Then, after the trial commenced on June 12, 2023, on the weekend of June 24-25, 2023, the defendants produced documents which related to the issue of truck parking on the Property.

[148] Further, the defendants' production of bank account statements for Vancity #136473 post-July 2004 was problematic, and the production that did occur (for the period between 2008 and 2010), was missing many months, missing many pages within those months, and the statements are heavily redacted and show no entries recording any deposits. Despite repeated requests for full production of this deposit information in unredacted format, such production never occurred. Mr. Cheema's explanation was that these statements arrived from the bank in a redacted format, which I have no difficulty in concluding is wholly implausible. I equally have no hesitation in dismissing his counsel's argument that I cannot conclude Mr. Cheema redacted the documents himself. They were Mr. Cheema's documents, and any redactions must have occurred with his knowledge and on his instructions.

- [149] Mr. Cheema was inexplicably able to produce unredacted statements for this account for the period between June 2002 and July 2004, in support of his position that no funds were used from the line of credit secured by the Property for the purchase of the residence owned by his wife.
- [150] Finally, Mr. Cheema failed to produce a number of documents that were clearly material to the issues at trial, including:
- a) he produced his Vancity #64873 August 1996 bank account statement which recorded his \$20,000.00 deposit for the purchase of the Property, but he failed to produce his September and October 1996 statement which would have shown Mr. Mand and Mr. Gill's deposits; Mr. Cheema testified he kept the August 1996 bank account statement in his file so he would have proof of payment of the deposit;
 - b) he failed to produce a copy of Mr. Gill's bank draft for \$40,537.67 dated September 13, 1996, and justified this by saying no one asked him for it;
 - c) he failed to produce the Laurentian Account statements from 1996 to February 2002 and testified that he gave all of these to Mr. Mand and Mr. Gill, "unopened";
 - d) he failed to produce any documents which would have alerted the plaintiffs to the work done by Binpal & Associates with respect to amending a trust deed for the Property in 2016;
 - e) he failed to produce all necessary documents which would have shown the revenues received by Trucking Ltd.; and
 - f) he failed to produce all necessary documents to establish the revenues of Transport Ltd. from April 1, 2012 to the start of trial.
- [151] I note with respect to (e) and (f), no argument was made by the defendants that these documents were not material to the issues at trial, and the defendants did in fact produce some documents.
- [152] The defendants also, despite repeated requests, failed to produce any of their documents in electronic format (other than the production of the Binpal File).
- [153] As noted above, when addressing document production on January 31, 2024, I took the step of requiring all of the parties to file and serve detailed sworn affidavits verifying their respective lists of documents, and took the somewhat unusual step of requiring counsel to deliver to each other their respective positions on any omissions in the other parties' document disclosure. I did this as the plaintiffs' document production has also been problematic. For example, both Mr. Mand and Mr. Gill were unable to produce their own bank records for the period from 1996 to 2004, which would have recorded Mr. Mand's capital contribution, and would have provided a complete record of the payments they made for their proportionate contributions to the ongoing expenses for the Property. Likewise, Mr. Gill was unable to provide a full set of documents recording the funds he received by way of rent for the Home, and then paid into Mr. Cheema's Laurentian, and

then Vancity, bank accounts. The plaintiffs also produced documents well after the commencement of trial. They criticize Mr. Cheema for the same failings they have exhibited.

- [154] The law is clear that an adverse inference may be drawn as a result of a failure to produce material documents: *Youyi* at paras. 104, 164 and 165; *Curl v. Mr. Cool Ice Cream Ltd.*, 2016 BCSC 1372 at para. 63; and *Le Soleil Hospitality Inc. v. Louie*, 2011 BCCA 305 at para. 55.
- [155] I do not accept Mr. Cheema's explanation that he retained the August 1996 Vancity #64873 account statement showing his \$20,000.00 deposit on the Property, but did not retain the September and October 1996 statements. If, as he testified, it was important to retain the statement showing his deposit in his file, it is reasonable to assume it would be equally important to retain the statement showing Mr. Mand and Mr. Gill's contributions. The evidence shows Mr. Gill paid Mr. Cheema his contribution, in the amount of \$40,537.67, by way of a bank draft dated September 13, 1996. I draw an adverse inference from his failure to produce his bank statements for Vancity #64873 for September and October 1996. I find, if produced, those bank statements would have been inconsistent with Mr. Cheema's position that Mr. Mand failed to make the necessary capital contribution to acquire the Property.
- [156] Further, the fact that Mr. Cheema was able to produce some unredacted statements for Vancity #136473 for the period between June 2002 and July 2004, to support his position that no funds were used from the line of credit secured by the Property for the purchase of the residence owned by his wife, is problematic in all of the circumstances. That he was able to produce some documents for this specific period, when it was in his interest to do so, and yet for the period after only able to produce a sporadic set of redacted statements for this account, for the period between 2008 and 2010, missing many months, and missing many pages within those months, affects his credibility as a witness. Further, the fact that he was able to produce the Laurentian Bank mortgage statements for 1996 to 2002, and yet not able to produce any Laurentian Bank bank account statements for the same period, is problematic. I do not accept his explanation as plausible that he gave all of these statements to the plaintiffs, and yet kept all of the mortgage statements. In light of his ability to produce records only to attempt to support his position, I draw an adverse inference from his failure to produce a full, unredacted set of these documents from the date the account was opened; specifically, that they would not have supported the position he advanced at trial that Mr. Mand and Mr. Gill failed to make those ongoing contributions Mr. Cheema requested, and they failed to deposit the rental income from the Home.
- [157] However, I cannot accept that the plaintiffs have proven the defendants actively concealed material documents, and I decline the plaintiffs' suggestion that it would be appropriate for me to conclude they did. The issues in this litigation go back to August 1996, spanning almost thirty years. All parties struggled to produce material documents which would provide independent corroboration of the events at issue, not just the defendants. In these circumstances, I do not believe it necessary to go so far as to conclude that the defendants

actively concealed material documents.

[158] Likewise, I do not find the adverse inferences the defendants invite me to make would be appropriate in these circumstances. Rather, the plaintiffs testified as to their inability to produce the documents in question. My determination of their credibility, and the facts I find in the circumstances, is dependent on my assessment of their evidence. I decline to draw the adverse inferences sought by the defendants.

5. The 16th Ave. Trust Agreements and Similar Fact Evidence

[159] Further, an issue arose at trial about the appropriate use of similar fact evidence. Similar fact evidence is presumptively inadmissible. As clearly set out by the Supreme Court in *R. v. Handy*, 2002 SCC 56 [Handy]:

[55] Similar fact evidence is thus presumptively inadmissible. The onus is on the prosecution to satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

[160] In British Columbia, our courts have applied the analysis from *Handy* in the civil context: see, for example, *Dahl v. South Coast British Columbia Transportation Authority*, 2018 BCCA 184 at para. 17; *Robinson v. Gallamore*, 2022 BCSC 993 at paras. 30, 31.

[161] In *0984394 B.C. Ltd. v. Sticky's Candy Holdings Ltd.*, 2017 BCSC 1760 the Court noted:

[10] In both civil and criminal contexts the concern is with ensuring that probative value outweighs prejudicial effect, which turns on the question of whether there is sufficient similarity between the conduct alleged and the claimed similar facts. The similarity must be such that the evidence goes beyond a claim of a general propensity of bad character and becomes probative of a specific propensity to engage in the conduct in issue.

[11] In *Randhawa*, the BC Court of Appeal quoted Justice Rosenberg on this point at para. 56 and 57:

[56] A useful comment of the correct approach to similar fact evidence was provided by Mr. Justice Rosenberg in *Law Society of Upper Canada, Special Lectures 2003: The Law of Evidence*, (Toronto: Irwin Law, 2004) at 401. He stated:

While propensity underlies the probative value of true similar fact evidence, the breaking point between general propensity and specific propensity is most easily understood as depending upon the objective improbability of coincidence. This in turn depends upon the circumstances of the particular case and the critical features of nexus or connectedness.

- [162] The first consideration is what particular issue the evidence relates to. The evidence must go beyond showing general propensity, and must be more probative than prejudicial in relation to an issue in the litigation: Handy at para. 71. The Court must first determine the material issue in question, and then consider the relevance of the evidence in relation to the issue: Handy at para. 99.
- [163] During the direct examination of Mr. Mand, the issue arose relating to two properties on 16th Ave.: 18843 16th Ave., Surrey and 18861 16th Ave., Surrey (the "16th Ave. Properties"). Both of these properties were held in trust, with trust agreements entered into by the parties to those two respective investments (the "16th Ave. Trust Agreements"). The parties involved included Mr. Cheema and Mr. Mand. At that time, the defendants objected to the admissibility of the evidence relating to these investments and the 16th Ave. Trust Agreements on the basis that it was irrelevant, and it was an inappropriate effort to tender inadmissible similar fact evidence. I allowed the evidence to be elicited at trial, but expressly authorized counsel to argue the admissibility of the evidence in closing argument.
- [164] Counsel for the plaintiffs says the evidence elicited on the issue of the investments in the 16th Ave. Properties is not, properly understood, similar fact evidence, as it does not constitute propensity or disposition evidence. They say the evidence is tendered to refute the evidence of Mr. Cheema related to March 30, 2005, and the execution of the trust documents. They rely on the evidence to:
- a) establish the timing of different versions of signatures of Mr. Cheema, in different years, on different versions of the 16th Ave. Trust Agreements; and
 - b) establish the timing of different versions of signatures of Alamjeet Cheema, in different years, on different versions of the 16th Ave. Trust Agreements.
- [165] The plaintiffs argue that this evidence is essential to their position that Mr. Cheema's signature in 2016 was consistently different than in 2005, which they say disproves his story that all of the trust agreements pertaining to the Property were signed March 30, 2005. Likewise, they say that Alamjeet's signature was also markedly different in 2016 than it was in 2005, and that listing his occupation as a "Canada Post Letter Carrier" indicates it was executed after he was hired as such. They say this evidence supports their position that the Modification Agreement was signed much later than 2005.
- [166] The plaintiffs also argue that Mr. Cheema's alleged decision to remove Trucking Ltd. as a beneficiary of the trust for the Property on March 30, 2005, and then his alleged decision to do something similar with Trucking Ltd. as a beneficial owner of the 16th Ave. Trust Agreements, is also evidence essential to testing the veracity of Mr. Cheema's evidence.
- [167] Standing alone, I am not satisfied this evidence is relevant to an issue in this litigation. First, as I understand their argument, the plaintiffs want me to draw a series of inferences from a comparison of Mr. Cheema and Alamjeet's signatures on Trust Agreement #2 and the

Modification Agreement, as well as their signatures on the 16th Ave. Trust Agreements and Modification Agreements. They ask me to draw conclusions as to when respective documents were executed from my own opinion of the similarities and differences of the signatures. I agree with the defendants that without a forensic handwriting expert able to opine on the issue, this would not be appropriate.

[168] The inferences I am being asked to draw are even more surprising given that, during the first portion of the trial, I expressed my surprise at there being no handwriting analysis expert evidence being tendered given the dispute as to when the various trust deeds were signed, and the arguments being made at that time that various documents had been forged or fabricated. The plaintiffs did in fact tender a forensic handwriting analyst's expert report, but she did not address this issue. Notably, the plaintiffs did not refer to her report or testimony at all during closing submissions. Each of the parties involved in the execution of Trust Agreement #1, Trust Agreement #2 and the Modification Agreement all testified as to when and where they executed each document, and identified their signatures on each document. While I note that the law clearly permits me to "engage in a basic level of handwriting review without expert assistance," that is not what the plaintiffs are inviting me to do: *Heyran v. 0668403 B.C. Ltd.*, 2024 BCSC 1110 at para. 76. Rather, they are inviting me to ignore evidence as to when various individuals affixed their signatures to documents, and to reach my own conclusions as to when various signatures were affixed (although I acknowledge I have determined much of this evidence is not credible). They ask that I do so to support their versions of events, and they ask that I use this analysis to reach the inference that Trust Agreement #2 and the Modification Agreement were not executed on March 30, 2005. This goes well beyond a basic level of handwriting review, and I find is not appropriate.

[169] In other words, Mr. Cheema and Alamjeet's signatures on documents unrelated to the Property, and Mr. Cheema's decisions with respect to beneficiaries of the two 16th Ave. Trust Agreements, again unrelated to the Property, are not relevant to any of the issues I must determine in this matter.

[170] The plaintiffs do acknowledge that there is "an element of propensity evidence" in that the 16th Ave. Properties demonstrate Mr. Cheema's tendency not to have all beneficial owners in an investment property either on title to the property or as a borrower on the mortgage. They say that this propensity is probative, and the defendants have failed to articulate any basis upon which the admission of such evidence might be prejudicial. However, I am not satisfied that the issue of whether beneficial owners on another investment property were on title to the property, or were a borrower on the mortgage, is relevant to an issue in this litigation.

- [171] I am satisfied that the evidence relating to the 16th Ave. Properties is either similar fact evidence, not appropriate to allow into evidence, or is an invitation to inappropriately review handwriting without the expert evidence necessary to do so. Given that determination, I need not consider whether to draw an adverse inference from Mr. Cheema's failure to call Mr. Jawandha as a witness.
- [172] Second, I am also not persuaded by the plaintiffs' argument that Mr. Cheema's alleged decision to remove Trucking Ltd. as a beneficiary of the trust for the Property on March 30, 2005, and then his alleged decision to do something similar with Trucking Ltd. as a beneficial owner in the 16th Ave. Trust Agreements, is also evidence essential to testing the veracity of Mr. Cheema's evidence.
- [173] Finally, the plaintiffs say, as the Binpal File refers to the two sets of properties, with respect to the work done by Mr. Saini in 2016, it is clear Mr. Cheema instructed his counsel to make parallel modifications in respect of his interests in the two sets of properties at the same time, and under the same retainer. The plaintiff says "whether events unfolded as recorded in the 2016 Binpal File, or alternatively as testified by Cheema, is not propensity evidence but critical contemporaneous evidence to central issues in this case". I find the Binpal File is relevant to the matters I must determine in this litigation; however, I do not find it relevant to consider the instructions given at that time with respect to the two 16th Ave. Properties.
- [174] Rather, as that file relates to the Property, it is directly relevant to the central issues. However, it is only to the extent of the instructions given by Mr. Cheema with respect to work he wished done regarding the Property, and the work actually done (as recorded in the Binpal File, and as testified to by Mr. Binpal and Mr. Sandhu), that I will consider the evidence. That evidence is not, properly understood, similar fact evidence, and so I need not undertake an analysis of the probative force and prejudicial effect of any of the other evidence relating to the 16th Ave. Properties: Handy at paras. 138, 150-151.

6. Rule in Browne v. Dunn

- [175] Counsel for the plaintiffs referred to the rule of Browne v. Dunn as a "wrinkle": Browne v. Dunn, (1893), 6 R. 67 (H.L.), 1893 CanLII 65 (FOREP). Properly understood, the rule in Browne v. Dunn is a rule of trial fairness. As Lord Herschell described at 70-71:

My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

- [176] As a matter of fairness, if a party intends to impeach another party's witness with contradictory evidence on a significant issue, then they should put that evidence to the witness on cross-examination: Angel Acres at para. 190. In that way, a witness has the opportunity to address or explain the contradiction: R v. Jajja, 2024 BCCA 125 at para. 42.

[177] If the rule is properly engaged, and breached, then the trial judge has broad discretion to fashion a remedy. There is no fixed consequence if a cross-examiner fails to do so; rather, it is within the purview of the trial judge to choose a remedy based on all of the circumstances. If it is not possible to recall the witness, then the trial judge may exercise their discretion to lessen the weight put upon the contradictory evidence, or the contradictory evidence may be rejected in favour of the testimony of the opponent's witness: *Angel Acres* at para. 190.

[178] The plaintiffs characterize the rule as a "wrinkle". They argue it is relevant in three specific ways, as they say the defendants:

- a) did not challenge Mr. Gill on his testimony that he was present and observed Mr. Mand present his bank draft, in the same amount as his own, to Mr. Cheema;
- b) did not challenge Mr. Mand on his evidence that he was unaware of the existence of the lease renewals that occurred in 2012, 2017 and 2022; and
- c) did not put to the plaintiffs any theory of who they say could have been involved in the creation of Trust Agreement #2 (new PID).

The plaintiffs argue that, pursuant to the rule in *Browne v. Dunn*, the defendants are precluded from advancing any theory inconsistent with the evidence of the plaintiffs on these three issues. They say where the plaintiffs' evidence was not challenged directly by the defendants on cross-examination the plaintiffs' evidence should be accepted.

[179] To do so would be to expand the rule in *Browne v. Dunn* beyond its appropriate scope. No one argued that it would be appropriate to recall the plaintiffs, nor would that have been reasonable given the excessive length of the trial. It may be that I ultimately put less weight on Mr. Cheema's evidence to the extent his versions of these events were not put to the plaintiffs. However, I do not find it appropriate to exercise my discretion to rely upon the rule to accept the plaintiffs' evidence where it was not challenged. To do so would be to entirely ignore the necessary assessment of the plaintiffs' credibility and reliability, which I have found to be lacking.

[180] If I rely upon the rule in *Browne v. Dunn*, I will reference it explicitly and set out my rationale, in the appropriate place in my analysis.

7. Use of Withdrawn Admissions

[181] As I have set out above, at the start of trial I allowed Mr. Cheema to withdraw the admissions he had made in his pleading that: the trust exists; the trust owned the Property; and the plaintiffs were beneficiaries of the trust and were entitled to a declaration to that effect: *Admissions RFJ* at para. 4. In closing argument, the plaintiffs argued that they could rely on the defendants' withdrawal of this admission as a change of evidence that I may determine, ultimately, negatively affects Mr. Cheema's credibility. They went so far as to argue that the initial admissions remain part of the evidentiary record at trial.

- [182] In support of this, the plaintiffs argue that a formal admission which has been withdrawn with leave may be treated as an "informal" or "evidentiary" admission, and the party who made it may be cross-examined on that admission. That is what happened here, in the application brought by Mr. Cheema to withdraw the admission. His cross-examination, by agreement of counsel, formed part of the evidence at trial.
- [183] However, the plaintiffs say an informal admission forms part of the evidence on the record: *R. v. Baksh*, 2005 CarswellOnt 3106, 2005 CanLII 24918 (ONSC) [Baksh] at paras. 86, 95 and 96; *Donison v. Uncle Bill Foundation Inc.*, 1984 CarswellSask 425, 1984 CanLII 2413 (SKCA) [Donison] at paras. 6 and 7. With respect, I do not accept the case law supports that broad proposition. An informal admission does not bind the party who made it, if it is overcome by other evidence: *Baksh* at para. 86, quoting from *Sopinka, Lederman & Bryant, The Law of Evidence in Canada*, 2nd ed. (Toronto: LexisNexis Canada) at para. §19.1. The case law permits the party who has been permitted to withdraw a formal admission because of error or inadvertence to be cross-examined on that withdrawal.
- [184] After withdrawal is permitted by the court, an admission made in error or by inadvertence cannot be used as evidence against that party: *Donison* at para. 7. An admission in a pleading that is withdrawn can no longer be relied upon as a formal admission. To the extent it may be characterized as an "informal admission", it is not binding on the party who made it, and they may lead evidence to explain or contradict the admission. The plaintiffs' argument that I should find the initial admission to remain as evidence at trial is implicitly based upon their position that it should continue to bind Mr. Cheema, as it was not "overcome by other evidence".
- [185] Mr. Cheema's explanation at the time of the application was that the admission was made in error. While I did not accept that Mr. Cheema had established the admission was made because of a mistake by his previous counsel, I assumed that the admission may have been untrue, as a result of two newly discovered documents. To that extent, the informal admission has been overcome by other evidence, including Mr. Cheema's testimony as to the events he says occurred which would be directly contrary to the admission, and so the admission does not properly form part of the evidence at trial. While he may be challenged on the inconsistencies on his evidence on the point, and impeached on his examination for discovery in the same way, the admission itself is not properly evidence.
- [186] The plaintiffs ask that I draw the adverse inference from Mr. Cheema's failure to call the lawyers who drafted the pleading containing the prior admission, that the lawyers would not have supported a finding that the admission was made by either their mistake, or misunderstanding. However, at the time Mr. Cheema was cross-examined on this issue, counsel clearly asserted privilege on the record. The plaintiffs concede that if I do not find a waiver of privilege occurred, it would be inappropriate to draw the adverse inference they seek. In the circumstances, I do not find an implied waiver of privilege, and so I decline to draw this adverse inference.

B. Are the defendants able to succeed on their Limitation Act defence?

1. Applicable Legal Principles

[187] In their Amended Response, the defendants plead:

61. During the years in which the Property has been owned, the Plaintiffs have been aware of the acts or omissions connected with the Property which they now raise in their Claim, and if they are held to have an interest in the Property, they consented to those acts or omissions either expressly or by clear implication.
62. The Plaintiffs are barred in Equity, including by way of estoppel, laches and/or waiver from now, all these years later, claiming that these acts or omissions constitute breach of trust, breach of contract, misappropriation, unjust enrichment or a basis for quantum meruit.
63. At all material times, the Plaintiffs have known, or reasonably ought to have known, all the material facts relating to the claims made herein, and therefore all such claims relating to acts, omissions or events from more than two years before the filing of the Notice of Civil Claim are time barred by the provisions of the Limitation Act, S.B.C., 2012, c.13.

[188] In their closing submissions, the defendants argued the plaintiffs' claim was barred pursuant to the application of the appropriate limitation period. They also argued that "the position of the Defendants ought not to be defeated by application of the doctrines of laches or estoppel". They did not make any arguments based on waiver. Accordingly, that is the manner in which I will consider their arguments.

[189] Section 6 of the Limitation Act, S.B.C., 2012, c. 13 [Limitation Act] provides the basic limitation period is two years after the day on which the claim is discovered.

[190] For a trust claim, s. 12 of the Limitation Act states, for the purpose of triggering the running of a limitation date, the claim is deemed to have been discovered when a beneficiary is fully aware that injury, loss or damage has occurred. The onus a proving that a trust claim has been discovered rests on the trustee: s. 12(3).

[191] The previous Limitation Act provided for a limitation period of 10 years: Limitation Act, R.S.B.C. 1996, c. 266, s. 3 and s. 6.

[192] In *Vandenbosch v. Vandenbosch*, 32 B.C.L.R. (2d) 190, 1988 CanLII 3199 (BC CA) at para. 13, the Court, when considering this previous statute, noted that a limitation period would commence when a trustee refused to acknowledge he was holding the property in trust for the plaintiff. In *Lennox v. Lennox*, 2019 BCSC 938, Justice Horsman (as she then was), in considering the Limitation Act, found the triggering event to be the point in time the beneficiary "became fully aware that the respondent denied existence of the trust and would refuse to transfer his interest in the Property back to him": at para. 46.

[193] As noted by Justice Iyer (as she then was) in *Ali v. Ali*, 2022 BCSC 1022:

[21] The burden of proof of discoverability rests on the trustee, in this case, Imran: s. 12(3). This is a more stringent test than the basic discoverability rule because the trustee must show that the beneficiary actually "knew", not merely that they "ought to have known" that their claim was being denied: *Maussion v. Maussion*, 2021 BCSC 530 at para. 35. The purpose of the test is to protect a dishonest trustee from obtaining the protection of a limitation period: *Hochsteiner v. Kilback*, 2013 BCSC 1316 at para. 33.

[194] The case law makes clear that, under either statute, a limitation period starts to run when an act occurred on the part of the trustee inconsistent with the beneficiary's interest: *Ghag v. United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Local 2009*, 2022 BCCA 360 at para. 65.

2. Analysis

[195] The defendants argue that the plaintiffs discovered their claim in 2005 when Mr. Cheema explicitly informed them that if they did not pay the required monies, they would not be a part of the investment in the Property. They say regardless of which statute would apply, their claim is statute barred. As set out below, I do not find that Mr. Cheema has proven on a balance of probabilities that he explicitly told the plaintiffs they would no longer be a participant in the investment in the Property in March 2005. This argument fails.

[196] In the alternative, they say that the plaintiffs became fully aware of their cause of action in 2014 when Mr. Cheema refused to give the plaintiffs their alleged share of the truck parking revenue; refused to execute the amendment to Trust Agreement #1 prepared by Ms. Mand; and failed to take any steps to buy out the plaintiffs' interest in the Property, and so, say their claim is statute barred by virtue of s. 6 of the Limitation Act.

[197] This ignores the fact that Mr. Gill produced an email dated July 19, 2016, which establishes he was in possession of a copy of an appraisal Mr. Wang conducted for Mr. Cheema dated April 8, 2016. I accept the defendants' argument that Mr. Cheema's recorded intention "to use this appraisal report to assist with determining a selling price between partners" is hearsay, inadmissible for the truth of its contents. I likewise decline to draw the adverse inference sought by the plaintiffs, who argue Mr. Wang should have been called to testify by the defendants. However, I find that Mr. Gill forwarded this appraisal to Mr. Mand and to Mr. Cheema on July 19, 2016. The only reasonable inference is that Mr. Gill had been given the appraisal either by Mr. Cheema or on his instructions. I do not accept that the plaintiffs were fully aware of their cause of action in 2014.

[198] The plaintiffs led a great deal of evidence about a meeting with Mr. Cheema at a Tim Hortons restaurant in late 2019, when they raised the issue of an account of net truck parking revenues, as well as the potential buyout of their interests. Mr. Cheema denies he was in the country in November of 2019. I do not find this to be relevant to the consideration of the limitation defence.

