

CANADA / JUDGMENT

Mayer v. Mayer

2018 BCSC 8

COURT

Supreme Court of British Columbia

DECIDED

4 January 2018

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2018 BCSC 8 Mayer v. Mayer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mayer v. Mayer,

2018 BCSC 8

Date: 20180104

Docket: S073324

Registry: Vancouver

Between:

Mhinder Singh Mayer, Mid-Isle Holdings Ltd.

and D & A Crushing Ltd.

Plaintiffs

And:

Bhora Singh Mayer, Marc Furnemont, 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, 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 Management Ltd., New Concrete Concepts Ltd.,

and Front Street Projects Ltd.

Defendants

And:

Kelly Ann Mayer, D & A Crushing Ltd., Mid-Isle Holdings Ltd., Chemainus Ventures Ltd., Island Structures Ltd., and C.A.R. Aviation Ltd.

Defendants by Counterclaim

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

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R. Barry Fraser

Martin W. Bühler

Place and Dates of Trial:

Vancouver, B.C.

September 19-23, 26-30, 2016

October 3-7, 11-14, 17-21, 24-28, 31, 2016

November 1-4, 7-18, 21-25, 28-30, 2016

December 1-2, 2016

January 13, 16-20, 2017

February 9-10, 2017

March 9-10, 13-17, 20, 2017

Place and Date of Judgment:

Vancouver, B.C.

January 4, 2018

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SCHEDULE OF CORPORATE PARTIES

1.0 INTRODUCTION

-
- [1] At the heart of this dispute is a battle between two brothers over the assets of a family trust (the "brothers' trust") of which they are the last two surviving members. They are co-trustees and co-beneficiaries of the trust.
- [2] In the beginning there were five brothers in the trust, the sons of Bal Singh Mayer. In birth order, they were Bhagwan, Bhora, Welbier, Mhinder and Bhim. Together, they owned properties and operated businesses on Vancouver Island, principally in the areas of trucking, construction, and gravel and concrete production and sales.
- [3] The two remaining brothers are the plaintiff Mhinder Mayer (70) and the defendant Bhora Mayer (74). Each brother has commenced action as plaintiff against the other as defendant. Their claims have been consolidated into the present proceeding, in which the bulk of the claims are advanced by Mhinder Mayer. The number of other parties to this litigation indicates the extent of the fallout from their fight.
- [4] Among those other parties are members of Bhora Mayer's family: his wife, Gina Mayer, his son, Richard Mayer, and his daughter, Rita Webb, together with companies individually owned by them (the "family companies").
- [5] The brothers' dispute has spawned many claims. The principal questions that arise in relation to the brothers' trust are fourfold. The first is whether, by its terms, it entitles the brothers to equal benefit. If so, Mhinder claims that he is owed a significant sum of money by Bhora. The second is whether Mhinder has left the trust; if so, Bhora says that Mhinder's claim upon its assets is severely limited by the trust's terms.
- [6] The third is whether Bhora managed a group of companies acknowledged to be assets of the brothers' trust (the "identified trust companies" or "ITCs", particularly Gulf Coast Materials Ltd, or "GCM") oppressively and in a manner inconsistent with his duty to Mhinder as co-beneficiary. This question relates specifically to whether Bhora, as manager of GCM, dealt with the family companies on uncommercial terms, to the benefit of the members of Bhora's family and the detriment of Mhinder and GCM.
- [7] The fourth is whether a set of corporate parties legally owned by Mhinder, called the "disputed trust companies" or "DTCs", and properties registered in Mhinder's name, are in fact assets of the brothers' trust like the ITCs, as asserted by Bhora.
- [8] Other issues related to the brothers' trust include whether Bhora and Gina must account to Mhinder for rents Gina collected on trust properties and other properties, but which were deposited solely to her and Bhora's credit (the "Gina rents claim").

- [9] Within the family but outside the brothers' trust arise issues concerning the family companies and the plaintiff/defendant by counterclaim D & A Crushing Ltd ("D & A"). It is acknowledged that these companies are not assets of the brothers' trust. Mhinder asserts, however, that Bhora's children, Richard Mayer and Rita Webb, hold their respective companies, the family companies, in trust for him and Bhora pursuant to a separate express trust or a constructive trust (the "new family trust").
- [10] This is an issue of major importance in this litigation. Most of the money that is left is in these family companies. The claim of an express trust is based on documents signed by Richard and Rita at Bhora's request on December 24, 2001 (the "acknowledgements of trust"), by which they purported to acknowledge that they held their respective properties and companies in trust for Mhinder and Bhora. The circumstances under which these documents came to be executed do not readily surrender to rational analysis.
- [11] Turning to D & A, its shares are registered in the name of the defendant by counterclaim Kelly Ann Mayer, who is the wife of Mhinder Mayer. Richard, supported by Bhora, asserts beneficial ownership by way of either an intentional trust or a substantive constructive trust. Mhinder says that he and Bhora are the beneficial owners pursuant to an acknowledgement of trust executed by Kelly in January 2002 under circumstances similar to those under which Richard and Rita executed their acknowledgements of trust. In addition, D & A advances a claim for equipment it says was wrongfully converted -- unless, of course, the party who allegedly converted the equipment turns out to be the beneficial owner of D & A, or turns out to be beneficially owned by the beneficial owner of D & A. All outcomes are plausible. This is not a simple case.
- [12] For ease of reference, I have attached a Schedule of the groups of corporate parties that sets out how they relate to members of the Mayer family and fit into the claims.
- [13] I refer to all members of the Mayer family by their first names to reduce confusion; I mean no disrespect by doing so.
- [14] The remaining individual party, Marc Furnemont, was the controller, accountant, and major-domo of the businesses operated by the Mayer family from September 1984, when he was hired by Bhagwan, to September 2007, when the family infighting made his position untenable. He played a pivotal role in these matters. Mhinder claims against him for professional negligence.
- [15] The various claims, then, are based on the terms of the brothers' trust, on other trusts allegedly arising intentionally or pursuant to either remedial or substantive constructive trusts, on other equitable principles including knowing assistance in a breach of trust and knowing receipt of trust property, on the statutory remedy of oppression, and on common-law principles of negligence, contract and conversion. No stone is left unturned or uncast.

2.0 THE MAYER FAMILY AND THE BROTHERS' TRUST

2.1 Origins

- [16] In their Agreed Statement of Facts, the parties agree that Bhora and Mhinder and their three brothers were parties to the brothers' trust, which is evidenced by three written agreements bearing the dates of March 20, 1966 (the "1966 Agreement"), January 12, 1978 (the "1978 Agreement") and February 8, 1984 (the "1984 Agreement").
- [17] As indicated, the other brothers are no longer members of the brothers' trust. Welbier died in 1985. His death, and the departures from the trust of the eldest, Bhagwan, and the youngest, Bhim, all gave rise to litigation, as we shall see.
- [18] In this regard I sound a cautionary note: the only brothers who participated in the trial before me were Bhora and Mhinder. Consequently, all the evidence concerning Bhagwan, Welbier and Bhim, apart from court documents, came solely through the respective lenses of Bhora and Mhinder, and may therefore be subject to distortion for reasons I discuss below in section 4.0.
- [19] The five brothers (there were also two sisters, but they had no involvement in the trust) grew up in and around Crofton and Duncan, BC. Their father, Bal, began with an operation in Crofton that consisted of one truck from which he sold wood. Through hard work and successful entrepreneurship, the business expanded in anticipation of the construction of the Crofton Pulp Mill. Bal acquired a lot on which he developed a gas station with a little grocery store and a bank. The family lived in the basement. He acquired more trucks to haul gravel during the pulp mill construction, and Bhagwan and Bhora assisted in the work.
- [20] Through the '50s and into the '60s, the family continued to work at various projects in and around Crofton. When demand for the trucks dried up, Bal and the boys worked in the mill. Then in about 1965, Bhagwan and Bhora secured a contract to haul gravel and supply materials for the construction of a new pipeline, and set up Mayer Brothers Contracting.
- [21] Not long after that, Bal, who had had some family businesses in India, encouraged the brothers to form what became the brothers' trust, an agreement by which they would all work together for their common good, holding properties and businesses in trust for the five of them.
- [22] According to Bhora, Bal transferred properties of his own into the names of Bhagwan and Bhora without consideration, and the brothers proceeded to develop and incorporate a number of businesses over the ensuing years, all centred around trucking, equipment repair and gravel and ready-mix concrete production. These included the ITCs: Osborne Contracting Ltd ("OCL"; Crofton is located on Osborne Bay, hence the name), Osborne Industries Ltd, Holman Transport Ltd, Mayer Truck & Equipment Ltd, Gulf Coast Materials Ltd and Timberland Investments Ltd.

[23] The foundational trust document is the 1966 Agreement. Although it is dated March 20, 1966, and is signed by all five brothers, there is a disagreement about when it was signed. Three of the brothers, Welbier, Mhinder and Bhim, would have been minors at that time. The only copy that survives is one that was appended to the 1978 Agreement, and is headed "Schedule 'A' to the Mayer Brothers Agreement".

[24] That 1978 Agreement begins with the following three recitals:

A. The Brothers entered into a Trust Agreement dated the 20th day of March, 1966, a true copy of which is attached hereto as Schedule "A" to this Agreement, to permit them to carry on business and own properties together even though three of them were not then of full legal age;

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 registration 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 property subject to any unnecessary restraints for 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;

[25] The thrust of the 1978 Agreement is to confirm that the 1966 Agreement remains binding on the brothers, and to effect the transfer from Bhagwan to Welbier and Mhinder of a number of properties and interests in property registered in Bhagwan's name, to be held in trust for all the brothers "as Bhagwan is now doing".

[26] According to Mhinder, the 1966 Agreement was not executed in 1966, but rather was prepared much closer to 1978 in the context of Bhagwan's marital difficulties. Bhora maintains that it was executed as stated in 1966, notwithstanding that Welbier, Mhinder and Bhim were minors.

[27] In these circumstances, one might well wonder whether the entire arrangement was a sham designed to protect assets from Bhagwan's soon to be ex-wife. If so, it was a poorly concealed one. But the date of execution is not a question I have to resolve, nor does any party dispute the validity and binding nature of the trust documents. What is clear, and I find, is that the brothers all conducted themselves as if bound by the arrangement not only after 1978 but well before, and as noted, it is an agreed fact that the terms of the trust are those set out in the 1966 Agreement as modified by the subsequent agreements. This nevertheless foreshadows the evidentiary difficulties that are to come concerning the business relationships among members of the Mayer family.

[28] I turn, then, to the terms of the brothers' trust.

2.2 The terms of the brothers' trust

[29] I set out the terms of the 1966 Agreement in their entirety:

THIS TRUST AGREEMENT SHALL ENURE FROM THIS DAY FORTH BETWEEN AND TO THE MUTUAL AND EQUAL BENEFIT OF THE UNDERSIGNED FIVE BROTHERS:

Bhagwan Mayer

Bhora Mayer

Welbier Mayer

Mhinder Mayer

Bhim Mayer

1. Mayer Brothers Contracting Ltd was incorporated in 1965, with directors being Bhagwan Mayer and Bhora Mayer, and shareholders being Bhagwan Mayer and Bhora Mayer. The interests of Welbier, Mhinder and Bhim Mayer are held by Bhagwan and Bhora in trust, until such time as a) the brothers are of age to become signatory and b) the brothers have joined the business on a full time basis.
2. ALL ventures engaged in shall be owned equally by all five brothers until such time as this agreement is altered or cancelled.
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.
4. IT IS AGREED that the financial needs of the brothers will vary and therefore it is agreed that equalization of drawings shall not be considered until such time as mutually agreed upon. [This clause was deleted by the 1984 Agreement.]
5. There shall be no question of position or effort as each agrees to do his part towards equal benefit.
6. If any venture, acquisition of business or property is engaged in by any one of the brothers for his personal benefit, he must clearly define this and obtain release of this trust for the purpose of his venture.
7. IF A BROTHER WISHES TO LEAVE THE TRUST he must sell and transfer his position, shares and properties to the other brothers at the original value, and/or purchase price. Payment of this and any inequity of personal drawings may be made by the other brothers over a five-year period. [This clause was deleted and replaced by the 1984 Agreement.]
8. THIS AGREEMENT can not be assigned to anyone, and shall be binding on heirs.

[30] Particularly contentious are: the meaning of clause 4 and the effect of deleting it on Mhinder's assertion of entitlement to equality; the application of clause 6 to Bhora's claim that the DTCs and properties registered solely in the name of Mhinder are in fact assets of the brothers' trust; and the consequences of clause 7 and its successor clause.

- [31] As we shall see, clause 7 was subsequently replaced, but its effect on the rights of a brother who "wishes to leave the trust" remained essentially the same: his claim against the assets would be limited to his proportionate share of their original value net of encumbrances, not their value at the time of leaving.
- [32] Bhora explained how this concept was one championed by their father as a way to keep the family together. But that is not the effect it has had. One brother after the other has left, with litigation the invariable result.
- [33] The first lawsuit was commenced in 1986 on behalf of the daughter and heir of Welbier, who had died in September 1985. She was met by the 1984 Agreement's replacement of clause 7 in the 1966 Agreement. The original clause 7 dealt with what happened when a brother wished to leave the trust, but neither the 1966 nor 1978 Agreements made any provision for what was to happen upon the death of a brother. This was rectified in the 1984 Agreement, which on its face was executed by all five brothers on February 8, 1984.
- [34] The 1984 Agreement, drafted without the benefit of legal advice, provided in clause 1 that "Clause 4 of the Trust Agreement of March 20th, 1966 be removed in its entirety". It went on to say this in clause 2:

It is further agreed that Clause 7, of the March 20th, 1966 Trust Agreement, be removed in its entirety and replaced by the following clause:

IF A BROTHER WISHES TO LEAVE THE TRUST he must sell and transfer his shares to the Brothers' Companies and his interest in all the properties to the other Brothers at the original value and/or his share of the purchase price. UPON THE DEATH OF ANY OF THE BROTHERS, the shares held by him in the Brothers' Companies shall be transferred forthwith to the surviving Brothers to this Trust. The total monetary consideration shall be the original value of the shares at the time of incorporation of the Companies. If, however, this clause be nullified due to ambiguity or illegality, then, as a second option the transfer of the shares shall be at their fair market value. FURTHER, upon the death of any of the brothers, his interest in the properties acquired to date and any properties acquired after the date of this Agreement, shall be transferred forthwith to the surviving Brothers to this Trust. The monetary consideration shall be the total of that Brother's interest times the purchase price or fair market value of the properties less his share of the total encumbrances thereon.

- [35] This rather bewildering clause would appear to be an open invitation to litigation, and that is indeed what happened.
- [36] Once again, there was a divergence in the evidence about the execution of this agreement. According to Bhora, it was executed in 1984 on the date stated. He testified that it was Welbier who had brought up the need for a revision. Welbier had gone through a bitter divorce, and his lawyer presciently pointed out that the existing agreement lacked any provision concerning what would happen on a brother's death.

- [37] According to evidence Mhinder gave under cross-examination, this agreement was in fact executed after Welbier's death in 1985 and backdated, which would of course mean that Welbier's signature was forged. Mhinder's evidence in chief did not suggest this; there, he said that Bhagwan had summoned him to Duncan to sign the 1984 Agreement because there needed to be a change "in case someone dies".
- [38] Was this, then, another sham transaction? As between Bhora and Mhinder, that is not an issue I need to resolve. Neither suggests that the 1984 Agreement is not binding, and the evidence, of which there was little and even less that was reliable, falls short of establishing that it is indeed a fraud. If it is, once again it is a most clumsily constructed one.
- [39] The 1984 Agreement's purported provision for what would happen on the death of a brother is not relevant to the claims of Bhora and Mhinder in this litigation, and the provision for what would occur if a brother "wishes to leave the trust" essentially reiterated what was there before. The significant changes for present purposes are: (1) the deletion of clause 4 in the 1966 Agreement, which recognized that the financial needs of the brothers would vary so that equalization of drawings should not be considered "until such time as mutually agreed upon"; and (2) the deletion without replacement of the portion of clause 7 in the 1966 Agreement that provided, on a brother's withdrawal, that "payment of [his share] and any inequity of personal drawings may be made by the other brothers over a five year period". Both Mhinder and Bhora rely on their differing interpretations of these amendments in arguing for and against the proposition that they are entitled to equal benefits as beneficiaries of the brothers' trust.

3.0 LITIGATION OVER THE BROTHERS' TRUST

3.1 The first lawsuit

- [40] Few private arrangements have generated as much litigation as the brothers' trust. As we have seen, the first lawsuit was commenced by Welbier's daughter in 1986, in the face of the surviving brothers' position that Welbier's estate was entitled only to a 1/5 share of the original value of the shares in the trust's companies, and of the original purchase price of the trust's properties, net of encumbrances. Her claim was ultimately settled in October 1989.

