

CANADA / JUDGMENT

Mayer v. Mayer

2012 BCCA 77

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 77 Mayer v. Mayer

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Mayer v. Mayer,

2012 BCCA 77

Date: 20120217

Dockets: CA038462; CA038597; CA038598; CA038599;

CA038600; CA038680; CA038681; CA038805;

CA038806; CA038807; CA038809

Dockets: CA038462; CA038809

Between:

Mhinder Singh Mayer

Appellant

(Plaintiff)

And

Richard Ravinder Mayer, Anuradha Mayer, Rita Webb, Gina Mayer,

Custom Pumping Ltd., R & G Equipment Ltd., formerly known as

R. & G. Equipment Rentals Ltd. and R. and G. Equipment Rentals Ltd.,

Aqua Pod Ltd., Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and

Front Street Projects Ltd.

Respondents

(Defendants)

And

Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd.,

Timberland Investment Ltd., Archer Holdings Ltd. (Incorporation No. BC0812178), and Custom Pumping Ltd.

(Defendants)

- and -

Dockets: CA038600; CA038680;

CA038681

Between:

Mhinder Singh Mayer

Appellant

(Plaintiff)

And

Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd.,

Timberland Investment Ltd., Gina Mayer, Rita Webb, Richard Ravinder Mayer, Anuradha Mayer, Archer Holdings Ltd. (Incorporation No. BC0812178),

Custom Pumping Ltd., R & G Equipment Ltd., formerly known as R. & G. Equipment Rentals Ltd. and R. and G. Equipment Rentals Ltd., Aqua Pod Ltd., Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and Front Street Projects Ltd.

Respondents

(Defendants)

And

Bhora Singh Mayer

Respondent

- and -

Dockets: CA038597; CA038807

Between:

Bhora Singh Mayer

Respondent

(Plaintiff)

And

Mhinder Singh Mayer

Appellant

(Defendant)

And

Marc Furnemont

Respondent

(Defendant by counterclaim)

- and -

Dockets: CA038598; CA038805

Between:

Mhinder Mayer

Appellant

(Plaintiff)

And

Gina Mayer

Respondent

(Defendant)

- and -

Dockets: CA038599; CA038806

Between:

Mhinder Mayer

Appellant

(Petitioner)

And

Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd.,

Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd.,

Timberland Investments Ltd., and Bhora Singh Mayer

Respondents

(Respondents)

And

Rita Webb, Gina Mayer, New Concrete Concepts, Custom Pumping Ltd.,

Island Aggregates Ltd., R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd.

Respondents

Before:

The Honourable Mr. Justice K. Smith

The Honourable Madam Justice D. Smith

The Honourable Madam Justice K. Neilson

On appeal from the Supreme Court of British Columbia:

September 2, 2010 (Mayer v. Osborne Contracting Ltd., 2010 BCSC 1249, Vancouver Docket S097716);

October 20, 2010 (Mayer v. Mayer, 2010 BCSC 1729, Vancouver Dockets S073324, S085604, S093607 and S097716));

December 1, 2010 (Mayer v. Osborne Contracting Ltd., 2010 BCSC 1881, Vancouver Docket S097716);

December 20, 2010 (Mayer v. Osborne Contracting Ltd., 2010 BCSC 1883, Vancouver Docket S097716);

February 11, 2011 (Mayer v. Mayer, 2011 BCSC 386,

Nanaimo Docket S52127 and Vancouver Dockets S073324, S085604, S093607 and S097716).

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Place and Date of Hearing:

Vancouver, British Columbia

May 17, 18, 19, 20, 2011

Place and Date of Judgment:

Vancouver, British Columbia

February 17, 2012

Written Reasons by:

The Honourable Mr. Justice K. Smith

Concurred in by:

The Honourable Madam Justice D. Smith

The Honourable Madam Justice K. Neilson

Written Reasons by:

The Honourable Madam Justice K. Neilson (page 48, para. 137)

Concurred in by:

The Honourable Mr. Justice K. Smith

The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice K. Smith:

Introduction

- [1] Before this Court are eleven appeals brought by Mhinder Mayer from twenty-eight orders set out in eight formal orders made by the Honourable Mr. Justice Walker of the Supreme Court of British Columbia during his case management of sixteen related proceedings in that Court.
- [2] The sixteen proceedings arise out of divers disputes between Mhinder Mayer; his brother Bhora Mayer; Bhora Mayer's wife, Gina Mayer; their two children, Richard Mayer and Rita Webb (née Mayer); and Richard Mayer's wife, Anuradha Mayer. The disputes stem from a trust (the "Brothers' Trust") created on March 20, 1966 by the Mayer brothers: Bhim, Bhagwan, Bhora, Mhinder, and Welbier. To avoid confusion, I will refer to the brothers and other members of their families by their first names in these reasons.
- [3] These reasons concern appeal no. CA38462, Mhinder's appeal from the first of two summary trial judgments, which was pronounced in Supreme Court action no. S097716 ("Action 716"). The other appeals will be dealt with by my colleague Madam Justice Neilson in reasons following these that I have read and with which I agree.
- [4] Following our reasons is an appendix that contains a glossary of terms used in both Mr. Justice Walker's reasons and ours.
- [5] The judge's reasons for judgment underlying this appeal are indexed as 2010 BCSC 1249. The orders he made, all challenged in this appeal, are these:
1. All of the Plaintiff's express trust claims are dismissed;
 2. All of the Plaintiff's resulting trust claims in respect of transactions that pre-date June 8, 2006 are barred and dismissed;
 3. All of the Plaintiff's claims for a constructive trust remedy in respect of transactions that pre-date June 8, 2006 of which the Plaintiff was aware, or could have reasonably become aware, by June 8, 2006 are barred and dismissed;
 4. All of the Plaintiff's claims, made in his own name, for diversion of assets from the Identified Trust Companies and the Disputed Trust Companies, as defined in the Statement of Claim herein, are dismissed;
 5. All of the Plaintiff's claims that duplicate his claims in any other actions or proceedings are stayed pending a reconciliation of pleadings and further order of this Court.
- [6] For the reasons that follow, I have concluded that the appeal should be allowed and the orders set aside.

- [7] Before describing Action 716, I will set out the relevant background, which will disclose the significance of the date "June 8, 2006" to the impugned judgment.

Background

- [8] By their trust agreement, the brothers agreed they would be equal beneficial owners of all business ventures undertaken and assets acquired by any of them, excluding personal residences. They acquired several parcels of real property and incorporated a number of companies to carry on various businesses, which they operated as the "Osborne Group" of companies (also described herein as the "Identified Trust Companies"). The properties and shares were held nominally by individual brothers.
- [9] Welbier died in 1985. In 1987, Bhim withdrew from the trust. He subsequently commenced action against the remaining three brothers for an interest in the trust assets. His action was settled without trial. The details of his claim do not appear in the record before us.

The Bhagwan Mayer Action

- [10] Bhagwan withdrew from the operations of the Osborne Group in 1991. Ten years later, he commenced action in the Supreme Court of British Columbia (the "Bhagwan Mayer Action") against Mhinder, Bhora, Richard, Rita, Gina, Kelly Mayer (Mhinder's wife), Marc Furnemont (a certified general accountant who was employed as comptroller for the Osborne Group of companies), and several companies that are also parties in the current litigation.
- [11] Curiously, Bhagwan's claim was in many ways a mirror image of Mhinder's claim in the extant proceedings. He alleged, among other things, that in 1988 the three remaining brothers (Bhagwan, Bhora, and Mhinder) had received advice that the Osborne Group of companies was paying higher corporate taxes by operating as a single integrated business subject to a trust agreement than it would have had to pay "if it operated as several smaller independent companies". He alleged,

Acting on this advice, the Remaining Brothers agreed in late 1988 to establish new companies with trusted family members as the sole shareholders. These new companies would be owned and operated for the benefit of the Remaining Brothers, but would be in a position to take advantage of a lower corporate tax rate.

- [12] Bhagwan pleaded the brothers agreed these "new companies" would be set up with Richard and Gina, and later Rita, as shareholders. He alleged the companies (described separately in these reasons as "Richard Mayer's Companies", "Gina Mayer's Companies", and "Rita Webb's Companies" and, when taken together with Richard, Gina, Rita, and Marc Furnemont, described jointly as the "Secondary Defendants") were then incorporated and operated so as to minimize the corporate taxes payable by the Brothers' Trust. Bhagwan also alleged the acquisition in trust for the brothers of certain properties that are now claimed by Mhinder to be held in trust for the Brothers' Trust. He referred to this arrangement as the "Related Trust".

- [13] Bhagwan alleged further that, in the spring of 1990, he asked Bhora to obtain written trust agreements from Richard, Rita, and Gina confirming the Related Trust. He pleaded that he was later shown a one-page document "confirming that Richard, Rita, and Gina were holding the Related Companies in trust for the benefit of the Remaining Brothers." He pleaded that this document bore the signatures of Richard and Gina but not that of Rita, and that Bhora advised him Rita would execute the document "when she was available." He alleged further that he understood the document was being held in a "company safe".
- [14] Bhagwan also alleged that Bhora and Mhinder had sold and encumbered trust assets without authority, had deprived him of his equal share of drawings, and had breached their fiduciary duties to him. He claimed an accounting, tracing of the trust assets, and damages for breaches of trust by Bhora, Mhinder, and the Secondary Defendants, alleging the latter participated in the breaches of trust and were in knowing receipt and use of trust assets for their own benefit and for the benefit of Bhora and Mhinder. He also claimed unjust enrichment and sought remedial constructive trusts.
- [15] Two weeks to the day after Bhagwan commenced his action, on December 24, 2001, Richard, Rita, Gina, and Marc Furnemont each signed documents entitled "Acknowledgment of Trust". They were in virtually identical terms. They purported to "confirm" that, except for personal residences, the signatories each held the shares in companies specified in each Acknowledgment and "the numerous real estate properties", which included those subject to Bhagwan's claims, in trust for Bhora and Mhinder. Mhinder was given possession of the signed acknowledgments.
- [16] Two months later, in February 2002, Bhora and Mhinder, through their solicitor, delivered a joint statement of defence in the Bhagwan Mayer Action in which they pleaded that none of the specified assets held in the names of Richard, Rita, and Gina were the property of the Brothers' Trust and that these assets had been transferred to Richard, Rita, and Gina in the ordinary course of business for good and valuable consideration. They pleaded, as well, that Bhagwan had resigned as a trustee of the Brothers' Trust in or about 1991 and had ceased to be a trustee or beneficiary at that time. Accordingly, they said, pursuant to the terms of the Brothers' Trust, Bhagwan was entitled on his withdrawal to only his share of the initial acquisition cost of the assets currently held in the trust.
- [17] In their statement of defence, delivered in March 2002, Richard, Rita, and Gina denied they had improperly received, used, or held any assets of the Brothers' Trust in trust.
- [18] Mhinder disclosed neither the execution of the Acknowledgments of Trust nor the documents themselves during discoveries in the Bhagwan Mayer Action (nor, apparently, did Bhora, Richard, Rita, Gina, or Marc Furnemont). As well, Mhinder testified in his examination for discovery by Bhagwan's solicitor in 2005 that the assets identified in the Acknowledgments of Trust were "owned" by their nominal owners. There is nothing in the record before us to indicate whether Bhora, Richard, Rita, Gina, or Marc Furnemont gave viva voce testimony in the Bhagwan Mayer Action or, if they did, whether they testified

about the Acknowledgments of Trust.

[19] Following two weeks of trial in November 2005, the trial of the Bhagwan Mayer Action adjourned. It did not resume. Rather, on June 8, 2006, the parties entered into a settlement agreement (the "Bhagwan Mayer Settlement Agreement") pursuant to which Bhora and Mhinder paid Bhagwan \$1.175 million and Bhagwan released his claim to "all alleged legal and beneficial interest in the trust assets/properties claimed" in his action. The agreement distinguished between Bhora, Mhinder, and the Osborne Group of companies (the "Osborne Defendants"), on the one hand, and Richard, Rita, Gina and the other defendants alleged to have received assets in trust for Bhagwan, Bhora, and Mhinder (the "Secondary Defendants"), on the other. Mutual releases were entered into between Bhagwan and all defendants. As well, although there was no lis as between the Osborne Defendants and the Secondary Defendants, the agreement contained these clauses, to which the judge in these proceedings attached considerable importance:

4. The Osborne Defendants and Bhagwan Mayer agree that none of Bhagwan Mayer, Bhora Mayer, Mhinder Mayer and the Osborne Defendants, or any of them, have any beneficial interest in any of the property or businesses legally owned or carried on by any of the Secondary Defendants.
5. Bhagwan Mayer and the Secondary Defendants agree that none of Bhagwan Mayer and the Secondary Defendants, or any of them, have any beneficial interest in any of the property or businesses owned or carried on by the Osborne Defendants.

[20] By a subsequent consent order, the Bhagwan Mayer Action was dismissed "for all purposes and effects as if pronounced by this Court after a full trial of this proceeding on the merits."

The Bhora Mayer Action, the Gina Mayer Rents Action, and the Oppression Proceeding

[21] Shortly after the Bhagwan Mayer Action settled, a dispute arose between Bhora and Mhinder concerning the operations of the trust businesses. As a result, in May 2007, Bhora commenced action no. S073324 in the Supreme Court of British Columbia (the "Bhora Mayer Action") against Mhinder for declarations that certain real properties and the shares of certain companies were held by Mhinder in trust for the Brothers' Trust and for consequential relief. Mhinder delivered a statement of defence and a counterclaim against Bhora and Marc Furnemont. He admitted some of the companies were trust companies (the "Identified Trust Companies", a.k.a. the "Osborne Group") and denied others were trust companies (the "Disputed Trust Companies") and he alleged breaches of trust and breaches of fiduciary duties by Bhora and Marc Furnemont, including failing to account for and to pay Mhinder his share of rentals earned on trust properties, causing the trust companies to transfer trust assets improperly and to loan trust monies to members of Bhora's family, and generally carrying on the trust businesses in a manner detrimental to Mhinder's interests.

- [22] In December 2007, Mhinder issued a petition in which he sought leave pursuant to s. 232 of the Business Corporations Act, S.B.C. 2002, c. 57, to bring a derivative action on behalf of Osborne Contracting Ltd. against Bhora and Island Aggregates Ltd., one of the Richard Mayer Companies. (Mhinder did not pursue this proceeding and his claims therein were subsequently subsumed in claims made in other proceedings.)
- [23] Then, in August 2008, Mhinder commenced Supreme Court action no. S085604 against Gina (the "Gina Mayer Rents Action") claiming she had converted rental income from trust properties to her own and Bhora's personal use.
- [24] In March 2009, Mhinder delivered a notice of motion in the Bhora Mayer Action seeking to join the Identified Trust Companies as defendants to his counterclaim in order to advance a claim that Bhora was administering the affairs of the Identified Trust Companies in a manner oppressive to him and to seek remedial orders pursuant to s. 227 and s. 234 of the Business Corporations Act, including an order authorizing him to commence derivative actions.
- [25] Bhora objected that a statutory oppression proceeding must be commenced by petition. Dissuaded by this objection, Mhinder issued a petition, no. S093607, on May 15, 2009 (the "Oppression Proceeding"), naming Bhora and the Identified Trust Companies as respondents. In his petition he stated he would discontinue the petition "if Bhora Mayer would consent to the addition of the Identified Trust Companies as defendants in Mhinder Mayer's Counterclaim" in the Bhora Mayer Action.
- [26] In July 2009, Mr. Justice Walker was appointed case management judge in the Bhora Mayer Action. In September 2009, he was appointed case management judge in all related proceedings, of which there are several I have not mentioned, some of them brought by and involving family members other than Bhora and Mhinder.
- [27] In October 2009, Mhinder delivered a revised notice of motion and a draft amended statement of defence and counterclaim in the Bhora Mayer Action seeking again to join the Identified Trust Companies, Richard, Rita, Gina, and their respective companies as defendants by counterclaim. However, at a case management conference on October 13, 2009, the judge dismissed the motion. He directed
1. that Mhinder advance these claims against Richard, Rita, Gina, and their respective companies in yet another action to be commenced by October 19, 2009;
 2. that Mhinder not pursue relief against the Identified Trust Companies in the Bhora Mayer Action and that he deliver an amended statement of defence and counterclaim in that action by October 19, 2009; and
 3. that Mhinder pursue his oppression claim against Bhora and the Identified Trust Companies in the Oppression Proceeding and that he deliver an amended petition by October 19, 2009.

Action 716

- [28] Pursuant to the first case management direction just mentioned, Mhinder commenced Action 716, the source of the appeal with which these reasons are concerned, on October 20, 2009 against the Richard Mayer Defendants, the Webb/Mayer Defendants, and the Identified Trust Companies, in which he made claims reminiscent of Bhagwan's claims in the Bhagwan Mayer Action. He alleged, among other things, that Bhora held certain assets in trust for him and the Brothers' Trust; that Bhora had managed the affairs of the trust companies in a manner detrimental to his interests; that Bhora had improperly caused trust properties and companies to be transferred to Richard, Gina, and Rita without his knowledge or consent; that Gina had appropriated rentals from trust property for the benefit of herself and Bhora; that Gina had been improperly paid fees from trust monies; and, although he was not a named defendant, that Marc Furnemont had participated in the alleged breaches of trust or that he was in breach of fiduciary and professional duties. Mhinder sought, among other things, leave to bring derivative actions in the names of the Identified Trust Companies; damages; a finding of unjust enrichment and disgorgement of profits obtained through breaches of trust; an accounting; and declarations that Bhora, Richard, Gina, and Rita held one-half of their respective companies and properties in trust for him.
- [29] Although Bhora was not named as a defendant in Action 716 (Mhinder's claims against Bhora in this regard had been advanced in his counterclaim in the Bhora Mayer Action), the judge granted him leave to enter an appearance and to participate in the proceedings, which he did.
- [30] The Acknowledgments of Trust executed on December 24, 2001 made their first formal appearance in early November 2009 when, in response to a demand for particulars of his trust claims, Mhinder pleaded them and alleged they "confirmed" that Richard, Gina, Rita, and Marc Furnemont held the companies and properties in question in trust for Bhora and him. As well, his response particularized a number of alleged breaches of trust.
- [31] In their statement of defence filed two weeks later, the Richard Mayer Defendants pleaded that Mhinder agreed at the time the Acknowledgments of Trust were executed that "those documents were of no legal force or effect", that he had returned the Acknowledgment Gina had executed to her, and that he had represented to the others that he had destroyed their Acknowledgments. As well, they pleaded the provisions of the Bhagwan Mayer Settlement Agreement and asserted that by reason of that agreement Mhinder was estopped from claiming that the properties and assets in question were held in trust for him. Further, they pleaded the action was barred in law by the Limitation Act, R.S.B.C. 1996, c. 266, and in equity by Mhinder's laches.
- [32] The Webb/Mayer Defendants pleaded to like effect in their statements of defence, both filed on December 1, 2009.

[33] At a case management conference on December 16, 2009, the judge, despite his earlier directions refusing to allow Mhinder to amend his counterclaim in the Bhora Mayer Action to claim oppression and directing him to bring this claim separately in the Oppression Proceeding, directed that the Oppression Proceeding go forward as an action, that it be heard concurrently with the Bhora Mayer Action, and that the petition in the Oppression Proceeding stand as a statement of claim.