[199] That is because it is clear from the evidentiary record that the defendants, in their first response to civil claim filed July 2020, and in their first amended response to civil claim filed August 2020, admitted Mr. Cheema held the Property in trust for the plaintiffs. Notwithstanding that this admission was allowed to be withdrawn in June 2023, it is proper to consider that until the Admissions RFJ was issued in June 2023, the plaintiffs cannot be found to have been fully aware that Mr. Cheema denied existence of the trust. Put another way, Mr. Cheema, as Trustee, cannot now attempt to completely ignore those admissions, and argue the plaintiffs should be found to have been fully aware of his denial of the existence of the trust based on previous alleged historic events. I am satisfied that, in these circumstances, the limitation period began to run in June 2023, not 2014.

C. What was the nature, and terms, of the oral agreement made in 1996 by Mr. Cheema, Mr. Mand and Mr. Gill with respect to the Property?

1. Applicable Legal Principles

[200] As a starting point, it is helpful to consider what a trust is. The following definition comes from Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada Limited, 2021) [Waters' Law of Trusts] at 4:

And among lawyers of the common law tradition the following definition is generally regarded as being one of the best:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

Another familiar definition, and one that has been cited with judicial approval, is:

A trust is an equitable fiduciary obligation, binding a person (called a trustee) to deal with property (called trust property) owned and controlled by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.

[201] Section 23(2) of the Land Title Act, R.S.B.C. 1996, c. 250 provides that indefeasible title is conclusive evidence at law and in equity that the registered owner is indefeasibly entitled to ownership of the land described in the title. It is a statutory presumption "whereby the registered owner is presumed to hold their legal or equitable interest to an estate in fee simple", unless the statutory presumption is rebutted: *Freeland v. Farrell*, 2021 BCSC 1318 [Freeland] at para. 34, aff'd on this point 2022 BCCA 99 at para. 42.

[202] The presumption of indefeasibility may be rebutted in three circumstances:

- a) through the operation of a resulting trust which may be inferred where no value is given for a legal interest;
- b) through the operation of an agreement between the parties that is contrary to the registered legal title; or
- c) taking into account the underlying equitable interests between the parties (e.g. considerations that arise in claims for unjust enrichment).

Freeland at para. 36.

[203] Section 59(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253 [Law and Equity Act], provides:

- (3) A contract respecting land or a disposition of land is not enforceable unless
 - (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
 - (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
 - (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interest, can be avoided only by enforcing the contract or disposition.

[Emphasis added.]

[204] A party to an oral agreement respecting land is prevented from using a lack of a written agreement as a defence when they themselves have acted as though there was a binding contract or the other party has detrimentally relied on the oral agreement: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at paras. 342-345 [Le Soleil].

[205] An agreement does not have to be in writing. It may be evidenced by writing, orally, by conduct, or by a combination of some or all of these. The fundamental issue is whether an agreement has been reached by the parties on all of the essential terms of the agreement. An enforceable agreement is reached where two or more parties have reached a manifest meeting of the minds. The parties must express themselves outwardly in a manner that indicates an intention to be bound, and there must be reasonably certain mutually agreed upon terms: *Le Soleil* at paras. 322-323; see also *Wong v. Wong*, 2024 BCSC 1305 [Wong] at paras. 241 and 247.

[206] In determining the terms of an oral contract, it may be that the parol evidence rule is applicable. As Justice Riley (as he then was) noted in *Wong*:

- [240] Of course, where an oral contract is alleged the [parol] evidence rule necessary[ly] operates differently than it would in the case of a written contract. As Justice Adair explained in *Shaw Production Way Holdings v. Sunvault Energy, Inc.*, 2018 BCSC 926 at para. 151, aff'd 2019 BCCA 72, "the interpretation of oral contracts turns on the same essential principles" that govern written contracts, however "in the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties". This "follows intuitively" from the recognition that oral contracts must often be construed without the benefit of a written instrument by which the parties expressed their respective rights and obligations in mutually agreed upon language.
- [241] To prove any contract, oral or written, the plaintiff must establish on a balance of probabilities that the parties reached a legally binding agreement. The test is "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of the contract": *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 36 [*Ethiopian Orthodox Tewahedo Church*], citing G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Thomson Reuters, 2011), at 15.
- [207] A trust is not a separate legal entity but is rather a legal relationship. The choice of a trust as an investment vehicle determines the attendant rights and responsibilities of the trustee and the beneficiaries.
- [208] With respect to a contract to create a trust, Waters' *Law of Trusts* characterizes it in the following manner at 67-69:

Agency arises out of contract, trust out of conveyance and the fiduciary obligation of the transferee. This we have already seen when examining the relationship of agent and trustee. When we turn to the concepts of contract and trust, we are obviously looking at the same matter but from a different and broader angle. Contract is a vehicle for the creation of reciprocal obligations between the parties to an agreement; the parties exchange value with each other. Contract is therefore essentially bargain, and in the common law system, unlike the civil law, contract by definition excludes gift, a transfer under which no value is given by the recipient. The object of a contract may take the form of a sale or exchange of property. However, while value or consideration is a broad concept, it does not include a promisee's reliance upon the promise to his or her detriment. As we have seen, a trust is a mode of transfer of property: the transfer may come about as a result of contract, or it may be a gratuitous unilateral act. That is to say, the settlor or testator may make a gift of property to others by way of a trust whereunder the donees become beneficiaries, or the beneficiaries or a third party may supply value or consideration to the settlor or testator in return for his or her promise to create the trust and the transfer or property to it. The latter is a contract to create a trust.

However, whether or not the trust is the outcome of contract, once it is created, whether by will or inter vivos act, and the property has been effectively transferred to the trustees, it is fully enforceable by the beneficiaries against the trustees.

The terms that are enforceable must also be identified. If the trust was created as the result of a contract, and whether or not the documentation includes a specific "Trust Agreement", the terms of the trust will be found in the contract itself, further to which the trust agreement, possibly and, if so, unwisely expressed in differing language, was drawn. That is to say, though the terms of the trust should be exactly and comprehensively reproduced in the trust agreement, the court is free in the event of doubt or silence to consult the language of the contract. The contractual agreement is the found and origin of the trust, and this may result in the court looking at any or all of the documents that contain evidence of the agreement reached.

- [209] Where a contractual relationship is established between the parties, care must be taken to ensure that "the interpretation of either facts or documents must not be distorted or given undue emphasis in order to impose the existence of a trust, where a reasonable and impartial interpretation would reveal that such a trust was neither intended nor created": *Zeitler v. The Estate of Alfons Zeitler*, 2008 BCSC 775 at para. 70.
- [210] The onus of proof as to the existence of a valid trust lies with the person asserting it: *Larochelle v. Soucie Estate*, 2019 BCSC 1329 [Larochelle] at para. 176.
- [211] A bare trust arises when a trustee simply holds legal title to an asset, with all of the risks and rewards remaining with the beneficial owner. A bare trustee must deliver the trust property to the beneficiary upon demand: *Dediu v. Martin Estate*, 2023 BCSC 852 [Dediu] at para. 100. A distinguishing characteristic of a bare trust is that the trustee has no independent powers, discretions or responsibilities, and his or her only responsibility is to carry out the instructions of the beneficiaries: *Scoretz v. Kensam Enterprises Inc.*, 2018 BCCA 66 at para. 33. For the purpose of this proceeding only, the parties acknowledge that the oral trust (as set out in the Agreement) and the subsequent written trust deeds are not bare trusts. This is a proper admission for the purpose of this proceeding, and I will proceed on that basis.
- [212] If, as in these circumstances, the oral agreement is to create a trust, the evidence must establish both a declaration of trust and constitution of the trust: *Larochelle* at para. 176. The declaration of the trust requires three essential characteristics known as the three certainties: certainty of intention to create the trust, certainty of the subject matter of the trust, and certainty of the trust object: *Warde v. Slatter*, 2017 BCSC 274 at para. 12. It is not necessary for the trust to be set out in a written document: it may be construed from conduct, or from documents and conduct taken together. The constitution of the trust requires the transfer of title to the trust property to the trustee: *Larochelle* at para. 177.

- [213] Certainty of intention to create the trust is analyzed with the intention of the parties as at the time of the transaction: Virk BCCA at para. 51. Certainty of intention may be inferred from a consideration of all the surrounding circumstances. As Justice Donegan (as she then was) noted in Larochelle, there is no need for any specific technical words or expressions:
- [183] Certainty of intention requires that the settlor's intention to create a trust must also be established with certainty in order for a trust to be valid. The settlor must clearly intend the recipient to hold the property in trust. While a trust can be construed from conduct alone, words are generally necessary to show intention. However, there is "no need for any technical words or expressions for the creation of a trust": Waters' Law of Trusts at 141. Conversely, the use of the terms "trust" and "trustee" in the originating document are probative, but not determinative, of the intention to create a trust: Angus v. Port Hope (Municipality), 2017 ONCA 566 (Ont. C.A.) at para. 104.
- [184] Evidence to determine the settlor's intention is not limited to the originating document. External evidence may be taken into account to resolve ambiguities, or "where the extrinsic evidence clearly demonstrates that the words of the document do not reflect the intention of the parties": Waters' Law of Trusts at 143. In fact, courts have characterized a search for certainty of intention that is limited to the document alone as a "vacuous inquiry": Antle v. R., 2009 TCC 465 (T.C.C.[General Procedure]) at para. 44 (aff'd 2010 FCA 280 (F.C.A.)).
- [214] Certainty of the subject matter of the trust requires certainty of the property subject to the trust, and certainty of the beneficiary's interest in that trust property: Grewal v. Khakh, 2018 BCCA 357 at para. 26.
- [215] Finally, certainty of the object of the trust requires that the objects of the trust must be clearly delineated, and there must be no uncertainty as to whether an individual is, in fact, a beneficiary: Dediu at paras. 101-102.

2. Analysis

- [216] As set out above, in the section entitled "Brief Background", the parties are largely in agreement on the events in 1996 surrounding the purchase of the Property.
- [217] I am satisfied that Mr. Mand and Mr. Gill introduced the Property to Mr. Cheema. Mr. Cheema purchased the Property for \$690,000.00 in September 1996. The parties agree that around the time Mr. Cheema purchased the Property they reached the Agreement. That is, that Mr. Cheema would hold legal title to the Property in trust for the beneficial owners of the Property, being: Mr. Mand as to a 10% beneficial interest, Mr. Gill as to a 10% beneficial interest; and Mr. Cheema as to an 80% beneficial interest. The parties also agree that the terms of that Agreement were:
- a) Mr. Mand and Mr. Gill were to pay Mr. Cheema their respective 10% capital contribution for the acquisition of the Property;

- b) Mr. Mand and Mr. Gill were to pay Mr. Cheema their respective 10% of the ongoing expenses related to the Property;
- c) Mr. Mand and Mr. Gill were responsible for renting out the Home; and
- d) Mr. Cheema would hold legal title to the Property pursuant to an oral trust with the same terms.

[218] While I heard significant evidence on when exactly the parties reached the Agreement that Mr. Mand and Mr. Gill would be 10% beneficial owners of the Property--whether before or after the removal of the subject clause on the contract of purchase and sale--that is not a relevant issue that must be resolved. The parties all agree the Agreement was reached before the purchase of the Property completed. Likewise, I heard significant evidence on when the involvement of Mrs. Mand and Mrs. Gill was first raised. Notwithstanding Mr. Gill was adamant that it was right from the beginning, Mr. Mand and Mr. Cheema disagreed with this, and both said their involvement was first raised in 2005. There is no independent documentary evidence that can resolve this conflict, and again it is not necessary to do so.

[219] It is clear that neither Mr. Mand nor Mr. Gill disclosed their beneficial interest in the acquisition of the Property to the vendor of the Property as required to do pursuant to s. 28 of the Real Estate Act. While Mr. Cheema no longer argues this failure invalidated the trust, he does say it reflects poorly on their credibility. I agree. Both Mr. Mand and Mr. Gill testified that they were aware of the disclosure obligations in force at the time the Property was acquired, and neither offered any clear evidence as to why they failed to make such disclosure. The only logical inference is that they decided not to go on legal title, nor on the mortgage, for the Property because of their concerns about this professional obligation.

[220] There was also significant evidence from Mr. Cheema that the plaintiffs refused to assume any responsibility for the mortgage on the Property. I need not resolve if, or why, they refused to do so, but I find that Mr. Cheema was the sole mortgagor and his son, Rajpal Cheema, guaranteed the mortgage required for the purchase of the Property.

[221] I find the purchase of the Property completed on September 17, 1996, with a possession date of September 19, 1996. The amount required for completion was \$385,376.76. The parties agree the capital contribution required from Mr. Mand and Mr. Gill for their 10% beneficial interest was \$40,537.67 each. Mr. Gill has provided independent documentary evidence to support his evidence that he paid his 10% share for the capital contribution to purchase the Property by way of a bank draft dated September 13, 1996 in the amount of \$40,537.67. Mr. Cheema admits Mr. Gill made this payment.

[222] However, while both Mr. Mand, Mrs. Mand and Mr. Gill maintain Mr. Mand also paid the identical amount, Mr. Mand has no documentation to support his evidence. I find it to be a reasonable inference based on the documentary evidence that does exist, the uncontroversial evidence agreed to by the parties, and the conduct of the parties in the years that followed, that, in all of the circumstances, Mr. Mand made his capital

contribution. In reaching this determination, I do not rely upon Mrs. Mand's evidence that she recalls seeing a significant amount of money withdrawn from their bank account in 1996, nor on Mr. Mand's evidence, but rather on the subsequent behaviour of the parties, which only makes logical sense if Mr. Mand did in fact make the required payment. That subsequent behaviour, which is corroborated by documentary evidence, includes:

- a) the cheque register that records a payment from Mr. Mand to Mr. Cheema on June 30, 2004, in the amount of \$2,500.00, with the notation "Subject Property", which matches the same payment Mr. Gill made on that day;
- b) Mr. Cheema including Mr. Mand as a named beneficiary on Trust Agreement #1, Trust Agreement #2 and the Modification Agreement; and
- c) Mr. Mand's involvement in matters related to the Property after 1996 including:
 - i. being a contact with the City of Surrey in 2006 with respect to an application for a commercial building on the Property;
 - ii. being a contact with Surrey City Development from 2009 to 2013 with respect to potential development of the Property and the Land Swap;
 - iii. being a contact for Aplin & Martin Consultants Ltd. ("Aplin & Martin") from 2010 to 2013; and
 - iv. being a contact for a potential development in 2013 at the Property.

[223] While Mrs. Mand corroborated Mr. Mand's testimony, and said that when she reviewed their cheque book between 1999 and 2004 she recalls seeing cheques that had been made payable to Mr. Cheema, I put no weight on her evidence, given my concerns with her credibility and reliability as set out below.

[224] However, I also rely upon the fact that Mr. Cheema clearly gave Mr. Mand and Mr. Cheema financial statements for Transport Ltd. in 2015 or 2016, for the years ended April 30, 2013 and April 30, 2014, albeit it in heavily redacted form, and a copy of an appraisal for the Property obtained in 2016. I address both of these findings of fact in greater detail above and below, in para. [197] and [449].

[225] Finally, Mr. Gill testified he was present and observed Mr. Mand present his bank draft, in the same amount as his own, to Mr. Cheema. The plaintiffs say Mr. Gill was not challenged on this evidence, although Mr. Cheema denies Mr. Mand did so. I do not find it would appropriate to rely on the rule in *Browne v. Dunn* to accept Mr. Gill's evidence on this point as the plaintiffs suggest.

[226] While I accept that Mr. Cheema did not have an email address and, therefore, relied on friends and family to accept and send emails on his behalf, I do not find Mr. Cheema's explanation that Mr. Mand would just "come along" to the meetings as his friend to be credible or logical. Neither do I accept his evidence that Mr. Mand was some kind of a consultant or assistant for him, and that he agreed to behave as such in the hope of getting further business from Mr. Cheema.

[227] Further, Mr. Cheema's evidence on this point has changed significantly over the course of the litigation. At his examination for discovery on January 23, 2023, he did not deny that Mr. Mand had paid his capital contribution. Rather, he said:

570 Q Mr. Cheema, I'm asking you if you -for your recollection. Did Gary Mand pay you an equivalent amount of around -over \$40,000 for the purchase of the 152nd Street property prior to the closing?

A I do not remember if he had given. If given, then he can show me the records, because Kuldip has also shown.

573 Q And I'm not referring you to any document today. I'm asking for your recollection.

A Honestly I do not remember. If given, if there's any record, he can show me.

575 Q You don't deny that Mr. Mand provided you with that money, do you?

A I answered earlier. I do not know whether he gave me or not. Deny is different. He can prove.

[Emphasis added.]

[228] However, at trial, his evidence changed; he was adamant that Mr. Mand had not made the capital contribution, and that he specifically recalled not only that fact but confronting Mr. Mand about that in 2005. He did not tender a satisfactory explanation at trial to explain the significant difference in his evidence. I do not accept this self-serving evidence to be true; rather, I find it is an ever-changing narrative that Mr. Cheema came to as a result of his position in highly adversarial litigation that evolved as the issues between the parties came to be framed more clearly.

[229] Accordingly, I am satisfied that the parties entered into the Agreement before the completion of the purchase of the Property, and agreed that Mr. Cheema would hold legal title to the Property in trust for the three beneficiaries, being Mr. Cheema as to an 80% interest, Mr. Mand as to a 10% interest, and Mr. Gill as to a 10% interest. The Agreement was subject to the terms set out at para. [217] above.

[230] I am satisfied the plaintiffs have proven, on a balance of probabilities, the three certainties necessary to find the creation of an oral trust: namely, certainty of the parties' intention to create a trust; certainty that the Property was the subject matter of the trust; and certainty that Mr. Mand, Mr. Gill and Mr. Cheema were the objects of the trust.

- [231] I am also satisfied the plaintiffs have proven the constitution of the trust, in that Mr. Cheema acquired legal title to the Property in his capacity as Trustee, pursuant to the Agreement.
- [232] I am satisfied that Mr. Mand and Mr. Gill made their capital contribution to Mr. Cheema, and that legal title to the Property vested in Mr. Cheema as Trustee. As a result, I find that a validly constituted oral trust was created in September 1996, of which Mr. Cheema was the Trustee, and Mr. Cheema, Mr. Mand and Mr. Gill were the beneficiaries.
- [233] For the sake of completeness, I do not accept the defendants' argument that after reviewing the Agreement, Trust Agreement #1, and Trust Agreement #2, "it is arguable that there is no provision contained within with respect to the trust being irrevocable. It may be argued that since there is no provision with respect to irrevocability, the trust has not been completely constituted". First, the case law the defendants rely upon makes clear that a bare trust (which is not in issue here) must be irrevocable: *The Canada Trust Company v. Bakus*, 2016 BCSC 601 at para. 44. The lack of the word "irrevocable" is not definitive, and in fact, there are no terms in either the Agreement or the two trust deeds which would result in the trust being revocable. Further, Trust Agreement #1, which I shall address more fully below, makes clear that Mr. Cheema, as Trustee, will have no equitable or beneficial interest in the Property.
- [234] I find the Agreement was subject to two specific obligations, in addition to the legal obligations of Mr. Cheema as Trustee, pursuant to the oral trust. Having found that Mr. Mand and Mr. Gill have proven on a balance of probabilities that they paid Mr. Cheema their respective 10% capital contribution for the acquisition of the Property in 1996, the Agreement remained subject to their obligation to pay Mr. Cheema their proportionate 10% share of the ongoing expenses related to the Property.
- [235] As I find that Mr. Mand and Mr. Gill have proven on a balance of probabilities that they satisfied the first condition (the condition precedent) and paid Mr. Cheema their respective capital contribution, they were only subject to the second condition (the condition subsequent) and required to pay Mr. Cheema their respective 10% of the ongoing expenses related to the Property.
- [236] Much, if not most, of the following analysis will turn on whether the condition subsequent was satisfied; in particular, who had the obligation to determine what the quantum of the ongoing expenses was, and who had the obligation to ensure the beneficiaries were each paying their proportionate share of the expenses of the Property.

D. What rights and obligations did Mr. Cheema, in his capacity as Trustee, have with respect to the Agreement after completion of the purchase of the Property?

1. Applicable Legal Principles

- [237] The overriding concern when interpreting a contract is to determine the intent of the parties and the scope of their understanding: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva] at para. 47. As noted above in para. [208], where a trust arises out of contract, the contract itself "is the found and origin of the trust". The court may look at the evidence of the contract reached if there is doubt, or silence, in the terms of the trust as to what the agreement between the parties was: *Waters' Law of Trusts* at 69.
- [238] In circumstances where an agreement was entered into by the parties which confirmed one party would hold legal title to a property in trust for the parties to the agreement, the trust must be interpreted against the commercial backdrop of the agreement. As stated in *Khavari v. Mizrahi*, 2016 ONSC 101, any ambiguity in the interpretation of the trust agreement should be resolved in giving effect to the commercial agreement:
- [46] As mentioned, the trust agreement must be read and interpreted against the commercial backdrop of the agreement, which it was intended to implement. The provisions of the trust agreement must therefore be read to give effect to the agreement rather than to contradict it. In particular, any ambiguity in the interpretation of its provisions should be resolved in favour of the interpretation that gives effect to the agreement. Moreover, as Addendum #2 is the last document in the chain, its provisions should govern to the extent there is any conflict between the provisions of the trust agreement, as originally executed, and Addendum #2 that is relevant to the issue of the intended arrangement between the parties. In this regard, it is important to note that Addendum #2 restricts the right of Khash under paragraph 12 of the trust agreement to require an assignment, transfer and conveyance of the Shares to him upon demand. []
- [239] Justice Fenlon, writing for a unanimous Court of Appeal, helpfully addressed the distinct origins of trust and contract law in *N-Krypt International Corp. v. LeVasseur*, 2018 BCCA 20 [N-Krypt]:
- [26] It is helpful at this point to consider the distinct origins of trust and contract law. Whereas contracts stem from the common law, trusts are a product of equity. The relationship between equity and the common law, as well as the origins of the trust are explained in D.W.M. Waters, M.R. Gillen & L.D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 5-6:

One system of law was interpreted and moulded in the King's Courts, and another system of law was gradually being established in the Lord Chancellor's Court, ultimately called the Court of Chancery. The first is the common law in the strict sense, the second is Equity, a gloss upon the first, designed as an act of the King's residual justice to bring equity to bear in the application of the laws of the realm. Equity is superior in authority because it is the King's personal ruling concerning the application of "his" justice in the realm. Equity, like the common law, gradually became institutionalized, with each system using its own forms and procedure, but in matters of substance Equity assumed the existence of the common law, assisting, modifying, and supplementing it.

It was out of this unique state of affairs, which endured even to the point of separately administered systems until the latter half of the nineteenth century, that the trust was born. In the eyes of the common law courts if [the trustee] held the legal title to land or chattels, he had the rights of disposition, management and enjoyment of that property. But, if [the trustee] had earlier promised the transferor to hold the property for the enjoyment of a person other than [the trustee] himself, the Court of Chancery was asked and finally agreed to enforce the moral obligation. At law, [the trustee] might be owner in the fullest sense that the common law recognized ownership, but in equity - which [the trustee] could not avoid if he were summoned to account [B, the intended beneficiary, could compel [the trustee] to yield up the enjoyment in the property and indeed administer it on B's behalf. [Emphasis added/]

[27] The relationship between equity and the common law is sometimes described by the maxim "equity follows the law": J. McGhee, ed., *Snell's Equity*, 31st ed. (Toronto: Carswell, 2005). The author of *Snell's Equity* elaborates on the meaning of the maxim at 95:

Where a rule, either of the common or statute law, is direct, and governs the case with all its circumstances, or the particular point, a court of equity is as much bound by it as a court of law, and can as little justify a departure from it.

However, the maxim that equity follows the law does not mean that common law always trumps equitable doctrines. To the contrary, s.44 of the Law and Equity Act, R.S.B.C. 1996, c. 253, provides that equity prevails where the rules of law and equity conflict.

[28] These statements may at first appear contradictory. However, they can be reconciled by appreciating that the relationship between equity and the common law is contextual.

[Emphasis in original.]

[240] Justice Fenlon concluded that, in the circumstances of that case, "the trust was the mechanism to give effect to the contract and the two are indissociable": *N-Krypt* at para. 31. She commented on a similar conclusion in *Buschau v. Rogers Communications Inc.*, 2006 SCC 28 that the terms of the contract underlying the root of the trust cannot be circumvented: at para. 94 (cited in *N-Krypt* at para. 40).

[241] It is against this background that Mr. Cheema's right and obligations, in his capacity as Trustee, must be considered.

2. Analysis

[242] As already noted, although the defendants initially argued that the trust arrangements between the parties were that of a bare trust, they resiled from this position in closing argument and now say it is not. The plaintiffs took the same position in closing argument.

[243] Notwithstanding the defendants focus their arguments on the terms agreed to by the parties in the Agreement, they, quite properly, do not argue that the parties never agreed that Mr. Cheema was going to assume the responsibilities of a trustee when he agreed to the terms of the Agreement (one of which was the oral trust), and took legal title to the

Property into his own name. As Justice Fenlon noted in *N-Krypt*, both the contract and the oral trust are "indissociable": at para. 31. The nature of the legal arrangement the parties chose, in order to implement their investment in the Property, affects the legal rights and obligations each party then bore. While the contract may be the original of the trust, the contractual terms cannot eliminate the fiduciary obligations of the trustee.