3.2 The second and third lawsuits

- [41] These actions were commenced by Bhim in 1987 and 1989.
- [42] According to Bhora, Bhim had been running the family's Brownsey Block operation and had run into difficulties. They moved him "upstairs" to Holman Transport, but Bhim was unhappy, and wanted to do his "own thing". He bought a truck and started hauling, in what the other brothers perceived was competition with Holman Transport. On December 1, 1987, Bhagwan, Bhora and Mhinder signed a letter demanding that he cease and desist that business activity and "any other activities in violation of the Trust Agreement". They took the position that he had left the trust.

- [43] Bhim's response was to commence action, initially in relation to the property where he lived, naming only Mhinder as a defendant. When his trial commenced in June 1989, Bhim called Bhora as a witness. Gina also testified. That apparently did not go well (see *Mayer v Mayer* (1994), 99 BCLR (2d) 166 (SC), where Bhim later alleged a conspiracy to commit perjury), and the trial was adjourned in order to allow Bhim to add Bhora and Bhagwan as defendants, and to expand his claim. It resumed in March 1991, and was purportedly settled on March 20 in circumstances under which Bhim found himself under considerable pressure. The next day, Bhim sought to withdraw from the settlement, but the trial judge considered it binding and stayed the action.
- [44] Bhim's appeal was dismissed in March 1993 (*Mayer v Mayer Estate*, 76 BCLR (2d) 330) for reasons which evidently seemed to Bhim (perhaps not surprisingly) to be a little harsh. Bhim retained new counsel and sought a rehearing. On that application, Madam Justice Southin would have ordered the rehearing, concluding that what had happened "offends my sense of justice" (*Mayer v Mayer Estate* (1993), 83 BCLR (2d) 87 at para 38). Unfortunately for Bhim, Southin J.A. was dissenting, and his application was dismissed. Leave to appeal to the Supreme Court of Canada was refused: 87 BCLR (2d) xxxii.
- [45] During the course of her Reasons, Southin J.A. mused, in words that the present proceedings imbue with an irony of which Her Ladyship would have been entirely unconscious:
- [34] Furthermore, no society can afford, nor indeed can the litigants themselves, interminable litigation. As yet, the Canadian legal system has not found its Dickens, but one day it may.

3.3 The fourth and fifth lawsuits

- [46] The fourth lawsuit was commenced by Bhagwan in January 1993. It was a matter of relatively minor significance. Of much greater significance was the fifth lawsuit, which Bhagwan started in December 2001 (the "Bhagwan action").
- [47] By all accounts, Bhagwan, being the eldest, was the most influential of the brothers in terms of the operation of the businesses that were part of the brothers' trust. He more or less ran the show, and had been instrumental in building up the businesses for the benefit of all the brothers. Consequently, it came as quite a surprise to both Bhora and Mhinder when Bhagwan announced that he wanted out of the brothers' trust in 1991.
- [48] According to Bhora, Bhagwan's departure was a difficult time. Bhagwan had been spending less time in the trust businesses over the preceding two years, and did not want to keep working anymore. He had a new wife, and was developing political connections. His eldest son was not interested becoming involved. Bhagwan wanted out. Bhora felt that Bhagwan was letting him down.

- [49] Bhora testified that Bhagwan called the brothers together to discuss his departure. He indicated that he would not create issues like Bhim had. The remaining brothers agreed to pay him a sum of money that would allow him to pay his arrears with the Family Maintenance Enforcement Program, and felt they owed him nothing more.
- [50] In the action he started in January 1993, Bhagwan asserted a beneficial claim to a portion of a company called Spruston Aggregates Ltd that was being operated outside of the brothers' trust. Bhagwan asserted that the shares were in fact held in trust for the brothers by its registered shareholder, Mr. Furnemont. Bhora and Mhinder took the position that although Mr. Furnemont had indeed held the company in trust for the brothers, the brothers (including Bhagwan) decided in 1989 to dissociate themselves from the company and grant the beneficial interest as well as the legal interest to Mr. Furnemont outright. I do not know how that ended, but it remained an issue in Bhagwan's next action. I discuss the status of Spruston Aggregates further in section 8.2 below, in the context of the beneficial ownership of D & A Crushing.
- [51] After Bhagwan's departure in 1991, the businesses continued to prosper. As we shall see, these included three companies: two that were not part of the brothers' trust, being Nanaimo Concrete Ltd, of which Bhora's son Richard was the sole shareholder, and Wee Tree Lumber Co. Ltd, of which Bhora's daughter Rita was the sole shareholder, and one DTC, Arrowsmith Concrete Ltd, of which Mhinder was the sole shareholder. These three companies operated ready-mix concrete plants and sold concrete under the OCL-registered trade name Mayco Mix, with Richard's Nanaimo Concrete being much the biggest producer. In a complex transaction that closed on April 27, 2001, all three businesses were sold to Lehigh Portland Cement Limited/Tilbury Cement Limited ("Lehigh") for some \$8,500,000 (the "Lehigh sale").
- [52] This transaction piqued Bhagwan's interest.
- [53] The Bhagwan action followed at the end of 2001. It casts a substantial shadow over the current litigation. In it, Bhagwan advanced claims that are echoed in the present proceeding, and the parties to the present proceeding, particularly Mhinder and Bhora, took positions and gave evidence in the Bhagwan action inconsistent with positions taken and evidence given before me. Moreover, Bhagwan's claims provide temporal context to the genesis of the acknowledgements of trust that Richard and Rita executed and which are the basis of Mhinder's claim of an express new family trust. Those acknowledgements were executed within weeks of Bhagwan's lawyer's initial correspondence to Bhora and Mhinder setting out Bhagwan's position and seeking information, and within days of the commencement of Bhagwan's action.
- [54] Bhagwan's allegations included the following:
- Bhagwan had not left the brothers' trust, but continued to be a trustee and beneficiary;

- it was an express or implied term of the brothers' trust after 1984 that all trust drawings would be made equally to all beneficiaries [this is the same as Mhinder's present claim for equal entitlement; he testified to a different understanding in the Bhagwan action];
- assets of the brothers' trust included three of the companies I have called the DTCs, whose shares were in Mhinder's name [C.A.R. Aviation, Mid-Isle Holdings and Chemainus Ventures; Bhora advances the same claim in the present action, but in the Bhagwan action he denied that they were assets of the brothers' trust];
- Bhora and Mhinder were in breach of their duties to Bhagwan as trustees by reason of their knowing participation in the transfer of various trust assets to third parties [this previewed Mhinder's claim in this action that Bhora has transferred trust assets to his family members, who were in knowing receipt];
- in a reorganization of the operations of the trust businesses (the "Osborne Group"), Bhora and Mhinder incorporated a number of new companies (the "related companies"), registered variously in the names of Richard, Rita, Gina and Mhinder, to which they transferred assets from the Osborne Group;
- all of Mhinder, Bhora, Gina, Richard, and Rita knew that the assets transferred to the related companies were and are held in trust for the Osborne Group/brothers' trust [this is much the same as Mhinder's present new family trust claim, except that while Bhagwan alleged that the related companies were assets of the brothers' trust, Mhinder alleges that the family companies are assets of a different trust, though still for the benefit of him and Bhora. In the Bhagwan action, Mhinder, Bhora, Richard and Rita all denied that the companies were subject to any trust, and none of them mentioned the acknowledgement of trust documents, in which, one expects, Bhagwan would have been keenly interested];
- Bhora, Mhinder, Richard, Rita and various companies sold trust assets and properties to Lehigh; and
- the proceeds of the Lehigh sale are trust assets.

[55] The defendants to that action divided into two groups that were separately represented. The first group (called the "Osborne Defendants") comprised Bhora and Mhinder and the companies that I have called the ITCs and DTCs. The second group (called the "Secondary Defendants") comprised Gina, Richard, Rita, Kelly, Mr. Furnemont and his wife, and the family companies, including most of those that Bhagwan called the related companies.

[56] This action proceeded to trial for two weeks before Madam Justice Morrison before adjourning. During the adjournment, the parties negotiated a settlement that included a payment by the Osborne Defendants to Bhagwan of \$1.175 million. The terms are set out in a Settlement Agreement made June 8, 2006, and are of interest in this proceeding because they are inconsistent with some of the positions now taken. In particular, by clause 4 of the Settlement Agreement:

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.

This is, of course, the opposite of what Mhinder now alleges in his new family trust claim.

[57] In addition, as suggested above, parties to this proceeding gave sworn evidence on discovery and in affidavits in the Bhagwan action that is at odds with evidence they have given under oath before me.

[58] The Bhagwan action was finalized by entry of a Consent Dismissal Order on October 12, 2006.

3.4 The sixth through twenty-third lawsuits and beyond

[59] In the years 2007-2009, members of the Mayer family or their companies commenced 18 actions in Nanaimo and Vancouver against other members of the family or their companies. Some of these have since been discontinued or dismissed, but most of them have been consolidated into this proceeding, with further claims added as the litigation developed.

[60] After the settlement of the Bhagwan action in June 2006, the relationship between Bhora and Mhinder became increasingly strained, and finally erupted into litigation. Bhora fired the opening salvo on March 22 and 23, 2007 when he filed caveats against properties registered in the name of Mhinder that Bhora claimed were assets of the brothers' trust, and in which he was therefore entitled to an undivided one-half interest. He followed this with an action he filed on May 15, 2007, in which he pleaded that he and Mhinder were both trustees and beneficiaries of the brothers' trust, and asserted his interest in the properties registered solely in Mhinder's name.

[61] Mhinder returned fire on July 30, 2007, when he filed his statement of defence and counterclaim. Mhinder maintained that five of the properties identified by Bhora were his own, and not trust properties. He counterclaimed for his one-half interest in rent collected from properties that were trust properties, but which rent he alleged was kept by Bhora for himself (now known as the "Gina rent claim" because the rents were physically collected by Gina).

[62] Mhinder went on to claim that the six ITCs had been operated by Bhora for his own benefit, inconsistently with Mhinder's best interests as beneficiary. Finally, Mhinder claimed against Mr. Furnemont as a defendant by counterclaim for negligence in the management and administration of the ITCs.

[63] The litigation escalated as the brothers' relationship deteriorated. In March 2008, Bhora amended his statement of claim to include a claim for an interest in the DTCs. Mhinder subsequently launched four further actions and issued a petition alleging oppression.

- [64] One of Mhinder's four further actions, commenced on October 20, 2009 to comply with a deadline imposed by the judge then assigned to manage the litigation, was the new family trust claim. With this, Mhinder rolled out the heavy artillery. Relying on the acknowledgments of trust, he alleged that Richard and Rita held the shares in their respective companies, together with properties registered in their names, in trust for Bhora and Mhinder. Much of the ammunition expended in this litigation has been spent on this claim, which brought Richard and Rita and their companies into the brothers' fight and is quite inconsistent with the position all members of the family (other than Bhagwan) took in defending the similar claims brought in the Bhagwan action.
- [65] The very starkness of this inconsistency, among other things, led the defendants in that new family trust claim (there had as yet been no consolidation) to apply for judgment dismissing it by way of summary trial.
- [66] Ultimately, after much procedural wrangling by the parties and a 13-day summary trial that included the cross-examination of Mhinder on his affidavits, Mr. Justice Walker dismissed all of Mhinder's new family trust claims: *Mayer v Osborne Contracting Ltd*, 2010 BCSC 1249. Much turned on the inconsistency between the evidence Mhinder gave in the Bhagwan action and the evidence he gave before Walker J., who decided the application "based on Mhinder Mayer's own case, including his evidence and prior conduct, without the need to weigh conflicting affidavit evidence" [para 292]. Walker J. was much struck by the fact that if he accepted Mhinder's evidence about the new family trust, "then it would mean he gave misleading and inaccurate discovery evidence in the [Bhagwan action] in order to benefit himself" [para 248], a position, he found, of the sort rejected by Huddart J., as she then was, in *Werner v Werner*, [1987] BCJ No. 2546 (SC), pursuant to the "clean hands" doctrine.
- [67] Mhinder appealed that decision. In the meantime, on a further summary trial application, Walker J. dismissed Mhinder's claims against Marc Furnemont based on the allegation that trust drawings had not been equal between Mhinder and Bhora, against Bastion Project Management Ltd, and against Gina for rents she collected. In addition, Walker J. dismissed Mhinder's application to amend his pleadings to allege further claims against Richard and Rita: *Mayer v Mayer*, 2011 BCSC 386. That judgment, too, was appealed, as were a number of other orders pronounced by Walker J. in the management of the litigation. Mhinder's application to the Court of Appeal for a stay of the proceedings in this court pending the hearing of his appeals was dismissed: *Mayer v Mayer*, 2011 BCCA 290.
- [68] Then on July 8, 2011, Walker J. awarded special costs against Mhinder arising from the dismissals (*Mayer v Osborne Contracting Ltd*, 2011 BCSC 914). These costs came to a total of \$1,163,590 plus taxes, demonstrating the high cost of the proceedings to that date, six years ago. This was unquestionably a very low point in the litigation for Mhinder. The tide turned, however, in the Court of Appeal.

- [69] That court's decision allowing Mhinder's appeals was delivered on February 17, 2012: *Mayer v Mayer*, 2012 BCCA 77, reported as *Mayer v Osborne Contracting Ltd*, 29 BCLR (5th) 232 ("Mayer CA"). The reasons are lengthy and cannot justly be summarized in a few paragraphs. The interested reader should therefore refer to the full judgment.
- [70] For present purposes, I note the following salient point (see Mayer CA at paras 68-84).
- [71] The court, per K. Smith J.A., considered that a determination of Mhinder's claims of express, resulting and constructive trusts could not properly be determined summarily in the face of conflicting evidence on the central facts, without a proper judicial consideration of the evidence, which would necessarily have included discovery and cross-examination of Mhinder's opponents. In other words, credibility could not be determined in a vacuum. Once issues of credibility arose, wrote Smith J.A., the judge ought to have permitted Mhinder to develop his case fully through discovery and cross-examination of the defendants on their affidavits or through a conventional trial. This problem was compounded by the fact that Mhinder was responding to a defence application, and was therefore deprived of the advantages accruing to plaintiffs in a normal trial of developing their claim fully in an orderly way and in its best light before it is challenged by the defence.
- [72] Following the Court of Appeal's decision, the various proceedings were assigned to me for ongoing case management, and I ordered their consolidation. Now, after five more years and a conventional trial of 60 days, all of the parties have had an opportunity to develop their cases fully.

3.5 Winding up the trust

- [73] One of the problems Mhinder had encountered both before Walker J. and in the Court of Appeal was that a number of the claims he wished to pursue were properly claims on behalf of the trust that the trustees would normally pursue, rather than claims personal to him. Before pursuing them, then, he was obliged to apply for directions under the Trustee Act, RSBC 1996, c 464.
- [74] In October 2013 I considered an application by Mhinder pursuant to section 86(1) of the Trustee Act for leave, as trustee, to pursue claims on behalf of the trust that his brother as co-trustee declined to pursue, or alternatively for confirmation of his right to pursue those claims as beneficiary. The claims in question were largely against Bhora, Marc Furnemont, and Richard, Rita and Gina, for various alleged wrongs suffered by the trust, and hence by Mhinder.
- [75] In addition, Mhinder sought a declaration that it was just and equitable to wind up the trust in order to break the deadlock between the trustees.

- [76] In *Mayer v Mayer*, 2013 BCSC 1958, I concluded that Mhinder could not pursue his proposed claims as a sole trustee of the brothers' trust, but was at liberty to pursue them in his capacity as a beneficiary of the brothers' trust, at his own risk and expense. Those claims were, accordingly, to be incorporated into the existing consolidated proceedings
- [77] I also concluded that, while a winding-up order seemed eminently sensible, I had no jurisdiction to order it in the face of Bhora's opposition. An appeal from that decision was dismissed, subject to the ability of the parties to raise at trial the question of whether the trust by its terms permitted a winding up order: *Mayer v Mayer*, 2014 BCCA 293.
- [78] That problem was resolved when the parties agreed to a winding up of the brothers' trust, subject to some details that I was asked to resolve: *Mayer v Mayer* (25 September 2015), Vancouver S073324. The winding up has continued. The proceeds realized will, of course, be subject to an accounting based upon these reasons for judgment.

3.6 A final skirmish

- [79] On March 10, 2016, some six months before the commencement of this trial, Bhora and the ITCs applied for an order disqualifying Mhinder's solicitors from continuing to represent him. If successful, Mhinder's position would have been seriously crippled, and the trial derailed.
- [80] The application was based upon the terms of an agreement Mhinder had entered into with his solicitors on April 1, 2011, to secure the fees he owed them. I dismissed the application (*Mayer v Mayer*, 2016 BCSC 791) and awarded special costs against Bhora (*Mayer v Mayer*, 2016 BCSC 615).
- [81] In this proceeding, Bhora pleaded that Mhinder's security agreement with his solicitors was one of a number of actions by Mhinder that demonstrate his election to withdraw from the brothers' trust. He did not pursue that allegation at trial.