The First Summary Trial - Action 716

[34] In early March 2010, Mhinder filed a notice of motion in Action 716 for an order for further and better discovery of documents by Bhora and the defendants. Then, by notices of motion dated March 9 and March 10, 2010 respectively, the defendants sought, pursuant to the summary trial rule, Rule 18A [now Civil Rule 9-7],

1. a declaration that pursuant to the [Bhagwan Mayer] Settlement Agreement among the Plaintiff, the Richard Mayer Defendants and others dated June 8, 2006, the Plaintiff has acknowledged and agreed that he has no beneficial interest in the property or business of the Richard Mayer Defendants, Rita Mayer and her companies and Gina Mayer and her companies.
2. an order dismissing this action ...

[35] At a hearing held on March 16 and 17, 2010, the judge adjourned generally Mhinder's application for further discovery and directed that he would hear the defendants' summary trial applications commencing on May 3, 2010. As well, he directed Mhinder to file his reply by March 24, gave directions for the delivery of demands for particulars and responses, and directed that Bhora and the defendants deliver their evidential materials by April 6 and that Mhinder deliver his by April 19. He also directed that Mhinder's examinations for discovery of Richard, Rita, Gina, and representatives of their respective companies were not to take place before the latter part of June 2010 because, as I understand it, it was his view that the summary trial to determine whether the Bhagwan Mayer Settlement Agreement barred Mhinder's claims could result in the dismissal of Mhinder's action without the necessity of oral and documentary discovery. Thus, the judge described this summary trial as a "surgical strike".

[36] To that point in time, the only examinations for discovery held had been a three-day examination of Mhinder by counsel for Bhora on March 24-26, 2010 and a three-day examination of Bhora by counsel for Mhinder on April 7-9, 2010, both conducted in the Bhora Mayer Action. Neither examination was completed. No examinations had been held in Action 716.

[37] Mhinder delivered his reply on March 23 in which he pleaded, among other things,

1. to the effect that he had left it to Bhora to instruct counsel on their joint behalves in the Bhagwan Mayer Action and that he had little knowledge of what was happening in that lawsuit;
 2. that the Bhagwan Mayer Settlement Agreement did not settle his claims against the Secondary Defendants;
 3. that the Secondary Defendants were trustees for him of the assets identified in the Acknowledgments of Trust and that as trustees they could not rely on his alleged contractual waiver in the Bhagwan Mayer Settlement Agreement because, in breach of their fiduciary duties to him, they failed to make full disclosure to him of material facts, unknown to him, bearing on his beneficial entitlement; and
 4. that he signed the Bhagwan Mayer Settlement Agreement relying on the representations of Richard and Rita that, if he did so, he was "not excluded from anything", that he was "not out", and that he "did it all", and that they were thereby estopped from raising the Agreement as a bar to his claims.
- [38] In response to demands for particulars of his allegations "that Bhora Mayer and Marc Furnemont directed large amounts of money and assets to be transferred to Richard Mayer, Gina Mayer, Rita Webb and the Other Family Companies for no consideration or at gross undervalues", Mhinder delivered particulars on April 8 and 16 in which he pleaded that, beyond what was set out in his statement of claim, the particulars demanded were "peculiarly within the knowledge of others" and that he would deliver further particulars to the extent he was able to do so "after discoveries are completed."
- [39] Thus, Mhinder's trust claims were based on allegations of express trusts (founded in large part on the Acknowledgments of Trust) and resulting trusts (founded on the alleged transfer of trust assets for no or inadequate consideration to Richard, Rita, Gina, and their companies). As well, he sought declarations of constructive trusts in aid of his claims of unjust enrichment.
- [40] Mhinder's affidavit evidence, which was supported in some respects by the evidence of Kelly, conflicted with the affidavit evidence of Bhora, Gina, Richard, Rita, and Marc Furnemont concerning the circumstances of both the execution of the Bhagwan Mayer Settlement Agreement and the execution of the Acknowledgments of Trust. As well, although the evidence of Bhora, Gina, Richard, Rita, and Marc Furnemont conflicted with Mhinder's evidence, they were not consistent as between themselves as to the circumstances of the execution of the Acknowledgments of Trust and Bhora gave differing evidence on that matter on separate occasions.

- [41] Following the exchange of materials ordered by the judge, Bhora delivered a further affidavit sworn on April 23, 2010 to which he exhibited extracts from a transcript of evidence given by Mhinder in 2005 on his examination for discovery by Bhagwan's solicitor in the Bhagwan Mayer Action, in which Mhinder asserted that some of the assets he is now claiming were "owned" by their nominal owners and denied he "owned" them. Neither the questions nor the answers distinguished between legal and beneficial ownership.
- [42] Thus, the summary trial had "morphed" (to use the judge's expression) from the discrete issue of interpretation and effect of the Bhagwan Mayer Settlement Agreement into a factual dispute with conflicting evidence and credibility issues.

The Hearing

- [43] Counsel for the defendants delivered lengthy written submissions: 15 pages for the Webb/Mayer Defendants, 79 pages for the Richard Mayer Defendants, and 53 pages for Bhora. They argued for findings of fact concerning the circumstances of the settlement of the Bhagwan Mayer Action, the execution of the Bhagwan Mayer Settlement Agreement, and the execution of the Acknowledgments of Trust and contended that, on those facts, Mhinder was estopped from bringing his claims by clause 4 of the Bhagwan Mayer Settlement Agreement, which I have set out at paragraph 19 above.
- [44] In his responding submissions delivered April 30, 2010, which were 68 pages in length, Mhinder's counsel argued that the issue was not suitable for summary trial. He submitted that because of the conflicts in the evidence concerning the circumstances of the execution of the Bhagwan Mayer Settlement Agreement and the execution of the Acknowledgments of Trust the judge would be unable to find the necessary facts to grant judgment and that, even if he could find the facts, it would be unjust to grant judgment because the discovery process was not complete, the defendants' evidence had not been tested by cross-examination, and it was likely therefore that further facts bearing on the issue had not yet come to light. As well, he submitted, findings of fact made on a summary trial of the issue would have to be addressed again at the subsequent trial, creating the potential for conflicting findings, and consequently that the case should not be "litigated in slices". After addressing the merits at length, he concluded by reiterating that the issue was not suitable for summary trial and, in the alternative, submitted "there should be, at the very least, an order for cross-examination on the affidavits that have been put forward", adding, "Cross-examination without full prior discovery is probably not going to put the court in a position to resolve the conflicts in the evidence and find the facts necessary for the just resolution of the legal issues."

- [45] When the summary trial application came on for hearing on May 3, 2010, the judge granted Mhinder leave to amend his statement of claim to add, as an alternative to his claim that Richard and Rita held the Richard Mayer Companies and the Rita Webb Companies in trust for Bhora and Mhinder, a claim that they held those companies in trust for Bhora, Mhinder, Richard, and Rita. This alleged arrangement was subsequently referred to as the "New Family Trust". Counsel for the Richard Mayer Defendants then began his oral submissions.
- [46] In his remarks, counsel for the Richard Mayer Defendants broadened his submissions to include, in addition to estoppel arising from the Bhagwan Mayer Settlement Agreement, arguments that Mhinder's action should be dismissed as an abuse of process and that Mhinder's lack of "clean hands" should bar the equitable relief he claimed. Counsel relied in this regard on the pleadings in the Bhagwan Mayer Action and on the evidence Mhinder had given on examination for discovery in that action, which the judge received in evidence without comment and apparently without objection.
- [47] At the commencement of the afternoon of the second day of submissions Mhinder's counsel objected that the abuse-of-process and clean-hands arguments had no foundation in the pleadings. As well, he submitted it would be unjust to permit these submissions to be raised "in the middle" of the summary trial, which had gone ahead on the basis it would be a "surgical strike" to consider the estoppel issue. He said allegations of fraud must be pleaded and, among other things, that these submissions raised the question whether he should consider tendering further evidence to meet them. Further, as I understand his position, he said he did not want to adjourn the summary trial of the estoppel issue because of the "enormous amounts of time and energy" already spent on it and because he wanted to get on with discovery of Richard, Rita, and Gina, which, as I have noted, the judge had directed be postponed pending the summary trial.
- [48] The judge asked Mhinder's counsel what new evidence there could be. Counsel responded that he could not say: that he needed time to consider the question. The judge then observed, alluding to the light that had been cast on Mhinder's conduct in remarks made earlier by defendants' counsel, that Mhinder's counsel had not been taken by surprise by the abuse-of-process and clean-hands submissions and that the only question was whether he needed time to consider whether to file further evidence and to review the volume of authorities counsel for the Richard Mayer Defendants had given him over the luncheon adjournment. The judge said he would be prepared to adjourn until 10:00 o'clock or 2:00 o'clock the following day, but no longer, and stood down for a few minutes to allow Mhinder's counsel to consider his position. When court reconvened, Mhinder's counsel advised that he would not attempt to tender further evidence given the short time the judge had specified.
- [49] The judge granted leave to the Richard Mayer Defendants to file an amended statement of defence to plead these issues and submissions by counsel for the respondents resumed and continued to their conclusion at mid-morning on May 7, the fifth day of the summary trial. The gist of these submissions was that there was no need for the judge to consider any

evidence other than Mhinder's evidence and no need to resolve any conflicts in the evidence. Rather, counsel argued, Mhinder's pleadings in the Bhagwan Mayer Action, his failure to disclose the Acknowledgments of Trust in that action, and his evidence given on his examination for discovery in that action showed him to be "a liar, a cheat, and a fraud." Accordingly, they submitted, his evidence should be rejected and, in that event, that he had failed to prove his case.

- [50] Mhinder's counsel commenced his submissions at mid-morning on May 7, a Friday, by again submitting that the matter was not suitable for summary trial on the bases he had put forward in his written submissions as outlined above. He also noted that Mhinder was at a disadvantage - since it was the defendants' application they had argued first and had set out the reasons his action should be dismissed before he had an opportunity to put forward his claim in its best light, as a plaintiff is normally entitled to do.
- [51] Shortly after counsel's submissions had begun, the judge interrupted and said he wanted to hear an explanation of the position Mhinder had taken in the Bhagwan Mayer Action. He inquired about this point several times thereafter during submissions by Mhinder's counsel. He observed that counsel for the defendants were urging him to dismiss the action on the basis of Mhinder's evidence alone and that he had heard nothing from Mhinder to answer them. Each time he raised the matter Mhinder's counsel said he would come to it. When counsel subsequently addressed this point he referred to Mhinder's evidence that he relied on Bhora to manage the Brothers' Trust, that Bhora instructed their counsel in the Bhagwan Mayer Action, and that he did not disclose the Acknowledgments of Trust because Bhora told him not to do so. As for Mhinder's examination for discovery evidence, counsel submitted, as I understand his remarks, that the questions and answers relied on by the defendants as contradictory to Mhinder's trust claims in Action 716 were all phrased in terms of "ownership" of the Richard Mayer Companies and the Rita Webb Companies, which he submitted should be seen as a colloquial use of the word and not necessarily inconsistent with Mhinder's current claim of beneficial ownership.
- [52] The judge was not content to accept submissions on the point. He remarked that Mhinder had not provided an explanation for his conduct through affidavit evidence, although he had been given an opportunity to do so. He asked rhetorically what he should do about this and told Mhinder's counsel to "think about it" over the afternoon recess. Following the recess, Mhinder's counsel advised the judge he would seek leave to tender a short affidavit sworn by Mhinder to address the point. Then, court adjourned for the weekend.
- [53] Court reconvened on Monday morning, May 10. Counsel for Mhinder tendered an affidavit in which Mhinder deposed that Bhora told him the "new trust" created by the Acknowledgments of Trust had been established after Bhagwan left the Brothers' Trust and that it should not be disclosed because it was a "completely separate matter" from Bhagwan's claim. He said he accepted and acted on Bhora's advice. As for his evidence given on discovery, he said he could "no longer recall my thinking on that day but I believe I gave the answers I did concerning the ownership of various companies thinking that the owner of

any company meant the person who owned the shares."

[54] Counsel for the defendants opposed the admission of the affidavit on the ground, among others, that they would have to file responding affidavits and the summary trial would thereby be prolonged. To that, the judge suggested that, rather than file responding affidavits they should apply to cross-examine Mhinder on his affidavit before him. Mhinder's counsel said he would not object to a cross-examination limited to what Mhinder did in the Bhagwan Mayer Action but said it would be unfair to expand the cross-examination into a "general attack on his credibility" unless the other parties were also subjected to cross-examination as to credibility. The judge admitted the affidavit and ordered cross-examination of Mhinder on the affidavit to begin the next morning. In his ruling (see 2010 BCSC 1945), he said,

[14] ... The cross examination will be limited to the clean hands issue. The cross examination will not, however, be limited to Mhinder Mayer's discovery evidence given in the Bhagwan Mayer action. Nor will it be limited solely to the points made by Mhinder Mayer in the affidavit that he now seeks to file.

He did not order cross-examination of the other parties.

[55] There followed three days of cross-examination of Mhinder by the three opposing counsel. Following that, the judge heard four further days of submissions with counsel for the defendants going first, counsel for Mhinder following, and then counsel for the defendants in reply.

[56] In his closing remarks, Mhinder's counsel again submitted the case was not suitable for summary trial. In the alternative, he sought leave to cross-examine the defendants on their affidavits, which the judge denied.

The Reasons for Judgment

[57] The judge reserved judgment and, on September 2, 2010, gave written reasons for judgment, 101 pages and 301 paragraphs in length. As I have mentioned, his reasons are indexed as 2010 BCSC 1249.

[58] The judge concluded the issues were suitable for disposition on a summary trial. He first set out the applicable approach, which is not in dispute:

[21] The Court may grant judgment on a summary trial application brought pursuant to Rule 18(5), now Supreme Court Civil Rules, Rule 9-7, in favour of any party, either upon an issue or generally, unless the Court is unable "on the whole of the evidence" before it on the application, to find the facts necessary to decide the issues of fact or law, or, the court is of the opinion that it would be "unjust to decide the issues on the application": *Orangeville Raceway Ltd. v. Wood Gundy* (1995), 6 B.C.L.R. (3d) 391, 59 B.C.A.C. 241, at paras. 30 to 34 and 43; and *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199 (C.A.).

- [22] Judgment may be granted on a summary trial application where there are conflicting affidavits, when the Court is able to make the necessary findings of fact on conflicting evidence: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.), cited in *Inspiration Management*, at para 42.
- [59] Then, he said, there was no need to weigh the conflicting evidence since, on his own evidence, Mhinder's trust claims failed. I will quote his words:
- [23] In this case, my decision does not follow upon a weighing of conflicting affidavit evidence between the parties.
- [24] Examination of Mhinder Mayer's own evidence and prior conduct without weighing conflicting evidence from various affiants (including the personal applicants), leads me to conclude that Mhinder Mayer's claims based on express and resulting trust as well as most of his constructive trust claims prior to June 8, 2006, are suitable for summary determination. I am satisfied that determination of the relief sought on this application, insofar as it concerns the trust claims, does not involve litigation in slices.
- [25] Mhinder Mayer has failed, on his own evidence, to prove his express trust claims. I have also determined that he should be barred from asserting any resulting trust claims and nearly all of his constructive trust claims for transactions that occurred prior to June 8, 2006.
- [26] Given my findings, which I go on to set out in these reasons for judgment, there is no further evidence that Mhinder Mayer could seek to obtain from the applicants that could assist him in proving his express or resulting trust claims, and most of his constructive trust claims prior to June 8, 2006.

Later, he added,

- [143] The applicants depose that those documents [the Acknowledgments of Trust] were drawn and signed at Mhinder Mayer's request. They point to several reasons being given to them to sign, and say that none of them had anything to do with evidencing a trust arrangement or agreement. I have not, in determining the application, weighed the evidence of the parties regarding the purpose(s) of the Acknowledgments. I have, instead, considered only Mhinder Mayer's evidence, his pleadings, and his conduct.
- [60] The judge went on to denounce Mhinder's evidence as unreliable and lacking in credibility. He concluded that Mhinder's claim on the theory of an express trust based in part on the written Acknowledgements of Trust could not be sustained on his own evidence. He continued,
- [228] Given the glaring inconsistencies in Mhinder Mayer's evidence, my findings concerning his credibility and the unreliability of his evidence, I am unable to accept his evidence concerning the effect to be given the Acknowledgments.

- [229] Moreover, I do not need to resolve the purpose or circumstances in which the Acknowledgements were signed in order to determine whether an express trust was created. Even if it were the case that the Acknowledgments were created for an inappropriate purpose so that it could be said the applicants lack clean hands, the applicants are not advancing a claim against Mhinder Mayer founded on those documents.
- [230] I find that Mhinder Mayer has not proven his claim of express trust on a balance of probabilities. My determination is based upon my view of all of his evidence and my adverse assessment of his credibility and the unreliability of his evidence. He has failed to discharge his onus to prove an intention to create a trust, let alone the certainty of objects or subject matter.
- [231] Where an intention to create an express trust may not be gleaned from documents, it may be found from specific words and conduct or from surrounding circumstances: *Horizon FX Investments Incorporated (Re)*, 2010 BCSC 416. In this case, Mhinder Mayer has not discharged his onus to prove when the new family trust was created, what property was settled on that trust, and the identity of the trustees and beneficiaries.
- [61] The judge concluded further that the Bhagwan Mayer Settlement Agreement barred Mhinder's resulting-trust and constructive-trust claims in respect of transactions of which he could reasonably have been aware at the date of the Agreement. He concluded as well that clauses 4 and 5 of the Bhagwan Mayer Settlement Agreement had contractual effect and that Mhinder could not avoid their effect for two reasons: Mhinder had not proven the elements giving rise to a promissory estoppel (paras. 238-41) and, if his evidence as to the existence of an express trust were accepted, he would lack clean hands (paras. 248-250).
- [62] The judge also held that Mhinder lacked standing to pursue claims in his own name as a beneficiary based on wrongs done to or by the various companies involved, while noting that the same relief was claimed against Bhora in the Bhora Mayer Action and that Bhora was not a party to Action 716.
- [63] Finally, the judge rejected the defendants' submission that Mhinder's entire action should be dismissed as an abuse of process. He said,
- [280] As well, my findings concerning Mhinder Mayer's lack of credibility and the lack of reliability of his evidence are confined to his trust claims advanced against the applicants. I have not made any findings about nor expressed any comment in relation to the merits of his other claims. My determination and findings in relation to one aspect of his action does not prohibit Mhinder Mayer from pursuing the remainder of his claims.

Positions on Appeal

- [64] On this appeal, Mhinder contends the judge erred in concluding his claims were suitable for disposition on a summary trial. He elaborates these contentions under four headings: (a) the judge erred in examining only his evidence, most of it given under cross-examination;

(b) the judge overlooked the failure to afford him full discovery and cross-examination of the opposing parties, thus denying him the opportunity to prove his case out of the mouths and from the documents of his opponents; (c) the summary trial of certain issues, leaving others left to be tried, was "litigating in slices", which ought to have been avoided; and (d) the complexity of the litigation and the length of the summary trial hearing militated against a summary disposition.