- [244] The law is settled that Mr. Cheema, in his capacity as Trustee, was a fiduciary. As such he owed fiduciary obligations to the beneficiaries of the trust. Those obligations may be found both in the common law and the equitable law of trusts. Some of those obligations were codified in the Trustee Act, R.S.B.C. 1996, c. 464 [Trustee Act], which came into force some seven months after the oral trust was entered into, on April 21, 1997.
- [245] Much has been written about fiduciary obligations owed by trustees, which is not necessary to canvas in depth here. However, I am satisfied that Mr. Cheema, in his capacity as Trustee, owed the beneficiaries the duty to follow the terms of the oral trust, and to observe those general principles of trust law which did not run counter to the express terms of the Agreement and the oral trust. These fiduciary obligations were neither contracted out of by the parties, nor minimized by the business arrangement entered into by the parties. He also owed the following duties, which are relevant to the analysis of the issues before me:
- a) the duty to exercise the care, diligence and skill of a reasonably prudent person;
 - b) the duty to act honestly, in good faith, and in the best interests of the beneficiaries;
 - c) the duty of loyalty, which requires a trustee not to act in the face of a conflict, not to prefer their personal interest, and not to take a secret profit, act dishonestly, or in bad faith;
 - d) the duty to act impartially, and not to prefer one beneficiary or group of beneficiaries to another;
 - e) the duty to avoid self-interest where their interest could conflict with the interests of the beneficiaries;
 - f) the duty to act in accordance with the settlor's intention and purpose in creating the trust, and to comply with the terms of the trust instrument or trust arrangement;
 - g) the duty to preserve the trust property on behalf of the beneficiaries;
 - h) the prohibition against acting in a manner that would give rise to a conflict of interest, except with the informed consent of all beneficiaries (the "no conflict rule");
 - i) the prohibition against personally profiting from the trust (the "no profit rule"); and
 - j) the duty to maintain adequate records and to account to the beneficiaries for the trust property.

Boe v. Alexander, 15 B.C.L.R. (2d) 106, 1987 CanLII 2596 (BCCA) at paras. 20-21, leave to appeal to SCC ref'd, 20662 (25 January 1988); Chung v. Chung, 2022 BCSC 1592 [Chung 2022] at paras. 50-55, rev'd in part on other grounds 2025 BCCA 136; Ghag v. Ghag, 2021 BCCA 106 [Ghag] at paras. 45-49; see also Trustee Act, ss. 15.1, 15.2.

[246] A court may interfere in the exercise of discretion by a trustee where a trustee, having done nothing, cannot show they gave proper consideration to whether they ought to exercise their discretion: Ghag at paras. 47 and 49. Further, if a trustee breaches their duty of loyalty, they are accountable for any right, profit or benefit acquired by reason of his fiduciary position: Chung 2022 at para. 55.

E. What rights and obligations did Mr. Mand and Mr. Gill, in their capacity as beneficiaries, have with respect to the Agreement after completion of the purchase of the Property?

[247] Mr. Mand and Mr. Gill had the right to enforce compliance by Mr. Cheema with his fiduciary obligations as Trustee.

[248] They each admit that after completion of the purchase of the Property, they had the obligation to "pay 10% of any net operating deficit reasonably arising at the Property, as and when requested by Mr. Cheema".

[249] I would go further--- I am satisfied that Mr. Mand and Mr. Gill were to pay Mr. Cheema their respective 10% of the ongoing expenses related to the Property. Whether that was to be their proportion of "any net operating deficit", or their proportion of the totality of the expenses, was a determination Mr. Cheema, in his capacity as Trustee, was able to make on an ongoing basis, depending upon all relevant factors, which may have included by way of example the quantum of expenses, rent received, and taxes paid on account of the rent received. The plaintiffs have adduced no documentary evidence to support their position that they were only to pay 10% of the "net" expenses. However, as by their own evidence they made no payments after June 30, 2004, that is not an issue I need determine.

[250] Rather, the critical issue is whether they were only obligated to make such a payment only if and when Mr. Cheema requested it (as the plaintiffs suggest), or if they had an independent obligation to demand the calculation from Mr. Cheema, and ensure they made all such payments in a timely manner (as Mr. Cheema suggests).

F. Between completion of the purchase of the Property in 1996 and March 30, 2005, did Mr. Mand and Mr. Gill fail, or refuse, to pay their proportionate share of the expenses for the Property?

[251] While the plaintiffs do not deny that Mr. Mand and Mr. Gill had the obligation under the Agreement to pay their proportionate share of expenses for the Property, they take the position that they have no obligation to make any such payments at this time if it is determined they failed to pay the entirety of the amount due and owing from them. While the plaintiffs do not deny that a trustee is entitled to be reimbursed for their reasonably incurred expenses when acting in their capacity as a trustee, they say Mr. Cheema failed to bring a counterclaim against Mr. Mand or Mr. Gill arising from his allegations that they

failed to make all required contributions, which means he cannot now claim for any expenses from 1996 to date. However, the Amended Response made clear the defendants' position that the plaintiffs had paid less than their proportionate share of the expenses related to the Property: at para. 32. For the reasons already addressed, I am satisfied that the terms of the Agreement (and the oral trust) clearly required this to occur, and the lack of a counterclaim is not determinative of the issue.

- [252] In 1997 and 1998, Mr. Gill testified that he prepared handwritten summaries of income and expenses at Mr. Cheema's request for tax purposes. Those two handwritten summaries were produced by the plaintiffs. On each, Mr. Gill listed the amount for property tax, insurance, repairs and maintenance, and interest paid on the mortgage. From those total expenses, he deducted 12 months of income from the Home, to record the total loss on the Property. In 1997 Mr. Gill recorded a total loss of \$9,305.99, and in 1998 he recorded a total loss of \$10,260.16.
- [253] The defendants produced two Laurentian Bank mortgage statements for the Property's mortgage, as at December 31, 1997 and as at December 31, 1998. On those two statements Mr. Cheema handwrote further notes--during the litigation--which the defendants then produced. On those two statements Mr. Cheema took no issue with Mr. Gill's figures; however, he added in the principal that had been paid on the mortgage.
- [254] The parties did not produce any handwritten summaries from January 1, 1999 onwards. Mr. Gill testified that Mr. Cheema told him that the Canada Revenue Agency ("CRA") had disallowed his claim to deduct net losses, but there is no corroboration of this statement.
- [255] There is a lack of documentary evidence to identify and prove all of the payments Mr. Mand and Mr. Gill made to their proportionate share of the expenses for the Property from September 1996 to March 2005. Both maintain they made all payments they were requested to make, with their last payment dated June 30, 2004.
- [256] Mr. Gill has produced documentary evidence in the form of a duplicate cheque register of the contribution payments he made to Mr. Cheema from 1996 to 2005 as follows:
- a) February 4, 1999 \$500.00
 - b) October 1998 \$1,000.00
 - c) October 10, 1999 \$500.00
 - d) March 13, 2000 \$500.00
 - e) June 16, 2000 \$800.00
 - f) April 18, 2001 \$800.00
 - g) June 30, 2004 \$2,500.00

[257] Mr. Mand could only locate a cheque register which recorded a payment to Mr. Cheema on June 30, 2004 in the amount of \$2,500.00, with the notation of "6728 - 152 St". This payment is identical in date and amount to the one Mr. Gill made.

[258] The plaintiffs point to a statement from July 2004 for the bank account Mr. Cheema used at the time, Vancity #136473, which shows a deposit of \$5,000.00 on July 7, 2004. It does not make it clear whether it was a deposit of cash or of cheque. They ask for the reasonable inference to be drawn that this must have been a deposit of the two cheques made out by Mr. Mand and Mr. Gill on June 30, 2004, in the amount of \$2,500.00 each. I cannot draw such an inference, as it is equally possible that the deposit of \$5,000.00 could have been made by some other individual, and by some other mechanism (for example, a single cheque in the amount of \$5,000.00). As the bank statement does not record two deposits of two cheques in the amount of \$5,000.00, there are equally plausible inferences available.

[259] However, once more, Mr. Cheema's evidence on this point has changed over time. At his examination for discovery on January 23, 2023 he gave evidence:

580 Q All right. Do you recall speaking with Mr. Gill about preparing annual reconciliations for this property?

A So yes, whatever they used to write, they used to do it. Rent also they used to collect it, and everything was their responsibility.

581 Q All right. And do you recall that they would pay from their own resources some additional amount every year to make up for the loss of the property, the cash flow deficiency?

A I would say not much. They used to do it.

At trial, however, Mr. Cheema maintained that he was certain Mr. Mand made no contribution to the expenses of the Property. He offered no explanation for this stark change in his evidence.

[260] I note Mr. Cheema used the Laurentian Account from September 1996 until February 2002 (when he moved the mortgage to Vancity). However, Mr. Cheema failed to produce any of the Laurentian Account statements for that period of time. When he was challenged on this failure in cross-examination, he maintained that he had given all of the bank account statements to Mr. Mand and Mr. Gill, "unopened". I have already addressed this issue at para. [156], and have drawn an adverse inference from his failure to produce a full, unredacted set of these documents from the date the account was opened; specifically, that they would not have supported the position he advanced at trial that Mr. Mand and Mr. Gill failed to make those ongoing contributions Mr. Cheema requested, and they failed to deposit the rental income from the Home.

[261] While he initially testified that he gave them all of the Laurentian Account statements from 1996 to 2004, he ultimately agreed that he ceased using the Laurentian Bank in February 2002 when he transferred the mortgage to Vancity. Mr. Mand and Mr. Gill deny that Mr. Cheema ever gave them these bank statements. There is no independent documentary

evidence to resolve this dispute. However, Mr. Cheema advanced no explanation of how, in 2003 and 2004, he was able to conduct the alleged reconciliation of how much Mr. Mand and Mr. Gill owed him on account of the expenses incurred with respect to the Property from 1996 on, if he did not have access to the Laurentian Account statements. As a result, I do not accept his evidence that he gave them unopened to Mr. Mand and Mr. Gill.

[262] Mr. Cheema testified that there were continual shortfalls of revenue for the Property, and that he assumed Mr. Gill was collecting and depositing all of the rent for the Home. His evidence was that he would be contacted by someone from the Laurentian Bank and be told he needed to make a deposit to increase the amount in the bank account so that the cheques would clear and property expenses could be paid, and that he would do so. I have no hesitation in rejecting this evidence as implausible.

[263] Mr. Cheema did produce the Laurentian Bank mortgage statements. Those statements show the mortgage due and owing as at the following dates:

- a) September 17, 1996 \$300,000.00;
- b) December 31, 1997 \$290,792.62;
- c) September 14, 1999 \$277,302.78;
- d) March 13, 2001 \$265,740.55;
- e) March 14, 2000 \$273,396.53;
- f) September 11, 2001 \$261,425.32;
- g) January 14, 2002 \$262,004.01.

[264] On January 14, 2022 the mortgage was discharged at a total discharge amount of \$262,299.26 when it was moved to Vancity. The Land Title Form C, dated February 18, 2022, records the amount of the mortgage assigned from Laurentian Bank to Vancity to be in the amount of \$262,203.91.

[265] In July 2003 Mr. Cheema also obtained a \$220,000.00 line of credit at Vancity, secured against the Property. By the end of December the evidence is clear that he began to use the line of credit to make mortgage payments.

[266] On April 14, 2004, the line of credit had the amount of \$16,439.67 due and owing, and as of April 8, 2004, the Vancity mortgage had a balance of \$235,811.65. On July 14, 2004, the line of credit had the amount of \$14,961.26 due and owing, and as of July 8, 2004, the Vancity mortgage had a balance of \$232,355.69.

[267] From July 2004 on, Mr. Cheema has not produced any unredacted Vancity #136473 statements. Those statements which have been produced, being a selection from 2008 to 2010, are missing many months, many pages within the months, and are heavily redacted. Mr. Cheema's explanation at trial was that the bank account statements "arrived from the

bank like that". While his counsel acknowledged that I could not find this explanation credible, he argued I could not determine that Mr. Cheema was responsible for the redactions. I have already addressed this. I have no difficulty in concluding that Mr. Cheema received the bank account statements in an unredacted form from Vancity, and either he, or someone at his request, redacted those statements before they were produced in this litigation. His testimony urging me to accept that they were received in that form is not plausible.

- [268] I am satisfied that it is reasonable to infer from the documents produced by the plaintiffs that Mr. Gill has established he paid at least \$6,600.00 to Mr. Cheema from September 1996 to June 30, 2004 on account of the funds he owed for his proportion of the expenses incurred for the Property. Based on the subsequent behaviour of the parties, already addressed in para. [222], I am also satisfied it is a reasonable inference that Mr. Mand made the same payments. In the circumstances, I find it is a reasonable inference that Mr. Mand and Mr. Gill made payments as recorded above from September 1996 to June 30, 2004, on account of their proportionate share of the expenses incurred for the Property.
- [269] Mr. Mand and Mr. Gill testified that they made the payments they were asked to make by Mr. Cheema. There was no evidence at trial that Mr. Cheema ever asked them to calculate the expenses incurred for the Property after January 1, 1999, nor that he gave them records upon which they could do so after that date. Based upon a careful consideration of the evidence I have accepted, I find it is a reasonable inference that they made the payments requested of them by Mr. Cheema. I make no determination that it was, in fact, full payment of the amount they owed for the period between September 1999 and June 30, 2004.
- [270] The defendants argue that Mr. Mand and Mr. Gill failed to fully perform the condition subsequent in the Agreement and the oral trust, and failed to make ongoing contributions to the expenses of the Property. They say this amounts to a "repudiation and any trust interest that in fact existed becoming defeasible". They argue that as of March 30, 2005, Mr. Cheema was entitled to either accept the repudiation or to affirm the contract and continue to require payment from Mr. Mand and Mr. Gill of their proportionate share of the expenses. The defendants say that Mr. Cheema affirmed the Agreement, and continued to require payment from Mr. Mand and Mr. Gill for their share of the expenses, until he ultimately accepted their repudiation. I will address the issue of conditions subsequent in the context of contracts and trusts in much greater detail below.
- [271] Further, the parties are also in general agreement that, pursuant to the Agreement, Mr. Gill and Mr. Mand were to take care of all of the arrangements for renting out the Home, and deposit the rental income in the Property's bank account. They agree Mr. Gill was primarily responsible for depositing these rental cheques. Mr. Gill takes the position that he dutifully deposited all of the rental cheques he obtained, although he acknowledges he has not been able to find a complete record of all of the deposits he made. He initially made the deposits into the Laurentian Account, and after the mortgage was transferred to Vancity, into Vancity

#136473.

[272] Mr. Cheema takes the position that Mr. Gill has failed to keep appropriate records, and he cannot prove that he deposited all of the rental proceeds. Mr. Cheema also has not been able to provide a full set of the relevant bank account records for the period from September 1996 to March 2005. However, as I found at para. [156], I have drawn an adverse inference from Mr. Cheema's failure to produce a full, unredacted set of these documents from the date the account was opened; specifically, that they would not have supported his position that Mr. Mand and Mr. Gill failed to deposit the rental income from the Home.

G. If Mr. Mand and Mr. Gill failed to contribute in full their respective proportionate shares of the expenses for the Property between 1996 and March 30, 2005, what rights, if any, does Mr. Cheema have?

1. Applicable Legal Principles

[273] The plaintiffs also advance an argument that, pursuant to the Limitation Act, Mr. Cheema cannot make a claim for their proportionate share of expenses to be paid more than two years after the date the expenses occurred. Although no one cited a case in support of this proposition to me, I note that when faced with a similar argument, in *Armitage v. The Salvation Army*, 2016 ONCA 971, the Court of Appeal noted:

[27] I am unable to accede to this rather circular argument. The fact is that in seeking court approval of the passing of accounts, an attorney for property is not seeking redress for any loss, injury, or damage. Rather, he or she is seeking approval from the court of his or her actions in managing the property, including approval for compensation previously taken or now sought. A passing of accounts application is the opposite of remedial; it is a process that seeks a court order that no remedy is necessary with respect to the accounts: see *Furrow and Zacks*, at pp. 9-10. Thus, the passing of accounts does not fit within the first part of the Limitations Act, 2002 definition of claim.

[28] An application for the passing of accounts also does not fit within the second part of the statutory definition of claim. Where the definition speaks of an act or omission, it must surely refer to an action taken or not taken by a third party that has the effect of causing loss, injury, or damage. It would be a strange result if a limitation period could not be triggered until the party asserting the claim took an action or omitted to do something.

[29] The result, in my view, is that a passing of accounts under the SDA is not subject to the two-year general limitation period found in the Limitations Act, 2002. The common law in that regard was not changed with the enactment of that legislation. Consequently, the only defences available are the equitable defences of laches and acquiescence, neither of which were asserted in the present case.

- [274] The SDA referred to in this quote is the Substitute Decisions Act, 1992, S.O. 2002, c. 30. I find the analysis equally applicable to a trustee seeking approval of their reasonably incurred expenses, and I am not persuaded by the plaintiffs' argument.
- [275] However, in oral submissions, the plaintiffs agreed the focus of their submissions were on the equitable doctrines of laches and proprietary estoppel. The defendants agreed the focus of their submissions was that their position should not be defeated by the application of either doctrine. This applied to both the time period from 1996 to March 30, 2005, and to the subsequent time period.
- [276] The parties agree that the doctrine of laches requires equitable claims be prosecuted without undue delay to do justice between the parties. There is no set time period after which the doctrine will apply. Rather, the determination requires consideration of all of the circumstances and, in particular, the length of the delay and the nature of the acts of the parties during the period of delay. A determination that the delay amounts to laches requires a consideration of (1) the claimant's acquiescence to the state of legal affairs and (2) a change in position by the respondent arising from reasonable reliance on the claimant's acceptance of the status quo: *Manitoba Métis Federation Inc. v. Canada* (Attorney General), 2013 SCC 14 [Manitoba Métis Federation] at para. 145.
- [277] Acquiescence depends on knowledge, capacity and freedom: *Manitoba Métis Federation* at para. 147. Acquiescence as to the state of legal affairs requires a party to have knowledge of their rights, and to know their rights give rise to an equitable claim. Acquiescence arises where a claimant delays, with full knowledge of the existence of their rights, and a breach of their rights, which leads to the inference of waiver: *M.(K.) v. M.(H.)*, [1992] 3 SCR 6, 1992 CanLII 31 (SCC) [M.(K.)] at 78-79. As the Supreme Court of Canada explains in *M.(K.)* at 78-79:

Acquiescence is a fluid term, susceptible to various meanings depending upon the context in which it is used. Meagher, Gummow and Lehane, *supra*, at pp. 765-766, identify three different senses, the first being a synonym for estoppel, wherein the plaintiff stands by and watches the deprivation of her rights and yet does nothing. This has been referred to as the primary meaning of acquiescence. Its secondary sense is as an element of laches - after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived. This, of course, is the meaning of acquiescence relevant to this appeal. The final usage is a confusing one, as it is sometimes associated with the second branch of the laches rule in the context of an alteration of the defendant's position in reliance on the plaintiff's inaction.

As the primary and second definitions of acquiescence suggest, an important aspect of the concept is the plaintiff's knowledge of her rights. It is not enough that the plaintiff knows of the facts that support a claim in equity; she must also know that the facts give rise to that claim: *Re Howlett*, [1949] Ch. 767. However, this court has held that knowledge of one's claim is to be measured by an objective standard; see *Taylor v. Wallbridge* (1879), 2 S.C.R. 616, at p. 670. In

other words, the question is whether it is reasonable for a plaintiff to be ignorant of her legal rights given her knowledge of the underlying facts relevant to a possible legal claim.

[278] Chief Justice McLachlin (as she then was) set out the test for proprietary estoppel in *Cowper-Smith v. Morgan*, 2017 SCC 61:

[15] An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for a party responsible for the representation or assurance to go back on her word. []

[279] The representation need not be an express statement, but may be implied by conduct or a course of conduct. The representation or assurance must be clear, and intended to have been taken seriously: *van Dishoeck v. Centre Stage Holdings Ltd.*, 2023 BCSC 1500 at paras. 198-199.

2. Analysis

[280] The plaintiffs' argument is summarized in their written submissions:

165A. Had Cheema genuinely believed that the plaintiffs owed him money in 2005 and refused to pay it (all of which is denied), he could not lay in the weeds for nearly two decades, knowing that documents naturally would not be preserved, then fault the plaintiffs for breaching some fiduciary or contractual obligation to preserve them.

[281] The defendants argue that "[o]bjectively, the contributions of Mand and Gill do not appear to have been adequate through this time period". Further, they argue that Mr. Gill was in a fiduciary capacity with respect to receiving and depositing the rental payments for the home, and state:

there can be no question that a party who receives funds which are beneficially owned by others, and accepts the responsibility of receiving and dealing with those funds by making them available to the beneficiaries, carries the burden of retaining records to prove his fidelity and adherence to basic principles of honesty and good faith with respect to other people's monies.

[282] There is a certain irony to this proposition, as Mr. Cheema also cannot produce the bank account records for this period of time that would have clearly shown the plaintiffs' payment to him, and the deposits by Mr. Gill of the rental income, and was also in a fiduciary capacity at the time.

- [283] To be clear, I do not find that Mr. Gill has provided a full accounting of all of the rental income he deposited into the Laurentian Account, and later into Vancity #136473. However, neither do I find that Mr. Cheema has produced the records of the plaintiffs' contributions he received from September 1996 to July 2004. Rather, I find the equitable doctrine of laches applies; because I conclude that Mr. Cheema failed to pursue his claim without undue delay.
- [284] In all of the circumstances I find Mr. Cheema has acquiesced, and failed to pursue Mr. Mand and Mr. Gill for any unpaid contributions for this period of time. Based upon his version of events, he knew they owed him money, and he took steps to obtain Trust Agreement #1 in March 2005 with that knowledge. I find the plaintiffs have reasonably relied upon Mr. Cheema's acquiescence by failing to retain all relevant records for this period of time. I find this to be equally true with regards to Mr. Cheema's allegation that Mr. Gill failed to fully account for the rental income for the Home for the same period. Neither party has retained the necessary documents from almost thirty years ago that would assist in resolving these claims. Given the claim was not commenced until 2020, almost 25 years later, it is not possible to obtain the missing documentation, as was made very clear by the unsatisfactory state of document production in this proceeding. In all of the circumstances, Mr. Cheema is barred from pursuing either claim from September 1996 to July 1, 2004 on the basis of the equitable doctrine of laches.
- [285] As a result of this conclusion, I need not consider the plaintiffs' similar argument based on proprietary estoppel. However, the plaintiffs admit they made no payment to Mr. Cheema on account of expenses for the Property after July 1, 2004. I will address the time period after July 1, 2004 in further detail below.

H. What trust deeds were executed by the parties as of March 30, 2005?

- [286] The phrase "those who live in glass houses shouldn't throw stones" is often attributed to Chaucer. It is a proverb the parties clearly do not aspire to follow. Rather, each put forward a version of events as to what exactly occurred after Trust Agreement #1 was executed on March 30, 2005, based upon conjecture and wild speculation. However, neither hesitated to strenuously castigate the others for doing the same. This was, perhaps, the natural result of the faded memories, hurt feelings, and poor retention of documents, but it caused significant and unnecessary court time to be spent on versions of events wholly unsupported by any admissible documentary evidence.
- [287] The parties tendered weeks of evidence to support their respective versions of events. Each put forward conspiracy theories as to the other's actions and motivations, which I need not address. Rather, upon a thorough review of the testimony of the parties and the witnesses each called, the limited production of relevant documents (with no question of their authenticity, provenance and date of creation), and the inferences I am able to draw from the evidence I accept, I conclude the plaintiffs have established Trust Agreement #1 was executed on March 30, 2005, and that Trust Agreement #2 and the Modification Agreement

were executed at some time after June 17, 2016.

[288] Counsel were in agreement that the evidence of Mr. Binpal, Mr. Sandhu, Manpreet, Mr. Dhillon, and Mr. Sekhon was credible and reliable. I agree with this assessment.

[289] As I have already noted, I found none of Mr. Cheema, Mr. Mand or Mr. Gill to be credible witnesses. Further, their family members who testified: Mrs. Mand and Mrs. Gill, and Rajpal, Satpal and Alamjeet were all, for obvious reasons, interested parties with significant reasons to align their testimony to that of Mr. Mand, Mr. Gill and Mr. Cheema, respectively. I will make further comments about the credibility of these witnesses as necessary. While Mrs. Cheema testified, she was not a party to the execution of the trust deeds, and her evidence was of no assistance in determining when they were prepared and executed.

[290] For the necessary context, the parties each urged that I reach a factual determination as to when the following documents were executed:

- a) Trust Agreement #1;
- b) Trust Agreement #2 (old PID);
- c) Trust Agreement #2 (new PID); and
- d) Modification Agreement.

[291] The parties agree that Trust Agreement #1 was prepared by Mr. Sandhu, and was executed by the parties on March 30, 2005. The disagreement is when Trust Agreement #2 and the Modification Agreement were prepared and executed.

[292] To repeat briefly, the defendants' theory is that Trust Agreement #2 (old PID) and the Modification Agreement were both executed on March 30, 2005, and that the plaintiffs have fabricated Trust Agreement #2 (new PID). In stark contrast, the plaintiffs say that all of these documents were executed in approximately late June or July 2016. While they have no explanation as to why a version of Trust Agreement #2 was created with the old PID, and another with the new PID, by the time of closing submissions they no longer argued the defendants had fraudulently created the version with the old PID.

[293] I pause to note that no original trust deeds were tendered that are capable of being definitively determined to be an original. Rather, two "alleged originals" were tendered--one of Trust Agreement #2 (old PID) and one of the Modification Agreement. However, the evidence in support of the conclusion that either was an original was insufficient to allow me to reach such a determination.

[294] Further, there were a plethora of versions of both that were either partially executed and/or had differing versions of signatures. There was an inordinate amount of testimony tendered to attempt to explain how this possibly came to be, all addressing different theories of versions being photocopied by various individuals at different stages of the

alleged execution process. As no one argues that Trust Agreement #1, Trust Agreement #2 (old PID), and the Modification Agreement were not fully executed, nor makes any argument that the formalities of execution were not complied with, it is not necessary to make any factual determination on this issue. Rather, the only issues I must determine are if I am able to determine when these documents were executed, and whether I accept the defendants' submission that the plaintiffs fabricated Trust Agreement #2 (new PID).