4.0 CREDIBILITY

- [82] Credibility is a significant issue in this litigation, and I have already outlined some of the difficulties arising from positions taken and evidence given in the Bhagwan action that differ markedly from positions taken and evidence given in this proceeding. It should also be evident that there were many interlocutory applications in this proceeding, only some of which I have described above. In the course of those interlocutory proceedings, too, the parties gave evidence that differs from their testimony at trial to varying degrees, and there were many inconsistencies between their discovery evidence and their trial evidence.
- [83] Counsel for Bhora, Mr. Canofari, and counsel for Mr. Furnemont and Gina, Richard and Rita and their companies, Mr. Fraser, did not hold back in excoriating Mhinder's credibility, and his problems in that regard are indeed significant. But credibility was a problem not just for Mhinder.

- [84] Before I delve into detail, which necessarily will involve some criticism of the principal parties, I would like to set out some positive observations.
- [85] All members of the family spent a considerable time in the witness box. Mhinder was under cross-examination for 10 days. Both Bhora and Richard testified and were cross-examined twice: as adverse party witnesses in the plaintiff's case, and again as party witnesses in their own cases. Even Kelly was in the box for four days. I had ample opportunity to observe them all, and have been managing this case now for over five years.
- [86] Mhinder impressed me as a man who has worked very hard all his life (all seemed to agree that he was the hardest working member of the family), has cared about his work, and is extremely knowledgeable about the operations side of all of the family businesses. He was the man on the ground, getting things done. He said, and I accept, that he paid little attention to, and had little interest in, administration, financial statements, ledgers and tax documents. He did not hesitate to share his practical expertise with and provide assistance to other members of the family, particularly assisting Richard and Rita as they grew into the businesses. The evidence is undisputed that until 2007, Richard and Rita had a closer relationship with Mhinder than they had with their own father, Bhora. With his affable personality and his considerable energy and practical expertise, Mhinder generally earned the respect and loyalty of the employees and customers with whom he worked.
- [87] Bhora also impressed me as very knowledgeable and hard-working. He had developed a great deal of experience in all aspects of the business, and did his best to step into Bhagwan's shoes, taking over the Osborne Group's administration and management. This was a role that did not interest Mhinder. Bhora devoted himself to managing the trust businesses and he, too, generally earned the respect and loyalty of the employees who worked under him.
- [88] Regrettably, due in part I expect to the mysteries of family dynamics, they were unable to maintain the respect and loyalty of each other. Bhora, by all accounts, including those of his children, managed with a rather domineering and confrontational style. Mhinder had a strong independent streak and, uninterested in management, was equally uninterested in being managed. The Bhagwan action had opened up a number of issues about the brothers' trust, many of which have been replayed in this litigation. Their relationship markedly and rapidly deteriorated after the Bhagwan litigation concluded.
- [89] I found Richard and Rita both to be very bright, energetic and businesslike. Richard learned the businesses from the ground up and has demonstrated a strong entrepreneurial flair and sound managerial ability. Rita is the best educated member of the family, earning a BA from the University of Victoria and an MBA from the University of Ottawa. Although her grounding was accordingly a little less practical, she nevertheless was prepared to work in any area of the business where she could assist, and proved to be a capable manager. The family could justly take pride in them as the next generation.

- [90] As a family, then, the Mayers were hard-working and productive contributors-until conflict over the brothers' trust drove them apart. As litigants, all four of these parties showed to varying degrees a tendency to adjust their evidence to fit their perception of the current strategic exigencies-with Rita at the more benign end of that scale, moving upwards through Richard to Bhora to Mhinder at the top.
- [91] Richard, for instance, was not alone in attributing discrepancies between his evidence at trial and evidence he had given in earlier affidavits to carelessness:
- but again back in 2009 I don't think I proofread every word and punctuation in affidavits.
- [92] Richard was also obliged to acknowledge that an affidavit he had sworn on January 18, 2008, in opposition to a claim Mhinder had made to repayment of a loan by OCL to Richard's company, was quite simply wrong in several respects that were inconsistent with his assertion at trial that he was the beneficial owner of D & A. This makes it rather difficult to know what to believe.
- [93] Bhora had a similar problem on the same issue. In this trial, Bhora testified, as did Richard, that Richard is the beneficial owner of D & A, not Mhinder, and not Mhinder and Bhora together. But in an affidavit Bhora swore in this proceeding on January 15, 2008, Bhora deposed that while Kelly owned the shares in D & A, he believed that Mhinder was the beneficial owner. He testified to the same effect when cross-examined on that affidavit, referring to D & A as "Mhindy's company".
- [94] These affidavits were sworn early on in this litigation, when the strategic outlook was undoubtedly different. But it was sworn evidence that could not stand with the assertions of Bhora and Richard at trial that Richard was and always had been the beneficial owner of D & A.
- [95] When Bhora's inconsistent earlier evidence was put to him at trial, he was reduced to describing it as false and incorrect, for which he had no explanation. The fact remains that the 2008 affidavit was clearly intended to convey to the court that Mhinder was the beneficial owner of D & A, not Kelly.
- [96] In both cases, it follows that on one occasion or the other, these parties were misleading the court, whether intentionally or not. These particular instances both relate to the status of D & A. As I discuss below, there was a good deal of confusion about the status of that company in 2007 and 2008, and this may in part explain these discrepancies. It suggests to me, at least, that Richard and Bhora were not intending to mislead the court. Bhora, however, had the added problem of serious and irreconcilable differences between evidence he gave in the Bhagwan action and evidence he gave in this trial.

- [97] I found that the inconsistencies in the evidence of Richard and Rita, when viewed in the context of the evidence as a whole, were of a much lesser degree than those of their father and uncle. In general, where their evidence conflicts with that of Bhora or Mhinder and is not inconsistent with independent evidence, I prefer the evidence of Rita and Richard. This is particularly so with the evidence of Rita. Nevertheless, I am obliged to approach all of the evidence carefully.
- [98] Although not a family member, Marc Furnemont played a central role in the family businesses and was an important witness. He demonstrated a tendency to give evidence based on his reconstruction of events as opposed to his recollection, as, on occasion, did both Richard and Rita. To that extent, parts of their testimony must be treated with some caution. Generally, however, I found Mr. Furnemont to be a credible witness.
- [99] I now turn to Mhinder, who, it is clear, intended to mislead the court on more than one occasion, going so far as to persuade a customer to do the same thing. This relates to events that occurred when Mhinder was managing the operations at Gulf Coast Materials ("GCM"), an ITC that operated a ready-mix concrete plant on Salt Spring Island.
- [100] During the course of this litigation, after Mhinder was no longer managing GCM due to circumstances that will be discussed in more detail below (section 12.0), the solicitors then acting for the ITCs sought, among other things, information concerning what appeared to have been "a significant number of cash sales which took place while Mhinder Mayer was involved in [GCM's] affairs", and for which there had been no accounting. That was in November 2011. The suggestion was that Mhinder had been pocketing cash, and had to account to GCM for that money.
- [101] Through his solicitors, Mhinder denied this, responding that while he was general manager of GCM, cash sales were "recorded in the ordinary course" through the company's accounting records. This was untrue, and on April 30, 2012, Mhinder's counsel wrote to say that he was now instructed that there were two occasions on which Mhinder received cash payments, totaling \$1,900, and that he acknowledged his obligation to GCM in that amount. At trial, Mhinder testified that he had tried to conceal this because he felt very bad, knowing that it had been wrong of him, and was ashamed of it.
- [102] But that was not all. On February 10, 2012, the solicitors for the ITCs had raised another question: a dispatch sheet had been discovered in a desk drawer showing a delivery made to one B at 7:30 a.m. on September 1, 2011 - a delivery that was missing from the dispatch sheet that formed part of the records for that date. This suggested an alteration. There was no other record of a transaction with B. B had later produced a cheque payable to GCM in payment of a handwritten invoice from Mhinder. This was put forward as an example of a cash sale which had not been "recorded in the ordinary course" as Mhinder had claimed.

- [103] Mhinder's counsel responded by letter of February 13, 2012, explaining that Mhinder had prepared a handwritten quote that he had forgotten to enter into the computer. Because B was about to leave at the time of delivery, counsel wrote, it was agreed that he could pay later, and he did so by cheque to GCM after Mhinder had been removed as manager. There had been, counsel declared, no cash sale to B.
- [104] At this trial in 2016, Mhinder acknowledged that although this representation from his counsel was made on his instructions, it was false. B had paid him in cash, to the tune of \$1,400, and Mhinder had arranged for the dispatch record to be altered to hide this. But when problems arose at GCM, he repaid this money to B, and persuaded B to write a cheque for a slightly lower amount to GCM. He had hoped this would end the matter, but it did not, and Mhinder continued to weave a tangled web, piling denial on denial.
- [105] This process reached its pinnacle in June 2012, when Mhinder's counsel prepared an application for an injunction restraining Bhora's ability to manage GCM unilaterally. I heard this application on July 3 and 4, 2012. In support of it, Mhinder swore and filed an affidavit in which he deposed that there had been no cash sale to B, and even produced an affidavit from B to the same effect. B deposed that Mhinder had come to his property first thing in the morning and provided a quote on a piece of paper. B told Mhinder that he was going into camp and would like to pay when he returned, which Mhinder said would be no problem. B further deposed that he brought the cheque to GCM on October 21, 2011, and that this was the only payment he made. This corroborated Mhinder's evidence; but it was a lie.
- [106] Mhinder lied under oath again when examined for discovery on this question in May 2016, maintaining the fiction that B had never paid him cash.
- [107] When this trial started, B was on Mhinder's witness list. Then on September 23, 2016, during the first week of this trial, Mhinder's counsel wrote a letter to counsel for the defendants disclosing the true facts. Needless to say, B did not appear as a witness. On the witness stand, Mhinder acknowledged that it was wrong of him to persuade B to swear a false affidavit, that he had been very foolish, and that he was sorry for getting B into trouble. By way of context, his counsel noted that the timing of these events coincided with Mhinder reaching rock-bottom in the litigation, having lost the summary trial before Walker J., and facing liability for special costs in excess of \$1,000,000.
- [108] These acknowledged lies concerned a relatively minor matter in the great scheme of this litigation. But they are revealing. Mhinder lied not only to his brother, but also to his counsel and to the court; he then went further, involving a customer in both cheating GCM and deceiving the court, all to the end of corroborating his lie. In this, his conduct was not just foolish; it was egregious and it was disgraceful.
- [109] Mhinder had a number of other difficulties. As we have seen, he seeks in this action to establish that Richard and Rita hold their respective companies in trust for him and Bhora as a new family trust. In doing so, he relies on the acknowledgements of trust that Richard

and Rita signed on December 24, 2001. In the Bhagwan action, he repeatedly denied the existence of any such trust arrangement and made no mention of the acknowledgements of trust. He did not produce them although he had them in his possession. He explained this by maintaining that he had been assured by Marc Furnemont that the acknowledgement of trust documents need not be produced as they were simply not relevant.

- [110] Before me, Mhinder continued to contend that they were not relevant to Bhagwan's claims. As far as he was concerned, he testified, anything that happened after Bhagwan left the brothers' trust in 1991 was none of Bhagwan's business notwithstanding that his pleadings squarely raised the issue of whether the family companies were held in trust. Mhinder was adamant that the new family trust was nothing that Bhagwan needed to know about. In fact, he did not feel Bhagwan needed to know anything they had done in the family after he left.
- [111] This viewpoint left me wondering what Mhinder might have felt none of Bhora, Richard, Rita or the court needed to know in this litigation.
- [112] Like his evidence that Marc Furnemont had assured him that he need not produce the acknowledgement of trust documents in the Bhagwan litigation, I observed that it was a habit of Mhinder to seek to add weight to his narrative through corroborative detail in the form of statements that he testified were made by other persons. With B, he took this to the extreme of obtaining a false affidavit. In other instances, those other persons, when asked about Mhinder's evidence, denied making any such statements and failed to corroborate Mhinder. That was the case with Mr. Furnemont here. Similarly, when discussing a controversial proposal he had made to Richard and Rita in February 2007, Mhinder testified that Tony Fitterer, who handled outside accounting for the Osborne Group, enthusiastically described the proposal as a sweet deal for Richard and Rita. Mr. Fitterer testified that no such discussion happened. I have no reason to doubt his evidence.
- [113] Another habit of Mhinder was to retreat into breathtakingly equivocal explanations when challenged on cross examination with prior inconsistent statements, of which there were many. Thus, when confronted with inconsistent evidence he had given on discovery in the Bhagwan action, and asked whether what he had said there was true, he answered, "To my thinking at that time it most probably was true at that time".
- [114] Mhinder, I conclude, was very much inclined to shape his evidence to support his position, rather than shaping his position to fit the evidence. There seems to be a lot of that going about these days. In this trial, as I have commented, Mhinder was not alone in this tendency, but, I find, took it considerably further than anyone else.
- [115] This affects not only his oral testimony, but also notes he made that he tendered into evidence. He testified that these were his diary notes relating to relevant events and meetings. He explained that some of the notes were made contemporaneously, while others were later transposed into his notebook from contemporaneous notes he had made on scraps of paper. I ruled that these notes could be entered into evidence as past recollection recorded, and were admissible for the truth of their contents to the extent Mhinder

vouched for their accuracy in the sense of being truthful at the time that he made the notes. He did so.

[116] In the end, I find myself unable to give these notes much weight. I have no confidence that his notes truly reflected what occurred at the time, as opposed to how he would like things to have occurred. Accordingly, I am unable to rely on them as corroborating Mhinder unless they are supported by other evidence.

[117] The defendants contend that I should reject all of Mhinder's evidence and all of his claims on the basis that he has no credibility, and I cannot safely rely on anything he says.

[118] His credibility is certainly in tatters, but it does not necessarily follow that because his evidence is unreliable his positions are untenable, and the same may be said of Bhora. That depends on what I am able to conclude from all of the evidence.

[119] In these circumstances, I consider it appropriate to adopt the approach taken by Madam Justice Allan in *Sangha v Reliance Investment Group Ltd*, 2011 BCSC 1324. There, Allan J. commented at para 196 that because the stakes were so large and the animosities so deep, "none of the parties had the slightest hesitation in tailoring their evidence to advance their positions". She concluded at para 199 that the court must nevertheless "attempt to ascertain the truth despite the unreliability of the evidence of the parties", quoting from her earlier judgment in *Randhawa v 420413 BC Ltd*, 2007 BCSC 1507, *aff'd* 2009 BCCA 602, *leave to appeal ref'd* [2010] SCCA No. 73:

[222] The critical issue is to determine which evidence on the core issue is consistent with the probabilities affecting the case as a whole and shown to be in existence at the material time: *Farnya v. Chorney* (1951), 4 W.W.R. (N.S.) 171 (B.C.C.A.) at 174:

In short, the real test of the truth of a story must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

[120] With this in mind, I will now review the many claims and counterclaims advanced in this litigation. Because these claims are interwoven and interdependent on a number of different levels, they are not easily organized into a chronological, or, for that matter, any kind of linear fashion, and will necessarily involve some repetition. I turn first to discuss Mhinder's claim that the family companies and various properties are held by Richard and Rita in trust for him and Bhora.

5.0 THE NEW FAMILY TRUST CLAIMS

5.1 Overview

- [121] As we have seen, Mhinder and Bhora raise a number of issues concerning their rights as beneficiaries and trustees of the brothers' trust, including whether certain businesses and properties registered only in the name of one brother or the other are assets of that trust.
- [122] But what about Bhora's children, the next generation? There are businesses and properties registered in their names too. No one suggests that their businesses or properties are assets of the brothers' trust. Mhinder, however, alleges that a new family trust was intentionally created by which Richard and Rita agreed to hold their properties and businesses in trust for Bhora and Mhinder, not through the brothers' trust, to which Richard and Rita are strangers, but through an express trust to which they all agreed in the period after Bhagwan left the trust, culminating in the acknowledgements of trust they signed on December 24, 2001.
- [123] Alternatively, Mhinder submits that even if the acknowledgements of trust do not create an express trust, the circumstances are such that the court should nevertheless impose a remedial constructive trust based upon unjust enrichment, or a subset of that concept, being knowing receipt of trust property. The claim is strongly reminiscent of that advanced by Bhagwan in his action in relation to the "related companies", in which context Mhinder stoutly resisted it (see paragraph 54 above).
- [124] Assessing these claims requires a review of much of the background of the Mayer family and their businesses in order to understand the genesis of Richard's and Rita's businesses, and the circumstances relevant to a consideration of the law and the equities of the situation.