- [65] In the alternative, Mhinder submits the judge erred in dismissing all of his claims for a remedial constructive trust in respect of transactions that pre-dated June 8, 2006 (the date of the Bhagwan Mayer Settlement Agreement) of which he was aware or could have reasonably become aware by that date, and in holding that Mhinder lacked standing in his capacity as a beneficiary of the Brothers' Trust to sue for wrongs done by and to companies incorporated to carry out the trust's purposes.
- [66] Mhinder seeks an order allowing the appeal, dismissing the summary trial applications, and remitting his trust claims to the Supreme Court of British Columbia.
- [67] The respondents submit the judge "dealt with the matter fairly and in a principled way that protected the court's interest in arriving at not only a just result but one which upheld the integrity of its process." They say even if Mhinder's assertions were true the court "would never permit itself to be used and to lend its assistance to Mhinder to perfect what would be a connivance and fraud". In their submission, further discovery would not have assisted Mhinder and there was no need for the judge to resolve conflicting evidence because, even if Mhinder was telling the truth, he did not come to court with clean hands and was therefore not entitled to the equitable relief he claimed. Further, they say, he submitted voluntarily to cross-examination and cannot now claim the process was unfair. They add that what Mhinder complains was unfair was the inevitable result of tactical decisions he made deliberately during the evolution of his position in the broader litigation, all calculated to oppress the defendants and to urge upon the court a case with no merit.

Discussion

The Mode of Trial

- [68] I agree with Mhinder's submission that the judge erred in permitting the issue on the summary trial to "morph" from a question of interpretation and effect of a document, the Bhagwan Mayer Settlement Agreement, to a summary determination of Mhinder's claims of express, resulting, and constructive trusts in the face of conflicting evidence on the central facts without a proper judicial consideration of this evidence, which would have included discovery and cross-examination of Mhinder's opponents.

[69] The judge's view that Mhinder was required to establish his case on his own evidence and that the respondents' evidence need not be considered does not accord with Rule 18A(11) [now Rule 9-7(15)], which requires the court to consider "the whole of the evidence before the court on the application":

18A (11) On the hearing of an application under subrule (1), the court may

- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application

[Emphasis added.]

And, as McEachern C.J.B.C. said, in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 215, 36 C.P.C. (2d) 199 (C.A.),

In deciding whether the case is an appropriate one for judgment under R. 18A, the chambers judge will always give full consideration to all of the evidence which counsel place before him ...

[Emphasis added.]

[70] In my view, the judge erred fundamentally in his approach in concluding he could find the facts necessary to decide the issues without considering all of the evidence before him and without resolving the conflicts in that evidence.

[71] Further, the judge refused to allow Mhinder to develop his case fully through discovery and cross-examination of his opponents and thereby possibly to present further evidence supportive of his trust claims in addition to his own.

[72] In particular, the judge found Mhinder's conduct in the Bhagwan Mayer Action to be misconduct without permitting Mhinder to attempt to buttress his evidence that he was acting on Bhora's instructions through discovery and cross-examination of Bhora and through evidence from others who may have had knowledge of the relevant circumstances. As the judge noted (at para. 161), Mhinder deposed,

32 Bhora Mayer told me that after 1991 (when, according to our belief, Bhagwan had left the Trust) a "new trust" had been created. I understood him to be referring to the Family Trust I have described. Bhora Mayer specifically told me that we should not disclose documents relating to the new trust. I did not discuss this with our lawyers.

In his affidavit evidence, Bhora denied discussing this "new trust" with Mhinder. He did not specifically deny he told Mhinder not to disclose the documents, although his denial could probably be inferred. This factual dispute was not fully investigated.

[73] As well, as the judge noted (at para. 166), Mhinder deposed he signed the Bhagwan Mayer Settlement Agreement on the basis of representations made to him by Richard and Rita. Specifically, he deposed,

39 My recollection is that Rita Webb called me to advise that the Bhagwan litigation had settled and to tell me that there was a settlement agreement being faxed to me. I looked at it and spoke with her again. The agreement contained two paragraphs that correspond to paragraphs 4 and 5 of the final signed agreement and I told her that I did not want to sign because paragraph 4 (or its equivalent) was not right. She told me that these paragraphs came from the lawyers who said they had to put them in. I said that I did not want to sign.

40 Then I got a telephone call from my nephew, Ricky Mayer, who apparently had spoken with Rita and wanted me to sign the agreement. At first I said that I would not sign. We discussed the same paragraphs I had discussed with Rita. At some point in this or a later conversation that day, he said, 'you are not excluded from anything', which was a reference to the businesses and properties referenced in paragraph 4.

41 I received a further telephone call from Rita in which we discussed again these same paragraphs. She said that if I signed the Agreement, 'you are not out', which was a reference to the businesses and properties referenced in paragraph 4, adding "you did it all".

Richard and Rita denied these alleged conversations. The judge refused to allow Mhinder to examine Richard and Rita for discovery before the summary trial and refused to allow him to cross-examine them on their affidavits. Thus, this factual dispute was not investigated.

[74] Similarly, the judge's conclusion that clauses 4 and 5 of the Bhagwan Mayer Settlement Agreement had contractual effect (at para. 237) because Mhinder intended them to induce the settlement and intended to benefit from the settlement was made without the full investigation of the relevant facts that was essential in order to determine the proper effect to be given to those provisions.

[75] These factual disputes were pivotal at the summary trial on the view the judge took of the matter. Yet, the judge said he was able to decide Mhinder's trust claims without considering any evidence aside from that given by Mhinder himself. He said,

[218] I find Mhinder Mayer's evidence concerning his trust claims, including the alleged new family trust, the Acknowledgements, the alleged representations made by Richard Mayer and Rita Webb (relied on in his evidence to invoke the doctrine of promissory estoppel), and his discovery evidence in the Bhagwan Mayer Action, lacking in credibility. In a number of instances (e.g., the promissory estoppel representations), I found his evidence so vague as to be unreliable. ...

...

[228] Given the glaring inconsistencies in Mhinder Mayer's evidence, my findings concerning his credibility and the unreliability of his evidence, I am unable to accept his evidence concerning the effect to be given the Acknowledgments.

...

[230] I find that Mhinder Mayer has not proven his claim of express trust on a balance of probabilities. My determination is based upon my view of all of his evidence and my adverse assessment of his credibility and the unreliability of his evidence. ...

...

[241] I do not accept Mhinder Mayer's evidence concerning the representations allegedly made by his nephew and niece. His evidence is neither credible nor sufficient to found an inducement claim. Mhinder Mayer has not proven representations were made. ...

[76] Then the judge concluded,

[276] It was submitted on behalf of Mhinder Mayer that adverse findings concerning his credibility will prejudice him and "wreak havoc" on the related actions. No particulars were provided to me other than it would be unfair to Mhinder Mayer to make adverse remarks about his credibility. I respectfully disagree. To decline, as a general rule, to decide Rule 18A applications out of concern for adverse findings of credibility in multi-party or complex litigation would permit the Court's process to be used by an untruthful party to prolong a case without merit against another party.

...

[281] I am not persuaded that my decision in respect of Mhinder Mayer's trust claims will cause unfairness in the determination of the claims advanced in the related actions. There is no reason to refrain from determining the Rule 18A application when it can be done based upon Mhinder Mayer's own evidence. In addition, my determination of Mhinder Mayer's trust claims on this application will shorten the length of trial by at least three to four weeks and the interlocutory proceedings considerably.

[282] There is no further evidence that Mhinder Mayer can seek to adduce of which I have been advised in order to prove his express trust claim, or to overcome his misconduct. Since my determination of this application is based upon Mhinder Mayer's own evidence and conduct, cross examination of the personal applicants on their affidavits will not advance his case in view of the evidence contained in their affidavits.

[283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. Although I have determined claims on this application, and not merely issues, I draw comfort from the

remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:

Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

[77] With respect, the judge erred in approaching the issues in the way he did. As Justice Sopinka stated in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 358-59,

... a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.

[Emphasis added.]

To the same effect, this Court stated, in *R. v. Barton*, 2001 BCCA 477, 51 W.C.B. (2d) 4,

[7] One of the fundamental principles upon which our legal system operates is the right of each side in a legal dispute to be heard. The Court is impressed with the duty to fully hear and consider both sides and to render a considered judgment as to the proper disposition of the case.

[Emphasis added.]

[78] The system is founded on the conception that the parties to a lawsuit will bring forward all relevant evidence available to support their case and will present their case in its best light. In that way, "it guarantees to each of the parties who are affected the right to prepare for themselves the representations on the basis of which their dispute is to be resolved": Professor Paul Weiler, "Two Models of Judicial Decision-Making" (1968), 46 Can. Bar Rev. 406 at 412, quoted with approval in *R. v. Swain*, [1991] 1 S.C.R. 933 at 972.

[79] Litigants do not always have access to all of the relevant evidence bearing on the issues raised. Often, relevant documents are in the sole possession or control of their opponents. Documentary discovery requires the opponents to disclose such documents and enables the litigants to use them in support of their case. Also, oral discovery offers the opportunity to learn of relevant evidence otherwise not known to the examining party, to obtain helpful admissions, and to explore the strengths and weaknesses of the opponent's case: see *Anglo-American Timber Products Ltd. v. British Columbia Electric Company Limited* (1960), 23 D.L.R. (2d) 656 at 657-58, 31 W.W.R. 604 (B.C.C.A.). Moreover, when a party is unable to tender necessary evidence in any other way, the party may adduce such evidence from his opponent: Rule 40(20) [now Civil Rule 12-5(26)]. Clearly, parties are not confined to reliance on their own evidence.

[80] Further, cross-examination is essential to protect trial fairness since, without it, the court cannot assess the probative value of the evidence: see *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 63. In *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663, Cory J. made the following remarks which, although made in a criminal context, are apposite to this discussion:

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. ... Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. ...

I would add that, in cases of conflicting evidence, cross-examination of the parties offering the conflicting evidence is essential - the credibility of one or the other cannot be considered in a vacuum.

[81] In addition to exposing credibility to scrutiny, cross-examination may also cast a different light on the evidence given by witnesses and may bring out relevant information that might not otherwise be disclosed, thus enabling the court to be informed of all the evidence bearing on the issues.

[82] In *J.M. Stafford & Associates Ltd. v. Integrated Resources Photography Ltd. and Bank of B.C.* (1985), 62 B.C.L.R. 60 (Co. Ct.), Leggatt Co. Ct. J. (as he then was), having heard the witness on one side of an issue cross-examined on a Rule 18A summary trial, refused to grant judgment without cross-examination on other conflicting affidavits. He saw it as a question of procedural fairness requiring "substantial procedural safeguards", as that phrase was used in *Martineau v. Matsqui Institution Disciplinary Bd.*, [1980] 1 S.C.R. 602 at 628-29. In a passage at 67 of his reasons for judgment, which was quoted with approval in *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 at 382 (C.A.), Leggatt Co. Ct. J. said,

In my view "substantial procedural safeguards" will usually involve more than the treatment of evidentiary matters through affidavit evidence. The nature of the decision-making process and, more specifically, the need to make findings of fact and weigh evidence most often necessitates the right to present viva voce evidence and to cross-examine witnesses without leave of the court. Without the procedural regularities of viva voce evidence and cross-examination, a party's opportunity to effectively present his case and to correct or contradict any relevant statement prejudicial to his view is significantly diminished. Consider how simple questions of fact may involve a very complex process of advocacy which may not be readily apparent. Relevant exculpatory evidence, essential to complete an accurate fact finding, may not be heard at all simply by virtue of the fact that witnesses are not cross-examined. Scenarios where one form of evidence (e.g., affidavit evidence) is challenged by another (e.g., live testimony) would clearly lead to an unbalanced procedural process where the weight given to evidence is more a function of the form of presentation rather than the substantive value of the evidence itself.

I would adopt these remarks as apt in the present circumstances.

- [83] In my view, once issues of credibility arose, it was unjust to proceed under Rule 18A without permitting Mhinder to develop his case fully through discovery and through cross-examination of the defendants on their affidavits or through a conventional trial if that was necessary.
- [84] Adding to the injustice, the application was brought by the defendants and, as a result, the manner in which the summary trial proceeded raised difficulties for Mhinder. The traditional order of trial is described in Rule 40(53) [now Civil Rule 12-5(72)]: plaintiffs lead their evidence first and then defendants lead their responding evidence, if any. In this way, plaintiffs are able to present the evidence in support of their claims fully, in an orderly way and in its best light, before it is challenged by the defendants. Here, Mhinder was thrown on the defensive at the outset. The summary trial was initially focussed on the estoppel defence arising out of the Bhagwan Mayer Settlement Agreement and on the alleged weaknesses in Mhinder's claims and, as a result, he was deprived of the advantages accruing to plaintiffs in a normal trial. This disadvantage was compounded when the issues to be tried changed mid-trial and Mhinder was virtually forced to give evidence to respond to the defendants' arguments. To proceed in this manner was unfair to Mhinder and unjust.

Mhinder's "Misconduct"

- [85] Nevertheless, the respondents defend the judge's dismissal of Mhinder's claims without resolving the evidentiary conflicts on the basis that, even if Mhinder had been truthful his trust claims would have been barred by the "clean hands" maxim, viz., "He who comes to equity must come with clean hands." They rely on the judge's hypothetical reasoning on this issue, although he made no express finding that the maxim was applicable.
- [86] The judge correctly stated the relevant rule (at para. 243) citing, among other authorities, I.C.F. Spry in *The Principles of Equitable Remedies*, 6th ed. (London: Sweet & Maxwell Ltd., 2001) at 169,

... it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief.

Thus, the relationship between the relief sought and the misconduct must be direct and necessary in the sense that the person seeking equitable relief must be required to rely on the misconduct in order to vindicate his claim: see *DeJesus v. Sharif*, 2010 BCCA 121 at paras. 84-86, 71 B.L.R. (4th) 159; *Attwood v. Small* (1838), 6 Cl. & F. 232 at 447-48, 7 E.R. 684 (H.L.); John A. McGhee, ed., *Snell's Equity*, 31st ed. (London: Sweet & Maxwell Ltd., 2005) at 98-99.

- [87] Here, the judge identified Mhinder's misconduct (at para. 249) as failing to disclose the Acknowledgments of Trust in the Bhagwan Mayer Action when he knew it was wrong to fail to do so, giving misleading evidence and untruthful answers on his examination for discovery in that action, signing the Bhagwan Mayer Settlement Agreement when he knew it was false and in the expectation that Bhagwan would rely on it, and using the process of the

court to obtain a dismissal of all Bhagwan's claims "including those that bear on the trust claims Mhinder Mayer advances in this action."

[88] He expressed his hypothetical conclusion in this way:

[248] As I have pointed out, if I had accepted Mhinder Mayer's evidence concerning the existence of a new family trust in this action, then it would mean he gave misleading and inaccurate discovery evidence in the Bhagwan Mayer Action in order to benefit himself. His misconduct in that case relates to the very same subject matter comprising his trust claims in this case.

[Emphasis added.]

[89] While it is true that Mhinder's misconduct as found by the judge relates to the same subject matter as the trust claims he brings in Action 716, the misconduct is not the foundation of his current claims. Mhinder relies on the Acknowledgements of Trust signed in December 2001, five years prior to the misconduct, as evidence of an express trust whereby Richard and Rita held the shares of their companies and certain properties in trust for Bhora and Mhinder (or alternatively, for Bhora, Mhinder, Richard, and Rita). Further, his claim for a resulting trust arises simply by virtue of the allegedly gratuitous transfer of certain assets to Richard and Rita commencing in or about 1988 which, if gratuitous, would raise a rebuttable presumption of resulting trust: see *Pecore v. Pecore*, 2007 SCC 17 at paras. 24-25, [2007] 1 S.C.R. 795.

[90] It follows that, although Mhinder's behaviour in the Bhagwan Mayer Action could constitute misconduct, depending on how the evidentiary conflicts in regard to this conduct might be resolved, the misconduct did not have an "immediate and necessary relation" to his trust claims and it would be possible for Mhinder to prove these claims without relying on the impugned conduct: *Tinsley v. Milligan*, [1994] 1 A.C. 340 at 367, 371, 375, [1993] 3 All E.R. 65 (H.L.). Further, the fact that, in the judge's view, Mhinder did not have a clean record in the matter was not a bar to the equitable relief he claimed. As Lord Brougham said in *Attwood*, *supra*, at 447-448, quoted in I.C.F. Spry, *The Principles of Equitable Remedies*, 8th ed. (London: Sweet & Maxwell Ltd., 2010 at 170),

... [T]hat general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract.

[Emphasis added.]

[91] The judge also referred (at paras. 245-47) to a number of cases that stand for the proposition that the court will not enforce a trust where to do so would require the plaintiff to give evidence that the trust was established in furtherance of an illegal or immoral purpose.

Thus, if the trusts Mhinder seeks to enforce were made for such a purpose his claims might be barred under this rule. However, none of the parties who gave evidence said that the transfers of assets to Richard, Rita, Gina, and Marc Furnemont were made in furtherance of any illegal or immoral purpose. Further, although there was conflicting evidence of the purpose of the Acknowledgments of Trust, none of the deponents said they were made for such a purpose.

[92] As well, the judge referred to *Taylor v. Wallbridge* (1879), 2 S.C.R. 616 at 639, where the Court commented that it would be contrary to public policy to permit a litigant to assert a resulting trust when the litigant had transferred the subject property out of his hands in order to perpetrate a "fraud on the court" by testifying as a disinterested witness in an earlier proceeding in which title to the property was in issue. In my view, this dictum would not apply here since, although Mhinder testified on his examination for discovery in the *Bhagwan Mayer Action* in a manner the judge found to be false and misleading, there was no evidence that this testimony was placed before the court in the truncated trial of that action and, in any event, although the consent order dismissed the action "as if pronounced by this Court after a full trial of this proceeding on the merits", the court did not adjudicate Bhagwan's claims and it therefore cannot be said Mhinder's evidence led to a "fraud on the court."

[93] Moreover, allegations of bad faith, abuse of process, lack of clean hands and the like cannot be resolved without a consideration of their full factual circumstances, especially when there are credibility issues. As Lord Bingham said, dealing with an application to strike out an action as an abuse of process in *Johnson v. Gore Wood & Co. (a firm)*, [2000] UKHL 65, [2001] 1 All E.R. 481 at 490 (H.L.),

The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court [citations omitted].

[Emphasis added.]

Here, there were no examinations for discovery of any of the parties on the clean hands issue, since it was not introduced into the pleadings until the second day of the summary trial hearing. Only Mhinder was cross-examined on the issue. Thus, no "scrupulous examination of all the circumstances" took place.

[94] It follows that the submission that Mhinder's position is the result of tactical decisions he made in order to oppress the defendants must be rejected since the premise of the argument cannot be supported in the absence of full evidence on the point.

[95] Accordingly, I would not accede to the respondents' submission that the judge's error in disregarding their evidence and in failing to resolve the conflicts in the evidence can be ignored because the "clean hands" doctrine would have defeated Mhinder's trust claims in any event.

"Litigating in Slices"

[96] The appellants contend, as well, that the judge erred in his approach by "litigating in slices", that is, by adjudicating certain issues on a summary basis and leaving the issues remaining in the action to be tried at a later time.

[97] Rule 18A(11)(a) contemplates the judge granting judgment "on an issue or generally". However, it is a salutary principle that the application judge must carefully consider whether trying some issues and not all will contribute, in the end, to the "just, speedy and inexpensive determination of the dispute on its merits": *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138 at para. 7. Generally, issues should not be tried separately under Rule 18A when they are interconnected with the remaining issues, when substantial time will be required for hearing a summary trial, and when there is a substantial risk of wasting time and effort and of producing unnecessary complexity: *Sinnott v. Westbridge Computer Corp.* (1993), 78 B.C.L.R. (2d) 28 at para. 16 (S.C.).