- [295] Again, there was no clear evidence on the trust deeds themselves as to when they were executed, and no independent documentary evidence that could shed any light on the issue. Unfortunately, no one returned originals to the Binpal & Associates offices for safe keeping. Rather, the parties each respectively made arguments that the only reasonable inferences that can be drawn in the circumstances support their version of events.
- [296] It is common ground between the parties that Mr. Cheema approached Mr. Mand and Mr. Gill in March 2005 to advise of his desire to create a formal trust deed to record their Agreement, and that Mr. Mand and Mr. Gill agreed to this. The parties also all agree that on the morning of March 30, 2005, Mr. Mand, Mr. Gill, Mrs. Gill and Mr. Cheema attended at the law offices of Binpal & Associates, where they executed Trust Agreement #1 in the presence of Mr. Sandhu, who at that time was an articulated student. Mr. Sandhu witnessed each of their signatures, and then Mr. Mand took the document to Mrs. Mand for her to execute, and he then returned Trust Agreement #1 to Mr. Cheema.
- [297] The parties also all agree that Trust Agreement #1 was then executed by Rajpal, Satpal, Alamjeet, and Mr. Cheema on behalf of Trucking Ltd., and that Mr. Cheema then gave a copy of the executed Trust Agreement #1 to Mr. Mand and Mr. Gill. It is from this point on that the parties fundamentally disagree.
- [298] I will first address the defendants' theory, and set out why I do not find they have proven the necessary facts for me to find they have proven their version of events on a balance of probabilities. Again, simply put, the defendants say that after Trust Agreement #1 was executed, Mr. Cheema then asked each of Rajpal, Satpal, and Alamjeet for the approximately \$80,000.00, and they each advised him they did not have the money. Mr. Cheema testified that he then returned to Binpal & Associates immediately and told Mr. Sandhu he required changes to be made to Trust Agreement #1 because he had determined that Rajpal, Satpal and Alamjeet would no longer be participating, and he had also determined that Trucking Ltd. would no longer participate. He instructed Mr. Sandhu to ensure that these beneficial interests were transferred to Mr. Cheema personally. Mr. Sandhu prepared Trust Agreement #2 while Mr. Cheema waited.
- [299] Mr. Cheema then took Trust Agreement #2 (prepared by Mr. Sandhu), contacted Mr. Gill, and asked him to come to the business office to collect it. Mr. Gill did so, and executed the trust deed. Although there was no evidence on this point, the defendants' theory is he then took it home, had his wife sign it and witnessed her signature, and then gave it to Mr. Mand and asked him to have his wife sign it, which he did. Mr. Cheema says he then took the

executed copy of Trust Agreement #2 back to Mr. Sandhu, who advised him there was a problem, in that Trust Agreement #2 could not be reconciled with Trust Agreement #1, and a modification agreement had to be signed. Mr. Cheema says Mr. Sandhu also prepared that on March 30, 2005, and again, Mr. Cheema had everyone sign the Modification Agreement.

- [300] Mr. Cheema bears the burden of proving the facts which underlie this version of events. As he can tender no independent documentary evidence to support this version of events, whether he can satisfy this burden must turn on my assessment of his credibility, the credibility of Rajpal, Alamjeet and Satpal, and the reasonable inferences I can draw from the evidence I do accept.
- [301] First, I must note that Mr. Cheema's evidence at trial was problematic. I have already addressed some of the difficulties with his evidence, and why I have not accepted him to be a credible witness. I will briefly address some further difficulties with his evidence.
- [302] His evidence changed on more than one topic over the course of the litigation, with no cogent explanation for the changes in his evidence. A few examples will suffice. First, in an affidavit sworn June 14, 2023, Mr. Cheema deposed that he provided "copies of the two versions of the trust agreement, in executed form, to Mr. Mand and Mr. Gill around the time they were signed" and attached a copy of Trust Agreement #1 and Trust Agreement #2 (new PID), and yet claimed at trial that the plaintiffs had, in fact, fabricated Trust Agreement #2 (new PID). He offered no explanation for this change in his evidence but in closing argument his counsel simply argued this was clearly "an inadvertent error". I cannot accept counsel's argument that Mr. Cheema cleared his evidence up on this point in cross-examination by testifying he received the document from the plaintiffs as he offered no cogent explanation for the change in his evidence.
- [303] Second, Mr. Cheema's evidence on Mr. Kaler witnessing Satpal's signature on Trust Agreement #1 changed. Initially, when asked about Mr. Kaler's attendance at his office on March 30, 2005, he responded "What would he do at my office"; then, when he was shown Trust Agreement #1 where Mr. Kaler is shown to have witnessed Satpal's signature on March 30, 2005, he testified that is correct, and Mr. Kaler would come to his office almost daily. Then, when he was taken to the contents of the Binpal File, where a copy of the Trust Agreement #1 showed Satpal's execution, but without Mr. Kaler witnessing the execution (and the rest of the trust deed fully executed), Mr. Cheema then claimed he had made a copy of the trust deed after Rajpal and Satpal had signed (and presumably everyone else) but before Mr. Kaler witnessed. He had no satisfactory explanation as to his shifting evidence on this particular issue.

- [304] Third, Mr. Cheema initially denied that he signed Trust Agreement #2 twice. However, when taken to different versions of this trust deed with obviously different signatures and witness blocks, he then changed his evidence and testified he had made a copy of Trust Agreement #2, and he and Rajpal had signed two copies. He blamed his change of evidence on confusion.
- [305] Further, Mr. Cheema had a notable propensity to blame others. Again, by way of example only: he blamed his bank for allegedly providing him with redacted bank statements; he blamed his son Rajpal for failing to bring the 2014 Draft Addendum prepared by Manpreet to his attention; and he blamed his accountant for truncating the financial statements he ultimately produced to the plaintiffs. This repeated propensity to blame others for acts which were clearly his responsibility demonstrates a pattern of obfuscation on issues he did not want to address squarely.
- [306] I have addressed above the impact of Mr. Cheema's failure to produce any documents relating to the 2016 work done by Mr. Saini at Binpal & Associates. When questioned as to why he failed to produce any of these documents, Mr. Cheema testified that the reporting letter dated June 17, 2016 may have been lost, might have been destroyed, and "I don't know about this". When asked about the invoice dated June 10, 2016, Mr. Cheema testified that perhaps he gave it to the accountant. He gave the same explanation as to the cheque he issued to pay the invoice. Finally, he testified that "No one asked from me. How can I produce?" Ultimately, he defensively testified that perhaps he gave a document related to the Binpal File to a previous lawyer.
- [307] Mr. Cheema also had no cogent explanation for why, on an invoice from Ward Consulting Group dated July 28, 2006, for paperwork for an application, he wrote "Kuldip Gill denied to PAY, gave to Cheema Harjinder", if Mr. Gill did not remain as a beneficial owner on the Property. Likewise, he provided no explanation for why he made an almost identical note on an email from Aplin & Martin dated August 20, 2010, in its initial preparation for the land swap, asking for a cheque in the amount of \$876.00 payable to the City of Surrey, on which he wrote "Gary Mand denied to pay".
- [308] Finally, much of Mr. Cheema's evidence was unreasonable, impossible, or extremely unlikely. Again, a few examples are sufficient. Mr. Cheema testified that he gave his unopened Laurentian Account statements to Mr. Mand and Mr. Gill, and yet despite his evidence that he had neither opened nor retained his own bank account statements, he was somehow able to calculate the exact amount they still owed him for their proportionate share of expenses. He had no cogent explanation for how this was possible without those statements. Further, Mr. Cheema somehow managed to produce voluminous expense records and mortgage statements, and yet failed to produce all records detailing the income earned on the Property, and the calculations he said he performed to detail the proportionate share Mr. Mand and Mr. Gill still owed him. He testified he no longer had the document recording these calculations, and that he had somehow unfortunately lost it.

- [309] Mr. Cheema also testified at length as to the immediate efforts he took to immediately and properly remove Rajpal, Satpal, Alamjeet and Trucking Ltd. as beneficiaries from Trust Agreement #1. He proffered no explanation as to why this was so important to him for his family members, and yet he apparently had no concern in doing the same with the plaintiffs. Notwithstanding Mr. Cheema's evidence he told them on March 31, 2005 they were no longer beneficiaries of the trust, he never took any steps to remove them from the trust deeds. He offered no explanation as to why that was not necessary or important to him, other than a statement that simply not preparing another trust deed was sufficient.
- [310] Mr. Cheema also testified dramatically that the work done by Mr. Saini in June 2016 was all in error, and yet had no explanation as to why he paid the legal bill rendered for those services, nor why the documents created by Mr. Saini in June 2016 are virtually identical to Trust Agreement #2 and the Modification Agreement.
- [311] I also note that Mr. Cheema frequently accused plaintiffs' counsel of being a liar, and repeatedly insisted he was telling the truth, and offered to bring additional documentary proof of his claims to court, or to produce additional witnesses, none of which ever materialized.
- [312] I cannot accept the evidence of Mr. Cheema except to the extent that it is corroborated by contemporaneous documentary evidence with unchallenged authenticity, provenance and timing, or by independent witnesses. Mr. Cheema relies upon the evidence of Rajpal, Satpal, Alamjeet and Mr. Sandhu to corroborate his evidence.
- [313] The plaintiffs take the position that Mr. Cheema is attempting to deceive this Court, and called his family members to support his false evidence. They go so far as to say "[a]s patriarch, Cheema's reliance on his own sons and nephew to lie under affirmation is reprehensible". In response the defendants argue:
379. The grand conspiracy theory was put, tediously, to each and every member of the Cheema family on multiple occasions, in multiple ways and repetitively. Not once was any evidence solicited which gave a shred of reality to the theory to which the Plaintiffs committed themselves which would require the Court to reject the evidence of the majority of witnesses called on behalf of the Defendants. It is highly unlikely that such a grand scale conspiracy could be so well executed by so many people who gave their own personal perspective and recollections of the same events.
380. The Defendants submit there is no merit at all to the far-fetched idea that there was a grand conspiracy of large scale and a grand forgery of equally large scale in connection with all of the events that many witnesses called by the Defendants testified to. It is far more likely that the Defendant witnesses were simply telling the truth and that is why their evidence accords. It is submitted that great caution must be exercised in rejecting evidence of so many witnesses when there has been no successful attack on that evidence by suggesting conspiracies and fraud of a complex level which has been activated with incredible consistency.

- [314] I do not accept the stark dichotomy of these two extremes: that I must either find the three family members engaged in a grand conspiracy to deceive this Court, or they are all credible and reliable witnesses.
- [315] First, as already noted, Rajpal, Satpal and Alamjeet were all, for obvious reasons, interested parties with significant reasons to align their testimony to that of Mr. Cheema. The evidence was clear that Mr. Cheema is the patriarch of the family, and they were all very close to Mr. Cheema. Notwithstanding neither Rajpal nor Satpal professed to know of it, Mr. Cheema testified that his sons would one day receive his interest in the Property.
- [316] Second, having already determined I cannot accept Mr. Cheema to be a credible witness, I accept I must be very careful in accepting the uncorroborated evidence of those witnesses he calls to buttress his testimony. There is no debate that the three actually signed the Modification Agreement; rather, the debate is when they signed them--2005 or 2016. I do not find the evidence of Rajpal, Satpal or Alamjeet to be credible or reliable, not because I find they have conspired to deceive this Court, but rather because they are clearly interested family members with incentive to support Mr. Cheema's version of events. I also note there are irreconcilable inconsistencies within their own evidence that lead me to this conclusion.
- [317] First, I note that all three testified as to events that they say occurred almost twenty years ago. While any missing memories would be understandable, all three testified as to specific events with a level of recollection that is not believable in the circumstances. There are no contemporaneous documents of unchallenged authenticity, provenance and timing that support their versions of events.
- [318] Turning first to Satpal, he testified on direct that his father told him he would have to put funds in to participate in the investment in the Property, but he did not have the funds. As a result, he said he automatically assumed his father would put the money in for him, but he did not discuss this assumption with his father. This evidence is not possible to reconcile with Mr. Cheema's versions of events, that all three men knew they had to contribute their funds on the day they signed Trust Agreement #1. Further, Satpal testified he was sure he observed Mr. Kaler witnessing his and Rajpal's signatures right after they signed; however, this evidence cannot be reconciled with the Binpal File--which shows a fully executed Trust Agreement #1 except for Mr. Kaler's signature witnessing his and Rajpal's signatures. I do not accept Satpal's evidence as it is not corroborated by any contemporaneous documents.
- [319] Turning next to Rajpal, he also testified he had a specific memory of signing and seeing Mr. Kaler witness his signature. He also was not able to offer an explanation as to the form of the trust agreement in the Binpal File where Mr. Kaler's signature was clearly missing. Further, Rajpal also testified that he specifically recalls the font and layout on one page of Trust Agreement #2--specifically Schedule A with the PID of the Property. He testified that he could recall that when he signed Trust Agreement #2 it did not have the new PID, as he reviewed a copy of Trust Agreement #2 with the new PID and explained it did not accord

with his memory. He testified he paid close attention as he went through Trust Agreement #2 to see if there was any other place he had to sign. Not only is it implausible to remember the font and layout of one page of a legal document almost twenty years later; if this evidence were true, it is reasonable to assume that Rajpal would have noticed that on one page of Trust Agreement #2 (old PID) Mr. Cheema's signature remained unwitnessed. I do not accept Rajpal's evidence as it is not corroborated by any contemporaneous documents.

- [320] Finally, I cannot accept Alamjeet's evidence as credible. Alamjeet signed Trust Agreement #1 with what the plaintiffs characterize as a "two word" signature. He then signed Trust Agreement #2 with a "one word" signature, and he witnessed his own signature recording his occupation as "Canada Post". On November 3, 2023, I granted an order that the plaintiffs were entitled to obtain Alamjeet's employment records with Canada Post, which shows he applied to them in June 2007, and accepted an offer of employment on October 31, 2007. I do not accept Alamjeet's explanation that he did not want to work for his uncle, and so he lied about his occupation and pretended to be an employee of Canada Post. His detailed explanation that he had made previous applications to Canada Post starting in 2004 (but failed to retain any such application), and that he had an unnamed friend at Canada Post who told him they could get him a job there was simply not believable. On that basis, I do not accept Alamjeet's evidence to be credible. It is not necessary to consider the issue of the different appearance of his signatures, as the plaintiffs urge me to do.
- [321] Notwithstanding I do not accept any of the evidence of Satpal, Rajpal, or Alamjeet, I do not accept the plaintiffs' theory that they fabricated their evidence as a result of concern for potential tax consequences if I determine the transfer of their beneficial interests occurred not in 2005, but rather in 2016. This was merely a theory advanced that was not tethered in any evidence, and is complete speculation. Nor do I find they engaged in a grand conspiracy to deceive this Court. There may be many reasons they tendered evidence that I do not find to be credible or reliable, and I will not hypothesize as to the reasons for their evidence. To do so is neither necessary nor appropriate.
- [322] The defendants also rely upon the evidence of Mr. Sandhu, who I agree was a credible and reliable witness who testified in a clear, forthright manner.
- [323] Mr. Sandhu first met Mr. Cheema in his articling year, and described him as an astute business person, who was very firm in his positions, and somewhat stubborn and persistent.
- [324] Mr. Sandhu candidly had no recollection of who prepared Trust Agreement #1, nor of the circumstances in which he witnessed anyone's signature on the trust deed. He acknowledged he must have witnessed those signatures on Trust Agreement #1 that bear his signature and witness information. He did recall that during his articling year (which commenced June 1, 2004) Mr. Cheema was frequently at the offices of Binpal & Associates, and had legal work done, principally related to real estate. Mr. Sandhu testified that Mr. Cheema had so many land deals, he was called the "King of Flips" at the office.

- [325] Mr. Sandhu testified that he vividly remembers one occasion when Mr. Cheema came into the office, told him he knew his father, and applauded him for being on the right track. Mr. Sandhu recalls this vividly because Mr. Cheema asked him to show some guidance to his own sons, and he characterized this as a fond memory. He recalls at that time Mr. Cheema came into the office for work on an agreement that dealt with both of his sons that needed to be amended, but he did not recall what agreement, whether it was to do with Trust Agreement #1 or not, whether Rajpal and Satpal were getting shares or having shares removed, nor what property it was in relation to. All he can recall is that the timeline between when the first document was prepared and when Mr. Cheema asked for a change was a short period of time, and he recalled it happening fairly soon after the original document was drafted. He was candid that he does not recall if there was any other trust agreement dealing with property that featured his sons. Mr. Sandhu testified that he did the work, and Mr. Cheema waited for the work to be done.
- [326] The defendants argue that this evidence must relate to an amendment to Trust Agreement #1. They argue that it is probable there was only one time when Mr. Cheema had a trust agreement dealing with property that featured his sons, where he shortly afterward wanted a change. They urge me to find that it is "highly corroborative of the fact that the change to the original Trust Document was prepared by Mr. Sandhu within a very short time of the original document which is agreed to be March 2005".
- [327] However, I do not accept that Mr. Sandhu's evidence supports such a finding. He was clear that he could not recall the specific details of the timing or the real estate involved in his memory of Mr. Cheema making an amendment that related to his sons. He was candid that he does not specifically recall which piece of property it was in relation to, nor if it was in relation to Trust Agreement #1. Inferences may only be drawn from proven facts: *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at paras. 339-341; *Lee v. Bolduc*, 2024 BCCA 7 at para. 21. The defendants are inviting me to draw an inference from Mr. Sandhu's testimony that amounts to conjecture or speculation, and I decline to do so.
- [328] Mr. Cheema testified that after Trust Agreement #2 and the Modification Agreement were signed, he spoke with Mr. Mand and Mr. Gill and asked them, again, to satisfy their payment obligations. He testified that unless they made the payments he said were still outstanding under the original Agreement, he was not prepared to continue the time for their performance and that if the payments were not made by March 31, 2005, he intended to end the relationship. Having not found Mr. Cheema to be a credible witness, I do not accept this evidence. It is uncorroborated by any documentary evidence whatsoever, and is not consistent with Mr. Cheema's own behaviour after March 2005.

- [329] Having concluded that I do not accept Mr. Cheema's version of events, I find that Trust Agreement #1 was executed by the parties on March 30, 2005, but he has not established that either Trust Agreement #2 nor the Modification Agreement were prepared or executed at that time. Given this conclusion, I need not consider the plaintiffs' argument that I should draw an adverse inference from the defendants' failure to call two of the witnesses, namely Harchet Kaler and Inder Dhaliwal.
- [330] I do not accept the defendants' argument that if I am unable to determine when Trust Agreement #2 and the Modification Agreement were signed, the plaintiffs have failed to prove their case. In these circumstances that is not the correct analytical approach, and I will address this issue further below. Although perhaps it is not, strictly speaking, necessary, I will set out the basis for my finding that these two subsequent trust deeds were executed at some time after June 17, 2016, for reasons set out below.
- [331] I do not find either Mr. Mand or Mr. Gill to be a credible or reliable witness. I have already made comments to that effect, but I will expand on them briefly at this time.
- [332] First, Mr. Mand struggled greatly giving testimony. I do not accept his counsel's argument I should find him credible "if not entirely reliable". Nor do I accept their invitation that I should accept his evidence where it is consistent with independent documents and the preponderance of the evidence as a whole. For whatever reason, he was effectively unable to provide a responsive answer to a significant portion of questions, even on his own direct examination. Even when he was able to provide a responsive answer, his evidence was frequently hopelessly contradictory. Not only was he impeached successfully with a number of answers he gave at his examinations for discovery, but he was also contradictory to evidence he had given on direct examination, and to answers he had previously given on cross-examination. There was no clear pattern to the contradictions.
- [333] Further, he was also frequently confused when historical documents were put to him, and on occasion, his confused recollections clearly became stuck in his mind. Plaintiffs' counsel admit his answers were, at times, perfunctory, and sometimes confused. They acknowledged he "struggled within the confines of the witness box and was clearly unused to having his word challenged and his recollections examined in minute detail." His counsel acknowledge that where his evidence is not supported with documentary evidence his testimony should be approached with caution, however, they maintain it "accorded with the preponderance of verifiable trial evidence".
- [334] In these circumstances, I cannot accept Mr. Mand was either a credible or reliable witness. Given his overwhelming difficulties with testifying, I cannot even accept his evidence where it corresponds with documentary evidence with no question of its' authenticity, provenance and date of creation. To do so would be to place weight of Mr. Mand's evidence on those rare occasions when it accorded with the documentary evidence--in other words--when he was able to have his story to align with the documents. That would be inappropriate in these circumstances.

- [335] Mr. Gill's testimony was equally problematic, albeit in a very different way. I have set out some of the difficulties with his behaviour in the courtroom above, and will not repeat them now. However, there are additional reasons I find Mr. Gill to lack credibility and reliability.
- [336] First, Mr. Gill changed his evidence significantly between his examination for discovery and trial. He justified these changes with variations of "that was my memory that day, and today my memory is more clear". While he acknowledged that he had refreshed his memory by reviewing all of the produced documents, and the chronology, he insisted that his memory was much clearer at trial, and would not admit it had been reconstructed by reviewing documents. He failed to advise defendants' counsel as to any errors in his evidence on examination for discovery as is required by the Supreme Court Civil Rules.
- [337] Second, he presented his evidence in an argumentative and combative manner, and repeatedly inappropriately insulted counsel for the defendants. Mr. Sandhu also reported being approached on a break during Mr. Sandhu's direct examination by Mr. Gill, and being told by Mr. Gill that he was a senior (or seasoned) realtor, president of a society, and that "I am listening very carefully". Mr. Sandhu, as an officer of this Court, reported that while he was not intimidated by such conduct, as a lawyer, he did not want to see behaviour of that sort in this proceeding or any other proceeding. I fully endorse Mr. Sandhu's comments, and his approach to handling this inappropriate overture.
- [338] In the circumstances I do not find Mr. Gill to be a credible witness. I cannot accept the evidence of Mr. Gill except to the extent that it is corroborated by contemporaneous documentary evidence with unchallenged authenticity, provenance and timing, or independent witnesses.
- [339] Finally, just as with Rajpal, Satpal and Alamjeet, Mrs. Mand and Mrs. Gill are clearly interested parties--they are plaintiffs, and they are the loving spouses of their respective husbands. I put no weight on their evidence except where it is corroborated by independent contemporaneous documentary evidence.
- [340] For the following reasons, I am satisfied that Trust Agreement #2 and the Modification Agreement were executed at the same time, at some time after June 17, 2016. Based on the evidence adduced at trial I cannot determine whether Trust Agreement #2 (old PID) and Trust Agreement #2 (new PID) were executed at the same time, or whether one was fabricated by either the plaintiffs or Mr. Cheema.
- [341] It is agreed upon by the parties that negotiations occurred with the City of Surrey to reconfigure the Property, starting in 2010. The emails tendered show Mr. Mand was assisting Mr. Cheema in communications with Aplin & Martin. Mr. Cheema eventually entered into a Land Exchange Agreement with the City of Surrey on February 13, 2012 (defined above as the Land Swap), through which the Property received a more favourable configuration with increased frontage on the arterial thoroughfare of 152nd St., and the Property was given a new legal description of the new PID. This reconfiguration was

registered at the Land Title Office on October 9, 2013.

- [342] Approximately a year later, on October 15, 2014, Mr. Mand emailed his daughter, Ms. Mand, attaching a copy of the Tax Report for the Property, noting on the document "New Legal - Due to Land Swap with City"--and directing her to "Make Amendment Letter to Existing Declaration of Bare Trust and Agency Agreement at March 30, 2005". He attached to the email a copy of the executed Trust Agreement #1.
- [343] Ms. Mand, whose evidence I accept, testified that she had a staff member assist her with preparing a form of addendum to Trust Agreement #1, which was dated for reference as of the 1st day of November, 2013, but effective as of the 30th day of March, 2005 (defined above as the 2014 Draft Addendum). This addendum provided for a replacement of Schedule A with a new Schedule A, reflecting the new PID.
- [344] Ms. Mand emailed the 2014 Draft Addendum to her father in Microsoft Word format on November 8, 2014. Mr. Mand then forwarded his daughter's email, with the attached 2014 Draft Addendum to Mr. Gill on November 10, 2014, and then again to Mr. Gill and to "RajpalHarjinder cheema" at cheemar@gmail.com, Rajpal's email, on November 11, 2014. As Mr. Cheema did not have his own email, this email was used for communications to him by Mr. Mand and Mr. Gill. This email was produced by the defendants, and appears to have been printed by Rajpal.
- [345] The parties agree the 2014 Draft Addendum was never fully executed. Mr. Cheema denies ever receiving this document although it was emailed to Rajpal, and that email was produced by the defendants.
- [346] Following the plaintiffs' application for further document production, Mr. Binpal produced the records of Binpal & Associates that he was able to locate, both from the paper and electronic files. He did not have any physical files from March 2005, as his firm's general practice is to destroy files after 10 years. He also could not obtain any electronic files from that period, although he had no specific recollection of whether those documents would have been removed from the electronic file. However, the Binpal File production included production of work done for Mr. Cheema in 2016. That file contains a file opening sheet dated June 10, 2016, with a description of "Re: Transfer of Interest - 6728 - 152 St. + 18861 - 16 Ave., Surrey", for Harjinder Cheema.
- [347] In a reporting letter dated Jun 17, 2016, Mr. Binpal wrote:

Re: Declaration of Trust Agreements being modified

You provided me with three trust agreements. These relate to the lands and premises located at 6728 - 152 Street, Surrey, 18861 - 16 Avenue, Surrey, and 18843 - 16 Avenue, Surrey.