5.2 The litigation context

- [125] The litigation also provides useful context. As set out above, Mhinder first raised the new family trust concept in a writ of summons and statement of claim he filed on October 20, 2009, to comply with a deadline imposed for the bringing of all new claims. In his statement of claim, Mhinder reiterated allegations pleaded by Bhagwan concerning the alleged transfer of large amounts of money and assets from the brothers' trust to Richard, Gina, Rita and other family companies, for no consideration or gross undervalues. The statement of claim did not refer to the acknowledgement of trust documents. These did not appear in the pleadings until Mhinder supplied particulars of his trust claims on November 10, 2009.
- [126] According to Rita, Mhinder telephoned her on October 18, 2009. He told her that if she and Richard did not get on Mhinder's side in his fight with Bhora, and do what he asked, he would make sure that she and Richard lost everything. Rita declined to yield to what she perceived to be blackmail. Mhinder's trust claim was filed within hours.
- [127] Mhinder denied making any such threat, although it is clear that he did telephone Rita, which Kelly acknowledged. Kelly further recalled that Mhinder received a "really mean and nasty" letter from Rita's lawyer telling him not to contact Rita again. This is consistent with the Rita's version of events.

[128] Also consistent is the evidence of Mr. Fitterer. He testified that he first learned about the acknowledgements of trust when Mhinder faxed copies to him on February 23, 2009. He discussed them with Mhinder afterwards. He told Mhinder that such documents could give rise to significant tax ramifications, and he also strongly recommended that Mhinder attempt to achieve a settlement of his dispute with Bhora, rather than expend significant sums on legal fees. Mr. Fitterer testified that Mhinder told him that he wanted half of the trust properties and the rental properties, half of the Custom Group (Rita's companies) and half of the Bastion Group (Richard's companies). Mr. Fitterer's comment was that he thought the likely result would be just retaining half of the Osborne Group and the trust properties. Mhinder responded, "If I can't get half of everything, I will make sure no one gets anything." This evidence was not challenged in cross-examination.

[129] I accept the evidence of Rita and Mr. Fitterer. It does not follow from this that Mhinder's evidence concerning the new family trust must be rejected. It adds, however, to the skepticism that Mhinder's evidence attracts.

5.3 Legal Principles

[130] To demonstrate the creation of an intentional trust (express or implied), Mhinder must establish three certainties: certainty of intention to create the trust, certainty of the subject of the trust, and certainty of the trust object: Waters, Gillen and Smith: Waters' Law of Trusts in Canada, 4th ed. 2012 ("Waters") at p 140 and following; *Lewis v Union of BC Performers* (1996), 18 BCLR (3d) 382 at paras 21-22 (CA); and *Brown v Manuck*, 2015 BCSC 1966 at paras 147-150.

[131] Mhinder contends that all three certainties are established here by the acknowledgements of trust signed by Rita and Richard.

[132] The foundation for his constructive trust claims is Mhinder's proposition that he and Bhora contributed a great deal in both time, energy and money to the establishment and success of the businesses that are in Richard's and Rita's names, and that they were essentially family enterprises, created for the common good, to which the businesses of the brothers' trust devolved their operations. Mhinder asserts that these contributions continued through 2006. After the brothers fell out in early 2007, he contends, Bhora continued to render financial assistance to the businesses of Richard and Rita, but now over Mhinder's objections. Mhinder repeats the words of Dickson J. in *Rathwell v Rathwell*, [1978] 2 SCR 436 at 455:

As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another .[F]or the principal to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law-- for the enrichment.

- [133] The test for unjust enrichment thus has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment: *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30; *Pettkus v Becker*, [1980] 2 SCR 834 at 848; and *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762 at 784. Mhinder maintains that those three elements are met by the contributions that Mhinder and Bhora made both individually and through OCL.
- [134] With respect to knowing receipt, Mhinder relies on that subset involving strangers to a trust (here the brothers' trust), who receive trust property for their own use and benefit and with the knowledge that the property was transferred to them in breach of trust. It is that knowledge that establishes the "unjust" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy; constructive knowledge (knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice. In the absence of constructive or actual knowledge of the breach of trust, the recipient may well have a lawful claim to the trust property, and would not be considered to have been unjustly enriched: *Citadel General Assurance Co v Lloyds Bank Canada*, [1997] 3 SCR 805 at paras 25 and 48-51.
- [135] Mhinder further refers to the venerable concept of a substantive constructive trust (as opposed to a remedial one), recently resuscitated (at least as a valid pleading) by the Court of Appeal in *BNSF Railway Co v Teck Metals Ltd*, 2016 BCCA 350. A remedial constructive trust, as discussed above, is a judicial remedy constructed by the court and imposed to enforce an equity obligation arising from two categories: breach of fiduciary duty or (in our case) unjust enrichment. A substantive constructive trust, on the other hand, arises by operation of law as from the date of the circumstances that give rise to it, and may arise outside of the two categories that pertain to remedial constructive trusts. The court's function is merely to declare that it has arisen in the past; see *BNSF Railway* at paras 3-4. The court may declare that either type of constructive trust operates retrospectively.
- [136] The purpose of the substantive constructive trust is to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain: *Soulos v Korkontzilas*, [1997] 2 SCR 217 at para 17. The emphasis, then, is on a wrongful acquisition as opposed to unjust enrichment. Conceptually, as noted by Cory J. in *Rawluk v Rawluk*, [1990] 1 SCR 70 at 81, it is very similar to an express trust.
- [137] The example raised in the *BNSF Railway* case was a series of payments allegedly made automatically and by mistake that BNSF Railway alleged the defendant held in trust. The court noted that all constructive trusts require that the plaintiff show that a monetary award would be inadequate or inappropriate, and identify property or proceeds thereof to which the plaintiff's labour or money contributed. In short, the plaintiff must establish a direct link to the property that is said to be the subject of the trust. The advantage of alleging a constructive trust was the availability of an equitable tracing remedy, as opposed to a pure monetary award which might be subject to limitation periods or insolvency problems (see

paras 68-70).

[138] It must be remembered that the issue in BNSF Railway was whether a proposed amendment to plead a substantive constructive trust, as distinct from a remedial constructive trust, was bound to fail. The court concluded it was not; rather, at para 55:

it is open to a court, "where good conscience so requires" (Soulos at para. 34), to develop the law in this area on an incremental or a case-by-case basis beyond the constraints of the two categories of breach of fiduciary duty and unjust enrichment.

[139] As will be seen, I conclude that Mhinder's claims must fail. As a matter of evidence, there was no intention to create an express new family trust. As a matter of equity, the undoubted contributions of Mhinder, Bhora and Mr. Furnemont to the success of the family companies did not rise to a level where they constituted a transfer of trust property to them, or an un-bargained, unjust transfer of wealth within the family relationship.

[140] As the Supreme Court stated in Peel at p. 788:

At the heart of the doctrine of unjust enrichment, whether expressed in terms of the traditional categories of recovery or general principle, lies the notion of restoration of a benefit which justice does not permit one to retain.

In my view, the circumstances of this case are such that neither justice nor good conscience prevents Richard, Rita and Gina from retaining the benefit of the businesses they built.

5.4 A change in focus

[141] By 1988, Welbier had died and Bhim had departed the brothers' trust, leaving Bhagwan, Bhora and Mhinder. Counsel for Mhinder described the business at this point, I think accurately, as akin to a partnership with Bhagwan the managing partner. OCL was operating two ready-mix plants, one in Duncan and one in Nanaimo at 1125 Farquhar Street, selling concrete under the tradename "Mayco Mix" ("Mayco" being an abbreviation of "Mayer Company"). Spruston Aggregates, then held in trust for the three brothers by Mr. Furnemont, operated a gravel pit in Nanaimo on Spruston Road (the "Spruston pit"). GCM was operating a ready-mix plant on Salt Spring Island. Holman Transport provided trucking, equipment and transportation services. OCL was making and selling Waffle-crete construction panels, and had leased out the Brownsey Block-making business formerly managed by Bhim.

[142] There is no real dispute in the evidence that a change in focus began to develop at about this point. There were a number of motives for this. One was a desire on the part of Bhagwan, with which Bhora and Mhinder agreed, to pull their business back from employee-intensive operations with associated payroll and union issues, and move into a more management/consultation-centred role. Another was the prospect of looming environmental liabilities, particularly in relation to the Nanaimo ready-mix plant. Tax concerns were also a factor. And another generation was coming along. No one testified

that this change in focus in any way involved an expectation that trust concepts would apply.

- [143] The strategy the brothers developed at this point, as we shall see, was the genesis of most of the family companies that are the subject of Mhinder's trust claims. With the advantage of hindsight, it is not difficult to understand Mhinder's mindset. This change in focus, a legitimate business decision in which he participated, led to the devolution of operating businesses to, and the creation of businesses by, companies owned by Richard and Rita. The fact remains that this was done for consideration, and Richard and Rita added a great deal of value to their businesses through their own efforts.
- [144] As this process continued, Bhagwan, the "managing partner", withdrew from the brothers' trust. Bhora stepped into his shoes. Mhinder, always involved in the operational side, became increasingly marginalized in the context of an administration-focused two-person trust. The two operating entities in which he was involved outside of the trust, Nanaimo Concrete and Arrowsmith Concrete, were sold in the Lehigh sale. Then, in the wake of that sale, Bhagwan reappeared, alleging that assets of the brothers' trust had been distributed to "related companies" owned by Richard, Rita and Gina, and maintaining that those assets (or the proceeds from their sale) continued to be held in trust. Mhinder, Bhora, Richard, Rita and Gina all maintained, pleaded and deposed that this was not the case.
- [145] But, it seems to me, the point was not lost on Mhinder and when a falling out led to his increasing marginalization, his trust claim was born, a sort of Bhagwan 2.0. The principal modification was the allegation of a new trust replacing Bhagwan's claim on behalf of the brothers' trust. Like Bhagwan, Mhinder also advanced an alternative pleading of a constructive trust.
- [146] As I review Richard's and Rita's businesses that are the subject of Mhinder's trust claims, I will comment on the equities that the evidence discloses before turning to review the evidence relevant to Mhinder's claim of an intentional, express trust.
- [147] In this regard, much of what Mhinder relies on is reminiscent of the sort of "family collective" claim that the court in Sangha rejected on the basis that it was not a legally-recognized concept in Canada. But Mhinder bases his claim upon the application of Canadian legal concepts and precedents. These include due consideration of the autonomy of the parties, their legitimate expectations, and their right to order their affairs by agreement: see Peel at p. 803, and Kerr v Baranow, 2011 SCC 10 at paras 40-41. Consequently, it is not enough simply to say that the family members were prepared to work together for the benefit of each other, which was clearly the case. Many families do that, and the benefits typically go both ways. They did so, I find, in this case.
- [148] Before looking at the businesses, it is helpful to bear in mind the general approach that members of the Mayer family took to the distribution of money.

5.5 The family's approach to money

- [149] When it came to the brothers' trust, Bhagwan, Mhinder and Bhora were in the habit of drawing out such money as they required whenever they required it, and Mhinder and Bhora continued this practice after Bhagwan's departure. Essentially, they would make their needs known to Mr. Furnemont, and he would arrange to make the money available. How this was accounted for, and whether there was or needed to be overall equality, are subjects of different aspects of this litigation. But as time went by, there were also other sources of funds, including Gina, Richard and Rita and their companies.
- [150] Members of the Mayer family and their companies transferred cash back and forth to each other on a frequent basis. Again, it was Mr. Furnemont who generally orchestrated this. As the controller of all the companies, he was the man who always seemed to know where money could be found and where it needed to go. Sometimes the money was transferred as a loan; sometimes there appeared to be no conditions at all; only occasionally was there any formal documentation as to terms and expectations; often, those involved could no longer remember why the money was transferred. Richard described the practice as "just the way we did it": if one of them needed funds, another would notionally lend the money, but with no expectation of it being paid back. This loose arrangement is part of the backdrop against which the equities arising among family members must be assessed.
- [151] One exception to this course of dealing was a thoroughly documented loan of \$300,000 from OCL, the principal operating asset of the brothers' trust, to Island Aggregates, a company registered solely in the name of Richard (successor to Nanaimo Concrete). This loan, advanced in March 2007, was secured by a promissory note and was ultimately repaid in full. A question arises as to whether Mhinder knew of and consented to this loan before it was made. It is clear that he objected to it afterwards, and he now claims that it is one of a number of transactions in which Bhora favoured his children and their companies at the expense of the brothers' trust through dealing with them on uncommercial terms.
- [152] Mhinder also claims against Richard and Rita in debt in relation to various sums he advanced them personally (there were other advances going the opposite direction), and against Richard under a promissory note for \$900,000 signed by Richard in Mhinder's favour as part of the Lehigh sale.
- [153] The point is that although money was often transferred among various members of the family, no one suggested that the money was understood to be Mhinder's money, or Bhora's money, or brothers' trust money, or money for which the transferee was accountable to the transferor (unless otherwise stipulated). All contributed as they were able, and all expected to benefit without any particular accounting. The sense was one of an informal collective.

5.6 The Family Companies

- [154] I have already described in general terms the strategic tack taken by the brothers that led to a change in focus for the brothers' trust, and ultimately to the devolution of operating businesses to the family companies. But, as we shall see, this devolution involved transfers that benefited both sides, not gifts.
- [155] Through this process, Richard and Rita undoubtedly benefited from a good deal of familial assistance, principally from Bhora, Mhinder and Mr. Furnemont. But, I find, this assistance was rendered either for consideration, or, in the context of this family and this case, did not constitute the sort of "incontrovertible benefit" that gives rise to a restitutionary right. Otherwise, both Rita and Richard would undoubtedly have preferred to decline the benefit if given the choice: see Peel at p. 795.
- [156] With respect to all of their businesses, Richard's and Rita's family connections doubtlessly gave them advantages not shared by persons without such connections, but I find that they do not constitute a benefit that it would be unjust for them to retain in the circumstances of this case. As the court pointed out in *Pettkus* at p. 848, the common law has never been willing to compensate the plaintiff on the sole basis that his actions have benefited another. More is required, and is not to be found here. In the circumstances before me, to give Mhinder and Bhora a beneficial interest in the family companies, as Mhinder claims, would create, not remedy, an injustice. It certainly would be contrary to the expectation of the parties at the time.

5.6.1 Nanaimo Concrete Ltd. and the genesis of Arrowsmith Concrete

- [157] Bhagwan, I am told, had six children and had hoped that his eldest might take over the Nanaimo ready-mix operation. But neither that child nor any of the others was interested in following in their father's footsteps. According to Bhora, Bhagwan then offered to sell that business to Richard-Bhagwan's nephew and Bhora's son.
- [158] The precise details of how this came about are not really important. What is important, I find, is that the brothers agreed to sell the Nanaimo ready-mix business to Richard on a franchise basis, and this was the origin of Richard's company Nanaimo Concrete Ltd, incorporated on December 29, 1988. After the Lehigh sale, Nanaimo Concrete became Island Aggregates Ltd. It is not disputed that Nanaimo Concrete was, at its inception, Richard's company both legally and beneficially, and was never part of the brothers' trust.
- [159] Moreover, this was no gift. Pursuant to the brothers' change in focus, Richard's company would take over operation of the ready-mix business and all its employees from OCL. OCL would continue to own the land and equipment. Richard would buy the equipment over time, pay rent for the land, a franchise fee for use of the tradename Mayco Mix, and an administration fee for accounting and administration including the use of Marc Furnemont. In addition, Nanaimo Concrete would be responsible for dealing with environmental charges. This was all consistent with the brothers' desired change in focus described above.