[98] The judge considered this axiom when he said, in a passage I have quoted above but which I will reproduce here for convenience,

[283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. ... I draw comfort from the remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:

Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

[99] I cannot agree that the "risk [was] minimized" in this case. For one thing, as will be seen in my colleague's reasons, the judge's adverse findings of credibility against Mhinder unjustly permeated his reasoning in his subsequent decisions. Moreover, the judge erred in principle in that he gave too little weight to the factors I have just mentioned.

- [100] Finally, although there are exceptions (see *Placer Development Ltd.* at 386), complex cases are generally not suitable for Rule 18A summary trials. As Esson J.A. said for the Court in *Cannaday v. Sun Peaks Resort Corp.* (1998), 44 B.C.L.R. (3d) 195 at para. 53, 102 B.C.A.C. 241 (C.A.),
- [53] One point which may properly be taken from this case is that the summary trial procedure is not well suited to factually complex cases. The difficulty, of course, is all the greater where not all parties are competently represented, and perhaps greater again where the application is brought by the defendant. All too often, proceedings such as these place an inordinate burden on the judge and in the end prove to be a waste of time and effort. In its place, Rule 18A is a useful procedure for permitting speedy and inexpensive resolution of cases, but it is doubtful that its place extends beyond cases which are relatively straightforward on their facts.
- [101] The parties in the case at bar were competently represented. However, the relevant events took place over a period of approximately 45 years and involved numerous corporate businesses and real properties and myriad transactions. Many if not most of the factual issues were the subject of conflicting evidence. The parties submitted in total 142 pages of written argument on the estoppel issue alone, the summary trial took 13 days to complete, and the judge's reserved reasons for judgment were 101 pages in length. Further, the issues were intermingled factually and legally with the issues in the related proceedings, all of which arise out of the Brothers' Trust. In total, the documentary evidence on the appeals now before the Court runs to 3,924 pages and fills 18 volumes of appeal books. This case is not "relatively straightforward" on its facts. I do not say that there are no discrete issues that might be determined summarily but the case as it was tried here is not the type of case for which Rule 18A was intended.
- [102] For those reasons, I have concluded that the trial judge erred in proceeding with a summary trial of Mhinder's trust claims and that Orders 1 and 2 set out in para. 5 of these reasons above should be set aside.

Pre-June 8, 2006 Constructive Trust Claims

- [103] Mhinder's alternative ground of appeal - that the trial judge erred in making Order 3 - need not be discussed. Since this order was founded on the judge's conclusion that clauses 4 and 5 were contractually binding on Mhinder, a conclusion that I have already observed should not have been reached without a full investigation of all relevant evidence, the order must be set aside.

Mhinder's Standing

[104] However, Mhinder's counsel has requested that, if we should conclude the judgment should be set aside and the trust claims should be remitted to the Supreme Court, we resolve the question arising out of Order 4, that is, whether the judge erred in applying the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Ch.) to conclude Mhinder did not have standing to advance in his own name claims arising out of the alleged diversion of assets from the Identified Trust Companies and the Disputed Trust Companies.

[105] In my view, discussion of this issue, although not strictly necessary to the disposition I would make of this appeal, will likely be beneficial to the parties, as it appears this dispute may be destined to be tried again in the Supreme Court.

Mhinder's Standing as a Beneficiary - The Rule in *Foss v. Harbottle*

[106] The Rule in *Foss v. Harbottle* is the subject of a comprehensive discussion in *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 276 at paras. 7-30, 82 B.C.L.R. (4th) 230, per Newbury J.A., writing for the Court. From *Everest*, I take the following propositions. The Rule holds that the proper plaintiff in respect of a wrong done to a company or association of persons is *prima facie* the company or the association of persons itself, and no individual member can maintain such an action if the matter relied upon as constituting the cause of action can be approved by a majority of the members. Implicitly, the Rule applies if the cause of action properly belongs to the company or the association of persons and not to an individual member in his own right (para. 7). The Rule does not apply to a cause of action that belongs to an individual member of the company or the association personally, an exception that is "particularly difficult to delineate in particular fact situations" (para. 9). Thus, a member who suffers personal and direct damage may bring a claim in that respect, but an individual member cannot claim for losses that are "reflective" or "derivative" of losses suffered by the company, such as a diminution in share value as a result of damage done to the company (para. 28). The reasons for the Rule include the avoidance of a multiplicity of actions and the avoidance of double recovery for the same loss (paras. 22, 28).

[107] Mhinder pleaded that he and Bhora, along with the other three brothers previously mentioned, documented the Brothers' Trust in three instruments dated March 20, 1966, January 12, 1978, and February 8, 1984 respectively. The trust was established by the first document in time and was amended by the second two. Although not set out in the pleading, each of the two amending documents contained, among others, this preambulatory clause:

B. In pursuance of the [trust] Agreement the Brothers have acquired many properties and carry on business through various companies and in many cases the formal registrations of title or ownership of the properties and shares have been placed in the names of one or some of the Brothers as a matter of convenience rather than in the names of all.

[108] Mhinder further pleaded breach of fiduciary duty by Bhora, the resulting unjust enrichment of the defendants, and, as well, their knowing participation in Bhora's breaches of trust. More specifically, he said,

58 At the direction of Mr. Furnemont [who was acting in his capacities as accountant, etc. to the Identified Trust Companies, the Disputed Trust Companies, and the Other Family Companies and the Brothers' Trust] and Bhora Mayer, since Bhagwan Mayer left the Brothers' Trust, large amounts of money and assets have been transferred to Ricky Mayer, Gina Mayer, and Rita Webb, and the Other Family Companies, for no consideration or at gross undervalues, some particulars of which are set out in this Statement of Claim. This was done without Mhinder Mayer's knowledge, or in the alternative, without his informed consent. Further particulars are peculiarly within the knowledge of those parties and will be given in accordance with Rule 19(11.1) of the Rules of Court. In the circumstances, Ricky Mayer, Gina Mayer, Rita Webb, and the Other Family Companies hold that money and those assets in trust for Bhora Mayer and Mhinder Mayer. Mhinder Mayer pleads the doctrine of resulting and constructive trust.

59 Further, in the circumstances, it is unjust and there is no juristic reason for the transfer of money and assets referred to in the immediately preceding paragraph, and Ricky Mayer, Gina Mayer, Rita Webb, and the Other Family Companies have been unjustly enriched.

60 In breach of his fiduciary obligations and duties of care to Mhinder Mayer, Bhora Mayer has appropriated and diverted, or caused the Identified Trust Companies and/or the Disputed Trust Companies, or some of them, to appropriate and divert certain of their assets for improper purposes and for the personal benefit of Bhora Mayer and members of his family...

[109] Mhinder's pleading then listed some particulars of numerous specific transactions, including a series of allegedly improvident contracts, loans, and transactions involving the Identified Trust Companies and the Disputed Trust Companies. He followed that with a pleading that full particulars of these claims were "peculiarly within the knowledge of the Defendants". As well, he pleaded that "the Defendants were aware that Bhora Mayer was acting in breach of trust at the time those breaches occurred and knowingly participated in those breaches of trust."

[110] In his prayer for relief, Mhinder claimed, amongst many other things, an order that the defendants disgorge all profits made as a result of the alleged breaches of trust; an accounting of all money due him as a result of the alleged breaches of trust; a declaration that the defendants hold corporate shares, assets, and properties in trust for him; and an order permitting him to trace the proceeds of the alleged breaches of trust.

[111] Curiously, Mhinder's parallel claims against Bhora in respect of these same transactions, which are legally and factually enmeshed with the claims under discussion, are found in Mhinder's counterclaim in the Bhora Mayer Action and Bhora is not a defendant in the action now under consideration. This is a regrettable result of the judge's refusal, at the case management conference on October 13, 2009, to allow Mhinder to amend his counterclaim in the Bhora Mayer Action to advance these claims together with his claims against Bhora

and of the judge's direction that these claims must be brought in a separate action.

[112] In any event, the judge held that these claims belonged to the corporations and that Mhinder had no standing to bring them personally. He said,

[262] Regardless of whether [these transactions] pre- or post-date the Bhagwan Mayer Settlement Agreement, they are not, in my opinion, claims for which Mhinder Mayer has personal standing to advance. Those claims belong to an aggrieved corporation and not a shareholder. Characterizing them as claims for a constructive trust remedy does not alter the analysis since the pleading is that corporate funds have been diverted. ...

...

[265] Claims in respect of diversion of corporate assets should be brought by the companies aggrieved. ...

[113] Relying on *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61, 65 B.C.L.R. (4th) 62, Mhinder submits the judge erred in failing to recognize that the Rule in *Foss v. Harbottle* does not apply where the plaintiff shareholder has both an independent relationship with the wrongdoer and a loss independent of that suffered by the company to which the wrong was done.

[114] In *Robak*, the plaintiffs claimed damages for alleged wrongful conduct relating to the control and management of a corporation in which the plaintiffs were shareholders and the defendants included a director, other shareholders, and the company's solicitors. The plaintiffs' causes of action included conspiracy to cause them economic injury, defamation, and breaches of fiduciary duties. The defendants applied successfully to strike portions of the statement of claim on the basis they disclosed no reasonable cause of action since the plaintiffs were precluded from bringing the claims by the Rule in *Foss v. Harbottle*. As this Court noted on appeal (at paras. 12-14), the chambers judge observed that the Rule does not apply when the shareholder has a personal right of action arising out of a relationship between the shareholder and the wrongdoer that is different from the relationship the shareholder derives through his shareholdings in the company, but concluded that, although the plaintiffs had established an independent relationship with the alleged wrongdoers and independent causes of action against them for conspiracy and defamation, the loss claimed, a reduction in the value of their shares, was derivative of the loss suffered by the company. This Court affirmed the judgment, stating,

[38] ... [The chambers judge] did not apply the wrong test for striking pleadings; she considered whether the appellants had a reasonable cause of action, including a valid claim for damages. She applied binding Canadian law, which has been considered and affirmed in a persuasive judgment of the Ontario Court of Appeal in *[Meditrust Healthcare Inc. v. Shoppers Drug Mart]* (2002), 220 D.L.R. (4th) 611]. In both *[Rogers v. Bank of Montreal]* (1986), 9 B.C.L.R. (2d) 190 (C.A.), affirming (1985), 64 B.C.L.R. 63 (S.C.) and *Meditrust*, shareholders claimed losses in the value of their shares as the result of an alleged conspiracy against them

involving wrongs done to the company, and in both cases the claims were dismissed. The chambers judge did not decide, contrary to the appellants' arguments, that a shareholder may never bring a claim for the diminution in the value of the shareholder's shares, but confirmed, by reference to [*Hercules Management Ltd. v. Ernst and Young et al*, [1997] 2 S.C.R. 165] and [*Haig v. Bamford*, [1977] 1 S.C.R. 466], that a shareholder may have a cause of action for loss in the value of shares where the shareholder has both an "independent relationship" with the wrongdoer and an "independent loss" from that of the company to whom the wrong has been done. She decided that in this case, the appellants had not shown that they have a cause of action for an "independent loss" in respect of wrongs done to Getty. I agree with her conclusion.

[Emphasis in original.]

- [115] As I understand Mhinder's position, he contends he has an independent relationship with the defendants because he is a trust beneficiary of the shares in the Disputed Trust Companies and the Identified Trust Companies and the defendants were knowing participants in and recipients of the benefits of Bhora's breach of his duty as a trustee in causing these companies to transfer their property to the detriment of the trust. Accordingly, his causes of action are based on a relationship with the defendants different from their relationship with the companies and his causes of action are not available to the companies. Further, he submits that the requirement for an independent loss must be understood in these circumstances as a requirement for an independent remedy and that the restitutionary remedies he claims would not be available to the companies in any action they might take against the defendants.
- [116] In my view, Mhinder has satisfied the first condition, a relationship with the defendants different from their relationship with the companies, and the issue turns on whether the loss he claims is merely reflective of losses sustained by the companies.
- [117] I find the reasoning in *Shaker v. Al-Bedrawi*, [2002] EWCA Civ 1452, [2002] 4 All E.R. 835 persuasive on this point. In *Shaker*, the plaintiff alleged he was induced by the defendant to invest in a business project to be managed and controlled by the defendant through an "operating company" incorporated for that purpose. He alleged that, although the defendant was the sole director and nominal shareholder of the operating company, the shares were held in trust for him. He alleged further that the defendant subsequently sold the business of the operating company to a third party without advising him and without accounting to him for his share of the profits on his investment. He claimed the defendant had misappropriated the purchase price in whole or in part and, as his trustee, was liable to account to him for his breach of trust. He also claimed against the defendant's solicitors in the sale transaction, alleging against them that they had knowingly participated in the breach of trust and had benefited to the extent of the fee they were paid out of the purchase price.

- [118] Relying on the Rule in *Foss v. Harbottle* or, as it has become known in the United Kingdom in its more recent iteration as the Prudential principle (from *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)*, [1982] 1 All E.R. 354 at 357, [1982] Ch. 204 (C.A.)), approved in *Johnson*, *supra*, at 502, the defendant applied to dismiss the plaintiff's action on a preliminary issue, that is, that the plaintiff was attempting as a shareholder to recover damages that were merely reflective of the operating company's loss and for which the operating company itself had a cause of action. This submission succeeded at first instance and the plaintiff appealed.
- [119] On appeal, the plaintiff argued that the Rule does not apply to a proprietary claim by a beneficiary under a trust to a profit obtained by a trustee through the use of trust property consisting of shares in a company even if the company may have a claim against the trustee for breach of fiduciary duty owed to it as director in respect of monies constituting the claimed profit, since the claim of a beneficiary against his trustee to account for a profit is different in nature from any claim the company could properly bring against the trustee. The Court accepted the plaintiff's contention and held the Rule did not apply unless the defendant could establish that the whole of the claimed profit reflected the company's loss and that the company had a cause of action to recover it. The Court held further that this could not be shown without a trial. I will quote the Court's remarks, at paras. 83-84:
- [83] In our judgment the Prudential principle does not preclude an action brought by a claimant not as a shareholder but as a beneficiary under a trust against his trustee for a profit unless it can be shown by the defendants that the whole of the claimed profit reflects what the company has lost and which it has a cause of action to recover. As the Prudential principle is an exclusionary rule denying a claimant what otherwise would be his right to sue, the onus must be on the defendants to establish its applicability. Further, it would not be right to bar the claimant's action unless the defendants can establish not merely that the company has a claim to recover a loss reflected by the profit, but that such claim is available on the facts. If in the present case it could be shown that the \$6m was misappropriated from ANA Inc or unlawfully distributed so that ANA Inc was entitled to the whole of the \$6m, we would accept that the Prudential principle applied to bar Mr Shaker's action.
- [84] However, for the reasons already given, that has not been, and cannot without a trial be, shown. It is possible that at least part of the \$6m was lawfully taken by Mr Bedrawi. Accordingly we respectfully disagree with the conclusion of the judge that the Prudential principle applies to prevent Mr Shaker proceeding against Mr Bedrawi in relation to the proceeds of sale.
- [120] The Court held further, at para. 85, that the same analysis was applicable to the plaintiff's claim against the defendant's solicitors for knowing receipt of trust proceeds.

[121] Thus, the plaintiff beneficiary had a restitutionary claim against the defendant trustee and the defendant's solicitors to the extent the monies they extracted from the purchase price of the company's assets were taken in breach of trust and the defendant and his solicitors bore the burden of showing, if they could, that the plaintiff's loss was wholly reflective of a loss suffered by the company for which it had a cause of action and that the Rule therefore precluded recovery by the plaintiff.

[122] In my view, as a beneficiary of the Brothers' Trust, Mhinder would be entitled under this reasoning to recover from the defendants the benefits they received from the breaches of trust, if any, unless and to the extent that the defendants might show the losses suffered by the Brothers' Trust were reflective of losses suffered by the companies for which the companies have causes of action, such as, for example, for damages against Bhora for breach of his duties as a director in making improvident sales of corporate assets and in misappropriating corporate profits. Further, a finding in favour of Mhinder might entitle him to an order for disgorgement and a remedial constructive trust, which is a proprietary remedy imposed by the court on unjustly obtained gains, to assist him in the recovery of his personal loss: see *Atlas Cabinets and Furniture Ltd. v. National Trust Co.* (1990), 68 D.L.R. (4th) 161, 45 B.C.L.R. (2d) 99 at 112-13 (C.A.).

[123] The questions raised by this analysis cannot be answered without weighing the relevant evidence and finding the necessary facts. As Lord Bingham said, in *Johnson*, *supra*, at 503-04, after outlining the Prudential principle,

These principles do not resolve the crucial decision which a court must make on a strike-out application, whether on the facts pleaded a shareholder's claim is sustainable in principle, nor the decision which the trial court must make, whether on the facts proved the shareholder's claim should be upheld. On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage...

[124] Here, there was affidavit evidence, rife with disputes, about many of the impugned transactions. However, it does not appear that the judge based his decision on any findings of fact made on the evidentiary record: he did not discuss the evidence at all but referred only to the pleadings and the submissions. Thus, it seems, although he dismissed the claims, he treated this part of the case as if it were merely an application to strike Mhinder's pleadings rather than as a summary trial of Mhinder's claims.

- [125] The judge did not find the facts necessary to decide this issue. Moreover, he could not have found the necessary facts on the affidavits filed without affording Mhinder an opportunity to develop his case fully through discoveries and cross-examination of the defendants. Accordingly, his decision that Mhinder's claim was barred by the Rule in *Foss v. Harbottle* was made prematurely.

Mhinder's Standing as a Trustee

- [126] However, this conclusion does not necessarily mean that Mhinder has standing to bring these claims as a beneficiary of the Brothers' Trust. Mhinder was not only a beneficiary of the Trust: he was, unlike the plaintiff in *Shaker*, also a trustee. This fact raises questions I think must be mentioned that were not addressed by the trial judge or argued by counsel on this aspect of the appeal.
- [127] The nature of the remedies available to beneficiaries of a trust are discussed in *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Thompson Canada Limited, 2005) at 1202-06. At 1203, Professor Waters states that the "classic view" is that "the remedies of the beneficiary are personal; they lie against the trustee to compel him properly to discharge his duties as a trustee" and, at 1204,

The beneficiary's principal right is to require that the trustees, who have caused loss to the trust through their breach of trust shall out of their own pockets indemnify the trust for its loss ... And it is up to the trustees to recover, if they can, from any third party who was involved with them in the breach.

- [128] On the other hand, if the breaching trustee cannot make good the loss, the beneficiary may have a remedy against third parties on behalf of the trust (at 1204). As Professor Waters notes at 1204, it is not always clear in this situation whether the remedy is the beneficiary's remedy or the trustee's remedy which the beneficiary is permitted to exercise and a case can be made for each analysis depending on the particular facts. Further, he observes at 1205 that where the breaching trustee has no rights against the third party because, for example, he has improperly made a gift of the trust property, "the beneficiary's claim cannot be understood as the derivative enforcement by the beneficiary of a right held by the trustee. It is a direct right."
- [129] Mhinder's primary duty is to pursue these claims against the defendants as a trustee on behalf of the beneficiaries of the Brothers' Trust. As stated in *Nelson House Indian Band v. Young* (1999), 169 D.L.R. (4th) 606, 6 W.W.R. 405 (Man. C.A.),
- [13] Beneficiaries of a trust have no status to commence an action for the protection or recovery of trust property if the trustee is willing and able to commence such an action: see *Sharpe v. San Paulo Rlwy. Co.* (1873), 8 Ch. App. 597 (C.A.) and *Norfolk v. Roberts* (1912), 28 O.L.R. 593 (App. Div.), affirmed (1914), 50 S.C.R. 283.