You indicated to me that the intention was the following:

- a) with respect to the lands and premises located at 6728 - 152 Street, Surrey, there was an error made in that the beneficiaries comprising of Cheema Bros. Trucking Ltd. and Sandeep Jawandha were not meant to be included and that interest comprising a 50% interest was meant to be held by you;
- b) with respect to the lands and premises located at 18861 - 16 Avenue, Surrey, there was an error made in that the beneficiaries comprising of Cheema Bros Trucking Ltd. and Sandeep Jawandha were not meant to be included and that interest comprising a 20% interest was meant to be held by you;
- c) with respect to the lands and premises located at 18843 - 16 Avenue, Surrey, there was an error made in that the beneficiaries comprising of Cheema Bros Trucking Ltd. and Sandeep Jawandha were not meant to be included and that interest comprising a 20% interest was meant to be held by you;

You have asked me to prepare a modification agreement and this is enclosed for your review. It will be necessary for all the parties to the original documentation to sign this modification and [these] modifications have been made effective to occur one day subsequent to the date when the originals were signed. After you have obtained necessary signatures from all parties, please let me have the completed copy for my file.

My account is also enclosed for settlement at your earliest convenience.

[348] Notwithstanding this letter was written by Mr. Binpal, he confirmed he did not do any of the work for this retainer, but it was done by Anurag Saini.

[349] There is a clear error in the letter insofar as it records the instructions from Mr. Cheema with respect to the Property, as Sandeep Jawandha was never included as a beneficiary in Trust Agreement #1. However, within the Binpal File is a copy of the fully executed Trust Agreement #1, with the names of Rajpal, Satpal, Alamjit (Alamjeet) and Trucking Ltd. stroked out, all with the notation "to Harjinder" or "Harjinder S. Cheema".

[350] There are then two new documents prepared with respect to the Property:

- a) a modification of declaration of bare trust and agency agreement, identifying Rajpal, Satpal, Alamjit (Alamjeet) and Trucking Ltd. as "Outgoing Beneficiaries", and Mr. Cheema as the "Incoming Beneficiary" for their respective shares; and
- b) a trust deed marked in handwriting as "New", noting Mr. Cheema as Trustee and Mr. Gill, Mrs. Gill, Mr. Mand, and Mrs. Mand each as holding a 5% beneficial interest, and Mr. Cheema holding an 80% beneficial interest.

[351] The account issued to Transport Ltd. for the "Declaration of Trust Agreements being modified" was dated June 10, 2016, in the total of \$680.75, and was paid in full by Transport Ltd. by way of a cheque, endorsed by Mr. Cheema, and dated June 22, 2016.

- [352] Mr. Cheema's evidence was that the work done by Mr. Saini in 2016 for the Property was done in error. He testified that he attended at the Binpal & Associates offices to pick up the work done by Mr. Saini, saw the work he had done in alleged error, became enraged, and ripped up the Modification Agreement and Trust Agreement #2 and threw it all over Mr. Saini's office, saying words to the effect of "why did you prepare this, it had already been prepared in March 2005". Mr. Cheema's explanation was that Trust Agreement #1 must have made its way by mistake into the file folder of trust deeds he brought with him, and so must have been given to Mr. Saini in error. There is nothing to corroborate this evidence. In fact, as noted, the evidence is clear that Mr. Cheema paid for the work performed by Mr. Saini, including for the work in drafting a second trust agreement and modification agreement for the Property. It defies belief that Mr. Cheema would have paid for work he had not requested.
- [353] Further, Mr. Cheema did not call Mr. Saini to testify. Notwithstanding that the defendants had expressly waived privilege over the Binpal & Associates file, in all of the circumstances, I find it appropriate to draw the adverse inferences that Mr. Saini would not have supported Mr. Cheema's version of events that Mr. Saini made an error in drafting the 2016 trust deeds for the Property, and that Mr. Cheema had not requested he do so. I further draw the adverse inference that Mr. Saini would not have supported Mr. Cheema's evidence that Trust Agreement #2 and the Modification Agreement were drafted on March 30, 2005.
- [354] I must comment on the issue of documents in native format again at this time. In closing submissions the defendants attempted to argue that I should consider the "properties" information from the electronic files produced in the Binpal File, notwithstanding my ruling that the metadata of both Ms. Mand and Mr. Binpal's documents had not been captured properly. Further, Mr. Binpal was not familiar with the manipulation of computer documents, and was unable to complete a demonstration of re-saving a copy of a document at the request of the plaintiffs that the defendants' strenuously objected to. I put no weight on the properties pages of the electronic copies of the documents above, and pay no heed to this argument advanced by the defendants. I do, however, put weight on the body of the electronic versions of the word documents, as opposed to their metadata.
- [355] I must also comment on the plaintiffs' efforts to have me compare various versions of the Modification Agreement and Trust Agreement #2, asking me to compare various versions of both in various versions of execution. They invite me to compare some with colour handwriting, some with different witness signatures and data, and some with missing signatures. Given the plaintiffs' position that both Trust Agreement #2 and the Modification Agreement were fully executed, and they do not argue non-compliance with the formalities of execution, I need not address these arguments.
- [356] Likewise, given my conclusion about Mr. Gill and Mr. Mand's lack of credibility and reliability, I need not address their changing testimony as to when these trust deeds were actually executed. I acknowledge that their testimony changed as documents were produced, and I accept the defendants' argument that they were clearly not testifying as to

their actual clear memories, but rather, were forcing their evidence to accord with the documents, especially after the Binpal File was produced. However, as I will explain below, the evidence of Ms. Mand, Mr. Binpal, the failure of Mr. Cheema to call Mr. Saini, and the independent documentary evidence from the Binpal File all supports the reasonable inference that Trust Agreement #2 and the Modification Agreement were executed by the parties at some time after June 17, 2016 (being the date of the reporting letter).

- [357] Finally, given my conclusion at para. [171] above, that the evidence relating to the 16th Ave. Properties is either similar fact evidence, not appropriate to allow into evidence, or is an invitation to inappropriately review handwriting without the expert evidence necessary to do so, I need not consider the plaintiffs' theories as to why the Binpal File also contained amendments to the two 16th Ave. Properties.
- [358] Further to my Order of January 31, 2024, requiring the parties to complete their document production and to swear affidavits verifying their respective production, on February 6, 2024, Mr. Gill produced an archive of past email messages sent and received (the "Gill Email Archive"). In that archive are a number of emails I rely upon to conclude that Trust Agreement #2 and the Modification Agreement were executed some time after June 17, 2016.
- [359] First, on July 10, 2016, Mr. Gill sent an email scan to himself with the Subject line of "revised contract re: 6728-152 st". Attached to that email is a PDF copy of Trust Agreement #2 (with no Schedule A attached), a PDF copy of the Modification Agreement, and a PDF copy of the version of Trust Agreement #1 found in the Binpal File, with the identical handwritten notations for the changes. On both copies of Trust Agreement #2 and the Modification Agreement attached to this email, Mr. Gill and Mrs. Gill are the only signatures. Both of these documents are identical to the two electronic documents in the Binpal File, with two minor differences. First, Trust Agreement #2 in the Binpal File has the old PID attached as Schedule A, whereas the Gill Email Archive version has no Schedule A.
- [360] Second, and of critical importance, both the copy of the Modification Agreement attached to Mr. Gill's email and the electronic Modification Agreement in the Binpal File contain an identical error: the signature block for Mr. Mand is missing from the correct place. In both of these versions, the body of the Modification Agreement is identical. As well, in both versions, there is a heading above the signatures of the "Original Beneficiaries" which reads:

KULDIP SINGH GILL, SUKHMINDER KAUR GILL, GURDARSHAN SINGH MAND, RAJPAL CHEEMA, SATPAL CHEEMA, ALAMJIT CHEEMA, CHEEMA BROS. TRUCKING LTD. IN THEIR CAPACITY AS ORIGINAL BENEFICIARIES:

In the paper portion of the Binpal File, Mr. Mand's signature block rightly appears under this heading, as one of the "Original Beneficiaries". However, in both the electronic Word version from the Binpal File, and the version from the Gill Email Archive, Mr. Mand's signature block does not appear in this section. Rather, in the electronic Binpal File version, Mr. Mand's signature block appears after the header:

HARJINDER CHEEMA IN HIS CAPACITY AS INCOMING BENEFICIARY

and after the signature block for Mr. Cheema. Mr. Mand's signature block has clearly been placed out of order in this electronic copy of the document.

- [361] In the version of the Modification Agreement from the Gill Email Archive, Mr. Mand's signature block is not only missing from the signature blocks of the "Original Beneficiaries", but it does not appear at all. After this header, all of the Original Beneficiaries are listed with appropriate signature blocks, except for Mr. Mand. This is the same error in the electronic copy of the Modification Agreement from the Binpal File, except for the fact that the electronic version in the Binpal File does eventually contain Mr. Mand's signature block, albeit in the wrong place.
- [362] Of note, in the version of the executed Modification Agreement produced by the defendants in this litigation, Mr. Mand's signature block also appears as the last signature. It is identical to the electronic version in the Binpal File. It is similar to the version attached to Mr. Gill's email, in that Mr. Mand's signature block is missing from the correct position. Mr. Mand's signature block in the executed Modification Agreement (and in the electronic word document in the Binpal File) is clearly an insertion made after that fact, to correct his accidental omission. I say this as he is not with the "Original Beneficiaries", but rather is placed last on the page, after the execution block for "Harjinder Cheema in his capacity as incoming beneficiary". This makes no sense, as Mr. Mand was an "Original Beneficiary", and yet cannot be found with the rest of the original beneficiaries, notwithstanding he is captured in the header for the original beneficiaries.
- [363] The Modification Agreement produced at trial has Mr. Mand's signature block in the same place as the electronic copy of the document found in the Binpal File. While there are brackets in the electronic copy of the document that do not appear within the executed version of the Modification Agreement, I am not persuaded that is of any relevance.
- [364] Then, on July 19, 2016, Mr. Gill emails himself and Mr. Mand an executed version of Trust Agreement #2, with Schedule A having the old PID. I do not accept the defendants' argument that while Mr. Gill may have emailed himself this document in 2016, it was a document executed in 2005 but emailed by Mr. Gill to himself, for unknown reasons, in 2016. Such an argument does not fit with the preponderance of probabilities.

- [365] Doing the best I can with the admissible evidence tendered at trial, I find the reasonable inference to be drawn, given the evidence from the Binpal File and from the Gill Email Archive, is that Mr. Saini prepared the Trust Agreement #2 and the Modification Agreement in June 2016 upon Mr. Cheema's instructions, and those documents were executed at the same time by the parties at some time after June 17, 2016.
- [366] There was no evidence adduced at trial from which I can determine who added Mr. Mand's signature block to the Modification Agreement at the end of all of the signatures.
- [367] Further, there was insufficient admissible evidence at trial from which I can determine who created the version of Trust Agreement #2 (new PID). Again, the version created by Mr. Saini had the old PID attached as Schedule A. One of the versions produced by the plaintiffs has the new PID attached as Schedule A. All counsel agree the new PID was created by someone cutting and pasting it from Schedule A to the 2014 Draft Addendum in the Word version. I agree.
- [368] Mr. Gill testified that Mr. Cheema brought him the version of Trust Agreement #2 (new PID) and that he put it into a hard copy file, and did not email it to himself. However, there is no independent documentary evidence to support such a finding.
- [369] Likewise, Mr. Cheema argues that the plaintiffs fabricated the version of Trust Agreement #2 (new PID) by using what he says was the version created in 2005, and then attaching Ms. Mand's Schedule A from the 2014 Draft Addendum. Upon a careful review of these two Schedules I am satisfied they are clearly the same document. Mr. Cheema argues that this document "is of questionable provenance and there is good reason to believe that Gill has added the Schedule with the new PID to the document improperly". However, this position is based upon speculation and conjecture, and is not rooted in any admissible evidence. In the totality of the circumstances, I cannot determine who created the version of Trust Agreement #2 (new PID).
- [370] Likewise, I cannot determine in what order Trust Agreement #2 (old PID) and the Modification Agreement were executed.
- [371] Accordingly, I find that Trust Agreement #2 (old PID) and the Modification Agreement were executed at some time after they were prepared by Mr. Saini, and sent to Mr. Cheema with the reporting letter dated June 17, 2016. I can make no determination of by who, or when, Trust Agreement #2 (new PID) was created. The plaintiffs argue that because the defendants failed to put to either Mr. Mand or Mr. Gill how either of them may have created Trust Agreement #2 (new PID) they are precluded from arguing that is what happened by the rule in *Browne v. Dunn*; however, that is not the correct result of the application of the rule. Rather, the correct application would be to put little weight on Mr. Cheema's evidence to the contrary. Given my determination that Mr. Cheema lacks credibility and reliability, and my determination that there is no independent documentary corroboration from which I can conclude when Trust Agreement #2 (new PID) was created, the rule in *Browne v. Dunn* provides no additional assistance.

- [372] I note this finding is also consistent with the conduct of the parties after March 30, 2005. Some of this is already set out above and below, but in brief, it includes the following.
- [373] First, Mr. Mand and Mr. Gill continued to be involved with the Property and Mr. Cheema after March 30, 2005, all of which is supported by independent documentary evidence.
- [374] On August 17, 2006, Aplin & Martin sent a report about a possible "East Newton NCP Amendment" by fax to Mr. Gill. Included in the paperwork for the amendment application was an invoice from Ward Consulting Group dated July 28, 2006, on which Mr. Cheema wrote "Kuldip Gill denied to PAY, gave to Cheema Harjinder".
- [375] Mr. Cheema conceded there were numerous meetings as a result of the potential NCP amendment, and acknowledged that Mr. Mand and Mr. Gill might have been in attendance with him, but he said they would have been there as his friends. At another time, he characterized Mr. Mand as a consultant or an assistant.
- [376] Likewise, with the 2013 Land Swap, he acknowledged Mr. Mand handled early discussions with Aplin & Martin, and that he attended meetings with him. He acknowledged he had given the City of Surrey Mr. Mand's email address as a contact. When he received an email from Aplin & Martin dated August 20, 2010 asking for a cheque in the amount of \$876.00 payable to the City of Surrey, he wrote "Garry Mand denied to pay".
- [377] The defendants characterized Mr. Mand and Mr. Gill assisting Mr. Cheema as them acting out of friendship, or out of a desire for real estate referrals, or for the opportunity to participate in property investment deals. I cannot accept this theory to be tethered in reality. Further, it does not answer in any way why Mr. Cheema would have noted their refusal to pay invoices for the Property.
- [378] Second, Mr. Cheema provided Mr. Mand and Mr. Gill with copies of the financial statements for the years ending April 30, 2013 and 2014 of Transport Ltd., as set out below at paras. [448] to [449]. Doing so makes no sense if they were not continuing in their capacities as beneficiaries under the terms of the trust deed.
- [379] Finally, as set out above at para. [197], Mr. Gill produced an email dated July 19, 2016, which establishes he was in possession of a copy of an appraisal Mr. Wang conducted for Mr. Cheema dated April 8, 2016. Mr. Gill forwarded this appraisal to Mr. Mand and to Mr. Cheema on July 19, 2016. The only reasonable inference is that Mr. Gill had been given the appraisal either by Mr. Cheema or on his instructions. While I accept the defendants' argument that Mr. Cheema's recorded intention "to use this appraisal report to assist with determining a selling price between partners" is clearly hearsay evidence which cannot be relied upon for the truth of its contents, it is nonetheless evidence that Mr. Cheema provided the appraisal to Mr. Gill at some point after it was completed on April 8, 2016. Again, doing so makes no sense if they were not continuing in their capacities as beneficiaries under the terms of the trust deed.

[380] The evidence harmonizes with my conclusion that the plaintiffs have established, on a balance of probabilities, that Trust Agreement #2 (old PID) and the Modification Agreement were executed by the parties at some time after June 17, 2016.

[381] The plaintiffs advanced a number of theories of what led to the "true genesis" of the documents in the 2016 File, including what they say is Mr. Cheema's practice of altering documents ex post facto; and his desire to "structure agreements to evade tax obligations". These are mere theories, unrooted in the evidence, and I need not address them.

I. Did execution of these trust deeds affect the plaintiffs' beneficial interest in the Property?

1. Applicable Legal Principles

[382] I invited the parties to address the legal principles of conditions precedent and conditions subsequent within the context of a trust deed. The defendants addressed this legal issue while the plaintiffs did not.

[383] The intention of the parties is to be analyzed at the time the transaction was entered into: Virk BCCA at para. 51. As Justice Watchuk noted in *Mong Alter Ego Trust No. 1. v. Yip*, 2022 BCSC 1327:

[104] The court's task is to "construe the agreement against the background facts to determine objectively the 'aim' of the transaction". In doing so, the court must look at all of the circumstances, not just the words of the trust deed: *Larochelle* at para. 193 (citing *Mohr v. C.J.A.* (1991), 40 E.T.R. 12 (B.C.C.A.)).

[384] I have considered these legal principles already in my analysis of whether there was an oral trust, and in my analysis of the trust deeds entered into by the parties.

[385] The parol evidence rule provides that, subject to certain exceptions, when the parties to an agreement have set down all of the agreements' terms in a document, extrinsic evidence is not admissible to add to, subtract from, vary or contradict those terms: *Gallen v. Butterley*, 53 BCLR 38, 1984 CanLII 752 (BC CA) at para. 34. Among the exceptions are evidence to demonstrate the factual matrix of the agreement, to establish a collateral agreement, or to support an allegation that the document itself was not intended by the parties to constitute the whole agreement: at para. 35; see also *Thomson v. Thomson Estate*, 2024 BCSC 2039 [Thomson Estate] at para. 32.

[386] If a provision requiring interpretation is ambiguous, following consideration of its text and the factual matrix surrounding the creation of the contract, post-contracting performance of contractual obligations can be admitted "as an aid to interpretation of the agreement in question": *Thomson Estate* at para. 58.

[387] Within the trust context, Justice Newbould noted in *Computershare v. Crystallex*, 2011 ONSC 5748:

- [20] A trust indenture is a contract and normal principles of contract interpretation apply to its construction. In interpreting a contract, the goal is to determine the intent of the parties by reference to the words that they chose. The plain meaning of the words is to be given effect, read harmoniously and in the context of other provisions of the contract, and in light of the factual matrix as a whole. Interpretations that give effect to all the terms of a contract should be preferred over interpretations that render one or more terms superfluous or ineffective. A commercial contract should be interpreted in a manner that accords with sound commercial principles, good business sense and that does not result in absurdities.
- [388] With respect, I cannot agree that a trust is a contract. For the reasons set out above at para. [200], a trust is a legal relationship, which arises when a person is compelled to hold title to property for the benefit of others (of whom he may be one). When a trust relationship is a component of a contractual relationship, then the two cannot be dissociated, as Justice Fenlon noted in *N-Krypt*. The inability to dissociate the two does not lead to the trust being found to be a contract. Rather, the court must consider the fiduciary obligations owed by the trustee in that capacity, and the contractual obligations agreed to by the parties, both within the context of the commercial arrangement. The choice by the parties to utilize the vehicle of a trust as part of the commercial arrangement requires an assessment of both the obligations of the trustee, and those of the parties to the contract--neither can be ignored.
- [389] A condition precedent is a term in a contract requiring a specific event or occurrence to happen, which if it does not take place, allows the contract to be treated as repudiated: *1061403 B.C. Ltd. v. Canada Willingdon Holdings Ltd.*, 2018 BCSC 1067 at para. 53. There are two types of conditions precedent: a "true" condition precedent and an "internal" condition precedent. A "true" condition precedent requires a third party to fulfil the condition whereas an "internal" condition precedent is one which can be satisfied by the actions of the parties: at paras. 54-56. If an "internal" condition precedent is not satisfied, then the other party has the choice of either repudiating the contract, or affirming it: at para. 55. Put another way, with a condition precedent, no gift under a trust is intended until the condition is fulfilled. Such a gift is contingent, and the condition must be fulfilled for the gift to be vested: *Jack Estate (Re)*, 2019 BCSC 777 [*Jack Estate*] at para. 28.
- [390] A condition subsequent differs, in that "non-compliance with the condition will put an end to an already existing gift": *Canada Trust Co. v. Ontario (Human Rights Commission)*, [1990] CarswellOnt 486, 1990 CanLII 6849 (ON CA) at 20. Such a gift is characterized as one vested, subject to divestment: *Jack Estate* at para. 28.
- [391] As noted in *Waters' Law of Trusts* at 337-338:

Finally, one of the common causes of failure of conditions is that they are uncertain. If a condition fails for uncertainty, the question of whether it will also fail for public policy reasons does not have to be decided. This has occurred in a succession of English cases commencing with *Re Borwick* in 1993 involving possible restraint on freedom of religious allegiance. Conditions

requiring persons to be openly and avowedly Protestant, or to conform to the Church of England, or not to marry any person not of Jewish parentage and of the Jewish faith have failed for uncertainty. These were cases involving conditions subsequent, and the test the courts apply in such a situation is that it must be clear from the moment of the commencement of the interest "precisely and distinctly upon the happening of what event" it is that the interest is to be divested.

Behind this diction between conditions subsequent and precedent lies the fact that the courts are not anxious to strike down a gift if that can be avoided. The condition subsequent, being void, leaves the gift free to run its natural duration. In this respect, the courts are assisted by the presumption of early vesting, for this means that there is a presumption in favour of a condition subsequent rather than a condition precedent.

Not every condition subsequent will be one which is subject to divestment.

2. Analysis

[392] All parties agree they were unable to locate any case directly on all fours with this one. The defendants argue that the trust arrangement came to an end in a variety of manners. I am not persuaded by any of their arguments, but I will address them in turn.

[393] First, the defendants argue that the Modification Agreement nullified both Trust Agreement #1 and #2. This argument was pleaded in their Amended Response:

25. On March 30, 2005 all of the parties to the Original Trust Agreement executed the Modification to the Bare Trust and Agency Agreement, dated for reference March 30, 2005 and effective as of March 30, 2005 and Mr. Cheema, Mr. and Mrs. Gill and Mr. and Mrs. Mand agreed to enter into a new Bare Trust and Agency Agreement.
26. The Modification Agreement, effective as of March 30, 2005, nullified both of the previously signed Bare Trust and Agency Agreements which had previously been signed on March 30, 2005 and which were effective as of March 23, 2005.

[Emphasis added.]

[394] As I understand their argument, it is that the Modification Agreement was the last document signed by the parties on March 30, 2005. As the Modification Agreement provided that the parties would enter into a "new trust declaration concurrently to reflect the beneficiaries of the Lands", and no new trust deed was executed after the Modification Agreement, then the relationship between the parties was "nullified". They provided no jurisprudence in support of this argument.

[395] I need not consider this argument, as I do not accept their position that Trust Agreement #2 and the Modification Agreement were both executed on March 30, 2005. However, even if I had, I do not accept their position that the result of an inadvertent omission of executing the two documents in the proper order--that is, Modification Agreement and then Trust Agreement #2--would result in a "nullification". That would be to put formalities of execution before the mutual intention of the parties, and to allow the Agreement to be

terminated in a manner never contemplated by the parties. Further, it would be to solely rely upon the law of contract to interpret the trust deeds; rather than acknowledging the law of trusts which also applies. The law holds they are "indissociable"; not that the trust becomes a contract. The defendants' reliance upon *Icon Marketing Inc. v. RPG Revenue Property Group Ltd.*, 2025 BCSC 120 is of no assistance to them.

- [396] For the same reason, notwithstanding I cannot determine when precisely, nor in what specific order, Trust Agreement #2 and the Modification Agreement were executed, I do not find that results in a conclusion that the entire agreement between the parties was somehow "nullified".
- [397] Further, notwithstanding I cannot determine who created Trust Agreement #2 (new PID), nor when it was executed, the only change from the version with the old PID was the legal description of the Property following the Land Swap. This change has no substantive impact on the respective rights and responsibilities of Mr. Cheema and the plaintiffs, as the law of tracing would follow the Property, notwithstanding the new PID: see *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376 at paras. 64-72.
- [398] Second, the defendants argue that the plaintiffs failed to satisfy what they say was a condition precedent, that is, pay their respective capital contributions. As I have already found that Mr. Mand and Mr. Gill have proven on a balance of probabilities that they satisfied this condition (at para. [235] above) I need not consider this further.
- [399] Finally, the defendants say the plaintiffs failed to satisfy the condition subsequent (that they pay their respective 10% of the ongoing expenses related to the Property) and say that this obligation was not an obligation that arose only if Mr. Cheema made demand for them for payment. Rather, they argue:
272. [This] was a contractual term that they agreed to and it was incumbent upon them to perform that term. The simplistic and misleading suggestion that Mand and Gill were unable to make contribution payments unless Cheema made a specific demand is inaccurate. In seeking to fulfill their contractual obligations, and satisfy what was clearly a condition subsequent to the agreement, Mand and Gill were capable of making inquiry of Cheema at any time and on an ongoing basis to ascertain what expenses were incurred and what their payment ought to be. There was no necessity for a demand before the obligation to make the payment required action on the part of the Plaintiffs.
- [400] Notwithstanding the terms of the Agreement were oral, Mr. Cheema failed to provide any documentation to support a finding that it was a term of the Agreement not only that Mr. Mand and Mr. Gill were responsible to pay their respective shares of the expenses, but that Mr. Mand and Mr. Gill were responsible to make ongoing inquiries of Mr. Cheema to determine their respective 10% of the ongoing expenses related to the Property.