- [160] Bhora testified, and I accept, that while Mhinder initially agreed to this sale to Richard, he later expressed misgivings. Mhinder viewed Nanaimo as "his town", having worked in the ready-mix business there for some time, and knowing all of the customers and competitors. Because Nanaimo Concrete was not a brothers' trust company, he was concerned that he would be considered to have left the trust if he continued to work in the same capacity for Nanaimo Concrete as he had when OCL owned the business. Bhagwan stepped in to resolve the matter and made it clear to Mhinder that he could work for Richard at Nanaimo Concrete, and be paid a wage, without being considered to have left the trust.
- [161] Moreover, Bhagwan agreed with Mhinder to establish another, smaller, ready-mix plant near Coombs, BC, that Mhinder could operate outside the trust. This business, to be operated in the shadow of Mount Arrowsmith, was incorporated as Arrowsmith Concrete Ltd. Arrowsmith later became Mid-Isle Holdings ("MIH") after the Lehigh sale, and is one of the DTCs. Through Arrowsmith, Mhinder, too, entered into a franchise agreement with OCL to use the Mayco Mix tradename, paying OCL a franchise fee and administration fees.
- [162] Thus, as discussed above, the benefits flowing from this arrangement went in both directions: to Richard, who was given an opportunity not readily available to someone outside the family; to Mhinder and Bhora as beneficiaries of the brothers' trust because it fulfilled their strategic aims, bringing in cash flow without operational obligations or risk of environmental liability; and to Mhinder personally by providing him with employment and the opportunity to establish Arrowsmith Concrete.
- [163] Bhora did not approve of Bhagwan's actions in this regard, but went along with them. He maintains, however, that they never went through with making Arrowsmith Mhinder's company although the shares were registered in Mhinder's name. As far as Bhora is concerned, it was always part of the brothers' trust. As I discuss later (section 6.3 below), I do not accept that evidence. Whatever may have been the status at the start, I find that Arrowsmith was conceptually intended to be Mhinder's company, and was treated as Mhinder's company by the time Bhagwan left in 1991.
- [164] Over the ensuing years, Richard, through Nanaimo Concrete, carried on with the operation and development of the ready-mix business in Nanaimo. As Mr. Furnemont testified, Richard brought a very different style of management to the company, improving it in many ways. He bought the equipment formerly owned by OCL, cleaned it up and bought new equipment as well. He continued to pay franchise and administration fees to OCL. Between 1989 and 1996, Nanaimo Concrete paid OCL franchise fees totaling \$1,886,349; administration fees totaling \$160,000; rent for 1125 Farquhar totaling \$372,000, and amounts for the purchase of well-used equipment totaling \$126,250.
- [165] Mhinder objects that these payments stopped in 1995-1996.

- [166] The franchise payments stopped because, I find, Richard had developed the business to the point where the continuing value in the Mayco name was largely due to his efforts, he had purchased all of OCL's equipment, and had bought or was buying the land. With respect to Richard's business development efforts, I accept his evidence and that of Mr. Furnemont that Richard had effected fundamental changes to the manner in which the Nanaimo ready-mix business was operated, upgrading it considerably.
- [167] In these circumstances, the parties agreed that enough had been paid. This is supported by the evidence of Richard and Mr. Furnemont, and accords generally with the circumstances independently established. I see no unjust enrichment here. Mhinder also stopped paying franchise fees on behalf of Arrowsmith.
- [168] Administration fees stopped, at least temporarily. I observe that the administration of businesses operated by members of the Mayer family did not necessarily follow the lines of ownership. Mr. Furnemont was, in essence, the chief administrator of all family businesses, whether inside or outside the brothers' trust. This applied not only to the businesses owned and operated by Richard and Rita, but also to those registered in the name of Mhinder.
- [169] Both Richard and Rita referred to Mr. Furnemont as "my controller" even though Mr. Furnemont remained an employee of OCL. But Mr. Furnemont was expected to bill Richard's and Rita's companies for his services even though much of the administrative work had been transferred from OCL to Bastion Management.
- [170] Mhinder submits that, on the evidence of the financial statements, Nanaimo Concrete stopped paying administration and management fees after 1995, paying nothing further until 2001 (Nanaimo Concrete thereafter paid consulting fees to OCL for assistance rendered in connection with the Lehigh sale). Mhinder describes this gap as financial support from Bhora and Mhinder in the form of Mr. Furnemont's services, whose salary was paid by OCL.
- [171] Once again, in the wider context of the manner in which this family operated, the evidence from Richard and Mr. Furnemont that there was an agreement between OCL and Nanaimo Concrete to suspend the payment of fees for Mr. Furnemont's services given all that it been paid up till then, the shift of administrative responsibility from OCL to Bastion Management, and the resumption of the payment of substantial fees after 2001, I am unable to find that this constitutes anything like unjust enrichment.
- [172] Ultimately, as I describe below, Nanaimo Concrete became the centrepiece of the Lehigh sale.

5.6.2 Bastion Management Ltd.

- [173] Bastion Management began as 363756 BC Ltd, incorporated on April 17, 1989. 363756 BC Ltd later became Bastion Project Management Ltd, and ultimately Bastion Management Ltd. I will simply use the term Bastion Management. Richard incorporated it on the advice of Mr.

Furnemont in order to purchase property at 265 Fry Street in Nanaimo, which is adjacent to the property at 1125 Farquhar Street where Nanaimo Concrete's ready-mix plant was located. It provided him with needed room for his equipment and trucks. That purchase completed on June 6, 1990 at a price of \$240,000.

[174] Later, on June 10, 1996, Bastion Management bought the property at 1125 Farquhar Street from OCL for \$550,000. OCL received \$275,000 cash, and gave a second mortgage back in the amount of \$275,000 at an interest rate of 7.75%. Nanaimo Concrete was now relieved of its rent obligation to OCL. Mhinder maintains those were terms excessively favourable to Richard, and support his contention that a trust arose. I reject that contention.

[175] During Mhinder's cross examination, Mr. Fraser suggested that it was Mhinder's idea to sell 1125 Farquhar to Richard because it had environmental problems. He put to Mhinder evidence Mhinder had given on discovery in the Bhagwan action as follows:

Q At some point the Farquhar property was sold to Nanaimo Concrete [sic]; is that right?

A Yes.

Q Were you involved at all in that decision?

A Yes, I was.

Q And how did it come about, the decision to sell the property to the Nanaimo company?

A The Farquhar Street property had some potential problems and, yes-- yes. And I knew of them and I mentioned that to Bhora. I said "Bhora, environmental problems are big problems." And after listening to some of the things that happened in Vancouver here and the amounts the government had to pay, I said, "You know what; we're going to sell it. Let's just sell it to Ricky." He is a lot younger than me. So we got enough raised, we sold it. Ricky said he would buy it. We sold it.

[176] When asked to confirm that his answers were true, Mhinder responded equivocally before being pinned down:

A Yes, somewhat. At that time what was in my mind.

Q What do you mean, "somewhat true"?

A Well, that's what was in my mind at that time, and we did sell it.

Q Was anything in these answers that aren't-- that isn't true?

A No, I don't think so.

[177] Mhinder then confirmed the truth of additional discovery evidence he had given in the Bhagwan action that he did indeed want to sell the property to Richard because of environmental contamination and because OCL needed the money.

- [178] Moreover, there was no evidence that the amount Bastion paid for the property, \$550,000, was less than its fair market value-indeed Mhinder's position in the Bhagwan action was to the contrary. Mhinder nevertheless points out that OCL received only \$275,000 cash, and gave a second mortgage back in the amount of \$275,000 at an interest rate of 7.75%. This resulted in payments rather less than what Nanaimo Concrete paid to OCL under the lease for the property. But I am unable to find that this constitutes anything like unjust enrichment. On Mhinder's own evidence, OCL received cash it needed and relieved itself of a significant exposure to liability it did not want. There was ample consideration.
- [179] In 1998, Bastion Management took over most of the administrative services provided by OCL, as those services were principally being consumed by Richard's companies. This relieved OCL of a number of employees.

5.6.3 Mack Sales & Service (Nanaimo) Ltd.

- [180] When Richard acquired the property at 265 Fry Street, it included a repair shop that Bastion Management initially rented out to an independent business. When that business proved unsuccessful, Richard incorporated Bastion Truck Maintenance Ltd in January 1996 to take over the business. That company was soon renamed B.T. Repairs Ltd. In 2001 it became Mack Sales & Service of Nanaimo Ltd ("Mack Nanaimo") when Richard acquired the Mack Truck franchise for the area.
- [181] I am unable to accept Mhinder's uncorroborated evidence that Bhora and Mr. Furnemont, acting on behalf of OCL, secured the Mack Truck franchise and put it in Richard's name, and then secured the lands that the former dealership had occupied and put them in Rita's name-essentially assigning assets the brothers had secured randomly between the children. Mhinder was unable to say that OCL put any money into the operation, could not say that he participated in any discussions about the purchase of the property, and was unable to provide any details of any of the financial aspects of these transactions. At the same time, he was obliged to concede that Richard had managed the company successfully and had grown it into a very successful business. No rational basis was offered for recognizing a beneficial interest in the company on Mhinder's part.
- [182] I prefer and accept Richard's evidence. The acquisition of the Mack dealership was clearly his initiative, arising out of his creation of BT Repairs Ltd, and his purchase of tools and parts in the course of the liquidation of the assets of the former Mack Truck dealership in Nanaimo.
- [183] Through this process, Richard was contacted by a representative of Mack Trucks. That organization was interested in securing servicing for Mack trucks, and ultimately Richard secured its agreement to the establishment of a new franchise on the old dealership property. To accomplish this, Richard required the assistance of his sister (not Bhora, Mhinder or OCL) because he did not have sufficient funds to purchase the land as well as the franchise. Rita's company Archer bought the property and leased it to Mack Nanaimo. I find that Richard, through Bastion, invested considerable funds in Mack Nanaimo,

arranged for appropriate financing, and proceeded without financial assistance from Bhora, Mhinder or OCL. The ultimate success of the business was due to his hard work and good management.

5.6.4 New Concrete Concept Inc.

[184] Gina incorporated New Concrete Concept Inc. ("NCC") on August 6, 1992, but never used it. Richard liked the name, and caused Bastion to acquire Gina's shares so that he could use the company as a vehicle for purchasing property at 1125 Cedar Road for use with his concrete business. NCC bought the Cedar Road property on December 16, 1996, for \$285,000, which it financed through a mortgage from CIBC and funds from Bastion.

[185] NCC subsequently purchased the Spruston Pit, and acquired lots at Duke Point, which played a role in the Lehigh sale. I discuss this further below.

5.6.5 Custom Pumping Ltd.

[186] According to Rita, she idolized Richard and was determined to follow him into the development of businesses within the areas in which the family was already experienced. I accept her evidence. Her first step in this regard was a company incorporated on February 13, 1990, which became known as Custom Pumping Ltd. Custom Pumping would provide pumping services for the delivery of concrete. Rita has always been the sole shareholder. In organizing this, she was assisted by Marc Furnemont and by a lawyer, Donald Orchard.

[187] To provide pumping services, it is necessary to have a pump truck. Rita arranged to purchase one on February 15, 1990 for \$415,000. Bhora helped her find it, and Mr. Furnemont helped with the negotiations. Rita paid cash of \$33,920, which came from a loan from her mother, Gina. The balance was financed through a conditional sales agreement.

[188] Custom Pumping began operating in Duncan under a manager whom Rita hired with assistance from her father, Bhora. Rita was not in a position to manage the operation herself because of her university studies. But she was no figurehead. When sales dipped she and her father met with the manager and Rita realized that she had to let him go. She hired a new manager who continued to operate the one pump in Duncan although he lived in Victoria. At his suggestion, Rita decided to move the operation down to Victoria and to expand by acquiring a second pump truck. She discussed the financing with Mr. Furnemont who indicated that he was willing to provide it through Spruston Aggregates. Spruston advanced the sum of \$140,000 with an interest rate of 12%, secured by a promissory note from Custom, guaranteed by Rita. Custom duly repaid the loan.

[189] Rita was able to acquire a third pump truck, financed through outside equipment financing, but ran into trouble when her manager proved to be siphoning revenue. She let him go and took over management herself.

- [190] Rita continued to expand the business, and ultimately moved it to premises she leased in a facility that had been developed by her brother on property Bastion had acquired in Langford.
- [191] Ultimately, Rita sold her pump trucks and closed the business down, except for one pump that she continued to lease to Gulf Coast Materials.
- [192] I find on the evidence that it was Rita's choice to pursue this business, though her choice was unquestionably inspired by the family businesses with which she was familiar. Bhora helped her with his experience. Gina helped with a loan, as did Mr. Furnemont in his personal capacity. Mr. Furnemont also assisted with his own expertise, for much of which he was compensated through billings from OCL. None of them claims a beneficial interest in the business.
- [193] In her business dealings, Rita was not only inspired by her family's businesses, but dealt with them. That she would prefer to deal with people she knew is hardly surprising. I accept that she also sought and received helpful advice from Mhinder, although he did not advance any funds or participate in any aspect of the business operation.
- [194] None of this, in my view, constitutes a knowing receipt of trust property, or an unjust enrichment of Rita to the detriment of Bhora and Mhinder.

5.6.6 Malo Holdings Ltd.

- [195] In 1993, Rita sought to purchase some property in Ladysmith on which she proposed to construct a building to be leased to British Columbia Building Corporation for use by the Ministry of Health. For this purpose, to purchase the property, Malo Enterprises Ltd was incorporated on September 1, 1993, in the name of Marc Furnemont (the name representing an abbreviation of the first names of Marc Furnemont and his then-wife, Lorraine). Both Rita and Mr. Furnemont testified that this was because the seller of the property wanted to sell only to a "local", for which description Mr. Furnemont qualified. Mr. Furnemont subsequently transferred the shares to Rita on December 1, 2000. He was clear that he had always held the shares in trust for Rita (without any written documentation), but that they had forgotten to transfer them into her name until 2000. Malo Enterprises purchased the property for \$24,250.
- [196] Mhinder maintains that Mr. Furnemont held the shares in trust for him and Bhora, rather than Rita, and indeed, in the flurry of signings on December 24, 2001, Mr. Furnemont signed an acknowledgement of trust to that effect. By then, however, he no longer owned legal title to the shares. He had already transferred them to Rita.
- [197] I accept Mr. Furnemont's evidence that he prepared and signed the acknowledgement in error, having forgotten what had happened with the shares in the context of fulfilling troubling instructions, as discussed in more detail below.

[198] I prefer the evidence of Rita and Mr. Furnemont concerning for whose benefit the company was intended. I also accept Rita's evidence that the purpose of incorporating the company was entirely her idea, that it was she who oversaw the project of constructing a building for occupation by BCBC, and that the purchase of the property and the construction of the building were financed by a mortgage from the Royal Bank of Canada. Neither Mhinder nor Bhora contributed anything to the financing.

5.6.7 Wee Tree Lumber Co. Ltd. and Archer Holdings Ltd.

[199] On February 15, 1994, Rita bought the shares of Wee Tree Lumber Co. Ltd. The principal asset of this company was a property in Ladysmith on which a lumber mill had been operated. The idea was to open up a new concrete plant on the property which would fit in with Richard's plans as he was having trouble servicing his customers to the south of Nanaimo. Rita was anxious to take this on. Mhinder found the property, and then helped Rita find, acquire and set up a small concrete batching plant. Rita financed this through an operating line of credit provided by Royal Bank of Canada.

[200] Wee Tree Lumber's ready-mix operation was sold as part of the Lehigh sale in 2001. Wee Tree Lumber then became Ladysmith Holdings Ltd which, together with Malo Enterprises, was then folded into Archer Holdings Ltd. Rita had initially incorporated Archer Holdings on August 4, 1993, for the purpose of buying real property. Mr. Furnemont had given her the same advice as he had given to Richard: to hold real estate, incorporate an entity separate from the operating business. Archer Holdings bought a number of properties, including one at 953 Balmoral in Victoria, purchased from Mhinder for \$120,000.

[201] In relation to his claim for a beneficial interest in Wee Tree, Mhinder relies in part on evidence that he made a cash advance to Rita of \$115,000 around the time that she purchased the company and established a ready-makes batch plant there.

[202] This seems to me to be one of a number of examples of opportunism on Mhinder's part. He cannot say as a matter of either record or recollection that he advanced funds to her to facilitate her investment in Wee Tree, nor can he say on what basis he advanced the funds (gift, loan or ?), or whether the funds were personal or obtained from OCL. He remembers nothing about them. Rather, he observes the timing and then, through post hoc ergo propter hoc reasoning, converts the transfer of funds into a contribution to her acquisition of Wee Tree. But in the context of this family's dealings with each other, the timing proves nothing either way. More is required in this context to prove an enrichment of Rita to Mhinder's detriment without juristic reason-to establish, in this instance, that it would be unjust to permit Rita to retain ownership of her company.

[203] Rita acknowledged that it is possible that she may have used some of the funds advanced by Mhinder for Wee Tree. She cannot now say given the passage of time and the absence of any records. But I am satisfied that any such use would have been incidental. Wee Tree came about because Rita was interested in getting into the ready-mix business, and Richard was having trouble servicing his customers south of Nanaimo through Nanaimo Concrete.

Rita obtained financing through an operating line of credit provided by the Royal Bank of Canada.

- [204] To get Wee Tree going, Mhinder provided a good deal of hands-on assistance. That was his way. He was knowledgeable and willing to help. But he was employed by Nanaimo Concrete, and paid for his work. His contribution, I find, though helpful, falls short of what is required to give him a remedial beneficial interest in the company.
- [205] As with other instances of Mhinder's hands-on help, he and Rita were not like a couple who worked together to create a joint enterprise or home, so that it would be inequitable to allow one to hold on to the whole. This was Rita's enterprise. I am satisfied that neither Mhinder nor Rita had any expectation that Mhinder's avuncular assistance would give him a beneficial interest in it.