[130] As Madam Justice Neilson notes at para. 233 below in response to submissions that were not made in respect of this appeal, co-trustees must act in concert and in these circumstances, where it is virtually certain that the consent of Mhinder's co-trustee, Bhora, to pursue these claims will not be forthcoming, Mhinder should seek directions pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464. The questions whether Mhinder should be given leave to sue as a single trustee and whether, if leave should be refused, he may sue in his own right cannot be answered in the absence of factual findings that must be made in the trial court.

[131] For those reasons, I would set aside Order 4 and remit this issue to the trial court.

The Stay of "Duplicate" Claims

[132] Order 5 stays all duplicate claims pending a reconciliation of the pleadings in the various proceedings and pending further order. As my colleague has noted at para. 246 below, the duplication was largely the result of the judge's directions on October 13, 2009, which left Mhinder no option but to pursue his claims in separate proceedings. Given our disposition of these appeals, Order 5 has no remaining utility and it should be set aside.

Conclusion

[133] For those reasons, I would allow the appeal from the first summary trial judgment, set the judgment aside in its entirety, and remit Mhinder's trust claims, including his claim for a remedial constructive trust, to the Supreme Court.

[134] Mhinder requests a direction that the remittal be to a different judge. He relies on the remarks of Hall J. (as he then was) in *British Columbia Nurses' Union v. British Columbia (Labour Relations Board)* (1995), 14 B.C.L.R. (3d) 363 at para. 20, [1996] 3 W.W.R. 113 (S.C.), aff'd 33 B.C.L.R. (3d), [1997] 6 W.W.R. 81 (C.A.). In this case, Mr. Justice Hall concluded the Labour Relations Board had erred in ordering that a grievance be remitted to the original arbitrator where the award involved findings on credibility. In his reasons, he said,

[20] ... In my judgment, when a decision turns, as the case at bar does, on a disputed issue of credibility, it is approaching the impossible to ask the tribunal of first instance to revisit the matter with a view to possibly reversing those findings and making new findings. To my mind, it is making a demand upon the original hearing tribunal that verges on the superhuman. Where decisions on credibility have been reached after due consideration and reflection, I should think it could scarcely ever be appropriate that the matter be remitted.

[135] In affirming Hall J.'s judgment, Lambert J.A. said, for the Court,

- [14] ... It is, in my opinion, completely unrealistic to expect a decision maker to free his or her mind from a previous conclusion that someone is in essence, lying, and to reach a new and entirely balanced conclusion completely free from that previous settled decision on the basis of new evidence which may do nothing more than add another piece to the total puzzle of credibility and fact finding.
- [136] The wisdom of these remarks is undeniable. Nevertheless, I would not presume to direct the Chief Justice of the Supreme Court in the exercise of his responsibilities for the administration of the judges of his Court. Accordingly, I would decline to give the direction sought.

Reasons for Judgment of the Honourable Madam Justice Neilson:

Introduction to the Remaining Appeals

- [137] I concur with the reasons of my colleague, Mr. Justice Smith, regarding the disposition of Appeal No. CA38462. The question now arises as to the impact of that decision on the remaining ten appeals.
- [138] These appeals arise from proceedings that followed the first summary trial. Briefly, these included several applications by Mhinder to amend his pleadings in Action 716, the Bhora Mayer Action, the Gina Mayer Rents Action, and the Oppression Proceeding, in accordance with directions given by the judge in his summary trial decision, as well as an application to add Gina, Rita, and some of their companies as defendants to the Oppression Proceeding. The respondents opposed these applications and they were ultimately dealt with during a 15-day hearing in which the judge also considered applications brought by the respondents to dismiss Mhinder's remaining claims in each action as an abuse of process, as well as applications by the respondents under Rule 9-7 for summary dismissal of Mhinder's claims. In the balance of this decision I refer to that hearing as the "second hearing". On February 11, 2011, the judge delivered reasons denying Mhinder's applications to amend and add parties and dismissing all of his claims against the respondents except those in his counterclaim in the Bhora Mayer Action: 2011 BCSC 386.
- [139] These proceedings took place in a context that arose from the summary trial judgment. With the reversal of that decision, the foundation for the parties' controversy reverts to its status at the commencement of that trial and many of the orders under appeal have been rendered academic. It therefore becomes necessary to consider whether issues in the remaining appeals should be determined.
- [140] The doctrine of mootness was discussed by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353-362, 57 D.L.R. (4th) 231 at 353-361. I take the following principles from that decision. An issue is moot if it raises a merely hypothetical or abstract question, and a decision by the court will have no practical effect on the parties' rights. The court will generally decline to hear such an issue, although it retains a discretion to depart from that rule in certain circumstances governed by a two-

step analysis. First, it is necessary to decide whether a live controversy remains between the parties. If not, the second step addresses three factors to determine whether the court should nevertheless exercise its discretion to hear the matter. These are, first, whether there is a continuing adversarial context; second, concerns of judicial economy; and, third, whether the court's intervention in the absence of an active dispute might be viewed as an intrusion on the role of the legislature.

- [141] I am satisfied that the application of those principles in this case leads to a conclusion that the reversal of the summary trial has rendered moot most of the issues in the remaining appeals. For example, Mhinder has appealed the orders dismissing his applications to amend his pleadings and dismissing his claims, made in the second hearing. My colleague's decision, however, returns the pleadings and claims of the parties to their status at the outset of the summary trial. Thus, these subsequent orders have no remaining significance.
- [142] I would, however, exercise my discretion to consider five issues that arise from the remaining appeals. There is clearly an ongoing adversarial dispute between the parties. As to judicial economy, these five issues may arise again in the controversy between the parties and it is my hope that our decision may provide useful future guidance. As we had full argument on these matters at the hearing of the appeal, there is little concern about using additional judicial resources to determine them. Finally, nothing suggests that court intervention on these issues might intrude on the role of the legislative branch.
- [143] Before turning to those five matters, I will set out the remaining orders under appeal, and identify those that I would set aside as academic and those remaining for consideration.
- [144] In Appeal Nos. CA38597, CA38598, CA38599, and CA38600, the following order was pronounced on October 20 and October 22, 2010 in Action Nos. S073324, S093607, S097716, S52127, and S085604, following an application brought by Mhinder Mayer to amend his pleadings:
1. Should Mhinder Mayer wish to further amend his pleadings in any proceeding to add claims or to add parties, Mhinder Mayer is required to file appropriate affidavit evidence in support of that application.

The judge's reasons for judgment are indexed as 2010 BCSC 1729.

- [145] I am satisfied I should exercise my discretion to decide the appeals from these orders as they raise an issue that may recur in future proceedings between the parties.
- [146] In Appeal No. CA38681, the following orders were pronounced December 1, 2010 in Action No. S097716, following an application by the respondents for a declaration that Mhinder has waived solicitor-client privilege:

1. Mhinder Mayer has waived privilege over otherwise privileged communications evidencing his motive, purpose and good faith in bringing his applications dated October 13, 2010 to amend the claims in Actions S093607, S073324, S078623, S085604, S52157 and S097716 (the 'Mhinder Mayer Actions') and to join parties in action S093607;
2. Subject to paragraph 3 of this Order and for clarity, the waiver of privilege extends to otherwise privileged communications created after the date on which the Mhinder Mayer Actions were brought to the extent that they concern the substance or language of the proposed amendments;
3. In respect of the application to join parties in action S093607 and for clarity, the waiver extends to otherwise privileged communications evidencing Mhinder Mayer's motive, purpose and good faith in seeking to join those parties pursuant to the proposed amendments and, on any previous occasion, to a consideration of joining them to a proceeding in which relief from oppression is being sought;
4. Mhinder Mayer shall produce to the Richard Mayer Defendants those documents, or portions thereof, from the files of Mhinder Mayer, Nathanson, Schachter & Thompson LLP and Gregory & Gregory in respect of which privilege has been waived;
5. Mhinder Mayer shall prepare a list, in a format to be agreed by the parties or settled by further order of the Court, of those categories of documents which he considers to remain privileged and deliver it to the Richard Mayer Defendants.

The judge's reasons for judgment are indexed as 2010 BCSC 1881.

[147] In my view it is appropriate to determine whether the waiver remains extant and operative and, if so, to examine whether the judge properly defined its scope. I accordingly intend to address the issues raised by this appeal.

[148] In Appeal No. CA38680, the following order was pronounced December 20, 2010, in Action No. S097716, following an application to clarify the scope of the waiver of solicitor client privilege:

1. By virtue of the waiver of privilege declared under the order pronounced December 1, 2010, the documents to be produced by Mhinder Mayer pursuant to the order must include drafts of Mhinder Mayer's affidavit #2 sworn April 19, 2010 so far as the drafts concern factual matters made the subject of the amendments proposed in Mhinder Mayer's applications dated October 13, 2010 to amend the claims in actions S093607, S073324, S078623, S085604, S52157 and S097716 (the 'Mhinder Mayer actions') and to join parties in action S096307.

The judge's reasons for judgment are indexed as 2010 BCSC 1883.

[149] Since this order also addresses the scope of the waiver of privilege, I will determine this appeal in conjunction with Appeal No. CA38681.

[150] In Appeal No. CA38807, the following orders were pronounced February 11, 2011, in Action S073324, following the second hearing:

1. Mhinder Mayer's application for leave to file a further amended statement of defence and counterclaim is dismissed and all new claims contained therein are barred, provided that the court will receive further submissions in respect of paragraphs 128 to 130 of the draft further amended statement of defence and counterclaim;
2. Mhinder Mayer's claims against Bhora Mayer for equalization of draws and income for the period prior to June 2006 are barred;
3. Mhinder Mayer is barred from advancing in this action claims against Bhora Mayer based on transactions that took place prior to June 8, 2006 or [sic] which he was aware, or could reasonably have been aware involving either the Identified and Disputed Companies or the assets of the Brothers' Trust;
4. Mhinder Mayer's action against Marc Furnemont is dismissed.

The judge's reasons are indexed as 2011 BCSC 386.

[151] These orders were made at the conclusion of the second hearing and flowed from circumstances created by the judgment rendered on the summary trial. With the reversal of that judgment, these matters have become academic and I would therefore allow the appeal to the extent of setting the orders aside.

[152] In Appeal No. CA38805, the following orders were pronounced February 11, 2011, in Action S085604, following the second hearing:

1. Mhinder Mayer's amended application for leave to file an amended statement of claim is dismissed and his proposed new claims are barred.
2. The action is dismissed.

The judge's reasons are indexed as 2011 BCSC 386.

[153] For the reasons just set out with respect to Appeal No. CA38807, the appeal from this order is allowed and the orders set aside.

[154] In Appeal No. CA38806, the following orders were pronounced February 11, 2011, in Action S093607, the Oppression Proceeding, following the second hearing:

1. Mhinder Mayer's application for leave to join Rita Webb, Gina Mayer, New Concrete Concepts Ltd, Custom Pumping Ltd, Island Aggregates Ltd, R & G Equipment Ltd, Mack Sales & Service of Nanaimo Ltd, and Bastion Project Management Ltd as defendants and for leave to file a further amended petition is dismissed;

2. Mhinder Mayer is barred from advancing in this proceeding claims against Bhora Mayer and the corporate Defendants based on transactions that took place prior to June 8, 2006 of which he was aware, or could reasonably have been aware prior to June 8, 2006;
3. Mhinder Mayer is barred from pursuing derivative relief and relief from oppression as against Richard Mayer, Anuradha Mayer, Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd, and New Concrete Concepts (the "Richard Mayer Group") and Gina Mayer, Rita Webb, Archer Holdings Ltd., Custom Pumping Ltd., R & G Equipment Ltd., R and G Equipment Rentals Ltd., Aqua Pod Ltd. and Front Street Projects Ltd. (the "Webb/Mayer Group") in this proceeding for any other action or proceeding, in respect of the alleged transactions that he pleaded in paragraph 58 and paragraph 60 (c)-(j) of his statement of claim filed May 12, 2010 in Action S097716 (the "Disavowed Claims"), provided that:
 - (a) Mhinder Mayer is not barred from otherwise pursuing derivative relief against the Richard Mayer Group or the Webb/Mayer Group based upon transactions that took place prior to June 8, 2006, which are not included in the Disavowed Claims, of which Mhinder Mayer was not aware, or could not reasonably have been aware prior to June 8, 2006; and
 - (b) Mhinder Mayer is not barred from seeking oppression remedies, including derivative relief, in respect of transactions that occurred after June 8, 2006, which are not included in the Disavowed Claims, so long as he meets the statutory prerequisites.
4. Mhinder Mayer is barred from pursuing claims for relief from oppression, including derivative relief, as against the Defendants herein based upon transactions that took place prior to June 8, 2006 of which Mhinder Mayer was aware, or could reasonably have been aware prior to June 8, 2006, provided that Mhinder Mayer is not barred from seeking oppression remedies against the Defendants, including derivative relief, in this action for transactions that occurred after June 8, 2006, so long as he meets the statutory prerequisites.
5. Notwithstanding the definition of the "Disavowal Claims" in this order, the Court reserves for further argument whether Mhinder Mayer is barred from pursuing derivative relief and relief from oppression in respect of the transaction that is the subject of his petition filed in proceeding S078623.

The judge's reasons are indexed as 2011 BCSC 386.

[155] For the same reasons as those pertaining to Appeal Nos. CA38805 and CA38807, the orders in paragraphs 1, 2, 4, and 5 are moot. The appeals from them will be allowed, and these orders set aside.

[156] Paragraph 3 of this order, however, raises the interpretation of the "Disavowal Pleading", a pleading by Mhinder that was extant at the commencement of the summary trial, and so remains in place. I therefore find it appropriate to address the appeal from this paragraph of the order.

[157] In Appeal No. CA38809, the following orders were pronounced February 11, 2011, in Action S097716, following the second hearing:

1. Mhinder Mayer's application for leave to file a further amended statement of claim is dismissed and his proposed new claims are barred;
2. Mhinder Mayer's claims against Bastion Project Management Ltd., Richard Mayer, Gina Mayer and Rita Webb are dismissed;
3. Mhinder Mayer is barred from pursuing derivative relief and relief from oppression as against the Defendants herein in respect of the alleged transactions that he pleaded in paragraph 58 and paragraph 60 (c)-(j) of his statement of claim filed May 12, 2010 (the "Disavowed Claims"), provided that:
 - (a) Mhinder Mayer is not barred from otherwise pursuing derivative relief against the Defendants herein based upon transactions that took place prior to June 8, 2006, which are not included in the Disavowed Claims, of which Mhinder Mayer was not aware, or could not reasonably have been aware prior to June 8, 2006; and
 - (b) Mhinder Mayer is not barred from seeking oppression remedies, including derivative relief, in respect of transactions that occurred after June 8, 2006, which are not included in the Disavowed Claims, so long as he meets the statutory prerequisites.
4. Notwithstanding the definition of the "Disavowed Claims" in this order, the Court reserves for further argument whether Mhinder Mayer is barred from pursuing derivative relief and relief from oppression in respect of the transaction that is the subject of his petition filed in proceeding S078623.
5. Mhinder Mayer may apply to the Court for directions under the Trustee Act, R.S.B.C. 1996, c. 464 to seek leave to bring an action against Bhora Mayer in respect of rent collected from Brothers' Trust Properties.

The judge's reasons are indexed as 2011 BCSC 386.

[158] The issues raised by paragraphs 1, 2, and 4 of that order are moot for the reasons previously expressed. The appeals from them are therefore allowed, and these orders set aside.

[159] Paragraph 3 of this order again raises the interpretation of the Disavowal Pleading and, as set out previously, I propose to determine that issue.

[160] Paragraph 5 of this order raises an issue with respect to Mhinder's standing to pursue the Gina Mayer Rents Action. I am satisfied there must be a determination of this issue before Mhinder can pursue this action, and it is appropriate for this Court to deal with it.

[161] In summary, the five issues that remain to be addressed are these:

1. Paragraph 1 of Appeal No. CA38681 - Did the judge err in finding Mhinder implicitly waived privilege by filing an affidavit of his counsel?

2. Paragraphs 2 through 5 of Appeal No. CA38681 and paragraph 1 of Appeal No. CA38680 - If privilege was waived, did the judge properly define the scope of the waiver?
3. Appeals Nos. CA38597, CA38598, CA38599, CA38600 - Did the trial judge err in ordering that Mhinder must adduce evidence in support of each of his applications to amend his pleadings and add parties to the Oppression Proceeding?
4. Paragraph 5 of Appeal No. CA38809 - Did the judge err in requiring Mhinder to apply to the Court for directions under the Trustee Act, R.S.B.C. 1996, c. 464 with respect to his standing to bring the Gina Mayer Rents Action?
5. Paragraph 3 of Appeal No. CA38806 and paragraph 3 of Appeal No. CA38809 - Did the judge err in finding the Disavowal Pleading precluded Mhinder from pursuing claims under the Business Corporations Act, S.B.C. 2002, c. 57 (the "BCA")?

[162] The appeals of each of the other orders are allowed and the orders set aside.

[163] The first three remaining appeals arise from Mhinder's attempts to amend his pleadings, and share the same factual chronology. I will set that out, and then deal with each of them.

Factual Chronology

[164] In his decision on the summary trial, the judge found that Mhinder's remaining claims in Action 716, including those for derivative relief under the BCA and for recovery of rental income from Gina, were an abuse of process because they duplicated claims brought by Mhinder against the respondents in other related proceedings. He therefore ordered that all duplicate claims advanced by Mhinder in Action 716 be stayed until Mhinder reconciled his pleadings. There followed a series of applications by Mhinder in an effort to comply with that order.

[165] Mhinder initially brought an application to consolidate all of his claims in the Bhora Mayer Action and to join some of the secondary defendants to that action with respect to his claim for derivative relief on behalf of the Identified Trust Companies. That application was heard on October 4, 2010. In their submissions, the respondents questioned Mhinder's motives in joining the new parties and argued his claim against them had no merit and was harassment and an abuse of process. As well, they maintained Mhinder's claim for derivative relief must fail because he could not establish the good faith required to obtain leave to bring a derivative action.

[166] The judge dismissed Mhinder's application. He expressed concern that some of the proposed amendments introduced substantively different claims and decided that, given Mhinder's history of inconsistent pleadings, amendment of the existing pleadings would provide greater clarity and certainty. He also intimated that allowing the consolidation to stand without requiring Mhinder to lead substantive evidence to support it would be problematic: 2010 BCSC 1728.