[401] Further, the terms of Trust Agreement #1, reduced to writing, clearly addressed the responsibility of the beneficiaries to pay their respect 10% of the ongoing expenses related to the Property. Those clauses are set out at para. [48] above. Clause 3 provided for the beneficiaries to reimburse the Trustee "for any amount reasonably and properly expended by the Trustee in connection with the Property with the written consent or direction of the Beneficiary". The clause goes on to provide:

Each party, defined collectively as the Beneficiary, shall be responsible and shall pay its respective share of any reimbursement to the Trustee and each respective share shall be equal to that party's proportionate share of the interest in the Property. All liabilities incurred or outstanding in respect of the Property, including any liability under any mortgage, debenture or security agreement in respect thereof, are the liabilities of the Beneficiary as principal and the Trustee in incurring or granting the same is acting only as agent for the Beneficiary. []

[402] However, the terms of Trust Agreement #1 are silent as to who bears the responsibility of ensuring the share of the liabilities of the Beneficiaries are paid: the Trustee or the Beneficiaries. Trust Agreement #2 contains the same clause 3, and is also silent as to who bears the responsibility of ensuring the share of the liabilities of the Beneficiaries are paid. Both are also silent on the consequences to a Beneficiary of not paying their respective shares owing. The fiduciary obligations of Mr. Cheema, both pursuant to the oral trust component of the Agreement, and later pursuant to the terms of Trust Agreement #1 and #2, lead me to the inevitable conclusion he cannot now claim the plaintiffs had the obligation to approach him to determine the amount of the reimbursement of expenses they owed. Rather, as the legal owner of the Property (and the bank accounts associated with it), and as the Trustee, I find Mr. Cheema had the fiduciary obligation to ensure that he was not only keeping accurate records for the Property, but was also seeking regular reimbursement from the plaintiffs for the expenses of the Property.

[403] Given this, I cannot find that the plaintiffs breached a condition subsequent, such that their entitlement as beneficiaries was divested. For such a condition subsequent to be found, it must either be clearly set out within the terms of the trust deed itself, or clearly found to be the intention of the parties at the time. Such a condition subsequent would have to not only identify the obligation, and who bore the responsibility of calculating the amount owed, but also the consequence of non-compliance. It would have to clearly set out upon what event the beneficial interest was to be divested. There is no evidence such a condition subsequent was part of the Agreement, nor within the trust deeds. There is no independent documentary evidence to support a finding that it can be found from the intentions of the parties at the time they entered into the Agreement. There is no basis upon which to conclude that Mr. Cheema accepted what he characterizes as their "repudiation".

[404] While the plaintiffs, in their capacity as beneficiaries, had (and have) the ongoing obligation to pay their respective share of the liabilities incurred by the Trustee, that obligation is not a condition subsequent, subject to divestment, that could result in the termination of the Agreement. Mr. Cheema, in his capacity as Trustee, cannot hide behind

a failure to provide the beneficiaries with an accounting of their proportionate share of expenses, and a failure to seek their proportionate contribution, and then rely upon their failure to make such payment to argue their beneficial ownership should be divested as a result. He was, and is, a fiduciary, and in that role, was required to put forward an accounting upon which to seek their proportionate contribution. His proper remedy is in seeking an accounting and payment of their respective proportionate share of expenses.

[405] Likewise, to the extent the plaintiffs argue that they never approved the expenses of Mr. Cheema as Trustee in writing, the fact is they never sought details of the expenses he was incurring. They cannot now argue that they are not responsible for their proportionate share.

J. Are the plaintiffs entitled to a Declaration of Trust?

[406] The Court has the jurisdiction to exercise its discretion to grant declaratory relief in circumstances where there is a real (as opposed to academic or hypothetical) dispute between the parties, respecting the relative interests or rights of parties to a legal relationship: *Solosky v. The Queen*, 1980 1 SCR 821, 1979 CanLII 9 (SCC), at 830-833. For the above reasons I am satisfied the plaintiffs are entitled to the declaration that seek; that is, that Mr. Cheema holds legal title to the Property in trust for the four plaintiffs, each as to a 5% beneficial interest.

K. From March 31, 2005 to March 31, 2012, were the plaintiffs obliged to contribute funds to Mr. Cheema in respect of the Property?

[407] The plaintiffs acknowledge that, pursuant to clause 3 of Trust Agreement #1, the "Beneficiary will reimburse the Trustee for any amount reasonably and properly expended by the Trustee in connection with the Property with the written consent or direction of the Beneficiary" and each beneficiary was to pay "its respective share of any reimbursement to the Trustee and each respective share shall be equal to that party's proportionate share of the interest in the Property". Clause 3 also makes clear that "[a]ll liabilities incurred or outstanding in respect of the Property, including any liability under any mortgage, debenture or security agreement in respect thereof, are the liabilities of the Beneficiary as principal".

[408] Although neither party argued the issue, I note that the law is also clear that a trustee is entitled to be indemnified out of the trust for all reasonably incurred expenses: *Re Vince Insurance Trust*, 2016 BCSC 1992 at para. 29. Justice Warren (as she then was) noted:

[28] It is helpful to start by summarizing the legal principles applicable to a trustee's claim to be indemnified for trust-related expenses.

- [29] Trustees are entitled to be indemnified against all reasonable costs and expenses they incur as trustees: *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353. This is reflected in s. 95 of the Trustee Act, R.S.B.C. 1996, c. 464, which provides, in material part, that a trustee "may reimburse himself or herself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his or her trusts or powers".
- [30] The general test to determine whether an expense is properly incurred, and therefore recoverable, is described in *Donovan W.M. Waters*, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Limited, 2012) at 1209 as:

whether the expense incurred arose out of an act within the scope of the trusteeship duties and powers, whether in the circumstances it was reasonable, and whether it was something that his duty as the trustee required him to do.

- [31] The application of this test, generally speaking, would disentitle a trustee to indemnification for expenses arising out of his or her own misconduct: *Tebbs v. Carpenter* (1816), 1 Madd. 290, and expenses that he or she voluntarily assumed: *Waters' Law of Trusts* at 1210. The matter is more complicated, however, in cases where a strict application of the test would preclude indemnity but where the trust benefited from the incurred expense.
- [32] It has been observed that in such circumstances, it would be reasonable "to indemnify the trustees on the ground that the beneficiaries are unjustly enriched": Albert H. Oosterhoff, "Indemnity of Estate Trustees as Applied in Recent Cases" in Megan Connolly & Anne E.P. Armstrong eds, *Ontario Estate Administration Manual*, (Toronto, Thomson Reuters Canada) (WL). Similarly, the authors of *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000) at 539, express the view that where a trustee has acted in good faith and has incurred costs in a transaction benefiting the trust estate, he or she may be entitled to indemnification even where the transaction was unauthorized:

In general, a trustee is not entitled to indemnity if he incurs costs or liabilities in a transaction which is unauthorised and without the request or implied assent of the beneficiaries. However, if the trustee acts in good faith, and the transaction benefits the trust estate, he may be entitled to indemnity to the extent that the transaction benefits the trust estate, though whether the indemnity is a matter of right rather than of discretion of the court is not clear.

[Emphasis added]

- [33] Ultimately, what is regarded as a properly incurred and therefore recoverable expense is "a question of fact in the circumstances of each particular case": *Waters' Law of Trusts* at 1209. The applicable principle I draw from the foregoing authorities is that there is no absolute prohibition against the indemnification of a trustee for expenses incurred as a result of acts beyond the scope of the trust (including voluntary acts) in circumstances where the denial of indemnification would result in unjust enrichment of the beneficiaries.

- [409] This is also codified in s. 95 of the Trustee Act, which provides that a trustee " may reimburse themselves, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of the trustee's trusts or powers".
- [410] The plaintiffs say Mr. Cheema advised them that he would use the line of credit secured by the Property to manage the cash flow required for the Property, and so there was no need for them to make any further contributions after July 1, 2004. The parties are in agreement that the plaintiffs made no further contributions to the Property after June 30, 2004.
- [411] As I understand the plaintiffs' position, it is that they are not required to make any contributions after July 1, 2004, because their duty to contribute was subject to Mr. Cheema's duty to inform Mr. Mand and Mr. Gill of the amounts they were required to contribute, and rather than doing so, he chose to "finance net cash flow deficiencies through the use of a line of credit secured by the Property". In the alternative, they say any claims are barred by either the equitable doctrines of laches or proprietary estoppel, as Mr. Cheema has failed to produce documents disclosing the rental income he received from the Home up until March 31, 2012.
- [412] Turning first to the plaintiffs' argument that they did not have to make any payments after July 1, 2004, the plaintiffs say that Mr. Cheema advised them he would use the line of credit secured by the Property to manage the cash flow required for the Property, and so there was no need for them to make any further contributions after July 1, 2004. Mr. Gill testified that this discussion took place in approximately June 2004. Again, there are no documents that can corroborate this, and I do not accept Mr. Gill's evidence on this point. Further, I note that it is not a reasonable inference to make; the only income coming in from the Property was the modest rental income from the Home. After presumably paying income taxes on that income, there was no evidence tendered which would allow me to draw the inference that the net income was sufficient to make all necessary monthly payments on the line of credit and mortgage, let alone all expenses incurred for the Property. I accept defendant counsel's argument that it would be absurd to assume that the bank would not require at least minimum payments to be made on the line of credit.
- [413] Turning next to the plaintiffs' alternative argument, they say any claims are barred by either the equitable doctrines of laches or proprietary estoppel, as Mr. Cheema has failed to produce documents disclosing the rental income he received from the Home up until March 31, 2012.
- [414] Notwithstanding Mr. Cheema's clearly deficient document production, I cannot accept the plaintiffs' argument that he is not entitled to reimbursement of any expenses incurred from July 1, 2004 to March 31, 2012 as a result. While I acknowledge it is highly questionable that he has been able to produce mortgage statements and line of credit statements for that period, yet been unable to produce a full, unredacted set of bank account statements for that period, I do not agree that the result is Mr. Cheema, in his capacity as Trustee, must bear all of those expenses personally.

- [415] As already noted, I find that on April 9, 2003, Mr. Cheema granted a second mortgage to Vancity, securing a \$220,000.00 line of credit. At this time, the principal balance on the mortgage had been reduced to \$247,313.80. The documents also establish that on July 14, 2004, the line of credit had the amount of \$14,961.26 due and owing, and as of July 8, 2004, the mortgage had a balance of \$232,355.69.
- [416] There are a few helpful documents produced which record the rental income received by Mr. Cheema during this period of time. The 2002 Residential Tenancy Agreement between Mr. Cheema and Mr. Schwab shows Mr. Schwab's residential tenancy of the Home began on July 1, 2002, and was for a rent of \$1,200.00 a month. The defendants produced a "Notice to End Tenancy" which shows Mr. Schwab was given notice that his tenancy was going to end on April 5, 2005.
- [417] The parties agree that after this tenancy ended, Mr. Cheema took over renting the Home.
- [418] While Mr. Cheema testified that there was no rental income after 2004, this is clearly not established by the documents. In the defendants' written submissions they note:
436. After March 2005, Cheema made efforts to rent the Property by himself and succeeded, to some degree. However, the quality of the tenants was [unacceptable] and the limited income from the Property was significantly insufficient to meet the expenses. Cheema was faced with the prospect of having to liquidate the Property because keeping up with expenses was becoming more troublesome on an ongoing basis.
- [419] Mr. Cheema, Mr. Mand and Mr. Gill all referred to the "stone guy" moving into the Home after Mr. Schwab. This was notable as apparently Mr. Cheema got into a physical altercation with this tenant. The documents corroborate the rental of the Property to someone after Mr. Schwab, as:
- a) on October 29, 2005, Mr. Cheema obtained a new policy with Wawanesa Mutual Insurance Co., that included the "rental dwelling" on the Property;
 - b) on September 20, 2006, Mr. Cheema changed the insurance to Canadian Northern Shield, and again obtained a policy to protect the "rented dwelling" on the Property;
 - c) on June 13, 2007, he paid for a major clean-up of garbage from the Home; and
 - d) on August 18, 2009, Mr. Cheema received a BC Hydro "Final Notice of Disconnection - Security Deposit Request" in a total amount of \$360.48, and on a copy of a cheque written out for that amount on September 1, 2009, his wife recorded "Sept.1/09 Spoke with Tia Will get Security deposit of \$279.00 back when hydro set up by new renter".
- [420] Then, in late 2009, Mr. Cheema hired Balvinder Dhillon to renovate the Home. Mr. Dhillon testified at trial that the Home was in a dilapidated state and appeared to have been used as a marijuana grow-op. Mr. Dhillon testified that he began work on the renovation in October 2009. He explained that he was also asked to work on a pond on the Property that the City of Surrey wanted Mr. Cheema to construct. He was finished with the renovation and the

pond around February 2010. He confirmed that he billed Trucking Ltd. for his work, and that he was told to make two separate rooms on the bottom level of the Home.

- [421] I find the documents establish that the Home was rented to Mr. Schwab from July 1, 2002 to April 5, 2005, for a monthly rent of \$1,200.00 a month. After that Mr. Cheema rented the Home to the "stone guy". It is a reasonable inference, based on all of the evidence I do accept, that this rental commenced after Mr. Schwab was evicted, and lasted until June 1, 2007 (when Mr. Cheema paid for the major clean-up of garbage from the Home). Mr. Cheema adduced no evidence to support a lower rental amount to this tenant, and so it is reasonable to infer it was for a similar amount.
- [422] Accordingly, I am satisfied it is a reasonable inference that the Home was rented from July 1, 2002 until June 1, 2007 for \$1,200.00 a month. Accordingly, for the purpose of the relevant period of time for my analysis, being from July 1, 2004 to March 31, 2012, I find the Home was rented from July 1, 2004 to June 1, 2007, for \$1,200.00 a month. As no evidence of income tax payments made by Mr. Cheema of this income was tendered, I have no evidence upon which to deduct such an amount.
- [423] There is no evidence to support the Home being rented out after June 1, 2007. I do not accept the plaintiffs' argument that Mr. Cheema clearly took steps to evict tenants in 2009.
- [424] I accept Mr. Dhillon's evidence that the Home was "uninhabitable" when he began to renovate it in October 2009, and that he completed his work in or around February 2010. Mr. Gill testified that at some point after the "stone man" was evicted, Mr. Cheema's cousin began living on the main floor, and Mr. Cheema began using the basement as office space. Mr. Cheema agreed that his relative lived there sometime in 2009 or 2010.
- [425] While I heard a great deal of disputed evidence from the parties as to whether Mr. Cheema considered using the Property as a nursery, that is not a dispute that I need to address, as the parties agree that Mr. Cheema decided to, and did, use the Property for truck parking. The parties also agree that Mr. Cheema has provided a summary of expenses that show from early 2009 to early 2011 he incurred site preparation costs to prepare the Property for truck parking in the amount of \$171,635.93. The plaintiffs accept that this amount was expended on the Property by Mr. Cheema at that time.
- [426] Further, the agreed statement of facts entered as evidence confirms that trucks were parked on the Property starting May 2010, and as of April 2012, "many large trucks are parked on the Property in its original configuration".
- [427] Rather, the plaintiffs stress that Mr. Cheema failed to provide any records to record his receipt of income from renting the Property out for truck parking up until April 1, 2012. However, they do not make a claim for any entitlement to any such revenue for the period up until April 1, 2012. They seek an adverse inference that had Mr. Cheema provided all of his unredacted bank statements it would not support his position that he, in fact, expended significant funds "on a net basis". I do not find this to be an appropriate adverse inference to

make in all of the circumstances, and I decline to draw such an adverse inference.

- [428] Again, in oral submissions, the plaintiffs stated that the focus of their submissions that Mr. Cheema is not able to claim for the reimbursement of any of the expenses he incurred for the Property were based on the equitable doctrines of laches and proprietary estoppel.
- [429] I am not persuaded by the plaintiffs' argument that they should not have to pay their proportionate share of the expenses incurred for maintaining the Property and preparing it for use as a truck parking lot, for the period from July 1, 2004 until March 31, 2012. I find neither of the equitable doctrines of laches or proprietary estoppel to be applicable in these circumstances.
- [430] Turning first to laches, I am not persuaded that Mr. Cheema, with full knowledge of his rights or the existence of his rights, delayed bringing a claim for the plaintiffs to contribute their proportionate share of expenses for this period of time. Again, there is no set time period after which the doctrine will apply; rather, the determination requires a consideration of all of the circumstances. The plaintiffs have furnished no evidence of any payment they made to Mr. Cheema, in his capacity as Trustee, for their proportionate share of the expenses of the Property, after June 30, 2004. I am not persuaded that they have established Mr. Cheema's acquiescence to a state of legal affairs; rather, their evidence--unsubstantiated by any independent documentary evidence--was that they thought the expenses were being paid out of the line of credit Mr. Cheema obtained on the Property. As there is no evidence they made any contribution after June 30, 2004, I find the appropriate time period to consider is from July 1, 2004 to March 31, 2012.
- [431] Further, unlike the period from 1996 to 2004, they have adduced no evidence that would lead me to conclude they acted on a belief that they did not have to continue to pay their proportionate share of the expenses incurred by Mr. Cheema, nor that they reasonably relied upon their belief that Mr. Cheema had accepted the status quo. There is no evidence they altered their position in reasonable reliance on Mr. Cheema's acceptance of the status quo. In these unique circumstances, I am not persuaded that Mr. Cheema is estopped by the doctrine of laches for bringing a claim for the plaintiffs' reimbursement of the expenses he incurred from July 1, 2004 to March 31, 2012 for the Property.
- [432] Turning next to proprietary estoppel, I do not find the plaintiffs have established that Mr. Cheema made a representation, either expressly or implicitly, that would be sufficient for the doctrine to be triggered. In these circumstances, it would have to be an assurance that the plaintiffs would enjoy some right to the Property, without the corresponding obligation to bear their respective proportion of the ongoing expenses. Without such an assurance, the doctrine has no application.
- [433] In all of the circumstances, doing the best I can with the evidence tendered at trial, I find during that relevant period of time (being July 1, 2004 until June 1, 2007 at \$1,200.00 a month) Mr. Cheema received rental income for the Home in the amount of \$42,000.00.

[434] Counsel acknowledged that there was insufficient trial time to afford the parties the opportunity to adduce the necessary evidence to quantify the reasonably incurred expenses Mr. Cheema incurred in his capacity as Trustee. Counsel also acknowledged that, should I find Mr. Cheema continues to hold legal title to the Property pursuant to the existing trust deeds, and the plaintiffs continue to be beneficiaries of the trust, then the proper procedure, after I determine the necessary legal issues, is to refer to the Registrar a passing of accounts for Mr. Cheema's reasonably incurred expenses. The plaintiffs continue to take the position that such a reference is inappropriate, which I address fully in section O below.

[435] Mr. Cheema is entitled to reimbursement from the plaintiffs for their proportionate share of the expenses incurred for the Property, being the total expenses incurred for the Property for the period from July 1, 2004 to March 31, 2012, minus the total rental income he received for that period of \$42,000.00.

L. Was Mr. Cheema obliged to, and did he, seek the plaintiffs' informed consent to enter into leases with Transport Ltd.?

[436] Mr. Cheema entered into a series of leases for the Property with Transport Ltd., commencing as of April 1, 2012, which I will address in further detail below.

1. Applicable Legal Principles

[437] As I understand it, the plaintiffs' argument is two-fold:

- a) as a fiduciary, Mr. Cheema must establish this decision was made properly, in good faith, and in the best interests of all of the beneficiaries; and
- b) pursuant to the terms of the trust deed, Mr. Cheema required the written direction of all of the beneficiaries to do so.

[438] The Court of Appeal set out a useful summary of the applicable principles in *Pirani v. Pirani*, 2022 BCCA 65 [Pirani], noting none of these propositions are controversial:

[94] The parties agree on a number of incontrovertible general principles. First, trustees are fiduciaries and owe duties to the beneficiaries of the trust. Second, as a general matter, trustees should not act in the face of a disabling conflict of interest or duty. Third, conflicts may exist between duties owed as trustees, and duties owed in other capacities; or conflicts may exist between duty and interest. Fourth, where a trustee acts in the face of a disabling conflict, the trustee will bear the onus of demonstrating that decisions were taken in good faith within the scope of the trustee's powers. Depending on the circumstances, the trustee may also have to demonstrate they did not profit from acting as a trustee. Fifth, a prima facie conflict may arise where there is a substantial risk the conflict could sway the decision making.

- [95] The parties also agree these general propositions are context specific, and not necessarily of universal application. Their applicability turns, at least in part, on the extent to which the trust instrument, interpreted in its appropriate factual matrix, informs, alters, modifies, or displaces the scope and content of fiduciary duties. The parties agree the trust instrument may authorize a trustee to act in the face of what may otherwise be a disabling conflict; displace the operation of the "no profit" rule; and in other ways modify the content of the fiduciary duty, for example, displacing an obligation to act only in the best interests of all beneficiaries with a more limited duty.
- [96] It is also common ground that in order to establish the degree to which the trust instrument has modified a trustee's duties, it is necessary to seek to determine the actual intentions of the settlor. This inquiry involves interpreting the trust agreement in light of the context in which the trust was established, its purposes and the principles governing its administration.
- [439] Pursuant to the terms of the trust deed, Mr. Cheema also had express obligations. Clause 2(d) provided that he would, upon written direction of the Beneficiary, deal with the Property, and would lease it "in such manner as the Beneficiary may determine". Clause 2(h) provided that he was not to deal with the Property, nor "execute any instrument, document or encumbrance in respect of the Property without the prior written consent or direction of the Beneficiary".

2. Analysis

- [440] Mr. Cheema entered into the Lease with Transport Ltd. as of April 1, 2012. This lease was for a period of five years, from April 1, 2012 to March 31, 2017. The monthly rental amount was \$500.00 plus GST, plus an amount equal to the costs associated with the Property, as set out in Article 3.1 of the Lease, which provided:

3.1 Gross Rent. Commencing as of April 1, 2012, the Tenant shall pay to the Landlord, or as the Landlord may in writing direct, in lawful money of Canada without any abatement, set-off, compensation or deduction whatsoever, rent which shall be the Gross Rent being the amount as set out in Section 1.1(e) together with the following additional amounts:

- (i) an amount equal to the insurance premium paid by the Landlord with respect to the insurance for the Property to be repaid to the Landlord by the Tenant on demand;
- (ii) an amount equal to the property taxes paid by the Landlord with respect to the Property to be repaid by the Tenant to the Landlord on demand;
- (iii) an amount equal to all expenses howsoever and whenever incurred by the Landlord on account of the Property to include, but not limited to, cost of repair, maintenance, landscaping, snow removal, utility and any other cost whatsoever paid for by the Landlord notwithstanding that the Tenant may be liable to attend to the same under this Lease.

- [441] This type of lease is frequently referred to as a "triple-net lease".

[442] The permitted business pursuant to the Lease was "Truck Parking and Use of residence by security guard(s)".

[443] Mr. Cheema entered into the 2017 Lease Renewal for the period from March 31, 2017 to March 31, 2022. This renewal was also a triple-net lease, with the same permitted purpose, and provided for lease payments:

- a) from March 31, 2017 to December 31, 2017: \$500.00 plus GST a month; and
- b) from January 1, 2018 to March 31, 2022: \$2,000.00 plus GST a month.

[444] He then entered into the 2022 Lease Renewal for the period from April 1, 2022 to March 31, 2027 on the same terms, with a lease payment of \$2,000.00 plus GST a month, on a triple-net basis.

[445] The plaintiffs argue that Mr. Cheema is required by the terms of the trust deed and the common law to establish that he made full disclosure of the leases to the Beneficiaries, and that he obtained their written consent prior to entering into it.

[446] There is no documentary evidence to resolve this issue. Mr. Mand and Mr. Gill testified that Mr. Cheema neither consulted with them, nor informed them, of his intention to enter into the Lease, or the fact that he had done so. While they argue that neither was challenged on this evidence on cross-examination, and say the defendants cannot now argue otherwise, relying on the rule in *Browne v. Dunn*, I do not agree. Properly, the rule in *Browne v. Dunn* would operate for me to give less weight to Mr. Cheema's evidence. In fact, it is notable that Mr. Cheema did not testify that he did not consult or inform Mr. Mand or Mr. Gill. Rather, he testified that he gave the plaintiffs the Lease in 2015. Specifically, he testified on cross-examination:

Q Mr. Cheema, you didn't tell them about the lease, the 2012 lease.

A In '15 I provided the paper of the lease. They knew everything about it.

Q Mr. Cheema, you never provided them with that lease in 2015. You're just saying so now.

A Mr. Lawyer, you are lying.

Q You had no reason to provide them with the 2012 lease in 2015.

A Absolutely, there was no reason for that, but they were walking around with the trust agreement.

Q So you agree that you never provided them with the 2017 renewal lease until this litigation started?

A In '18 I visited their office and handed over to them.

Q Well, I'm going to suggest to you that that is just not true.

A This is absolutely true. I went to their Sutton Group office. I even know their room where they were. You take me today I'll show you the room.

Q Sir, I put it to you that you didn't give them the renewal lease, you didn't give them the lease, and you didn't tell them about the existence of either of those documents?

A He can keep saying anything he wants to. He is absolutely lying. I provided them with everything.

Q And you didn't tell them that you were renting the property to your own company?

A Sir, you can keep saying anything you want. I absolutely disagree with what you are saying. That is their own position. That's not my position.

[447] I note this evidence is impossible to reconcile with the position Mr. Cheema now takes in closing submissions that he told the plaintiffs shortly after the events of March 30, 2005 that they were no longer beneficiaries of the trust, and no longer had an interest in the Property. If that were true, there would be no reason to provide them with a copy of the Lease or the 2017 Lease Renewal.

[448] Further, the plaintiffs also disclosed two financial statements they say Mr. Cheema provided to them in 2015 or 2016. The versions produced by the plaintiffs are missing a header, and have no indication of either the entity involved, nor the time period they cover. The two documents appear to each include a balance sheet and an income statement. Both were printed on 2/10/2015, the first at 12:45 pm and the second at 12:46 pm.