5.6.8 Richard's and Rita's properties

- [206] Richard and Rita own a number of properties individually. They also own one property together, jointly with their mother, Gina. The one they owned jointly is a condominium that is presently rented out. Previously, both Richard and Rita used it as a personal residence.
- [207] In addition, Richard owns 244 Fry St. in Nanaimo, which he purchased on July 26, 1995, for \$85,000. The seller took a mortgage back in the amount of \$65,000. He also owned 1581 Prairie Ave. in Port Coquitlam, which he purchased on April 27, 1989, for \$97,000, with Gina's assistance. He sold it in 2002 for \$228,000.
- [208] Rita bought property at 1737 Northfield Rd. in Nanaimo on March 30, 1995, from Dan Helgesen, an employee of OCL and GCM, for \$162,000, and sold it ten years later for \$163,000. Only during the course of this trial did it emerge that, according to both Mhinder and Mr. Helgesen, Mhinder had a half interest in that property although it was registered only in the name of Mr. Helgesen. I discuss this transaction in more detail below (see paras 307-312).
- [209] Rita owned another property on Northfield Road, which she bought on January 3, 1997, for \$132,000, and sold on October 14, 2004, for \$152,000.
- [210] Neither Mhinder nor Bhora financed or contributed to the purchase of any of these properties.

5.6.9 The Lehigh sale and the \$900,000 promissory note claim

- [211] The Lehigh sale closed in the spring of 2001. It was certainly a catalyst. By the fall of that year, Bhagwan was raising questions and threatening litigation. On December 12 he filed, but did not serve, his writ and statement of claim. On December 24, Richard and Rita signed the acknowledgements of trust upon which Mhinder relies. Mr. Furnemont signed one too, with Kelly signing hers on January 24, 2012.

- [212] The Lehigh transaction is important to an understanding of the ways in which members of the family and their companies, in and outside of the brothers' trust, interacted. The structure of the Lehigh sale was complicated. Many sophisticated professionals were involved in planning the design of the transaction, and I did not have the advantage of hearing from its chief architect, KPMG.
- [213] As we have seen, the Lehigh sale involved the sale of three ready-mix concrete operations: Arrowsmith's operation in Coombs; Wee Tree's operation in Ladysmith; and Nanaimo Concrete's operation in Nanaimo. But it was more than that, and it all began with the supply of cement powder.
- [214] Richard's company, Nanaimo Concrete, was a larger operation than the other ready-mix suppliers in the family, Arrowsmith, Wee Tree and GCM, but it was a good deal smaller than its giant competitors, Lehigh/Tilbury and Ocean Cement. Although he was in competition with them Richard had to buy his cement powder from Lehigh, which put him at a competitive disadvantage and caused him logistical problems. The powder had to be picked up from Lehigh's terminal at Mill Bay, and it was difficult to store in large quantities.
- [215] In order to address this, Richard researched offshore sources of cement powder. He envisioned building a large silo on the property he purchased through NCC at 1125 Cedar Road in December of 1996. He could then bring in cement powder by the container load. Bhora helped him by negotiating with a supplier in Indonesia who could provide powder at a much lower cost.
- [216] Lehigh learned of these inquiries through its own contacts in Asia, and Lehigh's president contacted Bhora to make it clear that he would prefer that Nanaimo Concrete continue to purchase its cement powder from Lehigh. Lehigh recognized the logistical problems and proposed working with Richard to construct a cement terminal to the benefit of both organizations.
- [217] This idea attracted Richard, and through NCC he bought a lot (Lot 11) at Duke Point on July 31, 1998. While his own property on Cedar Road would have been adequate for cement powder storage for his own purposes, it was not suited for the construction of a cement terminal. Lehigh advanced \$180,000 to assist in this regard. NCC later leased and then purchased a second lot, Lot 14, which was on the water and better suited to his plans. The Lot 14 lease was signed at the end of September 1999 by NCC as lessee, and by Richard and Bhora as guarantors. It included a list of qualifying works that were to be undertaken by the lessee, including the construction of three silos for the storage of cement, and a deep water barge loading facility.
- [218] In the meantime, on August 1, 1998, Lehigh (actually Tilbury Cement, but the parties treated them as interchangeable and so will I) entered into a Cement Purchase Agreement and Rights of First Refusal with Nanaimo Concrete and Richard Mayer. By this agreement, Nanaimo Concrete agreed to purchase all of its cement from Lehigh, on terms equal to or better than those otherwise available in the marketplace. In addition, in consideration of

the sum of \$250,000, Nanaimo Concrete granted to Lehigh a right of first refusal (ROFR) to purchase all of its shares, expiring in 2002. The agreement recites the fact that Richard is the registered and beneficial owner of all of Nanaimo Concrete's issued and outstanding shares.

- [219] Similar agreements with Lehigh were concluded by Wee Tree Lumber, Arrowsmith and GCM, with much less consideration for the ROFR. The agreement with GCM was signed by Mhinder and Bhora, recited to be the registered and beneficial owners of all of GCM's issued and outstanding shares. The agreement with Arrowsmith was signed by Mhinder, recited to be the sole registered and beneficial owner of all of Arrowsmith's issued and outstanding shares. The agreement with Wee Tree was signed by Rita, recited to be the sole registered and beneficial owner of all of Wee Tree's issued and outstanding shares. In each of these three agreements, the consideration for the ROFR was a total of \$1500 payable in three instalments of \$500.
- [220] Shortly after this, Richard moved the Nanaimo Concrete ready-mix plant and offices from 1125 Farquhar Street to 1125 Cedar Road. I accept Richard's evidence that he did so because the Cedar Road property was now available, given the change in plans relating to the cement terminal, and because the property in Nanaimo was becoming too cramped, neighbours were complaining, and restrictions were being imposed. It was, in Richard's words, "a good time to get out of town".
- [221] Then, later in 1999 or in 2000, the idea was floated of Lehigh buying Nanaimo Concrete. According to both Richard and Bhora, the idea came from Lehigh, whose president first raised it with Bhora. Lehigh had concerns about entering into a cement distribution arrangement with a competitor, because they already owned Ocean Ready-Mix in Nanaimo. They wanted to move ahead with the development of the terminal, but preferred to take Richard out as a competitor by buying Nanaimo Concrete. I accept that evidence. It is consistent with what occurred.
- [222] Although the Nanaimo Concrete, Arrowsmith and Wee Tree operations were separately owned, they worked cooperatively. Wee Tree was set up in Ladysmith because Nanaimo Concrete was having difficulty servicing the area south of Nanaimo, and Coombs also was out of Nanaimo Concrete's area. Yet they were close enough so that if someone needed an extra truck for the day or assistance with a big job, they could help each other out. When Richard discussed with Rita and Mhinder the proposed sale, Mhinder expressed some reluctance about carrying on in business if Richard was no longer going to be running Nanaimo Concrete.
- [223] From this hatched the concept of exploring whether they could persuade Lehigh to buy all three plants. Bhora and Mr. Furnemont undertook the negotiations. I observe that the three plants being considered for sale were those that were not operated by ITCs. There is no evidence of any consideration of including GCM's ready-mix business in the sale. GCM, of course, is an ITC.

[224] Negotiations proceeded. The vendors received advice from KPMG with regard to structuring the transaction to minimize tax, and were represented by a team of lawyers from Blake, Cassels & Graydon LLP led by William MacLagan, QC. The transaction was structured in a way that required, among other things, the incorporation of a new holding company to receive shares and land, the amendment of the authorized capital of the vendor companies to create new classes of shares, the incorporation of subsidiaries of the vendor companies, and the exchange of promissory notes.

[225] As the transaction was structured, the flow of funds went this way:

Wee Tree

- to subsidiary for assets and goodwill: \$1,300,000
- to Rita for her shares: \$500,000
- to Rita for non-competition: \$300,000

Arrowsmith

- to subsidiary for assets and goodwill: \$1,700,000
- to Mhinder for his shares: \$500,000
- to Mhinder for non-competition: \$500,000

Nanaimo Concrete

- to subsidiary for assets and goodwill: \$2,000,000
- to Richard for his shares: \$500,000
- to Richard for non-competition: \$700,000

Bhora Mayer

- for non-competition \$500,000

TOTAL \$8,500,000

[226] But there was more to be accomplished. The transaction included a lease agreement between Tilbury as lessee and NCC as landlord concerning the lease of Lot 14 at Duke Point where the terminal was to be developed. Richard and Bhora signed the lease agreement as covenantors. It required NCC to pay a security deposit of \$3,000,000 to secure the performance of its obligations under the agreement in relation to the purchase, subdivision and development of the lands. That deposit was funded by a loan of \$3,000,000 to NCC from Richard.

- [227] As the transaction was structured, Richard obtained \$2,000,000 of that \$3,000,000 through loans from Rita (\$700,000), Mhinder (\$900,000) and Bhora (\$400,000). The documentation included non-interest-bearing demand promissory notes from Richard to each of Rita, Mhinder and Bhora in those amounts. This left Mhinder, Rita and Bhora with \$100,000 each from the cash they received individually.
- [228] Mhinder forgot all about this until he came upon Richard's promissory note to him in the amount of \$900,000 during the course of this litigation. On September 21, 2010, much to Richard's surprise, Mhinder demanded repayment of what he considered to be the balance owing on his note.
- [229] Richard, Rita and Bhora all maintain that these promissory notes were notional only, in essence 'pre-forgiven', designed as a means to get the funds for the security deposit to flow through into Richard's hands in a tax-free basis. They were never intended to be called upon, and all parties, including Mhinder, understood that when they signed all of the documentation at the closing. Neither Rita nor Bhora has made any demand on their promissory notes.
- [230] As Mr. Furnemont explained it, the lease aspect of the transaction developed after the negotiations that led to an agreed purchase price of \$8,500,000. The transaction was then restructured. The security deposit of \$3,000,000 payable by NCC, to be funded by Richard, included \$2,000,000 that was really part of the value of Nanaimo Concrete, but was not allocated to Nanaimo Concrete. Notionally, then, the value placed on Nanaimo Concrete was \$2,000,000 more than what was allocated to it. But instead of allocating it all to Nanaimo Concrete/Richard, some of it was allocated to Rita (\$700,000), some to Mhinder (\$900,000), and some to Bhora (\$400,000). That money was then transferred to Richard via notional loans secured by the promissory notes. Because the promissory notes were not interest-bearing, they would not attract tax as investments, and were effectively forgiven. But it was really Richard's money all along because Nanaimo Concrete is what Tilbury was actually paying for. This structure saved taxes of approximately \$1,000,000.
- [231] Mr. Furnemont testified that he reviewed these allocations with all members of the family, including Mhinder, explaining how the re-allocation saved taxes by allocating some of the funds due to Richard/ Nanaimo Concrete to Rita/Wee Tree, Mhinder/Arrowsmith, and Bhora. At the end it would flow back to Richard via "loans". These "loans", therefore, were notional only and not intended to be repaid.
- [232] I confess to having had some difficulty with this explanation, which was consistent with that of Richard, Rita and Bhora. While I certainly understand the goal of minimizing taxes, I was, perhaps naïvely, surprised to see it accomplished with professional advice through what appeared to be a series of dealings apparently designed to disguise the true nature of the flow of funds for tax-saving purposes. It demonstrates once again that very little in this case can be taken at face value. Nevertheless, there was no evidence that such a design was in any way unlawful.

- [233] Although I did not hear from the accountant at KPMG who helped design the structure, I did hear from Mr. Maclagan. He had no specific recollection of what advice he gave, but did say that he could not imagine advising a client that promissory notes such as those signed by Richard could not be called upon, or that the loans documented by the promissory notes were not real. While I accept Mr. Maclagan's evidence, I am not at all sure that it takes me very far. He did not say that his firm would never have permitted a transaction such as this to be structured in the way described by Mr. Furnemont, nor did his evidence exclude the possibility that the parties agreed to a structure that would operate in the manner described by Mr. Furnemont. So I must look at the transaction itself and the surrounding circumstances.
- [234] On the one hand, I have Bhora, Richard, Rita and Mr. Furnemont all testifying that the notional loans to Richard, as evidenced by the promissory notes he signed, were never intended to be repaid, and that the parties, in effect, agreed not to make demand on them. The money, they say, was always considered to be Richard's. I observe that all of the parties (including Mhinder) acted in a manner consistent with this concept for over nine years, until Mhinder apparently rediscovered his promissory note during the course of this litigation. No one sought repayment from Richard before then, even when he received the \$3,000,000 deposit back from Lehigh/Tilbury. It is difficult to believe that the parties would simply have forgotten that they were owed such substantial sums.
- [235] On the other hand, Mhinder relies upon the note which, on its face, represents a promise by Richard to repay him the sum of \$900,000 on demand. He points out that there is no record of any agreement not to rely on the notes, or to forgive them. He denies being given any such advice, although he admits that he paid little attention to what advice he was given. He asserts that the funds that flowed to him and to Rita and their companies properly reflected the relative value of the businesses, so that the monies then transferred to Richard were truly loans. He contends that Richard has failed to establish an agreement to forgive or not to make demand on the promissory note, failing which there is no reason not to enforce what is valid on its face. He points to payments Richard made to him, which Mhinder credits towards the debt covered by the note.
- [236] When I view this claim on the promissory note in the context of not only this transaction, but all of the evidence, I find I am unable to accept Mhinder's position. I begin with the family's rather lax approach to the transfer of funds among family members. The amounts Richard transferred to Mhinder, which Mhinder now says were on account of this debt, were never recorded as such. Viewed objectively in the context of this family's dealings, the fact of the payments does not support the existence of a debt. More importantly, the evidence of Mr. Furnemont is to the contrary. He testified that he asked Richard to make these payments because there was a need for cash in the Osborne Group, and he knew that Richard had cash at that time. In the absence of anything from Mhinder acknowledging payment on account of the debt, which one would expect if it was in fact a formal repayment, I accept Mr. Furnemont's evidence.

- [237] I turn next to the structure of the Lehigh transaction. It is noteworthy in my view that the promissory notes were non-interest-bearing, and were never called upon before Mhinder made demand in the course of this litigation. This is consistent with tax planning that included forgiving the debts, as described in the unchallenged report of David Rickards, CPA, CA. It is not consistent with a true loan. Where members of this family documented true loans, interest was invariably charged.
- [238] Mhinder then sought to demonstrate through the comparison of the three companies' financial statements that their relative value, taking into account either or both of assets and income, was consistent with the allocations in the transaction (\$4,800,000 to Wee Tree and Arrowsmith versus \$3,200,000 to Nanaimo Concrete), and would be inconsistent if the amounts going back to Richard by way of loans truly represented the value of Nanaimo Concrete. I did not find that argument convincing.
- [239] If one backs out the funds lent to Richard from the consideration paid to Rita/Wee Tree and Mhinder/Arrowsmith, they were together left with \$3,200,000, with \$5,200,000 flowing to Richard/Nanaimo Concrete/NCC. That ratio, I find, is entirely justified. Whether measuring by income or assets, Nanaimo Concrete was worth more than the other two companies put together, and strategically, from a competition point of view, worth still more.
- [240] I find that Nanaimo Concrete was Lehigh's true target, with Arrowsmith and Wee Tree being essentially afterthoughts of some, but rather less, interest. This is consistent with the nature of the operations, the size of the operations, the sophistication of the operations, the land included in the businesses, the amounts that Lehigh was prepared to pay for rights of first refusal in relation to the businesses, and the ongoing obligations and risk undertaken by Richard through NCC.
- [241] Moreover, the argument concerning relative value does not explain the \$500,000 allocated to Bhora for agreeing not to compete (a tax-free transaction), given that he was selling nothing. Bhora was not in a competing business at the time. While he certainly had expertise, it is not at all clear why \$500,000 should be allocated to him on that basis, other than for tax-planning purposes. The net payment to him of \$100,000, on the other hand, makes sense given his contribution.
- [242] As to the ROFRs, Mhinder argues that the amounts paid under each agreement were arbitrary, and simply assigned by the family. I accept the evidence of Richard and Mr. Furnemont that that was not the case: that it was in Nanaimo Concrete that Lehigh was primarily interested, and the ROFRs for the remaining companies were essentially pro forma based on past supply contracts. This evidence is supported by the inclusion of Gulf Coast in those lesser ROFRs, although Gulf Coast was never part of the Lehigh sale.
- [243] In cross-examination, Mhinder's counsel, Mr. Gomery, put to Mr. Furnemont discovery evidence he had given to the effect that he was "unaware of any agreement that the note was not a valid note". Mr. Furnemont also had testified that the note was "prepared and signed to cross the T's and dot the I's on the transaction of the Lehigh sale". Mhinder then

asserts that there is a significant difference between promissory notes that are interest-free and need not be called upon, supporting a tax driven structure, and promissory notes that cannot be called upon-a point well taken.