- [167] On October 13, 2010, Mhinder delivered applications to amend his pleadings in five proceedings, including the Bhora Mayer Action, the Oppression Proceeding, Action 716, and the Gina Mayer Rents Action. The proposed amendments moved all claims under the BCA from Action 716 and the Bhora Mayer Action to the Oppression Proceeding, and sought to add Rita, Gina, New Concrete Concepts Ltd., Custom Pumping Ltd., Island Aggregates Ltd., R & G Equipment Ltd., Mack Sales and Service of Nanaimo Ltd., and Bastion Project Management Ltd., to whom I will refer as the "new parties", to that proceeding. Each of the applications stated that no evidence was required on an application to amend or add parties but, "[i]n any event, the affidavit of Mr. Gomery sets out the basis for the amendments". The relevant parts of that affidavit stated:
2. I swear this affidavit in support of the plaintiff's application to amend its pleadings in this action and in certain of the related actions and proceedings, including proceeding S093607, in which it is also sought to join certain parties as described below.
 3. Many of the amendments proposed in these applications arise in consequence of the Order of Justice Walker pronounced September 2, 2010. In particular:
 - (a) The claims against which have been dismissed in this action (no. S097716) have been removed from the proposed amended notice of civil claim; and
 - (b) The court having ruled that certain claims can only be advanced as derivative claims, and Mr. Fraser having taken the position that derivative claims can only be brought by petition, those derivative claims which were formerly advanced in this action have been moved to proceeding no. S093607, a petition proceeding in which related claims for relief under s. 227 of the Business Corporations Act were already being advanced.
 4. In order to properly plead the derivative claims in proceeding no. S093607, it is necessary that the following parties be added as petition respondents: Rita Webb, Gina Mayer, New Concrete Concepts Ltd., Custom Pumping Ltd., Island Aggregates Ltd., R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd.
 5. Mhinder Mayer seeks the addition of parties to proceeding no. S093607 only for the limited purpose I have described and not for any collateral or improper purpose. He seeks the amendment of the pleadings in the various actions in order that his claims may be fully and properly put before the court.

[Emphasis added.]

- [168] These applications were heard on October 20, 2010. The respondents took the position they were brought in bad faith and that Mhinder should be required to file evidence in support of his proposed amendments. They also suggested Mr. Gomery had waived solicitor-client privilege in providing the affidavit. The judge made no ruling on the issue of waiver. He described Mr. Gomery's affidavit as "woefully insufficient", dismissed Mhinder's applications, and ordered Mhinder to provide "appropriate affidavit evidence" in support of any future applications to amend his pleadings or add parties: 2010 BCSC 1729. He stated:

- [6] My decision on the summary trial application was founded, in part, on the history of inconsistent pleadings and positions filed and taken by Mhinder Mayer. My decision was also founded on the evidence he gave in this and in other related cases. Mhinder Mayer was cross examined on those inconsistent positions contained in the pleadings and in his evidence. I rejected his evidence given during the summary trial application insofar as those inconsistencies were concerned.
- [7] In my opinion, Mhinder Mayer should come forward with evidence to support his proposed amendments at this stage of the litigation, following a summary trial application, and approximately two and a half months before trial is to start, in a case involving a lengthy and complex fact pattern.
- [169] Subsequently, Mhinder's counsel advised the respondents' counsel that Mhinder would not rely further on Mr. Gomery's affidavit and would renew his applications relying on his own affidavit evidence. New applications were accordingly filed on November 1, 2010, supported by two affidavits sworn by Mhinder. One of these, filed in the Oppression Proceeding, included these statements:
6. The existing petition seeks a declaration that the affairs of the Identified Trust Companies are being administered in a manner that is oppressive to me and remedial orders under ss[.] 227 and 324 of the Business Corporations Act, including an order authorizing me to commence legal proceedings in the name of the Identified Trust Companies as this Court thinks fit. The proposed amendments state the relief sought more precisely and identify the proposed derivative claims as those listed in paragraph 39 of the statement of facts. (All paragraph numbers in this affidavit refer to the draft petition with interlineations at Exhibit A.)
 7. The Proposed New Respondents are the persons against whom the proposed derivative claims would be brought, if the proposed derivative claims are permitted.
 8. I firmly believe that the dealings between Bhora Mayer and his wife and children have been unfair to the Identified Trust Companies. I seek leave to bring these derivative claims because I believe it is in the best interests of the Identified Trust Companies to do so.
- ...
12. I am swearing this affidavit for the purpose of my application for leave to amend the petition and join the Proposed New Respondents. I do not suggest that the evidence I am putting forward in this affidavit proves my claims. I propose to prove my claims at trial.
- [170] Mhinder's second affidavit, filed in the Bhora Mayer Action, dealt with his amendments in the remaining proceedings.

- [171] The respondents filed an application for a declaration that paragraphs 4 and 5 of Mr. Gomery's affidavit effected a waiver of privilege, and for an order compelling production of solicitor and client communications regarding Mhinder's motives and purposes in seeking the amendments and the addition of the new parties. That application was heard with Mhinder's renewed applications to amend his pleadings and add parties over several days, commencing November 17, 2010.
- [172] The judge rendered his decision on December 1, 2010: 2010 BCSC 1881. As to Mhinder's applications to amend and add parties, he observed that the respondents had notified Mhinder and his counsel well before the summary trial that they viewed some of his claims as an abuse of process. He noted the respondents now argued, in addition, that Mhinder's applications were abusive because they sought to circumvent the effect of the judgment on the summary trial, and represented an attempt to gain an advantage in his litigation against Bhora by causing economic hardship to members of Bhora's family. The judge reviewed the proposed amendments, and concluded it was in the best interests of all parties to hear the respondents' forthcoming applications to strike Mhinder's claims as an abuse of process before deciding what, if any, amendments should be permitted. Over Mhinder's objections, he also decided that the question of abuse of process could be dealt with on a summary application instead of at trial.
- [173] As to the issue of waiver of privilege, the judge found Mhinder had waived solicitor-client privilege when Mr. Gomery "entered the fray" by filing an affidavit that went to two matters of substance. The first was Mhinder's statutory obligation to demonstrate good faith as a prerequisite to seeking derivative relief under ss. 232 and 233 of the BCA. The second was Mhinder's motives and alleged mala fides in proposing further proceedings against the new parties. He stated:
- [81] Mr. Gomery's affidavit spoke of his personal knowledge concerning Mhinder Mayer's state of mind and good faith. Mr. Gomery's evidence dealt squarely with his client's intention to add parties to the lawsuits where derivative relief is being sought. In those lawsuits, given the requirements of the BCA, the question of Mr. Mayer's good faith is engaged.
- [82] Further, Mr. Gomery and Mhinder Mayer have been well aware of the respondents' position that Mhinder Mayer's claims and his proposed claims against the secondary defendants are mala fides and constitute an abuse of this Court's process.
- ...
- [85] By those remarks [in paras. 4 and 5 of his affidavit], Mr. Gomery vouchsafed for his client's good faith, his client's purpose, and his client's state of mind, all in the midst of serious allegations that Mhinder Mayer has been and continues to take steps in various actions and proceedings that are an abuse of process.
- ...

- [95] Here, Mhinder Mayer's solicitor provided evidence of his client's good faith, the effect of which was to deny allegations of his client's alleged mala fides in seeking the amendments and to add parties. This all occurred in the midst of allegations of mala fides and abuse of process.
- [96] Mr. Gomery's evidence was also given in respect of statutory prerequisites. It does not lie in the mouth of the solicitor and his client to now say, "you cannot see the information I had from which I, as a solicitor, advised the Court of my client's good faith."
- [174] As to the scope of the waiver the judge found:
- [97] In conclusion, I find that Mr. Gomery's affidavit has waived privilege over matters that are central to the dispute between Mhinder Mayer and the secondary defendants. Solicitor-client privilege has been waived concerning Mhinder Mayer's good faith in respect of the amendments that he now seeks.
- [98] In my opinion, there has been no waiver of solicitor-client privilege in respect of Mr. Gomery's entire file. In that regard, I accept Mr. Schachter's alternate submission that waiver has been effected in respect of the matters addressed in Mr. Gomery's affidavit.
- [175] The parties appeared before the judge again on December 15, 2010 to settle the ambit of the order waiving privilege: 2010 BCSC 1882. Insofar as the waiver related to Mhinder's motives and purpose in seeking the amendments, the judge rejected the respondents' submission that it extended to solicitor-client communications before the litigation began. As to the waiver related to the requirement of good faith in derivative proceedings, the judge found it concerned a matter arising at the beginning of oppression proceedings where derivative relief is sought and concluded the waiver extended to communications prior to the commencement of those proceedings in which Mhinder sought relief from oppression under the BCA.
- [176] The second hearing proceeded. In its midst, a draft of an affidavit sworn by Mhinder was inadvertently produced. The chambers judge extended the scope of the waiver of privilege to include all drafts of this affidavit and ordered they be produced: 2010 BCSC 1883.

Analysis

1. Did Mhinder implicitly waive privilege by filing an affidavit of his counsel?
- [177] Although the orders dismissing Mhinder's applications to amend his pleadings have been set aside, Mr. Gomery's affidavit remains part of the record. I am satisfied we should deal with this issue in the event the import of that affidavit arises in future proceedings between the parties. The central question is whether the judge erred in finding that, by filing his affidavit of October 13, 2010, Mr. Gomery entered the fray and implicitly waived privilege by testifying to two matters of substance: first, Mhinder's good faith in bringing new claims against the new parties and, second, Mhinder's ability to meet the statutory requirement of good faith in seeking derivative relief under the BCA.

- [178] The legal principles governing privilege and its implied waiver are not contentious. The Supreme Court of Canada has consistently recognized the fundamental role that solicitor-client privilege plays in the proper functioning of our legal system and has guarded its breadth and primacy as a substantive rule of law, recognizing that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance": *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 24, [2006] 2 S.C.R. 319; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 9, [2008] 2 S.C.R. 574.
- [179] Solicitor-client privilege, however, may be waived expressly or by implication. It will be implicitly waived when a solicitor "enters the fray" by providing affidavit evidence that goes to a matter of substance in the client's litigation: *Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.* (1998), 161 D.L.R. (4th) 750, 55 B.C.L.R. (3d) 233 (S.C.); *Sholinder and MacKay Sand and Gravel Ltd. v. Lake Windermere Resort Ltd.*, [1998] B.C.J. No. 779 (S.C.).
- [180] What is a matter of substance is defined by the material facts set out in the pleadings and by the law that governs a party's claim.
- [181] In *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.) at 220-21, 35 C.P.C. 146 (S.C.), Madam Justice McLachlin described implied waiver of privilege, and the role that considerations of fairness and consistency play in finding waiver:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication, will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost: *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

...

As pointed out in *Wigmore on Evidence* (McNaughton revision (1961)) vol. 8, pp. 635-36, relied on by Meredith J. in *Rogers v. Hunter*, supra, double elements are predicated in every waiver - implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant's act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.) [leave to appeal to S.C.C. refused [1980] 1 S.C.R. xii], it was inferred from the accused's reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in

fairness be permitted to use privilege to prevent his opponent exploring its validity.

- [182] As well, in deciding whether privilege has been implicitly waived, the court will consider whether a party has made its state of mind material to its claim or defence in such a way that enforcement of solicitor-client privilege would confer an unfair litigation advantage on that party: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2004 BCCA 512 at para. 12, 245 D.L.R. (4th) 443.
- [183] Mhinder argues, first, that Mr. Gomery's affidavit was of no substance. He says it was unnecessary and points out the judge found it inadequate and declined to rely on it. As well, he maintains it was spent and supplanted by his own affidavits before his applications to amend and add parties were heard. He argues these circumstances preclude a finding that Mr. Gomery's affidavit went to matters of substance, or gave Mhinder a litigation advantage over the respondents.
- [184] I agree Mr. Gomery's affidavit was unnecessary. Evidence is not required on applications to amend pleadings or add parties: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 at 25, 28 C.P.C. (2d) 49 (C.A.); *MacMillan Bloedel v. Binstead* (1981), 58 B.C.L.R. 173 (C.A.); *Strata Plan VIS3578 v. Canan Investment Group Ltd.*, 2010 BCCA 329 at para. 45, 323 D.L.R. (4th) 482.
- [185] I do not agree, however, that the affidavit was spent. It was filed and relied on at the October 20, 2010 hearing. The accompanying applications stated that the affidavit "set out the basis for the amendments". The decisions in *Cheung et al. v. 518402 B.C. Ltd.*, [1999] B.C.J. No. 2415 (S.C.) at paras. 13 and 22, and *Casino Tropical Plants Ltd.* at para. 16, suggest that once a waiver of privilege has been made it cannot be retracted. This is a logical consequence of the waiver, as being able to retract it would result in untenable litigation advantages and general unfairness.
- [186] There is nothing that explains why Mr. Gomery filed this affidavit. Mhinder's submission that counsel commonly file such affidavits as innocuous "boilerplate" on applications of this nature is not helpful in the absence of evidence identifying this as the purpose of Mr. Gomery's affidavit.
- [187] The affidavit thus remains extant and unexplained. The central issue is whether the judge erred in finding it went to matters of substance in Mhinder's litigation.
- [188] The question of whether privilege has been implicitly waived requires identification of matters of substance by reference to the material facts and the law that governs the client's claim or defence, as well as an examination of considerations of fairness and consistency, and any litigation advantage that may arise from the enforcement of the privilege. That assessment takes place in the context of the legal standards that govern the rule of solicitor-client privilege. Thus, whether there has been an implied waiver of privilege is a question of mixed fact and law, reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 36, [2002] 2 S.C.R. 235.

- [189] I turn to the judge's finding that Mhinder's purpose and good faith in seeking the amendments and the addition of the new parties were matters of substance. Mhinder reiterates a party's motive is immaterial on such applications, relying again on McNaughton. As well, he points out that when Mr. Gomery filed the affidavit there were no formal allegations of bad faith or abuse of process. He says the judge therefore erred in finding that Mr. Gomery's reference to his state of mind was a matter of substance.
- [190] The respondents reply that throughout Action 716 they alleged Mhinder's proceedings against Richard, Rita, Gina and their companies were an abuse of process. They say the manner in which the summary trial developed, Mhinder's evasion and inconsistent evidence during that proceeding, and the judge's detrimental findings as to his credibility all confirmed this abuse. They maintain that Mhinder's attempts to amend his pleadings and add the new parties after the summary trial went far beyond the judge's directions, making it evident the concern of abuse of process remained, and they raised it expressly in submissions before the judge on October 4, 2010. The respondents say that in these unique circumstances it was not necessary to formalize their allegations of abuse of process or bad faith in pleadings or affidavits. Both Mhinder and the judge were well aware that his motives and purpose in pursuing his proceedings against the new parties were matters of substance.
- [191] I acknowledge that following the summary trial the respondents continued to argue that Mhinder's proceedings and applications were brought in bad faith and were an abuse of process. These arguments, however, were different in substance from those they had advanced during that trial. In Action 716, the only formal allegation of abuse of process was set out in Richard's amended statement of defence, filed May 5, 2010, and was based on Mhinder's conduct in the Bhagwan Mayer Action, an issue dealt with by the judge at the summary trial. The respondents' allegations of bad faith and abuse of process following that trial centred on the view that Mhinder's applications were designed to harass the new parties, in order to gain leverage against Bhora in the Bhora Mayer Action. None of those allegations had been formalized in a pleading, application, or affidavit when Mr. Gomery filed his affidavit on October 13, 2010.
- [192] Given the fundamental importance of solicitor-client privilege, it is my view that where it is alleged a solicitor has entered the fray and implicitly waived privilege by testifying to a matter of substance in his client's litigation, that matter must be something on which issue has been formally joined. Arguments and allegations alone, regardless of how firmly held or advanced they may be, cannot be sufficient to create a matter of substance. To hold otherwise would result in significant and unanticipated intrusions into solicitor-client privilege, create uncertainty, and work against the objectives of fairness and consistency that underpin the concept of implied waiver.

- [193] As well, both the respondents' arguments and the judge's findings on this point relied to a substantial extent on the negative findings made with respect to Mhinder's motives and credibility at the summary trial. This was despite the judge's assurances in his reasons (2010 BCSC 1249) that his findings would not prejudice Mhinder in subsequent proceedings overseen by him as the case management judge:
- [280] As well, my findings concerning Mhinder Mayer's lack of credibility and the lack of reliability of his evidence are confined to his trust claims advanced against the applicants. I have not made any findings about nor expressed any comment in relation to the merits of his other claims. My determination and findings in relation to one aspect of his action does not prohibit Mhinder Mayer from pursuing the remainder of his claims.
- [281] I am not persuaded that my decision in respect of Mhinder Mayer's trust claims will cause unfairness in the determination of the claims advanced in the related actions. There is no reason to refrain from determining the Rule 18A application when it can be done based upon Mhinder Mayer's own evidence. In addition, my determination of Mhinder Mayer's trust claims on this application will shorten the length of trial by at least three to four weeks and the interlocutory proceedings considerably.

...

- [283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. Although I have determined claims on this application, and not merely issues, I draw comfort from the remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:

Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

- [194] In my view, the judge erred in relying on his prior findings to elevate Mhinder's state of mind to a matter of substance when that issue had not been formally joined.
- [195] As to the judge's finding that Mhinder's claims under the BCA made his good faith a matter of substance, Mhinder says both the respondents and the judge mistakenly assumed he was seeking leave to advance a claim for derivative relief under ss. 232 and 233 of the BCA. Mhinder accepts that s. 232(2) provides that a complainant seeking derivative relief under those provisions must seek leave of the court, and must meet these requirements in s. 233(1) before he may advance such a claim:

The court may grant leave under section 232(2) or (4), on terms it considers appropriate, if

- (a) the complainant has made reasonable efforts to cause the directors of the company to prosecute or defend the legal proceeding,
- (b) notice of the application for leave has been given to the company and to any other person the court may order,
- (c) the complainant is acting in good faith, and
- (d) it appears to the court that it is in the best interests of the company for the legal proceeding to be prosecuted or defended.

[Emphasis added.]

[196] Mhinder says, however, that his claim under the BCA was not advanced under those provisions, but was pleaded as a claim for oppression and unfair prejudice pursuant to ss. 227 and 324 of the BCA. He says good faith is not a precondition to this claim, nor must he obtain leave to commence it. Mhinder concedes that if he establishes oppression and seeks to pursue derivative proceedings as a remedy he may have to establish good faith at that point, but says this is not clear and, in any event, neither the BCA nor the authorities make good faith a matter of substance in a pleading of oppression and unfair prejudice.

[197] Sections 227 and 324 of the BCA bear this out. The requirements for an oppression action are set out in s. 227(1) and (2):

227 (1) For the purposes of this section, "shareholder" has the same meaning as in section 1 (1) and includes a beneficial owner of a share of the company and any other person whom the court considers to be an appropriate person to make an application under this section.

(2) A shareholder may apply to the court for an order under this section on the ground

- (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
- (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

[198] Section 227(3) provides a comprehensive list of remedies available on a finding of oppression or unfair prejudice, including derivative proceedings:

- (3) On an application under this section, the court may, with a view to remedying or bringing to an end the matters complained of and subject to subsection (4) of this section, make any interim or final order it considers appropriate, including an order

- (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[199] Those parts of s. 324 relevant to Mhinder's claim provide for liquidation and dissolution of a company on an application by a shareholder or a director, among others, where such an order is just and equitable. Section 324 also provides the court may make any order it considers appropriate under s. 227(3).

[200] Thus, nothing in the provisions of ss. 227 and 324 make a complainant's good faith a precondition for a pleading of oppression or unfair prejudice, even if a remedial order involving derivative proceedings under those sections is pleaded in the prayer for relief.