[449] Without further information, it would not be possible to identify what entity these two financial statements relate to. However, the defendants produced the Transport Ltd. Balance Sheet as at April 30, 2013 and Income Statement for the same period of time. They also produced the same as at April 30, 2014. Both are identical to the documents produced by the plaintiffs (which they say they received from Mr. Cheema) with the exception that they have full headers identifying the documents. Mr. Cheema agreed to this on cross-examination, and confirmed he gave the financial statements to Mr. Gill. I find Mr. Cheema gave Mr. Mand and Mr. Gill these financial statements.

[450] I am unable to conclude that Mr. Cheema provided Mr. Mand and Mr. Gill with a copy of the Lease. In any event, Mr. Cheema did not testify that he had consulted with either Mr. Mand or Mr. Gill prior to executing the Lease, or either of the renewals. I find Mr. Cheema did not consult with the plaintiffs prior to entering into the Lease, and failed to advise them that he had entered into the Lease after execution.

M. As Mr. Cheema failed to obtain the plaintiffs' informed consent to enter into the lease agreements with Transport Ltd. from April 1, 2012 to date, what are the plaintiffs' rights and remedies with respect to this failure?

1. Applicable Legal Principles

- [451] In *Pirani*, the Court went on to note that when a trust is created, trustees may be authorized to act in the face of a conflict, and may also be relieved of other aspects of their fiduciary duty: at para. 102.
- [452] The plaintiffs rely on the principles of equitable compensation, and say they are entitled to their proportionate share of the rental income Mr. Cheema ought to have received for the Property, had he rented it to an arm's-length lessee.
- [453] Equitable compensation is a loss-based remedy, intended to deter wrongdoing and enforce the trust at the heart of fiduciary relationships: *Southwind v. Canada*, 2021 SCC 28 [Southwind] at para. 66. It differs from an accounting for profits or a constructive trust, both of which are gain-based remedies, meant to measure a fiduciary's gain rather than a plaintiff's loss. Rather, equitable compensation is a loss-based remedy, intended to make up the plaintiff's loss: at para. 67. The Supreme Court of Canada characterizes it as "equity's counterpart to common law damages": at para. 69. It is discretionary and restitutionary in nature, and aims "to restore the actual value of the thing lost through the fiduciary's breach, referred to as the plaintiff's lost opportunity": at para. 69. To find equitable compensation appropriate, there must be factual causation; that is, the fiduciary's breach must have caused the plaintiff's lost opportunity: at para. 70.
- [454] At its heart, equitable compensation "is designed to put the beneficiary in as good a position financially as he or she would have occupied but for the breach of the equitable obligation, not a better one": *Shen v. West Continent Development Inc.* (BC0844848), 2020 BCSC 5 at para. 98.
- [455] Equity is especially concerned with deterring wrongful conduct by fiduciaries, as beneficiaries are peculiarly vulnerable to a fiduciary's use, misuse or abuse of power. As *Southwind* explains, "[b]y restoring the beneficiary's lost opportunity, equitable compensation enforces the fiduciary relationship and deters the fiduciary's wrongful conduct": at para. 72. The Court in *Southwind* also states:
- [73] Due to these differences, rather than relying on common law principles, McLachlin J. explained that the proper approach to equitable compensation "is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy" (Canson, at p. 545). McLachlin J.'s approach was subsequently followed by this Court in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (SCC), [1999] 1 S.C.R. 142, and recognizes that the applicable rules will depend both on the nature of the fiduciary relationship and the fiduciary obligations: "Differences between different types of fiduciary relationships may, depending on the circumstances, dictate different approaches to damages" (Canson, at p. 546). In other words, "[t]he rules appropriate to a breach of duty by a trustee . . . have to be determined in the light of the characteristics of the obligation in question" (AIB, at para. 93). There must be a close relationship between the fiduciary duty and the fiduciary remedy, and the fiduciary duty must "forcefully shape the content of [the] fiduciary remed[y]" (Bray, at p. 451). Thus, while factual causation will always apply to

equitable compensation in the sense that the fiduciary's breach must cause in fact the plaintiff's loss, common law limiting factors will not readily apply because of the nature of the fiduciary relationship and obligations.

[74] Equity assesses the loss at the date of trial and with the benefit of hindsight (Guerin, at pp. 361-62, per Wilson J.; Canson, at p. 556; Target Holdings Ltd. v. Redfurns, [1996] 1 A.C. 421 (H.L.), at pp. 437-39). This means that equity compensates the plaintiff for the lost opportunity caused by the breach, regardless of whether that opportunity could have been foreseen at the time of breach. McLachlin J. described the analysis as follows:

The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach.

(Canson, at p. 556)

[75] McLachlin J.'s use of the phrase "common sense view of causation" in Canson should not be taken to mean that the causation analysis in equitable compensation cases will always have an "intuitively obvious answer" (AIB, at para. 95). This is not always the case; trial judges are often faced with difficult questions of causation in claims for equitable compensation. Instead, the phrase "common sense" clarifies that the rules developed in legal causation, such as foreseeability, do not readily apply in equity: "The requirement that the loss must result from the breach of the relevant equitable duty does not negate the fact that 'causality' in the legal sense as limited by foreseeability at the time of breach does not apply in equity" (Canson, at p. 552). Professor Rotman explains the same point as follows:

Each starts with the idea of "but for," "cause-in-fact," or "sine qua non," causation. This generally satisfies Equity, but the common law requires more; it demands a finding of materiality or substantial cause to link the impugned activity with the harm to the plaintiff. Further, the common law imports ideas of foreseeability (or reasonable contemplation) and remoteness into its assessment of causality. . . . These other considerations do not readily enter into Equity's assessment of fiduciary accountability.

(Fiduciary Law (2005), at p. 634).

See, also, Target Holdings, where Lord Browne-Wilkinson observed that "the common law rules of remoteness of damage and causation do not apply" (p. 434).

[456] However, a plaintiff must establish that their losses flowed from the breach of fiduciary duty: Stirrett v. Cheema, 2020 ONCA 288 [Stirrett] at paras. 86-90.

- [457] Further, to achieve the purpose behind equitable compensation, "the assessment is also guided by presumptions that equity makes against breaching fiduciaries": Southwind at para. 78. One such presumption is that "[e]quity presumes that the plaintiff would have made the most favourable use of the trust property": at para. 79. However, Southwind makes clear:
- [80] The focus is always on whether the plaintiff's lost opportunity was caused in fact by the fiduciary's breach. Equity will assess that opportunity under the presumption that the beneficiary would have put the asset to its most favourable use. The most favourable use must be realistic. The common law requires a plaintiff to lead evidence to that effect.
- [81] There are additional equitable presumptions that are applicable in appropriate cases. The presumption of legality, discussed in more detail below, prevents breaching fiduciaries from reducing compensation by arguing they would not have complied with the law.
- [82] Another presumption, the so-called Brickenden rule, applies where the fiduciary breached a duty to disclose material facts. The breaching fiduciary is prevented from arguing that the outcome would be the same regardless of whether the facts were disclosed (*Brickenden v. London Loan & Savings Co.*, 1934 CanLII 280 (UK JCPC), [1934] 3 D.L.R. 465 (P.C.)).
- [83] In summary, equitable compensation deters wrongful conduct by fiduciaries in order to enforce the relationship at the heart of the fiduciary duty. It restores the opportunity that the plaintiff lost as a result of the fiduciary's breach. The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations undertaken by the fiduciary. The loss must be caused in fact by the fiduciary's breach, but the causation analysis will not import foreseeability into breaches of the Crown's fiduciary duty towards Indigenous Peoples. Equitable presumptions -- including most favourable use -- apply to the assessment of the loss. The most favourable use must be realistic. The trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial and the importance of the relationship between the Crown and Indigenous Peoples.
- [458] Ultimately, equitable compensation "is a discretionary remedy that is assessed and not precisely calculated": at para. 123. Rather, as the Court explains, "a trial judge will often have to provide a global assessment of the lost opportunity and that assessment needs to be realistic": at para. 123. The Court has the discretion to fashion an appropriate remedy. Equitable relief is "flexible, adaptable, and intended to address fairness between the parties and the integrity of the fiduciary relationship": *Sather Ranch Ltd. v. Sather*, 2024 BCSC 598 at para. 44.

2. Analysis

[459] While I have determined that Mr. Cheema did not advise Mr. Mand and Mr. Gill that he had entered into the Lease with Transport Ltd., notwithstanding the financial statements he gave them in 2015, and I accept that was a breach of his fiduciary duties, that is not, on its own, determinative of the appropriate remedy. Again, the behaviour of the plaintiffs, and the business nature of their arrangements, is indissociable from the terms of the trust deed.

[460] Inherent in the plaintiffs' submission is their position that they ought to have been entitled to a proportionate share of the revenue Transport Ltd. received from the truck parking business it conducted on the Property. They argue in their written submission that:

Cheema's failure to produce critical evidence has stymied the Plaintiffs' ability to seek disgorgement as a remedy, which misconduct triggers the prophylactic purpose of an award of equitable compensation and the principle that in the absence of evidence to the contrary, the defaulting fiduciary must account to the beneficiary on the basis most favourable to the beneficiary.

[461] However, as noted above, the most favourable use must be realistic. There is no admissible evidence which would lead me to the conclusion that the plaintiffs were willing to establish and run an independent truck parking business on the Property, a business for which they have no experience. I do not find that would have been a realistic endeavour. I cannot accept the plaintiffs' argument that they should be entitled to an accounting of the truck parking revenue Mr. Cheema obtained from using the Property from April 1, 2012 to date.

[462] As an alternative, the plaintiffs argue they should be entitled to their proportionate share of the rental income that could have been obtained had Mr. Cheema rented the Property to an arm's-length lessee.

[463] The plaintiffs argue that Mr. Cheema leased the Property at less than fair market value, and given the lack of an accounting of the truck parking revenue he obtained from using the Property from April 1, 2012 to date, as well as the unreliability of the documents purporting to record income and expenses, they propose to use what they say would have been fair market rent for the historical time period. They seek an order of equitable compensation calculated at 20% of the annual net rent as calculated by Lonnie Neufeld, a Director, Valuation, for Ryan ULC, or alternatively, an accounting of the net truck parking revenue received, in an amount to be assessed.

[464] Mr. Neufeld was certified as an expert in real estate valuations relating to industrial and commercial development properties in the Lower Mainland, including appraisals of leasehold interests. He prepared two expert reports:

- a) a retrospective rental evaluation for the Property dated March 17, 2023 (the "Rental Evaluation"); and
- b) an addendum dated January 30, 2024 (the "Addendum").

[465] Mr. Neufeld confirmed on cross-examination that the current zoning for the Property is agricultural, but he noted that the Official Community Plan designates it as mixed employment business park. Specifically, he wrote in his Rental Evaluation:

OCP or Future Zoning:

The City of Surrey's Official Community Plan designates the subject property as Mixed Employment - Business Park (see Addendum C). The Mixed Employment designation is intended to support a mix of industrial, commercial, business and office uses that are not suited for location within Town Centres or commercial centres. Commercial uses may include business parks, retail, outdoor storage. Office use may include those related to industrial uses and construction trades. Development within Mixed Employment areas may range from 1.0 to 1.5 FSR. Industrial uses are encouraged to be located in Mixed Employment designated areas. In the listing of permitted uses "outdoor storage and vehicle and equipment servicing" is included. This is the current, and long term, use of the subject property.

[466] Mr. Neufeld was asked to opine on an estimate of the fair market rental value of the Property from April 1, 2012 to April 1, 2023, and further into 2023. He noted in the Addendum:

In considering fair market value, as noted in the original report, given the history, I have considered various aspects of zoning and OCP permissions and the actual status of the subject property. The subject property was originally viewed on November 11, 2021 and revisited on January 20, 2024 and no changes to the site, its continued occupancy as a truck parking facility, nor to the immediately surrounding area were noted. Similar to my observations during my previous inspection of the subject property, my reinspection observed that the subject truck parking facility was substantially occupied. I have assumed that the subject property has been in continued occupancy as a truck storage parking lot in every year since at least April 2012.

In updating the Fair Market Rents and having reviewed the evidence noted above I had discussions with the following City of Surrey employees: Allison Sowinski, Property Records Clerk and Kevin Shackles, Planner 2, to ascertain whether or not there were any applications regarding the subject property and the current situation with respect to truck parking requirements in the City of Surrey. The following is noted:

- the local truck industry is having significant difficulty in obtaining sufficient parking areas to meet the needs of the growing trucking industry and the City of Surrey has created a task force to look into means to resolve the situation.
- The Development/Permit department receives and processes application. Protocols require applications to be logged into the computer data base when they are received. A review of their records indicates that no application with respect to the subject property for truck parking is in their system.

- Where property owners have requested temporary parking permits to allow truck parking on their property the city of Surrey council has approved some of them; staff working in the Planning and Development Permit department provides this information but declined to be specific as to the addresses of these properties.

Furthermore, I have reviewed correspondence from Mr. Oleg Verbenkov at Pacific Land Group to Mr. Cheema, dated August 17, 2022, advising him that he/Mr. Verbenkov could manage the application for a Truck Parking permit on the subject site. However, Mr. Verbenkov informed me (phone call on January 29, 2023) that Mr. Cheema never responded to his correspondence, and therefore Mr. Verbenkov never proceeded with the file.

Given the lengthy history of the subject property as a truck parking facility and the above noted discussion, I consider it to be a reasonable assumption that a prospective tenant would lease the subject lands, and pay market rent, for yard storage purposes including truck parking amongst other potential storage uses. In my experience, standard lease documents contain provisions whereby if the use for which the property is no longer possible or permitted the lease is terminated.

[Emphasis added.]

[467] I note, to the extent Mr. Neufeld's opinion is based upon the evidence of either Kevin Shackles or Oleg Verbenkov, neither testified at trial, and so his summary of their advice to him is hearsay and is inadmissible for the truth of its contents.

[468] His ultimate opinion as set out in the Addendum is:

On the basis as set out in the original Narrative Report and extended to April 1, 2023, it is our opinion that the annual market rental values on a triple net basis from 2012 to 2023, subject to the assumptions and contingent and limiting conditions contained in the report, are estimated to be:

FAIR RENTAL VALUE OF SUBJECT LANDS

Renewal Date

3 Net Rental Rate (\$ per sq. ft.)

Site Size

(sq. ft.)

Annual Rent (\$ Total)

April 1, 2012

April 1, 2013

April 1, 2014

April 1, 2015

April 1, 2016

April 1, 2017

April 1, 2018

April 1, 2019

April 1, 2020

April 1 2021

April 1,2022

April 1, 2023

\$1.00

\$1.10

\$1.35

\$1.45

\$1.50

\$1.75

\$2.00

\$2.25

\$2.50

\$3.00

\$3.50

\$4.00

187,069

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\$187,069

\$205,776

\$252,543

\$261,897

\$280,604

\$327,371

\$374,371

\$420,905

\$467,673

\$561,207

\$654,742

\$748,276

While a fair market rent has not been calculated as at the date of this Addendum a clear pattern of rising rents is evidence and could be in the region of \$4.25 per sq. ft.

[469] For the period from April 1, 2012 to March 31, 2024, Mr. Neufeld calculates a total net rent of \$4,742,201. The plaintiffs claim 20% of these annual net rents.

[470] At the time of closing submissions, the plaintiffs sought \$1,041,974.00, plus 20% of the annual net rent from April 1, 2024 to the date of closing argument, and an additional 20% of the annual monthly net rent from the date of closing argument to the date these reasons for judgment are issued. They also sought court order interest calculated and compounded annually. I note that Mr. Neufeld made no adjustments for inflation, and no evidence of applicable tax rates on such income was tendered.

[471] However, I cannot ignore the fact that the Property is currently not zoned for truck parking. Mr. Cheema emphasizes a "stop use" letter he received from the City of Surrey dated June 26, 2022, which advised:

A recent inspection of the above property has revealed that you are operating a truck parking facility and storing commercial vehicles and commercial trailers. Your property is zoned A1-General Agricultural. This zoning does not permit this use on the property.

You are required to stop the illegal use by August 26, 2022.

We will conduct a follow-up inspection to determine compliance with the by-law and whether further action is required by the By-law Enforcement Section. If you have any questions, please call me at 604-598-5793.

[472] The plaintiffs attempt to minimize the fact that truck parking was clearly not permitted on the Property in a number of ways:

- a) they say, notwithstanding Mr. Cheema testified he received numerous letters, he was only able to produce one letter; and
- b) they criticize him for failing to make an application to the City of Surrey for a temporary use permit for truck parking.

[473] While Mr. Cheema did produce documents reflecting correspondence he had exchanged with the City of Surrey about applying for a temporary use permit, he agrees he ultimately did not file the application. While I do not accept Mr. Cheema's evidence that he did not file such an application because some unknown person at the City of Surrey told him there was a 99% chance the application would be refused, I do accept he did not make such an application. I do not accept the plaintiffs' argument that I should draw the inference that he did not make the application as he did not want the permit to be approved, as that would undermine his legal position that Mr. Neufeld's appraisal is inaccurate.

[474] Finally, I also cannot ignore the fact that the Property has not been able to be leased for a purpose other than truck parking. Mr. Cheema retained Swarn Sekhon to list the Property for rent, a realtor from the plaintiffs' real estate office, who is friends with both Mr. Mand and Mr. Gill. The listing agreement with Mr. Sekhon was dated April 4, 2023, and listed the Property for an annual rent of \$665,182.98, for a term of three years. The description of the Property on the listing was:

4.363 acres of prime land in the heart of Surrey. Frontage on high exposure 152 Street and just by 68 Ave. Present zone A1, however land is designated as an Industrial Business Park. Can be used for multi-purposes. Bring your bright ideas. Hard to find such a prime location. No truck parking will be allowed. Small house on the property.

[475] Mr. Sekhon testified at trial. He said he placed a series of advertisements between April 2023 and early 2024. He confirmed that while he had received five to six enquiries, they had all been from potential truck parking operators. He received no other enquiries.

[476] The plaintiffs argue that Mr. Cheema "sabotaged" any opportunity to achieve fair market rent for the Property by only listing it for a three-year term, and excluding truck parking. I do not accept this argument.

- [477] Further, the plaintiffs encourage me to ignore the current zoning for the Property. The plaintiffs' position is that because Mr. Cheema used the Property for truck parking since approximately 2010, it can clearly be used in that fashion. They say not only did Mr. Cheema fail to obtain their written consent to renting the Property to Transport Ltd., but it is clear that he made no effort to determine what fair market terms would be for the Lease.
- [478] First, the plaintiffs' submission is problematic in that it encourages me to ignore the current zoning for the Property. I heard a significant amount of evidence relating to the current zoning of the Property, and the legality of using it for the purpose of truck parking. The parties agree that the Property is not currently zoned for use as truck parking. I accept the defendants' argument that this is a significant factor to any assessment of a proper quantum of equitable compensation.
- [479] Second, no evidence was tendered as to what potential lessees may have been willing to pay to rent the Property for a long-term leasing opportunity, in the hope they may redevelop the site. To consider this to be a failing on Mr. Sekhon or Mr. Cheema's part would be purely hypothetical and would not be grounded in the evidence.
- [480] Finally, while I accept Mr. Cheema failed to take steps to obtain an independent assessment of the rental market value before he entered into the initial Lease; failed to advertise or list the Property for rent; and failed to retain a broker to list the Property (before he rented it to his associated corporation) , I cannot find the plaintiffs have established that they lost the opportunity to have the Property rented out for use as a truck parking lot, and, therefore, they should receive the net rental income as calculated by Mr. Neufeld. The most favourable use of the Property must be realistic. I am not persuaded that the most favourable use would have been to rent the Property out for what was clearly an unauthorized purpose.
- [481] While I cannot accept Mr. Cheema's testimony that he "knew" a monthly rent of \$500.00 was fair value as it is entirely uncorroborated, I must consider the use of the Property before Mr. Cheema entered into the Lease. That is, there was a small Home on the Property, which historically had been rented for between \$1,200.00 and \$1,250.00. Further, under the terms of the Lease, Transport Ltd. was responsible for all expenses covered under its terms (on a triple-net basis).
- [482] In all of the circumstances, when I consider the historical rental income, the costs associated with keeping and insuring the Property, and the fact that truck parking was illegal, I cannot accept the plaintiffs' argument that they are entitled to equitable compensation based on Mr. Neufeld's two expert reports.
- [483] However, that is not the end of the analysis. Mr. Cheema did enter into the Lease, and the two renewals. His evidence at trial was that he did not always collect the lease payments, as if he had collected more, then he would have paid more tax.

- [484] I am satisfied the plaintiffs have established that the most favourable use of the Property from April 1, 2012 to date was the Lease, and the renewals entered into. I find that any lease of the Property for truck parking purposes, other than to an entity owned and controlled by Mr. Cheema, would have been an objectively high-risk transaction that may have exposed Mr. Cheema, and so the trust, to liability.
- [485] I find the plaintiffs have proven their loss, being their 20% proportionate share of the lease payments from April 1, 2012 to date. As Mr. Cheema failed to collect the payments, and failed to establish he either paid tax on those payments or what the applicable tax rate would be, I find the appropriate equitable compensation payable to the plaintiffs is 20% of the gross lease payments Mr. Cheema ought to have made.
- [486] Although the defendants invited me to refer the matter of appropriate tax treatment to the Registrar, the fact remains that Mr. Cheema failed to provide evidence that he either collected those payments or paid the requisite taxes due and owing on them. In those circumstances, I am satisfied the appropriate assessment is that the plaintiffs are entitled to 20% of the gross lease payments Transport Ltd. owed to Mr. Cheema. It would be neither appropriate nor proportionate to refer the issue of "notional" tax payable to the Registrar, when he has failed to provide evidence at trial that he paid any tax.
- [487] Further, the issue of the triple-net lease, and Transport Ltd.'s obligation to bear the expenses associated with the Property, is also relevant and discussed further below.
- N. From April 1, 2012 to present, were the Plaintiffs obliged to contribute funds to Cheema in respect of the Property?
- [488] Mr. Cheema entered into the Lease as of April 1, 2012, and then into the two renewals. Each of these three leases were a "triple-net lease". The details of these three leases are set out at paras. [440] to [444].
- [489] In their closing submissions, the defendants acknowledge:
451. The lease entered into with the Cheema trucking company is a "triple net lease", which is of significant benefit for the Property because all of the expenses relating to the Property are now paid by a third party. On top of that provision, there is additional lease payments made. In all, the lease agreements in place constitute the best available lease terms that could hope to be extracted for the Property without exposing Property owners to significant and unacceptable risk.
- [490] In closing argument, defendants' counsel acknowledged that, if I were to find that the plaintiffs have a beneficial interest in the Property, then they should be entitled to 20% of the rent that Transport Ltd. should have paid to Mr. Cheema, in his capacity as Trustee, pursuant to the terms of the three leases, and the plaintiffs should not be liable for any of the expenses covered by the terms of these three triple-net leases.

- [491] The plaintiffs argue that under the terms of the three leases, since April 1, 2012, Transport Ltd. has been responsible for paying all expenses for the Property, "other than financing costs, if any, and which were not put to the Plaintiffs for reimbursement. Accordingly, there has been no payment due by the Plaintiffs to Cheema".
- [492] As set out above at para. [485], I find that the plaintiffs are entitled to 20% of the rent that Transport Ltd. should have paid to Mr. Cheema from April 1, 2012 to date, pursuant to the terms of the three leases. Mr. Cheema testified that he never actually paid that rent from Transport Ltd. to himself; as a result, no taxes were ever paid by Mr. Cheema, in his capacity as Trustee, on that income. In those circumstances, the plaintiffs are entitled to 20% of the gross rent that should have been paid by Transport Ltd. to Mr. Cheema, from April 1, 2012 until the earliest of the date the Property is sold or the term of the 2022 Lease Renewal expires (being March 31, 2027).
- [493] I also find that the plaintiffs are not responsible for any of the expenses Mr. Cheema incurred for the Property that should have been properly covered under the terms of the triple-net leases, from April 1, 2012 forward. However, the plaintiffs are responsible for their 20% share of any expenses Mr. Cheema incurred for the Property that should not have been properly covered under the triple-net leases, from April 1, 2012 forward.
- [494] That leaves the issue of the financing charges Mr. Cheema incurred for the Property from July 1, 2004 onwards, which I will address next.

O. Accounting of All Expenses Incurred by the Trustee

- [495] In the Amended Response, Mr. Cheema pleads that on November 9, 2009, he paid \$100,000.00 to Mr. Mand, pursuant to Mr. Mand and Mr. Gill's request to withdraw this amount on account of their beneficial interest in the Trust Property: at para. 35. This issue was not addressed by either party in their closing submissions and so I will not address it further.
- [496] The defendants also plead in their Amended Response that the plaintiffs have paid less than their proportionate share of the expenses related to the Property: at para. 32. While Mr. Cheema did tender some limited evidence as to the expenses he has paid, counsel ultimately agreed the quantum of those expenses could not be addressed within the scheduled trial time. Counsel agreed any determination of the expenses he incurred could likely be addressed by agreement after these reasons for judgment are delivered; failing which, there should be reference to the Registrar.
- [497] At the end of closing submissions, I raised the issue of a determination of the expenses incurred by the Trustee in that capacity, and I invited counsel to provide me with their submissions on an appropriate reference to the Registrar.