- [244] From my perspective, however, the cross-examination of Mr. Furnemont did not detract from his evidence concerning the advice he gave about the structure, including the allocation for tax purposes to Rita, Mhinder and Bhora of monies that notionally were part of the consideration for the sale of Nanaimo Concrete's business. I find that while Mhinder paid little attention to detail, he was fully advised of the intent of the structure. Although he denies it, this is the only reasonable inference that arises from the evidence as a whole, including that of Mr. MacLagan. It follows, and I find, that Mhinder agreed to this concept and structure by participating in it and signing the necessary documentation. The transaction was structured, in short, with the understanding that there would be no call upon the promissory notes. I do not accept that Mhinder understood it to be otherwise at the time. Moreover, it is evident that Mhinder benefited considerably by the manner in which the transaction was structured, and indeed would not have been in a position to sell Arrowsmith's ready-mix business at all but for the participation of Richard, Nanaimo Concrete and NCC.
- [245] I conclude that when Mhinder came across the promissory note in the course of reviewing documentation in this litigation, he pursued an opportunistic claim that the evidence as a whole does not support. I am prepared to accept that when he reviewed the note, he no longer had in mind the reason for it and the way the transaction had been structured. But, I find, he must be taken to have known all about that when he signed the documentation, and, having taken all the benefits of that structure, he is estopped from pursuing his claim on the note; see, for instance, *Vision West Development Ltd v McIvor Properties Ltd*, 2012 BCSC 302 at paras 63-66, and cases cited therein. Mhinder's claim on the promissory note is accordingly dismissed.
- [246] Richard argues further that, in any event, Mhinder's demand on the note is time-barred under the provisions of the Limitation Act, RSBC 1996, c 266. I agree. The loan evidenced by the promissory note was a demand loan, giving rise under the legislation then in force to a limitation period of six years within which to make a claim on the note. Time began to run on the date the loan was said to have been made: April 27, 2001-see *Kong v Saunders*, 2014 BCCA 508. It follows that unless confirmed, the cause of action expired on April 27, 2007, more than three years before Mhinder's demand.
- [247] Mhinder argues that Richard did confirm the cause of action through payments he made to Mhinder that Mhinder says were on account of that debt. But as I indicated above, the evidence indicates that those payments were not made in respect of the alleged debt, or indeed of any debt. Mhinder made no accounting of them at all. I find it likely that his later attribution of those payments to the alleged debt is no more than wishful thinking. Accordingly, I am unable to find any confirmation of the cause of action. It follows that any claim on the note is time-barred.

[248] Quite apart from his claim on the promissory note, Mhinder refers to the Lehigh sale for two other purposes: first, as corroborating his claim that Arrowsmith Concrete and its successor, Mid-Isle Holdings, are indeed his companies, and not trust companies; and second, as evidence of the degree to which he and Bhora contributed to the success of the family companies-another example, he says, of the family working together for their common benefit.

[249] The first I address below in section 6.0. As to the second, there can be no doubt that members of the family worked together to pull off the Lehigh sale. They did so because they all stood to benefit from a transaction that saw the profitable sale of ready-mix operations to a much larger and increasingly dominant competitor. Bhora helped put it together and pocketed \$100,000 personally. Mhinder was able to effect the sale of Arrowsmith for payments totaling \$1,800,000. Rita was able to effect the sale of Wee Tree for payments totaling \$1,400,000. Richard was able to effect the sale of Nanaimo Concrete for payments totaling \$5,200,000, \$3,000,000 of which he lent to NCC and was at risk in relation to the development of Lot 14, an integral part of the whole transaction. Bhora and Mhinder, through OCL, benefited from consulting fees with the potential for further consulting and administrative fees in relation to the development of Lot 14. Mhinder, in the meantime, benefited from continued employment with Island Aggregates (Richard's company that was the successor to Nanaimo Concrete after the sale). No one was unjustly enriched.

5.6.10 After Lehigh, still working together

[250] Mhinder submits that in the years after 2001 through to 2006, Mhinder and Bhora continued to render financial assistance to Richard and Rita and their companies, on the continuing understanding that "everyone was working together for the common good, and the benefits of success would be shared".

[251] One significant enterprise that began in 2001 and continued after the Lehigh sale was the Nanaimo waterfront project undertaken through what became Rita's company, Front Street Projects. Another concerned NCC. It continued with the development of Duke Point, and in 2001 also acquired two properties it still owns, the Spruston Pit, which it purchased from OCL, and adjacent lands that it bought from Weyerhaeuser Company Limited (the "Weyerhaeuser lands").

[252] I turn to look at these enterprises.

5.6.10.1 The Nanaimo waterfront project (Front Street Projects)

[253] This project did not have a happy ending. If it had gone well, one wonders if the family would today be mired in so deep a morass of litigation.

- [254] Front Street Projects was originally incorporated on February 20, 2001, as 622589 BC Ltd, and then underwent several name changes. Its purpose was to construct a conference centre on the Nanaimo waterfront. The project, led by Rita, proved impracticable and was dead by the summer of 2003. Thereafter, Front Street Projects entered into a joint venture with another company to build a condominium development on the site, but in the end this missed the market and was not a financial success.
- [255] In the meantime, financing had been arranged through Great Pacific Financing, later called Accredited Mortgage.
- [256] The initial mortgage was for \$2,300,000. The "borrowers" were Mhinder, Bhora and Gina. In addition, there were a number of "covenantors" who included the various ITCs and family companies as well as Mr. Furnemont. Additional funds were borrowed resulting in a new mortgage in the amount of \$2,550,000, replacing the old one. Once again, Mhinder, Bhora and Gina signed as "mortgagors". This time, Rita signed as a "covenantor", as did her companies, the other family companies, and the ITCs. Ultimately, there was a shortfall that the mortgagors, Mhinder, Bhora and Gina, had to make up.
- [257] Mhinder seeks contribution from the covenantors to the mortgages via his "Accredited mortgage claim", which I consider below in section 10.0. In addition, while Mhinder does not advance a claim for an interest in Rita's company, he relies on this venture as a clear example of the family working together for a common purpose.
- [258] I agree that the Nanaimo waterfront project was one in which members of the family did indeed work together for their mutual benefit. I disagree that it involved any transfer of trust property to Rita, or otherwise gave rise to an unjust enrichment. Bhora, Mhinder and Gina assisted by acting as mortgagors, not expecting that the mortgages would in fact go into default. Many, I think, would be startled to learn that a constructive trust arose every time a family member secured a relative's lease or loan. The question that arises is not whether this act of itself constitutes unjust enrichment (it does not), but rather what happens if the mortgagor or guarantor is called upon. That question arises here in relation to Mhinder's Accredited mortgage claim, which I address separately.
- [259] Mhinder also lent money, through Mid-Isle Holdings, as did Richard through Bastion. These were fully documented loans, and Mid-Isle subsequently sued to recover on its debt. OCL was paid management fees for some of the work contributed by Bhora and Mr. Furnemont. Had things gone well, the mortgages and loans would have been paid off, and OCL could have looked forward to further management fees. In the meantime, the bulk of the expenses were underwritten by Rita through her companies. Apart from the mortgages, the risk was hers. All this was consistent with the strategy developed by the brothers beginning in 1988.

5.6.10.2 NCC and Island Aggregates

- [260] Richard caused NCC to purchase the Spruston Pit and the Weyerhaeuser lands on July 27, 2001.
- [261] NCC bought the Spruston Pit from OCL. Although OCL had owned it, it had not operated it. Crushing operations previously carried out by Mr. Furnemont's company, Spruston Aggregates, had been in the hands of D & A for some years, with D & A supplying aggregate to Nanaimo Concrete. With Nanaimo Concrete selling its ready-mix operations in the Lehigh sale, there was an impetus for change.
- [262] Although Mhinder denied it, I accept the evidence of Richard and Mr. Furnemont that the Spruston Pit was nearing the end of its useful life, most of its accessible gravel supply having been mined. The purchase of the adjoining Weyerhaeuser lands added to the gravel supply, and also permitted an expansion of the gravel resource available from the Spruston Pit.
- [263] Mhinder submits that the manner in which this project proceeded and was financed further supports his claim of unjust enrichment. The evidence, however, does not support that contention.
- [264] NCC's purchase of the Weyerhaeuser lands was financed through a mortgage from CIBC.
- [265] NCC bought the Spruston Pit from OCL for a price of \$375,000, after the parties obtained an appraisal. NCC did not, however, pay cash to OCL. Rather, it entered into an unsecured loan agreement for the purchase price, plus an additional advance, for a total loan of \$435,964 at a rate of 7.00%. That loan was consolidated with OCL's loan to Bastion for the purchase of 1125 Farquhar Street, with the combined interest rate now set at 7.00% (the Farquhar Street loan had been set at an interest rate of 7.75%, but by this time rates had declined, and would shortly decline significantly further). The loan was recorded in the books of Bastion, of which NCC was a subsidiary.
- [266] Bastion made payments of principal and interest on the loan from OCL until July 2009. At that time, Bastion and Island Aggregates entered into postponement of claims agreements with OCL and the Business Development Bank of Canada ("BDC"), from which bank they were borrowing \$4,088,000. By these agreements, OCL agreed, in essence, that its loans to Bastion (now \$620,183) and Island Aggregates (the \$300,000 loan now down to \$283,386) would be postponed in priority behind the BDC loan, and that Bastion and Island Aggregates would pay OCL interest only at a rate not exceeding 6.00% until the BDC loan was repaid in full. By this time, the bank prime rate had fallen to 2.25%.
- [267] Although neither Bastion nor Island Aggregates was obliged to make payments of principal during the currency of the postponed agreements, Richard made those payments out of his own pocket. He testified that he felt obliged to do so, having signed a promissory note on the OCL loan to Island Aggregates. It was suggested to him in cross-examination that he had sworn a false affidavit because he had deposed that "Island Aggregates has adhered to all the terms and conditions set forth in [the promissory note]", when in fact OCL had given

up its rights under the promissory note by signing the postponement agreement. Richard explained that although OCL did give up its rights to some degree, he nevertheless considered the promissory note binding and continued to make the payments of principal himself. His explanation was, I found, reasonable.

- [268] It is thus evident that Bastion (and Island Aggregates) obtained their financing through documented loans that were repaid, and for which they gave consideration in the form of genuine interest. Mhinder argues, however, that they did so on terms that were excessively favourable and uncommercial. He points out, for instance, that OCL received no consideration for entering into the postponement agreements, of which Mhinder was unaware, and that he never agreed to the \$300,000 loan to Island Aggregates (a proposition that I reject below; see section 8.5.3.2).
- [269] I do not see these concerns as constituting "incontrovertible benefits" that would give rise to a restitutionary claim against Richard, Rita, or the family companies. To find otherwise, I am satisfied, would do considerable violence to the expectations of the parties. These sorts of arrangements, like others I will be considering below, were business arrangements into which Bhora entered in his capacity as the de facto managing partner. They did not involve transferring trust property in breach of trust as required to support a claim of knowing receipt. To the extent Mhinder has claims arising out of these business arrangements, they will be in the nature of derivative claims against Bhora, and oppression claims arising out of Bhora's alleged mismanagement of the affairs of the ITCs in a manner that was oppressive and unfairly prejudicial to Mhinder. I discuss this further in section 12.7 below.
- [270] Another project undertaken through NCC was the development of a barge ramp facility on Lot 14 at Duke Point. There is no question that Mhinder provided valuable hands-on assistance to Richard in this matter until February 2007 when, under circumstances discussed below in section 8.5.2, Mhinder withdrew from his employment with Island Aggregates and from rendering any assistance to Richard. This was in the wake of Richard's refusal to hand control of the project over to Mhinder.
- [271] Ultimately, some years later, NCC sold Lot 14 with the barge facility at a considerable profit. Mhinder submits that this profit is largely attributable to assistance rendered to Richard by Mhinder, Bhora and Marc Furnemont.
- [272] I accept that all three rendered assistance. Mhinder helped on the ground. Bhora assisted with co-signing and contacts, and Marc Furnemont fulfilled his usual administrative duties, for which OCL was paid. But it was Richard who had the ideas, put up the money, took the risk, and pushed forward the project. There was never any understanding that Mhinder's assistance would give rise to an equitable interest, nor, I am satisfied, would Richard have accepted his assistance if Mhinder indicated such an expectation.

5.7 An express new family trust?

[273] I turn to consider Mhinder's claim that he and Bhora, Richard, Rita and Gina all agreed to the creation of an express new family trust.

[274] There are two interlocking aspects to this claim. The first is a new family trust that Mhinder testified the family contemplated in the years following Bhagwan's departure from the brothers' trust in 1991. The second is the execution of the acknowledgements of trust on December 24, 2001, which Mhinder maintains they did in furtherance of that new family trust.

[275] Mhinder gave different evidence at different times about the timing of the first aspect. In his evidence at trial, he confirmed that Nanaimo Concrete was set up in 1988-89 as Richard's company, and not as a trust company. He said, however, that after Bhagwan's departure in 1991:

and in around, I'm going to say '94/'95, somewhere in there, it changed because the help was all coming from us to the kids. And we discussed it, and we said, lookit, we should make a new family trust up, separate than [sic] the brothers' trust. And then we bring the kids into it but we have a trust with them. It's going to be complete for all of us. Not just the kids. It was actually with R & G [Gina's company] too. All of those companies were brought into that new family trust. And that was contemplated from I would say-- like I say, '94/'95, somewhere in there. Never documented but contemplated, and with that contemplation and everybody working together, that's how more equity came into the company, like, Nanaimo Concrete.

[276] As he explained it, all of Gina's, Richard's and Rita's companies were to be held as assets of this new family trust, the beneficiaries of which were all five of them: Bhora, Mhinder, Gina, Richard and Rita - not just Bhora and Mhinder as with the brothers' trust. He said that this was discussed among them more than once,

because I can recall many times that, "Guys we have--", whenever we got together, we kind of talked about it a bit or we bought more stuff to put in those companies. I said, "Guys, we have to put this down in writing." "Yeah, yeah. We will, we will, we will. Yeah, we will." And time marched on and we all got busy.

[277] Bhora, Gina, Richard and Rita all deny that any such discussions took place, or that any such arrangement was contemplated.

[278] Turning to the second aspect of Mhinder's express trust claim, there is no doubt that Richard and Rita executed acknowledgements of trust on December 24, 2001. No witness, however, was able to explain satisfactorily why these documents came to be signed.

[279] It is clear that the documents were drafted by Mr. Furnemont. He prepared four acknowledgements in the same form to be signed by each of Richard, Rita, Gina and Kelly, cosigned by Bhora and Mhinder, and witnessed by himself. He also prepared one for his own signature. Each included the same typographical error in its title: "ACKNOLWEDGEMENT OF TRUST AGREEMENT BETWEEN " Richard's read as follows (the others are parallel):

ACKNOLWEDGEMENT OF TRUST AGREEMENT BETWEEN RICHARD RAVINDER MAYER AND BHORA SINGH MAYER AND MHINDER SINGH MAYER.

I, Richard R. Mayer, of 2504-154 Promenade Drive, Nanaimo, BC, hereby confirm that I hold the common shares of Island Aggregates Ltd., Mac Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd. in trust for my father Bhora Singh Mayer and my uncle Mhinder Singh Mayer.

I also confirm that, even though I am registered as owner of the numerous real estate properties, I am holding these properties (with the exception of my principal residence) in trust for my father Bhora Singh Mayer and my uncle Mhinder Singh Mayer.

Signed at Nanaimo this 24 of December, 2001

[signed by Richard, Bhora and Mhinder, all signatures witnessed by Mr. Furnemont]

[280] As will be discussed in more detail below, Mhinder maintained that Mr. Furnemont prepared these documents in an attempt to document the new family trust to which the parties had agreed years before. But two discrepancies will be immediately apparent. First, the objects of the trust have contracted from the five beneficiaries contemplated in the new family trust described by Mhinder to just two: Mhinder and Bhora. Second, the subjects of the trust have expanded beyond the family companies to include as well the real estate properties held by Richard, Rita and Gina.

[281] There is no dispute that each of Richard, Rita and Gina signed their respective documents individually on December 24, 2001, in Bhora's office. Their signatures, together with those of Bhora and Mhinder, were witnessed by Mr. Furnemont, although Mr. Furnemont was not present when each of Richard, Rita and Gina signed, and Mhinder was not in the office at all.

[282] Mr. Furnemont's acknowledgement, with the same typographical error, confirmed that "I hold the common shares of Malo Enterprises Ltd in trust for Mhinder Singh Mayer and Bhora Singh Mayer". That, too, was signed on December 24, 2001. Mr. Furnemont's signature was witnessed by Mhinder Mayer. The principal oddity is that Mr. Furnemont did not then hold the common shares of Malo Enterprises Ltd, as he had transferred them to Rita more than a year earlier, on December 1, 2000.