[201] A review of Mhinder's pleadings in the relevant proceedings as they stood on October 13, 2010, and in the proposed amendments supported by Mr. Gomery's affidavit, reveals no claim under ss. 232 and 233 of the BCA. His amended statement of claim in Action 716 made no express reference to the BCA, although the prayer for relief included a claim for an order granting Mhinder leave to commence litigation in the names of the Identified Trust Companies to address any of the delicts alleged in his statement of claim.

[202] Mhinder's counterclaim in the Bhora Mayer Action set out lengthy allegations of mismanagement of the Identified Trust Companies by Bhora and alleged diversion and misappropriation of their assets, as well as those of the Disputed Trust Companies, by him to his family members and their companies. He alleged each of these events constituted oppression under s. 227 of the BCA. The prayer for relief listed 29 potential remedies, one of which was identical to that for derivative relief in Action 716.

[203] Mhinder's allegations in the Oppression Proceeding against Bhora and the Identified Trust Companies listed many of the same transactions as those in the Bhora Mayer Action and claimed these constituted oppression under s. 227. The prayer for relief sought a declaration of oppression and a variety of remedies under s. 227(3), including liquidation, access to corporate records, share transfers, and an order permitting derivative actions in the name of the Identified Trust Companies.

[204] The amendments Mhinder put forward on October 13, 2010, supported by Mr. Gomery's affidavit, proposed consolidating all of his claims under the BCA in the Oppression Proceeding and adding the new parties. The proposed amended petition reiterated his allegations that Bhora had conducted the affairs of the Identified Trust Companies in a manner that was oppressive and unfairly prejudicial to Mhinder and listed particulars of these allegations. As well, it alleged Bhora had caused the Identified Trust Companies to enter many of the same transactions with the new parties as those described in Action 716 and the Bhora Mayer Action, resulting in loss to the Identified Trust Companies. Those aspects of the proposed petition that referred to the BCA were in these terms:

1 Mhinder Mayer claims against Osborne Contracting Ltd ("OCL"), Osborne Industries Ltd, Holman Transport Ltd, Mayer Truck & Equipment Ltd, Gulf Coast Materials Ltd and Timberland Investment Ltd (collectively, the "Identified Trust Companies") and Bhora Mayer:

A A declaration that the affairs of the Identified Trust Companies have been conducted in a manner oppressive to Mhinder Mayer and that acts have been done by Bhora Mayer in the Identified Trust Companies that are unfairly prejudicial to Mhinder Mayer;

B Orders pursuant to s 227 and s 324 of the Business Corporations Act to remedy the matters complained of including:

- a) A declaration that it is just and equitable that the Identified Trust Companies be dissolved and appropriate consequential relief;
- b) An accounting of all amounts due to Mhinder Mayer by the Identified Trust Companies or Bhora Mayer or both;
- c) Judgment in favour of Mhinder Mayer for all amounts found owing on the accounting;
- d) The appointment of a monitor, receiver or receiver-manager of the Identified Trust Companies;

2 Mhinder Mayer further claims against the Identified Trust Companies, Bhora Mayer, Rita Webb, New Concrete Concepts Ltd, Custom Pumping Ltd., Island Aggregates Ltd., New Concrete [sic] R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd.:

C An order authorizing or directing that such legal proceedings may be commenced by the Identified Trust Companies to redress the actions of those Petition Respondents as set out in paragraph 37 below, as Mhinder Mayer may direct, on the following terms:

- a) Mhinder Mayer shall have conduct of the proceedings;
- b) Mhinder Mayer will be given unfettered access to the documents and employees of the Identified Trust Companies for the purpose of the litigation;
- c) The proceedings shall be conducted at Mhinder Mayer's expense, provided that he will have liberty to apply to the trial judge, at the conclusion of the proceedings, for an order that one or more of the Identified Trust Companies indemnify Mhinder Mayer for all or a part of his legal expenses incurred in advancing claims on their behalf;
- d) Subject to further order of the court, Mhinder Mayer will indemnify the Identified Trust Companies against any costs they may be required to pay to a defendant sued on Mhinder Mayer's instructions.

...

PART 3: LEGAL BASIS

37 Mhinder Mayer's claims against Bhora Mayer and the Identified Trust Companies in Part I, paragraph 1, are founded in ss 227 and 324 of the Business Corporations Act;

38 Mhinder Mayer's claims against Bhora Mayer, the Identified Trust Companies, Richard Mayer, Rita Webb, Gina Mayer, New Concrete Concepts Ltd, Holman Transport Ltd, Custom Pumping Ltd., Island Aggregates Ltd., New Concrete [sic] R & G Equipment Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd. in Part I, paragraph 2, are founded in s 227(3)(r) of the Business Corporations Act.

[205] It appears clear the judge misapprehended the nature of Mhinder's claim under the BCA. In his reasons of December 1, 2010, the only provisions he referred to were ss. 232 and 233 and the authorities he considered dealt with those provisions. I am persuaded this misapprehension led him to err in finding Mhinder's good faith was a matter of substance and operated to waive privilege.

[206] The respondents argue that because Mhinder's oppression pleadings ultimately sought derivative proceedings as a remedy under s. 227(3)(r), good faith remained a matter of substance. They point out that Mr. Gomery's affidavit was clearly directed toward derivative proceedings against the new parties and reiterate their view that such a claim has no merit and represents harassment by Mhinder.

[207] I do not find these submissions persuasive. This issue arose while matters were still at the pleading stage. There is nothing in s. 227 or in the authorities provided by the parties that supports the view that good faith is a matter of substance at the outset of a proceeding under ss. 227 or 324. While it may become an issue if Mhinder ultimately seeks remedial derivative proceedings, that is not an express requirement in s. 227. Moreover, Mhinder also seeks other remedies that may obviate any wish to seek derivative relief. Thus, it is by no means clear that good faith will become a matter of substance even at a later point in the proceedings.

[208] I find support for these views in the comments of Kevin P. McGuinness in Canadian Business Corporations Law, 2d ed (Markham: LexisNexis, 2007) at 13.42:

There is no strict requirement that an applicant for relief have clean hands in order to obtain relief under the oppression remedy; nor is it necessary to show that the parties have behaved reasonably. In *Journet v. Supercchef Food Industries Ltd.* Gomery J. rejected the argument that the right to institute an oppression proceeding was limited to complainants who could establish their own "perfect probity". He stated:

Furthermore, the court is not convinced that the clean hands doctrine applies to the recourse provided in s. 234. The statute does not say so or even require that the applicant be in good faith, a requirement when a complainant wishes to commence a derivative action under the C.B.C.A. ... To require perfect probity from an applicant would imply that dishonest or improper management is sanctioned if no spotless complainant may be found to request the Court's

intervention. That cannot have been the intention of the drafters of this legislation. Fault on the part of the complainant cannot excuse oppression and unfairness on the part of the corporation or its directors.

Nevertheless, the complainant's conduct is not an irrelevant consideration. The behaviour of the complainant may well be relevant to a determination of whether the steps taken by the management of the corporation were in the best interests of the corporation, or that the control group within the corporation was not acting unfairly in the circumstances. Even where this cannot be shown, it may affect the relief that the court is prepared to grant, or cause the court to exercise its discretion to refuse a remedy.

[Footnotes and citations omitted.]

[209] I am satisfied that while good faith may become an issue at the stage of remedy it is not a matter of substance at the pleading stage of an oppression claim.

[210] The new parties also argue that they are not directors or officers of the Identified Trust Companies and so could not have oppressed Mhinder as a shareholder. Their only role lies as potential defendants if Mhinder eventually obtains the right to commence actions against them on behalf of the Identified Trust Companies. They therefore say that joining them as parties is premature, and a demonstration of bad faith and harassment.

[211] In my view, these arguments do not assist the respondents on the issue of waiver of privilege. They are more productively advanced under Rule 6-2(7)(c), which deals with considerations on an application to add parties.

[212] I conclude the judge erred in finding that Mr. Gomery entered the fray on matters of substance, resulting in an implied waiver of privilege. I would therefore allow the appeal from paragraph 1 of the order of December 1, 2010, which forms part of Appeal No. CA38681, and set aside that aspect of the order.

2. Did the judge properly define the scope of the waiver of privilege?

[213] Since the order waiving privilege has been set aside, it is unnecessary to consider this issue. The appeals from paragraphs 2 through 5 of the order of December 1, 2010, which comprise the balance of Appeal No. CA38681, and the appeal from the order of December 20, 2010, which comprises Appeal No. CA38680, are allowed.

3. Did the judge err in requiring Mhinder to provide evidence to support his applications to amend his pleadings and add the new parties?

[214] It appears the disposition of these appeals may lead to further applications by Mhinder to amend his pleadings or add parties. I am therefore satisfied this Court should determine this issue to prevent any confusion over whether such applications must have an evidentiary foundation.

[215] The fundamental purpose of pleadings is to define the issues to be tried with clarity and precision, give the opposing parties fair notice of the case to be met, and enable all parties to take effective steps for pre-trial preparation: *Lax Kw'alaams Indian Band v. Canada* (Attorney General), 2011 SCC 56 at para. 43, 338 D.L.R. (4th) 193.

[216] As previously stated, the general rule in this province is that a party is not required to lead evidence to support an amendment to its pleadings or the addition of parties. In *McNaughton* at 25, McLachlin J.A. gave this rationale for that principle:

To require a party seeking to bring a third party claim to adduce evidence supporting that claim in advance of trial, is to deprive him of his right to plead a cause of action first and defer proof of it until trial. It is to require him to produce evidence at the outset, without the aid of discovery or the other means afforded by the rules for obtaining evidence, under peril that if he does not do so his claim will be struck out. It confuses the function of pleading - to outline the claim or defence - and the purpose of the trial - to determine whether, on the evidence, the claim or defence is made out.

[217] On October 20, 2010, the judge nevertheless ordered Mhinder to file affidavit evidence to support any further attempt to add claims or parties to any of his proceedings. In doing so, he acknowledged the general rule but relied primarily on this excerpt from *McNaughton* at 23 in deciding to depart from it, in particular, the reference to bad faith that I have emphasized:

The Supreme Court Practice (the White Book), dealing with O. 28, r. 1, the predecessor of our rule on amendment, summarizes the principles governing the granting of amendments as follows:

In *Tidesley [sic] v. Harper*, 10 Ch. D. pp. 396, 397 [*Tildesley v. Harper* (1878), 10 Ch. D. 393] Bramwell, L.J., said: "My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise". "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs".

...

As a general proposition, a third party should not be required to adduce evidence in support of a pleading before trial. ... It is sufficient that his pleading discloses reasonable cause of action or defence. The courts take a liberal approach to pleadings. Before the courts will strike out a pleading or refuse an amendment on the ground that it discloses no reasonable cause of action or defence the case must be perfectly clear.

[218] In my view, the judge's departure from the general rule was not justified. In *McNaughton*, Madam Justice McLachlin was not dealing with allegations of bad faith. She relied on the excerpt from the White Book only to support the generally accepted view that the courts should take a liberal approach in granting leave to amend pleadings or add parties.

Moreover, Lord Justice Bramwell's comment suggests that, if an application to amend is brought in bad faith, the appropriate remedy is to deny the amendments, not require an evidentiary basis for them. I appreciate that at another point in his judgment he suggested an affidavit or statement by a solicitor might be required to establish that an error addressed by the proposed amendment was made bona fide, but that was not the basis for his decision. Moreover, this aspect of his decision was not adopted in the White Book, nor by McLachlin J.A. Nor have the respondents produced any case in this jurisdiction that has endorsed an evidentiary requirement for an application to amend pleadings or add parties.

- [219] In short, I find little support in the passage cited by the judge for the evidentiary requirement he imposed on Mhinder. To my mind, the most telling aspect of Bramwell L.J.'s comments is the requirement that the court must be satisfied that a party is acting mala fide before denying leave to amend or, perhaps, before requiring that such an application be supported by evidence.
- [220] This raises the question of what material the judge relied on to satisfy himself that Mhinder was acting in bad faith when he made these orders. As described previously, there were no formal allegations of mala fides at this juncture. Mr. Gomery's affidavit was the only evidence filed on the applications. It is clear from the judge's reasons that his order requiring evidentiary support for Mhinder's applications was anchored in his observations and findings regarding Mhinder's conduct and credibility at the summary trial. As mentioned before, this was despite his assurance that those matters would not find their way into the continuing proceedings between the parties.
- [221] I am satisfied that despite his stated intent to the contrary, the judge's adverse findings with respect to Mhinder in the summary trial wrongly coloured his views of the applications that followed, and led to an inappropriate and unwarranted departure from the widely accepted rule that evidence is not required to support amendments to pleadings or the addition of parties.
- [222] I would therefore allow each of Appeal Nos. CA38597, CA38598, CA38599, and CA38600, and set aside the orders that required Mhinder to file affidavit evidence to support his applications to add claims or parties.
4. Did the judge err in requiring Mhinder to apply to the Court for directions under the Trustee Act, R.S.B.C. 1996, c. 464 with respect to his action for rental income?
- [223] This appeal involves Mhinder's standing to bring the Gina Mayer Rents Action, and arises from his attempt to amend his pleadings to reflect that the rental properties that are the subject of his claim are beneficially owned by the Brothers' Trust, and not by him personally as originally pleaded. While those amendments have not yet been made, I believe it is appropriate to consider this appeal as they appear inevitable and give rise to a dispute over whether Mhinder, as a trustee and beneficiary of the Brothers' Trust, has standing to pursue the claim.

- [224] On August 6, 2008 Mhinder commenced the Gina Mayer Rents Action against his sister-in-law, alleging she had failed to account for rents she collected on seven properties registered in his name. The statement of claim stated that he owned six of the properties "in his own right" and held a beneficial half-interest in the seventh. It did not mention the Brothers' Trust. Mhinder alleged that Gina stood in a fiduciary capacity to him and held all funds received from the properties in trust either for him, or for him and Bhora. He also alleged Gina converted the rental income to her own use, or to the use of herself and Bhora. He sought an accounting and judgment for the amount owed to him.
- [225] In her statement of defence, Gina pleaded the seven properties were subject to the Brothers' Trust Agreement. She agreed she collected rent and managed the properties since 1989, and said this was pursuant to an agreement with Mhinder and Bhora. She stated that, on their instructions, she paid the proceeds initially to Osborne Contracting Ltd. and, since 2000, to Bhora. She claimed Mhinder received regular accountings of this income until the family disputes arose.
- [226] The same properties are also the subject of claims advanced by Bhora in the Bhora Mayer Action and by Mhinder in Action 716. In his pleadings in those actions, however, Mhinder either expressly or implicitly pleaded these properties were held by him pursuant to the terms of the Brothers' Trust rather than by him personally.
- [227] Mhinder's claim against Gina for rental income in Action 716 was one of the few claims to survive the summary trial. The judge ruled Mhinder had standing to pursue the claim because it was personal to him, and because Mhinder submitted he had been unaware of Gina's misappropriation of rent prior to the Bhagwan Mayer Settlement Agreement. He noted, however, the duplication between the pleadings in the Gina Mayer Rents Action and Action 716, and directed that Mhinder's claim for rental income against Gina in Action 716 be stayed as an abuse of process.
- [228] In the ensuing applications to amend his pleadings, Mhinder proposed that his claim against Gina for rental income be dealt with solely in the Gina Mayer Rents Action, and applied to amend his statement of claim in that action by properly describing the properties at issue as assets of the Brothers' Trust. Mhinder explained these amendments in an affidavit of December 10, 2010:
4. I accept that all of these properties are trust properties of the Brothers' Trust. I do not recall ever disputing this and I formally accepted it on September 4, 2008, in my statement of defence and counterclaim amended in response to the amended statement of claim in action S073324. I also accepted it in my statements of claim filed in action S097716. The description of 6 of the Rental Properties as personal properties of mine in paragraph 10 of the present statement of claim in this action was a mistake.

...

7. I respectfully seek leave to amend the statement of claim in this action to correct the mistake in paragraph 10 of the statement of claim and to plead the Brothers' Trust consistently with the claims advanced by me in the other actions.

[229] In response, Gina filed an application seeking dismissal of the Gina Mayer Rents Action as an abuse of process, relying on alleged inconsistencies in Mhinder's pleadings and representations of his claim against her. She also argued Mhinder did not have standing to sue her if the properties were subject to the Brothers' Trust.

[230] The judge determined these issues at the second hearing. He accepted Gina's argument that, if the properties were subject to the Brothers' Trust, Mhinder did not have standing to bring his claim against her as a beneficiary of that trust and could only pursue it in his capacity as a trustee if the Court granted leave to do so under s. 86 of the Trustee Act. He stated:

[221] Mhinder Mayer's claim for collection of rents in relation to Brothers' Trust property owned for transactions that occurred prior to June 8, 2006 (the date of the Bhagwan Mayer settlement agreement), are barred by my reasons for judgment on the first summary trial application. The only trust claims or remedies that can survive are in respect of transactions that:

- (a) occurred following June 8, 2006; and
- (b) occurred prior to June 8, 2006, and which Mhinder Mayer was not or could not reasonably have been aware of.

Even then, Mhinder Mayer can only pursue those trust claims and remedies where he can demonstrate that Gina Mayer is still in possession of trust property: *Hayim v. Citibank NA*, [1987] A.C. 730 (P.C.); *Sharpe v. San Paulo Railway Co.* (1873), L.R. 8 Ch. 597.

[222] Any claim brought by Mhinder Mayer for accounting of rents is not in his capacity as a beneficiary. It must be brought in his capacity as a trustee and with leave of the Court: *Hayim*; A.H. Oosterhoff et al, *Oosterhoff on Trusts: Text, Commentary and Materials* 6th ed. (Scarborough: Carswell, 2004) at 14 and 27; and D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 1203.

[223] Mhinder Mayer must apply to the Court for directions pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464 because he claims that he holds legal title to the impugned properties for the Brothers' Trust and is, therefore, a trustee of trust property.

[224] Mhinder Mayer is not, in my opinion, able to bring a stand-alone claim as a trustee without leave of the Court in accordance with s. 86 of the Trustee Act: *Kordyban v. Kordyban*, 2003 BCCA 216 at para. 40; *Gibb v. McMahon*, [1905] O.J. No. 145 (C.A.); and *Bronson v. Hewitt*, 2010 BCSC 169 at para. 452.

...

- [227] In my view, the case cited by Mhinder Mayer, *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, is distinguishable from this case because it concerned a situation involving one beneficiary, one trustee, and a regime created by statute. Seen in that context, the case cannot stand for the proposition that the line of authority described in *Hayim* has been overturned by the Supreme Court of Canada in *Citadel*.
- [228] In addition, Mhinder Mayer's affidavit evidence does not disclose whether only some or all of the rents were collected prior to June 8, 2006. If they were then the claim is barred unless Mhinder Mayer could establish that he did not know and could not reasonably have known about the transactions.
- [229] As a trustee, Mhinder Mayer must apply for directions to advance the claim against Bhora Mayer. He must do so as the trustee. His claim is not a personal claim as a beneficiary, since the claim is one for an accounting of trust assets that must be returned to the Brothers' Trust and not to Mhinder Mayer personally.
- [231] The order arising from these reasons raises three issues:
1. Does Mhinder, as a trustee of the Brothers' Trust, have standing to sue for an accounting and recovery of rental income earned by trust properties held in his name?
 2. Does Mhinder, as a beneficiary of the Brothers' Trust, have standing to sue for an accounting and recovery of rental income earned by trust properties held in his name?
 3. Did the judge err in holding Mhinder's claim against Gina in the *Gina Mayer Rents Action* was a claim for constructive trust, and thus any claim prior to June 8, 2006 was barred?