- [498] Plaintiffs' counsel wrote on March 26, 2025 to reiterate their position that given the dearth of production supporting the housing and trucking revenues received by the defendants both before and after April 1, 2012, they are doubtful that the evidence is sufficient to support a reference to the Registrar. Defendants' counsel wrote on the same day, noting the parties were unable to come to an agreement on a proposed form of Reference Order, and providing their draft order for such a reference. Neither counsel provided any case law on such a reference.
- [499] Section 99 of the Trustee Act codifies what was once a common law duty of a trustee to present and pass their accounts. When a trustee and beneficiaries are unable to reach a consensus on the trustee's proper accounts, then those accounts must be brought before the court for a resolution. Rules 25-13 and 25-14 of the Supreme Court Civil Rules provide a procedural code for doing so. Specifically, Rule 25-13(3)(b) provides that the court may direct the Registrar "to conduct an inquiry, assessment or accounting in relation to any matter relating to the accounts or the remuneration of the personal representative". Rule 25-13(3)(c) provides the court may "make any other order or give any direction that the court considers appropriate in the circumstances". Further, upon referral of the matter to the Registrar, then under Rule 25-13(5), unless the court otherwise orders, the Registrar must certify his or her results in Form P39. If a Form P39 certification is filed under Rule 18-1(9), then the certificate is binding, subject to appeal, on the persons who had notice of the inquiry, assessment or accounting.
- [500] At para. [268]-[269] I found Mr. Mand and Mr. Gill made payments as on account of their proportionate share of the expenses incurred for the Property from September 1996 to June 30, 2004. At para. [283] I found Mr. Cheema was barred from pursuing any claim that the plaintiffs failed to make all contributions necessary from September 1996 to July 2004, and failed to fully account for the rental income for the Home for the same period.
- [501] The evidence is clear that on July 14, 2004, the line of credit had the amount of \$14,961.26 due and owing, and as of July 8, 2004, the mortgage had a balance of \$232,355.69.
- [502] Pursuant to the Agreed Statement of Facts, on March 21, 2012, a new TD mortgage was registered against the Property, replacing the Vancity financing. A loan principal of \$485,000.00 was advanced, paying out the remaining \$107,760.00 outstanding under the original mortgage assumed by Vancity from Laurentian, and the Vancity operating loan balance of \$376,599.00.
- [503] The plaintiffs are adamant that they owe no money on account of any expenses incurred by the Trustee, and that even if they did, it would not be possible to calculate without a full accounting of the rental income Mr. Cheema received from the Home, and a full accounting of all revenue he (or Transport Ltd.) received from the truck parking post-April 1, 2012. For the reasons set out above, I do not accept this proposition.

[504] However, the defendants seek a reference for a determination of all expenses paid by Mr. Cheema, Trucking Ltd. and Transport Ltd., for the period September 18, 1996 to the commencement of trial on June 12, 2023. For the reasons set out above, I also do not accept this proposition. Rather, I find that Mr. Cheema, in his capacity as Trustee, is entitled to be reimbursed by the plaintiffs for their respective proportion of the expenses the defendants paid for the Property:

- a) for the period from July 1, 2004 to March 31, 2012; and
- b) for any expenses not covered by the trip-net leases, for the period from April 1, 2012 to the earlier of the either the date the Property is sold, or the date the appointment for the hearing before the Registrar is filed (both presumably occurring before the 2022 Lease Renewal expires in March 2027).

The evidence establishes that Mr. Cheema did not keep accurate records of which entity he used to pay the expenses of the Property: whether accounts associated with the Property, his own personal accounts, or those of Trucking Ltd. or Transport Ltd. In those circumstances, the expenses are to be those expenses incurred for the Property by any of the defendants.

[505] While there were a number of comments made by plaintiffs' counsel that Mr. Cheema had used mortgage funds for personal purposes, no evidence was tendered to support this allegation, nor were any argument advanced in either closing submissions or the further written submissions to this effect. However, there is a lack of evidence that would establish no mortgage or line of credit funds were ever used to pay any of the expenses related to the Property, and a clear lack of a complete evidentiary record from which to create a full financial accounting for the period from July 1, 2004 forward. In such circumstances there is no way to avoid accidental duplication of reimbursement, if either were used to pay for any of the expenses.

[506] The initial mortgage obtained in 1996 from Laurentian Bank was \$299,288.78. This mortgage not only has not been paid down, but the evidence established the balance on the new TD mortgage on the Property, replacing the Vancity financing, was \$485,000.00 on March 21, 2012. This establishes the mortgage amount due and owing increased over the past decades.

[507] Given the lack of document production, it would not be possible to undertake a full forensic accounting of not only the expenses paid, but the uses of funds obtained from the mortgage and line of credit. While not perfect, I am satisfied the appropriate approach is to determine the expenses paid by Mr. Cheema for the Property, including payments toward the mortgage and line of credit. Mr. Cheema is entitled to be reimbursed the amount of the outstanding mortgage on July 8, 2004 (\$232,355.69) and the amount outstanding on July 14, 2004 on the line of credit (\$14,961.26), plus all expenses paid for the Property, for the period from July 1, 2004 to March 31, 2012, subject to my comments below. After April 1, 2012, that will include only the expenses, including financing expenses, not covered by the terms of the triple-net leases. Proceeding in this manner will, to the extent possible, avoid double

counting (which may result if both the expenses are determined and Mr. Cheema is also entitled to payment of the mortgage and the line of credit outstanding at the time the Property is sold).

- [508] I must comment on the defendants' position that if I were to find the plaintiffs do have any entitlement to the Property " then it may well be that submissions will need to be made to the effect that Cheema is entitled to contribution and indemnity with respect to expenses he has solely funded, with interest". To the extent Mr. Cheema had any further legal arguments to make with respect to his entitlement to contribution and indemnity, he had to make such arguments at the close of this proceeding, in his closing submissions. He has no ability to delay such submissions regarding entitlement until a later date. To seek to do so is neither proportionate, nor efficient, particularly in a proceeding that took 108 days of trial to complete. As Justice Newbury observed in *Universe v. Fraser Health Authority*, 2022 BCCA 201:
- [78] The objective of 'proportionality' is now expressly recognized as an important part of civil litigation. This objective reflects that no one litigant or group has the right to demand that unlimited time and resources be devoted to a particular case, no matter how important it is. The rights and interests of other litigants in other cases waiting to be heard must be balanced in a fair way against litigants who are before the court, and measures designed to increase efficiency must generally be followed, both in the form of court rules and in judges' management of trials.
- [509] I would expect that counsel, with the benefit of these reasons for judgment, could easily reach an agreement on the quantum of Mr. Cheema's reasonably incurred expenses from July 1, 2004 to March 31, 2012, and for the period from April 1, 2012 to date, as ordered in these reasons for judgment. To the extent they are unable, there is to be a reference to the Registrar to address the quantum, and to quantify Mr. Mand and Mr. Gill's net proportionate 20% share (after deduction of the income from the rental of the Home, as set out above). However, counsel for Mr. Cheema may not make further arguments with respect to the issue of the appropriate contribution and indemnity to expenses, including any alleged entitlement to interest. The time for such submissions was provided, and it has now passed. There must be an end to this proceeding, and the parties are entitled to expect finality at some point. The purpose of the reference to the Registrar is to quantify the expenses Mr. Cheema incurred in his capacity as Trustee.
- [510] Mr. Cheema is not entitled to be reimbursed for the amount of the outstanding mortgage or line of credit as at the time of the sale of the Property. Neither is he entitled to bring any claim for interest based upon the outstanding mortgage, outstanding line of credit, or the expenses incurred from July 1, 2004 onwards. He adduced no evidence in support of such a claim, either oral or documentary.
- [511] Accordingly, there is to be a reference to the Registrar to determine the expenses paid by the defendants for, and in connection with, the Property, on the following terms:

- a) the Registrar shall determine the expenses paid by Mr. Cheema, in his capacity as Trustee, for and in connection with the Property, between the dates of July 1, 2004 and March 31, 2012 (after deduction of the income from the rental of the Home, as set out above);
- b) the Registrar shall determine the expenses paid by Mr. Cheema, in his capacity as Trustee, not covered by the triple-net leases, for and in connection with the Property, between April 1, 2012 and the earlier of the date the Property is sold or the date of the appointment for the hearing before the Registrar is filed; and
- c) the Registrar shall determine the costs for the reference;

(the "Reference Determination").

[512] The parties must schedule and attend a pre-hearing conference in accordance with Administrative Notice-8 prior to securing dates for the Reference Determination. At the completion of the Reference Determination, the Registrar shall certify the results pursuant to Rule 25-13(5)(a).

[513] The process for the Reference Determination is governed by these reasons for judgment, the Supreme Court Civil Rules, and any further directions made by the Registrar, whether pursuant to Rule 23-6(5) or otherwise. The Registrar may refer to any exhibit from the trial and shall be entitled to review any other document disclosed in this action or produced by the parties for the purpose of the Registrar's hearing, as necessary to conduct her reference. However, counsel for Mr. Cheema may not address further arguments with respect to the issue of the appropriate contribution and indemnity to expenses, including any alleged claim to interest.

P. Are the Plaintiffs entitled to a remedy under the Partition of Property Act to redeem their collective 20% beneficial interest; and if so, what is that remedy?

1. Applicable Legal Principles

[514] The plaintiffs seek an order that the Property be sold, and the net sales proceeds be divided in accordance with the parties' beneficial interests in the Property.

[515] Section 2 of the Partition of Property Act, R.S.B.C. 1996, c. 347 [PPA] provides:

Parties may be compelled to partition or sell land

2 (1) All joint tenants, tenants in common, coparceners, mortgagees or other creditors who have liens on, and all parties interested in any land may be compelled to partition or sell the land, or a part of it as provided in this Act.

- (2) Subsection (1) applies whether the estate is legal or equitable or equitable only.
- (3) In order to achieve partition, special timber licences may be assigned to any of the interested parties.

(4) Despite subsection (3), a special timber licence must not be partitioned and any special timber licences left over after the others have been assigned, must be ordered to be sold and the proceeds distributed among the interested parties in order to achieve partition.

[516] Pursuant to s. 2, the Court should grant either partition, or sale in lieu of partition, on the application of an eligible co-owner "unless there is some good and sufficient reason to the contrary": *Dosanjh v. Singh*, 2011 BCCA 179 at para. 10; *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453 at para. 122.

[517] Section 4(1) of the PPA sets out who may bring a proceeding for partition:

Parties to proceeding and persons entitled to notice

4 (1) Any person who, if this Act had not been passed, might have maintained a proceeding for partition may maintain such a proceeding against any one or more of the interested parties without serving the other or others, and a defendant in the proceeding may not object for want of parties.

[518] This section codifies the test for standing set out in *Morrow v. Eakin*, [1952] 2 D.L.R. 593, 1953 CanLII 278 (BCSC) at 594-595. The test has been described as "whether a party could have brought the partition application under English law as it existed in 1858": *Chung v. Chung*, 2018 BCSC 1126 [Chung 2018] at para. 35, citing *Pallot v. Douglas*, 2017 BCCA 254 [Pallot] at para. 17.

[519] The Court of Appeal in *Pallot* approved the following description of who was entitled to bring a petition for partition under English law in 1858:

[20] A recent summary as to who was entitled to bring a petition for partition under English law in 1858 is found in the British Columbia Law Institute consultation paper Consultation Paper on the Partition of Property Act (June 2011) at 5-6:

In order to determine who is eligible to seek partition, therefore, the English law pre-dating the English Partition Act, 1868 [31 & 32 Vict., c. 40] needs to be examined. Specifically, it is the law of England as it existed on 19 November, 1858 that needs to be examined, as the Law and Equity Act [R.S.B.C. 1996, c. 253, s. 2] makes English law as it existed on that date applicable in British Columbia except to the extent it has been altered by laws of the province or is inapplicable to local circumstances. As of that date, the classes of persons eligible to seek partition were coparcenary tenants and those co-owners to whom the statutes of 1539 and 1540 had extended the remedy. As coparcenary tenancy no longer exists, the persons eligible to seek partition or sale in lieu of partition in British Columbia are those described in the 1539 and 1540 statutes, namely:

- (a) joint tenants of the fee simple or a profit à prendre;
- (b) tenants in common of the fee simple or a profit à prendre;

- (c) joint tenants or tenants in common of a life estate;
- (d) co-owners of a leasehold estate (co-lessees).

There is another requirement: anyone seeking partition or sale must have an immediate right to possession of the land. Thus owners of a future interest, such as joint tenants of a remainder following a life estate, cannot claim these remedies.

[Emphasis added.]

[520] The issue of who has standing to demand partition or sale of property under the PPA was addressed by Justice Pearlman in *Chung* 2018. He considered both the Court of Appeal decision in *Pallot*, as well as the trial decision (*Pallot v. Douglas*, 2015 BCSC 1296). He concluded:

[47] If, upon an examination of the terms of the trust, there is a bare trust and the beneficiary is entitled to conveyance of the legal title to the property, then the beneficiary has an immediate possessory interest. Conversely, if the trust gives management and control to the trustee, the beneficiary cannot demand partition and thereby vary the terms of the trust: *Pallot v. Douglas*, 2015 BCSC 1296 at para. 37.

[521] Section 6 of the PPA provides:

Sale of property where majority requests it

6 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if the party or parties interested, individually or collectively, to the extent of 1/2 or upwards in the property involved request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property, the court must, unless it sees good reason to the contrary, order a sale of the property and may give directions.

[522] Section 7 of the PPA sets out the process by which the Court may order a sale instead of a partition:

Sale in place of partition

7 In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, and if it appears to the court that because of the nature of the property involved, or of the number of parties interested or presumptively interested in it, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the interested parties than a division of the property, the court may

- (a) on the request of any of the interested parties and despite the dissent or disability of any other interested party, order a sale of the property, and
- (b) give directions.

[523] Where a party or parties hold less than a 50 percent interest in the property, the effect of s. 7 places the burden on them to establish why a sale and distribution of proceeds would be more beneficial to the interested parties than a partition of land: *Zackariuk v. Chepsiuk et al*, 2005 BCSC 919 [Zackariuk] at para. 33.

[524] Finally, s. 8 of the PPA provides a right of first refusal to any party interested in the property where an order for sale is made, to allow a party to purchase the share of the party requesting the sale:

Purchase of share of person applying for sale

8 (1) In a proceeding for partition where, if this Act had not been passed, an order for partition might have been made, then if any party interested in the property involved requests the court to order a sale of the property and a distribution of the proceeds instead of a division of the property, the court may order a sale of the property and give directions.

(2) The court may not make an order under subsection (1) if the other parties interested in the property, or some of them, undertake to purchase the share of a party requesting a sale.

(3) If an undertaking is given, the court may order a valuation of the share of the party requesting a sale in the manner the court thinks fit, and may give directions.

[525] Justice Smith provided a very helpful summary of the application of these sections in *Zackariuk*:

[27] In *Harmeling v. Harmeling*, 1978 CanLII 1961 (BC CA), [1978] 5 W.W.R. 688 (B.C.C.A.), the court considered what is now s. 2 of the Act. At ¶ 10 it stated:

I think that we ought to accept without qualification the general statement that there is a prima facie right of a joint tenant to partition or sale and that the Court will compel such partition or sale unless justice requires that such an order should not be made.

[28] *Harmeling* involved an application for an order for sale by a joint tenant under the equivalent of s. 2 of the Act. That section applies equally to any co-owner, tenant in common, or party who has an interest in land.

[29] Section 2 provides the gateway through which a party with an interest in land may have the court consider whether to order a partition or sale of the property. A party who does not wish to "suffer partition or sale" bears the onus of demonstrating to the court that justice requires that the order for partition or sale not be made. Failing such a demonstration, the court must enforce the interested party's prima facie right to partition or sale.

[32] Having met the s. 2 threshold, the court must next consider the application of ss. 6 and 7 of the Act in dealing with the court's discretion to order partition or sale.

- [33] Where a party or parties requesting an order for sale hold a 50% or greater interest in the property, s. 6 requires the court to grant an order for sale instead of a partition, unless the opposing party or parties establish "good reason" why such an order should not be made. Where a party or parties hold less than a 50% interest in the property, s. 7 places the burden on the party or parties to establish why a sale and distribution of the proceeds would be more beneficial to the interested parties than a partition of the land. See *Hoggard v. Hoggard*, [1996] B.C.J. No. 2502 (S.C.).
- [34] A number of cases cited by both the petitioner and the respondent, while distinguishable on their facts, demonstrate the strength of the prima facie right of a co-owner to compel sale. In each of the cases sale was ordered because the opposing party could not demonstrate that justice required no order be made. They also demonstrate that partition, or actual division of the land as opposed to sale, is a rare order. [citations omitted]

2. Analysis

- [526] The defendants argue that the plaintiffs are not entitled to an order for partition and sale. The plaintiffs were surprised by this position in closing argument and argued that not only was the position wrong at law, but to make such an argument at this stage was an abuse of process. They grounded this argument in the fact that the defendants withdrew this legal position from their response to civil claim filed in July 2020, after receiving a letter from counsel for the plaintiffs dated July 30, 2020 asking them to reconsider this position and confirming that, if they did not do so, the plaintiffs would apply for further declaratory relief and would make a formal demand for transfer of legal title (which would inevitably cause double property transfer tax to be payable). After receipt of this letter, the defendants withdrew the allegations that the plaintiffs lacked standing under the PPA in their amended response to civil claim filed on August 19, 2020. As I agree the defendants' position is wrong at law, it is not necessary that I consider the plaintiffs' argument that their position in closing submissions was an abuse of process.
- [527] The defendants argue that beneficiaries of a trust, under which trust property is owned, do not have standing under the PPA as they do not have a right to an immediate possession of trust property. They argue that they must first dissolve the trust pursuant to the rule known as the "rule in *Saunders v. Vautier*" from the 1841 English decision which provided that if all beneficiaries are sui juris and in agreement, they may terminate a trust and have the trust property transferred to them: *Pallot* at paras. 36-37.
- [528] However, Trust Agreement #1 provided the beneficiaries with the ability to demand Mr. Cheema transfer legal title to the Property "to or as directed by the Beneficiary forthwith upon the written demand of the Beneficiary": clause 2(d). As already noted, "Beneficiary" is a defined term in the trust deed, meaning all of the named beneficiaries. The same provision is found in Trust Agreement #2.

- [529] I am satisfied that, pursuant to the terms of the trust deed, the plaintiffs are entitled to demand Mr. Cheema convey legal title to the Property to them as to their 20% beneficial interest, and thus, have an immediate possessory interest. That provides them with the necessary standing to seek an order for partition and sale pursuant to the PPA.
- [530] In the alternative, were I persuaded by the defendants' argument that the plaintiffs lacked standing, I would have granted the plaintiffs a vesting order pursuant to the terms of the trust deed, much as Justice Grauer (as he then was) did in *Haigh v. Kent*, 2016 BCSC 333 [Haigh] at para. 15.
- [531] The burden is on the plaintiffs, as they hold less than a 50 percent interest in the Property, to establish why a sale and distribution of the proceeds would be more beneficial than a partition of the Property: *Zackariuk*, at para. 33. I am satisfied that the plaintiffs have satisfied this burden. To continue to tie the parties together as co-owners of the Property by way of partition would just generate further conflict and inevitable legal proceedings. The most efficient manner in which to address the high level of conflict and animosity between the parties is to order the sale of the Property.
- [532] At trial, the plaintiffs tendered an expert report of Ms. Fenton ("Fenton Appraisal"), qualified to give appraisal evidence in British Columbia, who opined that as of October 5, 2022, the market value of the Property was \$24,000,000.00. Her opinion noted that the Property is currently zoned A-1 (General Agriculture Zone), is designated "Mixed Employment" in the Official Community Plan, and is designated as "Business Park" in the East Newton Business Park Neighbourhood Concept Plan. She provided an appraisal of the Property at its "Probable Highest and Best Use" for development to a business park.
- [533] In their opening submissions, the plaintiffs indicated they would be willing to accept an offer to purchase their 20% beneficial interest for \$4,800,000.00, being 20% of the fair market value as set out in the Fenton Appraisal. However, otherwise, they say the Trust Property should be sold on the open market for fair market value, and they should receive 20% of the net sale proceeds, plus equitable damages.
- [534] Notwithstanding that the defendants cross-examined Ms. Fenton at length on the assumptions underlying her opinion, and were highly critical of her decision to appraise the Property at its "Probable Highest and Best Use" without considering the cost and time delay of re-zoning the Property, they failed to tender their own appraisal.
- [535] In closing argument, for the first time in a year and a half, Mr. Cheema advised he wishes to buy out the plaintiffs, should they be found to still have a beneficial interest in the Property. However, s. 8(2) of the PPA provides the Court may not order a sale if another party with interest in the property undertakes to purchase the share of the party requesting the sale. Mr. Cheema has not made such an undertaking. It is only if such an undertaking is given that the Court may order a valuation of the share of the party requesting a sale in the manner the Court thinks fit: *Haigh* at para. 56.

[536] It would be neither proportionate, nor efficient, after 108 days of trial, to deny the plaintiffs the relief they seek, and prolong the litigation between the parties. I am satisfied the plaintiffs have established they are entitled to the order they seek--that the Property be sold. I will address in further detail below how the net sales proceeds from the sale of the Property are to be divided.

XI. REMEDY

[537] Having determined that Mr. Cheema holds title to the Property in trust, I declare that he holds legal title to the Property in trust; including for each of the four plaintiffs, each as to a 5% beneficial interest, and for himself as to an 80% beneficial interest.

[538] Having determined the plaintiffs are entitled to the order they seek for sale of the Property under the PPA, I make the following orders:

- a) the Property shall be listed for sale within 60 days of the date of these reasons for judgment, and the parties shall have joint conduct of sale on the following terms:
 - i. Mr. Cheema and the plaintiffs shall each appoint their own respective listing realtors, each of whom shall be in an arm's-length relationship from the parties to this proceeding;
 - ii. the parties shall correspond through legal counsel for the purposes of carrying out the listing and sale of the Property;
 - iii. if there is more than one listing realtor appointed, they shall share equally in the listing commission, and the total commission to be so shared shall be equivalent to the commission had it just been one listing realtor;
 - iv. the parties shall list the Property for sale at a price recommended by the realtor, or if two realtors are appointed, they will make best efforts to reach a consensus for both the terms of listing and the terms of sale;
 - v. the parties shall execute all documents necessary to list the Property;
 - vi. if the parties cannot agree to the listing terms or sale terms, any party may apply to this Court for further directions, including an order for approval of a listing, for approval of any offer, and for a vesting order if necessary and appropriate;
 - vii. Mr. Cheema shall execute all documents necessary to transfer the Property to the purchaser, including but not limited to a Form A transfer of the Property;
 - viii. in conjunction with the completion of the sale of the Property in accordance with the terms hereof, the plaintiffs shall cause the certificate of pending litigation registered in the Land Title Office under Instrument No. CA8197075 to be discharged to provide clear title to the purchaser of the Property;

- b) upon completion of the sale of the Property, the proceeds of sale of the Property shall be applied to pay the following expenses:
 - (1) the realtor commission plus applicable taxes;
 - (2) all necessary closing costs, including conveyance and legal fees, plus applicable taxes; and
 - (3) any outstanding mortgages, charges and property taxes,(the "Net Sales Proceeds"); and
- c) the Net Sale Proceeds shall be held in trust by the conveyancing lawyer, not to be distributed in any manner without further court order or written agreement, and shall be placed into an interest-bearing trust account.

[539] Immediately upon completion of the sale of the Property, Mr. Cheema, in his capacity as Trustee, is to file with this Court a reconciliation fully setting out the realtor commissions, closing costs, and outstanding mortgages, charges and property taxes paid out of the gross sales proceeds from the sale of the Property (the "Reconciliation").

[540] As set out above, if the parties are unable to reach an agreement on the quantum of the expenses for which Mr. Cheema is entitled to be reimbursed, in accordance with these reasons for judgment, then within 60 days of these reasons for judgment being delivered, the parties are to take the necessary steps to begin the process for the reference to the Registrar to conduct the Reference Determination.

[541] I note that in closing submissions, all parties suggested it would be appropriate that I order they obtain joint tax advice as to the consequences of the sale of the Property. Unfortunately, notwithstanding I had recommended they do so since the commencement of the trial in June 2023, no tax advice was ever obtained. There are clearly significant tax consequences which will arise from the sale of the Property, including but not limited to capital gains. The parties are to bear all tax consequences arising from the sale of the Property in the proportion of their beneficial interest.

[542] After the sale of the Property closes, and the Reference Determination is complete and the Registrar has certified the results, the plaintiffs shall forthwith receive their share of the Net Sales Proceeds from the Property, which is to be calculated as follows:

- a) 20% of the gross proceeds of sale of the Property minus:
 - (1) 20% of the realtor commissions plus applicable taxes;
 - (2) 20% of all necessary closing costs, including conveyance and legal fees plus applicable taxes; and
 - (3) 20% of the mortgage and line of credit outstanding on the Property as of July 14, 2004 and July 8, 2004 (being the closest statements available to July 1, 2004, as set out above in para. [266]);

- b) plus 20% of the \$42,000.00 for the rental of the Home from July 1, 2004 to June 1, 2007, as set out above in para. [433];
- c) plus 20% of the total payments Transport Ltd. should have paid to Mr. Cheema under the terms of the Lease, the 2017 Lease Renewal, and the 2022 Lease Renewal, from April 1, 2012 to the earliest of the date of the sale of the Property or the date of the Registrar's hearing;
- d) minus 20% of Mr. Cheema's reasonably incurred expenses as determined in the Registrar's Determination;
- e) minus 20% of the tax consequences arising from the sale of the Property.

XII. COSTS

[543] All counsel agreed the issue of costs was appropriate to address after reasons for judgment were issued. Accordingly, I defer the decision on costs to a further hearing. If the parties are unable to resolve the issue of costs, then they are to exchange and file written submissions, not to exceed 20 pages each, double spaced. The plaintiffs are to exchange and file their written submissions within 60 days of these reasons for judgment, and the defendants are to do the same within 30 days of receipt of the plaintiffs' submissions. The parties should then submit a request to appear to Supreme Court Scheduling to schedule a hearing, which should not take more than one day. I see no need to defer the issue of costs until after the Registrar's Determination is issued.

"Blake J."

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