Analysis

- [232] The third issue is straightforward. The limitation of June 8, 2006, the date of the Bhagwan Mayer Settlement Agreement, was based on the judge's findings in the summary trial. As those findings have been set aside, that temporal limitation is removed as well.
- [233] As to Mhinder's standing to sue Gina as a trustee of the Brothers' Trust, it is common ground that there is a strong principle of unanimity that requires co-trustees to act in concert. Professor Oosterhoff, in *A. H. Oosterhoff et al., Oosterhoff on Trusts: Text Commentary and Materials*, 7th ed (Toronto: Carswell, 2009) describes this in these terms at 1050-51:

Unless the trust instrument provides otherwise, trustees of private trusts must act jointly; that is, their decisions must be unanimous. The requirement of unanimity exists for every decision of the trustees; whether the decision relates to the exercise of a power or a duty is irrelevant for the purpose of determining how the trustees are to make decisions in relation to the exercise of the power or duty. In consequence of the unanimity requirement, if one trustee fails to agree with his or her co-trustees, there is a deadlock.

[234] Mhinder argues that principle is displaced here because the terms of the Brothers' Trust permit the trustees to hold trust property in their individual names and therefore to act unilaterally with respect to those properties. In particular, Paragraph 3 of Schedule "A" to the Brothers' Trust Agreement of March 20, 1966, states:

3. any property or properties (except personal homes) held by any one or more of the brothers, shall be considered held in trust as being equally owned by all five brothers.

[235] Further, Recitals B and C of amendments made to the Brothers' Trust on January 12, 1978, in anticipation of Bhagwan's divorce, affirm that individual trustees may hold trust property in their own names:

B. In pursuance of the Trust Agreement the Brothers have acquired many properties and carry on business through various companies and in many cases the formal registrations of title or ownership of properties and shares have been placed in the names of one or some of the Brothers as a matter of convenience rather than in the names of all.

C. Bhagwan is being divorced by his wife and the Brothers do not wish to have any of the properties subject to any unnecessary restraints or limitations, and in particular, do not want Bhagwan's wife to have any power to frustrate or delay any sale, mortgaging or development of real property beneficially owned by the Brothers pursuant to the Trust Agreement.

[236] I am not persuaded those terms of the Brothers' Trust displace the principle of unanimity. In my view, the fact the trustees may own trust property in their own names as a matter of administrative convenience is insufficient, by itself, to import the right to bring suit over that property unilaterally.

[237] It appears uncontroversial that Bhora would not agree to join Mhinder in taking action against Gina to recover rental income from the trust properties held in Mhinder's name. Thus, a deadlock arises. I am satisfied the judge properly found this situation may be addressed only by bringing a petition under s. 86(1) of the Trustee Act for directions respecting management or administration of these trust properties. While the courts are reluctant to exercise a trustee's discretion, they have an inherent jurisdiction to intervene in certain narrow circumstances, such as a deadlock: Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 3d ed. (Toronto: Carswell, 2005) at 1098, 1102-1104; *Kordyban v. Kordyban*, 2003 BCCA 216, 13 B.C.L.R. (4th) 50.

[238] I discern no basis on which we could interfere with the judge's finding that Mhinder has no standing as a trustee to bring this action against Gina without seeking directions.

[239] Mhinder then argues the judge erred in finding he did not have standing to bring the Gina Mayer Rents Action in his capacity as a beneficiary of the Brothers' Trust pursuant to the doctrine of knowing receipt of trust property. He maintains this is a personal claim and the judge wrongly found it was not sustainable unless Gina still had possession of the trust property. As well, he says the judge misinterpreted the relevant law by wrongly distinguishing *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805,

152 D.L.R. (4th) 411 and holding that *Hayim v. Citibank N.A.*, [1987] 1 A.C. 730 (P.C., H.K.) negated this claim.

[240] The Supreme Court of Canada set out the elements of a claim for knowing receipt in *Citadel* at paras. 19, 21, and 24. In essence, a beneficiary may claim against a stranger to the trust for knowing receipt of trust funds where the stranger has improperly and knowingly received trust property for her own benefit.

[241] A beneficiary's first avenue of redress to recover trust property wrongly taken by a stranger to the trust lies, however, against the trustees to compel them to carry out their duties. It is only if the trustees are unwilling or unable to take action that a beneficiary may assume the position of the incapacitated trustees and sue to recover the trust property: *Waters' Law of Trusts*, at 1204. In *Hayim*, the principle was stated in these terms at 748:

These authorities demonstrate that a beneficiary has no cause of action against a third party save in special circumstances which embrace a failure, excusable or inexcusable, by the trustees in the performance of the duty owed by the trustees to the beneficiary to protect the trust estate or to protect the interests of the beneficiary in the trust estate.

[242] The judge properly recognized that *Mhinder's* dual role as trustee and beneficiary of the *Brothers' Trust* presents difficulty in advancing a claim of knowing receipt against *Gina* as a beneficiary. The trustees of the *Brothers' Trust* are not *ad idem* as to pursuing the *Gina Mayer Rents Action*. Thus, as both a dissenting trustee and a beneficiary, *Mhinder's* ability to pursue that action is circumscribed by the requirement that he first discharge his obligations as a trustee and apply to the court for directions as to whether he may pursue the action in that capacity. To hold otherwise would allow a dissenting trustee who is also a beneficiary of the trust to circumvent the requirement of trustee unanimity.

[243] I am satisfied the judge made no error in deciding *Mhinder* did not have standing to pursue the *Gina Mayer Rents Action* without leave of the court under s. 86 of the *Trustee Act*. Should *Mhinder* succeed in an application for leave, I expect the court determining that issue will decide whether the proper defendant in that action is *Gina*, *Bhora*, or both of them.

[244] I would therefore dismiss the appeal arising from paragraph 5 in the order made February 11, 2011 in Action S097716, which forms part of Appeal CA38809.

[245] This result requires an ancillary order as to the future course of the *Gina Mayer Rents Action*. I earlier set aside the judge's orders dismissing that action and dismissing *Mhinder's* application to amend the pleadings in Appeal CA38805. He now cannot pursue the action unless he obtains leave to do so. The issue of standing that requires leave will not arise, however, unless he is permitted to make the amendments dealing with ownership of the properties. I would therefore order that *Mhinder* is at liberty to renew his application to amend the statement of claim in this action, but thereafter the action will be stayed until determination of his application under s. 86 of the *Trustee Act*.

5. Did the judge err in finding Mhinder could not pursue his claims under the BCA due to the "Disavowal Pleading"?

[246] This appeal arises from the judge's finding at the second hearing that, because Mhinder's amended statement of claim in Action 716 disavowed the relief he sought in the Bhora Mayer Action and the Oppression Proceeding, Mhinder was barred from seeking derivative relief and relief from oppression against the new parties. While this order falls with the others made at the conclusion of the second hearing, I am satisfied it is appropriate to address the import of the "Disavowal Pleading" because it remains extant in Mhinder's pleadings.

[247] The background to this issue is set out in paragraphs 21-28 of the reasons for judgment of my colleague, which describe the pre-trial motions and case management directions that preceded the summary trial. Briefly, Mhinder made several attempts to consolidate his claims by adding parties and claims to the Bhora Mayer Action. These were unsuccessful due to the positions taken by the respondents and the judge's directions on October 13, 2009, which left Mhinder no option but to pursue his claims in three separate actions. The result has been tremendous duplication in his pleadings, as well as an inability to plead his claims in the alternative in the same action, as is the usual practice.

[248] Consequently, on October 20, 2009 Mhinder amended his statement of claim in Action 716 to include the Disavowal Pleading:

87 Mhinder Mayer has commenced Action No. S093607 (the "Oppression Proceeding"), and has filed a counterclaim in Action No. S073324 (the "Original Action") against Bhora Mayer and the Identified Trust Companies. In this action he disavows any relief he claims in the Oppression Proceeding and the Original Action.

[249] The respondents raised no objection to this pleading and, as Mhinder points out, both he and they continued to pursue pre-trial steps in each of the actions.

[250] The judge, apparently on his own initiative, raised a concern about the Disavowal Pleading during the summary trial and, in his reasons, stated that it raised confusion about the nature of the relief sought by Mhinder under the BCA, and resulted in apparent duplication in the pleadings in the three actions with respect to that relief. He left resolution of this issue "for another day", however, stating:

[270] It is not clear therefore, whether Mhinder Mayer intends to seek any of the relief sought in his original petition that was not duplicated in the counterclaim he filed in the Bhora Mayer Action. Nor is it clear what sections of the Business Corporations Act Mhinder Mayer relies upon in his current action as none are mentioned in the amended statement of claim. There was a lack of consistency in oral submissions as well. I leave it for another day to resolve the nature of the statutory relief Mhinder Mayer seeks, i.e., whether he seeks any of the relief previously sought in the petitions, and whether at this stage, he is entitled to do so.

[251] The issue was picked up and pursued by the respondents during Mhinder's amendment applications. At the hearing of October 4, 2010, Mhinder's counsel clarified the Disavowal Pleading was not intended to disavow any relief substantively but simply to acknowledge he was not trying to duplicate the relief he sought as between proceedings. At the conclusion of the second hearing, however, the judge found this pleading represented an unequivocal election by Mhinder that precluded him from pursuing the relief he sought under the BCA. He found the trust claims Mhinder had advanced in Action 716 were based on an ownership interest in the respondents' companies that was inconsistent with the claims he now sought to advance as a shareholder under the BCA. He observed that, if Mhinder had succeeded in those trust claims, he would not now be able to bring proceedings against Richard, Rita, and Gina and their companies under that legislation. He concluded:

[268] In my view, having regard to the historical circumstances of the litigation, Mhinder Mayer's claims to add the secondary defendants as parties to the oppression proceedings after my reasons for judgment were issued in the first summary trial proceeding, and after his election to disavow in VA S097716, are abusive. They show an ongoing attempt by Mhinder Mayer to advance claims against the same parties regardless of their inconsistency with previous or existing claims.

...

[272] I am of the view that because Mhinder Mayer made his disavowal election against the secondary defendants for the matters complained of in the existing amended statement of claim in VA S097716, he should not be permitted to pursue derivative relief against the secondary defendants in respect of those matters.

[252] I am satisfied the Disavowal Pleading did not represent a formal election and was simply an indication that Mhinder intended to avoid duplication of relief, necessitated by the case management orders. Properly construed, it was limited in its application to Action 716 and evinced a present intent to continue with the claims under the BCA in the Bhora Mayer Action and the Oppression Proceeding. Moreover, when Mhinder amended his pleadings to include the Disavowal Pleading, the defendants to his counterclaim in the Bhora Mayer Action and in the Oppression Proceeding were different from the defendants in Action 716. It is therefore difficult to construe the Disavowal Pleading as directed to future proceedings against the Secondary Defendants.

[253] Nor is it clear to me that the claims made by Mhinder in Action 716 were necessarily inconsistent with those made under the BCA in the Bhora Mayer Action and the Oppression Proceeding. If he succeeded in establishing a 50 percent beneficial interest in the properties and companies of the defendants to Action 716 by virtue of his trust claims, I am not convinced this would preclude him from advancing an oppression claim as a shareholder of the Identified Trust Companies against Bhora, and perhaps other respondents, for mismanagement or misappropriation of trust assets. In essence, rather than pleading inconsistent facts, Mhinder's allegations may be seen as allegations based on

different forms of liability arising from the varying roles played by the respondents in what he claims were wrongful transactions. Had Mhinder been able to bring his trust claims and his claims under the BCA in the same action, I cannot see what would have precluded him from pleading these in the alternative: *Mahoney v. National Bank Financial Ltd.*, 2005 NSCA 139 at paras. 15-16, 238 N.S.R. (2d) 237, *aff'g* *National Bank Financial Ltd. v. Potter*, 2005 NSSC 8, 231 N.S.R. (2d) 14.

[254] I would accordingly allow the appeal from paragraph 3 of the order that forms the basis for Appeal No. CA38806 and paragraph 3 of the order that forms the basis for Appeal No. CA38809, both orders having been made on February 11, 2011.

[255] Finally, I cannot leave this matter without an observation on the extensive overlap in the claims presented by Mhinder in Action 716, the Bhora Mayer Action, and the Oppression Proceeding. While the future of any amendments to those pleadings will lie in the hands of the parties and the case management judge, it is my admittedly gratuitous view that this extensive and complex litigation cries out for simplification and consolidation of those claims.

Conclusion

[256] Appeals CA38462, CA38597, CA38598, CA38599, CA38600, CA38680, CA38681, CA38805, CA38806 and CA38807 are allowed.

[257] The appeal from paragraph 5 of Appeal CA38809 is dismissed, and the balance of this appeal is allowed.

Reasons for Judgment of the Honourable Madam Justice D. Smith:

[258] I have read the reasons of my colleagues and I agree with both sets of reasons.

"The Honourable Mr. Justice K. Smith"

"The Honourable Madam Justice D. Smith"

"The Honourable Madam Justice K. Neilson"

APPENDIX

GLOSSARY OF TERMS

"Acknowledgements of Trust"

Documents signed by Richard Mayer, Rita Webb, and Gina Mayer, dated December 24, 2001, alleged by Mhinder Mayer to evidence an express trust or "new family trust" for his benefit.

"Archer Holdings"

Archer Holdings Ltd. An amalgamation of various companies bearing the names Archer Holdings Ltd., Malo Enterprises Ltd., Mayne Island Concrete Ltd., and Ladysmith Holdings Ltd. (formerly Wee Tree Lumber Ltd.). A company owned by Rita Mayer. "Archer Holdings" is referred to by Mhinder Mayer as "New Archer Holdings", and is to be distinguished from previous companies with an identical or similar name.

"Aqua Pod"

Aqua Pod Ltd. A company owned by Gina Mayer.

"Bastion"

Bastion Project Management Ltd. A company owned by Richard Mayer.

"Bhagwan Mayer Action"

VA S017022. An action commenced by Bhagwan Mayer against Bhora Mayer, Mhinder Mayer, Gina Mayer, Richard Mayer, Rita Webb (then Rita Mayer), Kelly Mayer, the Osborne Group of Companies, the Disputed Trust Companies, "Richard Mayer's Companies", "Rita Webb's Companies", R & G Equipment Rentals Ltd., and others on December 12, 2001.

"Bhagwan Mayer Settlement Agreement"

The Bhagwan Mayer Action was settled pursuant to an agreement dated June 8, 2006. The parties to that agreement include: Bhagwan Mayer; Mhinder Mayer; Bhora Mayer; Richard Mayer; Rita Webb; Gina Mayer; Kelly Mayer; the Osborne Group of Companies; and the companies owned by Richard Mayer, Rita Webb, and Gina Mayer. The terms of the agreement included a payment of \$1.175 million to Bhagwan Mayer, and required the parties to enter into broad mutual releases and to cause the Bhagwan Mayer Action to be dismissed by entry of a (with prejudice) Consent Dismissal Order.

"Bhora Mayer Action"

VA S073324. An action commenced by Bhora Mayer against Mhinder Mayer on May 15, 2007, seeking, inter alia, a declaration as to an undivided one-half interest in the assets he claimed were owned by the Brothers' Trust and asserted by Mhinder Mayer to belong to him personally. Those companies are referred to as the "Disputed Trust Companies".

"Brothers' Trust"

A trust originally comprised of all five Mayer brothers (Bhim, Bhagwan, Bhora, Mhinder, and Welbier), and evidenced in documents as having been created in 1966. The Brothers' Trust was arranged so that the five brothers were equal beneficiaries and trustees of certain assets, including real property, corporate shares, corporate assets and other assets. The Brothers' Trust was amended in 1978 and again in 1984. The only brothers that remain in the Brothers' Trust today are Bhora Mayer and Mhinder Mayer.

"Custom Pumping"

Custom Pumping Ltd. A company owned by Rita Mayer.

"Disputed Trust Companies"

Mid-Isle Holdings Ltd., C.A.R. Aviation Ltd., Chemainus Ventures Ltd., and Island Structures Ltd. The ownership of these companies is the subject of a dispute between Bhora Mayer and Mhinder Mayer. That dispute is identified in the pleadings filed in the Bhora Mayer Action. The companies either belong to the Brothers' Trust or to Mhinder Mayer personally.

"Front Street Properties"

Front Street Properties Ltd. A company owned by Rita Mayer.

"Gina Mayer Rents Action"

VA S085604. An action commenced by Mhinder Mayer against Gina Mayer on August 6, 2008 for an accounting of rental income and repayment of compensation paid to Gina Mayer for her services collecting rent.

"Gina Mayer's Companies"

Companies owned by Gina Mayer: R & G Equipment Ltd. and Aqua Pod Ltd.

"Identified Trust Companies"

Osborne Contracting Ltd., Osborne Industries Ltd., Gulf Coast Materials Ltd., Mayer Truck & Equipment Ltd., Timberland Investment Ltd., and Holman Transport Ltd. They are owned by the Brothers' Trust. They are also known as the "Osborne Group of Companies".

"Island Aggregates"

Island Aggregates Ltd. A company owned by Richard Mayer. It is the result of an amalgamation of Island Aggregates Ltd. (formerly Nanaimo Concrete Ltd.) and Island Pumping Ltd.

"Mack Sales"

Mack Sales & Service of Nanaimo Ltd. A company owned by Richard Mayer.

"New Concrete Concepts"

New Concrete Concepts Ltd. A company owned by Richard Mayer.

"Oppression Proceeding"

VA S093607. An action commenced by Mhinder Mayer on May 15, 2009 against Bhora Mayer and the Osborne Group of Companies, seeking a declaration of oppression, that certain companies be liquidated, an accounting of all monies due, and the appointment of a receiver-manager.

"Other Family Companies"

Ricky Mayer's Companies, Gina Mayer's Companies, and Rita Webb's Companies.

"Osborne Group of Companies"

Osborne Contracting Ltd., Osborne Industries Ltd., Gulf Coast Materials Ltd., Mayer Truck & Equipment Ltd., Timberland Investment Ltd., and Holman Transport Ltd. They are also known as the "Identified Trust Companies". These companies all belong to the Brothers' Trust.

"R & G Equipment"

R & G Equipment Ltd. Formerly R. & G. Equipment Rentals Ltd. A company owned by Gina Mayer.

"Richard Mayer's Companies"

Companies owned by Richard Mayer: Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and Island Aggregates Ltd. (formerly Nanaimo Concrete Ltd.).

"Richard Mayer Defendants"

Richard Mayer, "Richard Mayer's Companies", and Anuradha Mayer.

"Rita Webb's Companies"

Companies owned by Rita Webb: Archer Holdings Ltd., Custom Pumping Ltd., and Front Street Projects Ltd.

"Secondary Defendants"

A term used in the Bhagwan Mayer Settlement Agreement. It includes Richard Mayer, Rita Webb, and Gina Mayer, as well as the companies owned by them, and Marc Furnemont.

"The First Summary Trial"

VAS097716. An action commenced by Mhinder Mayer on October 20, 2009 against the "Richard Mayer Defendants", the "Webb/Mayer Defendants" and the "Osborne Group of Companies". After a 13 day long summary trial, the trial judge summarily dismissed most of Mhinder's claims on September 2, 2010.

"Webb/Mayer Defendants"

Rita Webb, "Rita Webb's Companies", Gina Mayer, and "Gina Mayer's Companies".

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