- [283] Kelly signed hers a month later, on January 24, 2002, at her home. Her signature is unwitnessed, as is Mhinder's. Bhora presumably signed it in advance, as his signature is witnessed by Mr. Furnemont. Neither Bhora nor Mr. Furnemont were present on January 24 when Kelly signed the document.
- [284] In the first paragraph of the document, Kelly confirmed that she held the common shares of D & A Crushing in trust for Mhinder and Bora. Before signing, however, she crossed out the second paragraph by which she purported to confirm that she owned her real estate properties in trust for Mhinder and Bora. That deletion is initialed by both Kelly and Mhinder, but not by Bhora.
- [285] Bhora was the first to have a go at explaining how these documents came to be signed, when he testified as an adverse party witness in the plaintiff's case. As I review his evidence and that of the other parties, it is important to distinguish between what they say they were telling each other, and what was actually happening.
- [286] According to Bhora, it was Mhinder who insisted that these documents be executed. Mhinder offered two reasons: first, he intended to leave his interest in the brothers' trust to Richard and Rita, but wanted to ensure that they would care for him and look after him if he did so. He needed them to demonstrate loyalty. He wanted to be satisfied that he could trust them not to leave him high and dry once he left his interest to them. This was a way of accomplishing that-not by creating new trusts, but by showing that they were willing to do so. Second, he was worried about his marriage and was concerned that Kelly would make a claim on his share of the trust, and on the shares of D & A.
- [287] Bhora testified that, at Mhinder's request, he asked Marc Furnemont to draft the documents, with Gina and Kelly to be included to show that the whole family was doing this thing together. His instructions to Mr. Furnemont were that Mhinder wanted to transfer his interest to the children because he is going through matrimonial issues with Kelly, and wanted to try to persuade her that the whole family is doing this. He described it as "very complicated". He maintained that he gave no specific instructions to Mr. Furnemont, but just a general description of what Mhinder wanted.
- [288] Bhora confessed that this made no sense to him, yet he did it anyway. It certainly made no sense to me. It is, however, essentially consistent with what Richard, Rita and Gina testified they were told by Bhora. It is also curiously similar in concept to a proposal Mhinder made much later to Richard and Rita (see section 8.5.2 below), which was that they should transfer control of their businesses to him for 25 years. He would run them and develop the businesses in return for a net salary of \$10,000 per month, and then retire (at 85), turning his controlling interest back over to Richard and Rita. I observe that such a proposal would seem unnecessary if Mhinder already held a beneficial interest in all these businesses.
- [289] Mhinder had quite a different explanation. As he had testified, he had for some time been urging the family in vain to get the terms of the new family trust into writing. Then, at last something was done. On December 24, 2001, out of the blue, Mr. Furnemont approached

him when Mhinder was working at the shop at Mack Nanaimo, and asked him to walk with him to his car. As they walked, Mr. Furnemont produced the four acknowledgement of trust forms. The ones for Richard, Rita and Gina had been signed and witnessed, but Kelly's was not yet signed. Mr. Furnemont told Mhinder, "this was something you've been wanting all along", and handed them to him:

so I looked at them and I said, "Marc, this does not reflect what I feel our new family trust is." And he says, "Mhindy, it's been a long time coming through for these documents, and I know we were supposed to be doing it a long time ago. This is a start. We can always change it." And I said, "Okay." So I signed it and he signed it. And he gave me these copies.

[290] According to Mhinder, Mr. Furnemont then told him that he would be bringing him one more acknowledgement of trust for Malo Enterprises. Mhinder reiterated that the documents did not match his understanding of the nature of the trust, but accepted Mr. Furnemont's advice that this was just a start, and they could always change it.

[291] Neither Bhora's nor Mhinder's account explains why Mr. Furnemont was expected to sign an acknowledgement of trust in relation to Malo Enterprises. That could not have had anything to do with a demonstration of loyalty or Mhinder's potential marital issues, and was equally irrelevant to any contemplated new family trust as described by Mhinder.

[292] Richard, Rita and Gina gave evidence about the events of December 24, 2001, that was consistent in all material respects.

[293] The family was planning to travel by ferry to Vancouver that afternoon to have Christmas Eve dinner with relatives. When they dropped into the OCL office, Bhora asked them to sign the documents, dealing first with Gina and Rita, and then separately with Richard, who came in later. Bhora was, they described, forceful and adamant as only Bhora can be.

[294] None of them could understand why they should sign such a document. They were upset. Bhora insisted, however, that this was necessary in order to appease Mhinder for the reasons Bhora described to me, and that they need have no concern, as the documents were not legally binding, meant nothing, and were going nowhere. Ultimately, they each caved in and signed, reluctantly, but with the understanding that there would be no legal consequences.

[295] Mr. Furnemont testified that he had had no discussions with anyone about these acknowledgement of trust documents before December 24, 2001. On that day, he spoke with both Bhora and Mhinder. He cannot differentiate between the two conversations because the day remains a bit of a blur for him. He confessed that he was not at all proud of what had transpired that day. He has regretted what he did ever since.

[296] As he recalled it, his instructions from Bhora and Mhinder were to prepare documents to be signed by Richard, Rita, Gina and Kelly that mirrored the basic terms of the brothers' trust: all businesses and properties other than the personal residences were held in trust for Bhora and Mhinder. He understood that there were difficulties between Mhinder and

Kelly, and the brothers were concerned about Kelly's shares in D & A. In order to persuade her to acknowledge that she held them in trust for the brothers, it was thought important to show that everyone else was doing the same thing, including Mr. Furnemont. But the documents (other than Kelly's) would otherwise mean nothing, and would be discarded or destroyed.

- [297] Mr. Furnemont drafted up one and gave it to Bhora to review. He said that it looked good, and to get Mhinder's approval. Mr. Furnemont called Mhinder, read it to him over the phone, and Mhinder approved. Mr. Furnemont then prepared the remaining documents and gave them to Bhora.
- [298] Asked if he had any concern about Kelly being shown false acknowledgements of trust executed by the other members of the family, he agreed that he did. But he justified it at the time because he had worked with Bhora and Mhinder for many years and believed them when they told him that Kelly was holding the D & A shares in trust, but was trying to keep them. As for the other documents, they were not meant to tie anyone down. Bhora's explanation that Mhinder was planning to transfer his share in the brothers' trust to the children, and required a demonstration of loyalty, was never communicated to him.
- [299] I accept Mr. Furnemont's evidence as to the circumstances under which he came to draft the documents, including the instructions he received from Bhora and Mhinder, and his understanding of the reason. His evidence came the closest of all to making sense of this, and his demeanour was entirely appropriate throughout, consistent with the discomfort and embarrassment he described. Bhora's suggestion that he just gave a general instruction to Mr. Furnemont to draw something up, from which these documents emerged, is not believable. Neither is Mhinder's evidence that Mr. Furnemont drafted them entirely on his own without any instruction at all. Mr. Furnemont's evidence that he was told to draft documents that reflected the structure of the brothers' trust makes sense and is consistent with what he in fact did.
- [300] I do not, however, accept that the reason Mhinder and Bhora arranged for these documents to be prepared and executed was as Bhora testified, and as he explained it to Gina, Richard and Rita. That explanation made no sense to Gina, Richard and Rita at the time, made no sense to Bhora when he testified about it, and makes no sense to me.
- [301] As to the first part of Bhora's explanation, that Mhinder required some evidence of loyalty in order to feel safe in transferring his interest in the brothers' trust to the children, it is difficult to understand how that could have been accomplished by documents purporting to transfer the beneficial interest in everything to Mhinder and Bhora, a one-way street. And Bhora was clear that they were not intended to be binding. So what was the point? A test of willingness to sacrifice of Abrahamic proportion? I think not. How would it test anyone who was first assured that the documents were not legally binding? And why would such a test arise so suddenly and be so rushed? No rational explanation was provided.

- [302] As to the second part of Bhora's explanation, if Mhinder were having marital difficulties, they had not surfaced. Moreover, it would make little sense to increase Mhinder's assets by adding the family companies and real estate properties to them--assets not covered by his co-habitation agreement with Kelly that they signed in 1996. I reject that explanation as well.
- [303] I do accept, however, that that is the explanation that Bhora communicated to Richard, Rita and Gina. It is the sort of arrangement with which Bhora and Mhinder would have been familiar from the manner in which the brothers' trust documents were prepared and executed. It wrapped the entire process up in family dynamics as being necessary to appease Mhinder. It was not, however, true.
- [304] What, then, was their purpose in having Richard, Rita, Gina and Mr. Furnemont sign these documents on so urgent a basis?
- [305] Mhinder argues that they did it for the obvious reason disclosed on the face of the documents: to acknowledge the existence of a trust. But Mhinder's evidence is equally improbable, and I reject it. The trust the documents purported to create is clearly not the one that Mhinder testified the parties contemplated. To suggest that the acknowledgements were intended to be merely a starting point for documenting the contemplated trust is not credible. His evidence that Mr. Furnemont prepared them on his own volition and then arranged for them to be executed before delivering them to Mhinder is, I find, pure fabrication. Apart from anything else, I am satisfied that Mr. Furnemont would not have hesitated to redraft the documents if they did not properly reflect what was intended by the family. They were all on word processing, and it would have been but a minute's work. And if, as Mhinder suggests, Mr. Furnemont had known all along of the wider trust that the family had discussed, he would never have drafted the documents that way to begin with. Moreover, as I indicated above, it is inconceivable to me that he would have proceeded to draft such documents without specific instructions.
- [306] In addition, Mhinder was unable to provide any explanation supported by evidence as to why the trust should now include the real estate properties owned by Richard, Rita and Gina. They funded the purchase of their properties on their own, without involvement of Mhinder, Bhora or OCL. The most that could be said is that Mr. Furnemont provided transactional assistance. That would not give rise to a trust.
- [307] Mhinder's evidence concerning one of Rita's properties, at 1737 Northfield Road in Nanaimo, illustrates the absurdity of his position. As noted above, Rita purchased the property from Dan Helgesen, an Osborne Group employee, on March 30, 1995, for \$162,000. She assumed responsibility for the existing mortgage of \$92,250, borrowed additional funds, and ultimately sold the property on May 30, 2005, for \$163,000. In the meantime, she paid the mortgage, taxes and other expenses.

- [308] Mr. Helgesen had bought the property on July 28, 1992, for \$105,000. He testified as a witness at trial, during which testimony it emerged for the first time that he had an agreement with Mhinder by which they owned the property equally, sharing the purchase cost and its expenses. Mhinder did not appear on title.
- [309] Rita testified that in 1995, Mhinder had told her that Mr. Helgesen was interested in selling the property, and suggested that she buy it. She was unaware of any interest in the property on Mhinder's part.
- [310] Mhinder claimed when the property was put up for sale by Mr. Helgesen, it was supposed to come to him. Somehow, however, Mr. Furnemont "switched it" so that it went into Rita's name instead. As such, complained Mhinder, Rita obtained the benefit of his interest, something he did not discover for some time. He also suggested that the price for which the property was sold to Rita was below market value, so that the profit represented only Mr. Helgesen's share, not his. Mr. Helgesen, however, confirmed that Mhinder received half of the profits of the sale, and Mhinder ultimately conceded this. Mhinder led no evidence to support his contention that Rita paid below market value.
- [311] Mr. Furnemont testified that he assisted Rita with the sale and in obtaining further financing for the purchase of this property, but had no dealings with Mhinder at all, and was unaware of any interest Mhinder might have had in the property.
- [312] Mhinder's evidence simply made no sense. It began with his concealed interest in the property, then alleged a botched transfer by Mr. Furnemont which apparently went unnoticed for years and was belied by the financing assumed and obtained by Rita, and ended with an allegation of lost profit that he was obliged to retract. I reject his evidence entirely, and I accept that of Rita and Mr. Furnemont. Their evidence, unlike Mhinder's, was straightforward and sensible, and in "harmony with the preponderance of the probabilities". On the whole, it is evident that Mhinder encouraged Rita to buy the property so that he could reap a healthy undisclosed profit.
- [313] Accordingly, I am satisfied that the acknowledgement of trust documents were not intended to evidence an actual trust that the parties contemplated. What, then, was their purpose?
- [314] The only alternative is that they were intended to mislead. But to suggest, as Mr. Furnemont understood, that they were intended to mislead Kelly will not do. Mr. Furnemont may have been prepared to accept that explanation, but I am not. Kelly never took the position that she held the shares in D & A for her own benefit, and indeed signed her acknowledgement without hesitation (objecting only, quite properly, to declaring that she held her real estate in trust). I accept her evidence that there were no marital difficulties at that time, and that she had always acknowledged that she held D & A in trust. She did not need to be tricked into signing the document. So who was to be misled?

- [315] The key, I find, lies in evidence Bhora gave in a slightly different context, and it all relates to Bhagwan's claim as set out in the correspondence that Bhagwan's solicitors delivered in October 2001.
- [316] By December 24, 2001, negotiations had gone nowhere and Bhagwan had filed (but not served) a statement of claim 12 days before. I am satisfied that both Bhora and Mhinder were well aware by then that Bhagwan was asserting that the businesses held in the names of Richard, Gina, Rita and Marc Furnemont were in fact assets of the brothers' trust, of which Bhagwan claimed still to be a beneficiary. This was all spelled out in the letter to Mhinder and Bhora from Bhagwan's solicitors dated September 13, 2001. The reference to Mr. Furnemont was, of course, in error given the transfer of his shares to Rita, but it was an error that was repeated in the acknowledgements of trust.
- [317] As we have seen, Bhora and Mhinder differ as to whether Arrowsmith Concrete (now MIH) was part of the brothers' trust. Bhora contends that it was, and that MIH still is. Yet when Bhora was examined for discovery in the Bhagwan action, this exchange took place:

Q Arrowsmith Concrete, later Mid-Isle Concrete, were its shares held by the trust for the benefit of the brothers?

A No.

- [318] Not surprisingly, Bhora was cross-examined about this evidence given its inconsistency with his position before me. He sought to explain it by differentiating between the brothers' trust alleged by Bhagwan, of which the beneficiaries were Bhagwan, Bhora and Mhinder, and the brothers' trust acknowledged by Bhora and Mhinder, of which they are the sole beneficiaries. Arrowsmith was not an asset of the trust Bhagwan asserted because, Bhora said, he did not recognize that trust and was entitled to ignore it unless and until a court ruled otherwise. When he said that the shares were not held in trust for the benefit of the brothers, he meant for the benefit of Bhagwan, Bhora and Mhinder. But, he testified, they were held in trust for the benefit of Bhora and Mhinder. That was something quite different.
- [319] As an explanation for his inconsistent evidence, this was woefully inadequate; but it does provide a clue as to Bhora's and Mhinder's thinking and illuminates their approach to defending Bhagwan's claims.
- [320] The only reasonable inference, I find, is that the acknowledgements of trust were misguidedly devised by Bhora and Mhinder to support a scheme to defeat Bhagwan's claim against those businesses by making them appear to be part of a trust that was different from the brothers' trust asserted by Bhagwan. They were intended, in short, to mislead Bhagwan.
- [321] What happened after December 24 is this. Mr. Furnemont gave the signed acknowledgements to Mhinder. Bhora and his family went to Vancouver, and Gina and Bhora subsequently vacationed in Mexico. Gina, whose evidence concerning these

circumstances I accept, continued to be concerned about the documents. On their return in January 2002, she asked Mhinder whether he had taken steps to transfer his assets as she understood he was to do. Mhinder said he was not going to do that, and so Gina asked for the documents to be returned. Mhinder agreed.

- [322] A few days later, I find, Mhinder returned Gina's acknowledgement of trust to her, and told her that he had ripped up the others. But he had not destroyed the others. Much to the surprise of Richard and Rita, he produced them years later, in 2007, when relations among the family members were seriously deteriorating.
- [323] The documents were not used in the Bhagwan litigation. Indeed, nobody mentioned their existence. Gina testified that in early January 2002, while she and Bhora were still in Mexico, Bhora told her that Bhagwan had sued them. Bhora and Mhinder already had solicitors. On her return to Vancouver, Gina, Richard and Rita retained Farris & Co. I find it reasonable to infer that once the action had been commenced and the amended statement of claim served (the first amended statement of claim was filed January 2, 2002), Bhora and Mhinder obtained legal advice and, after consideration, concluded that their scheme to protect the family companies by purporting to put them in a new trust in favour of Bhora and Mhinder would not accomplish their goal. No doubt it is for this reason that Mhinder was happy to return Gina's document. If there was a problem with Mhinder's marriage as suggested by Bhora, it seems highly unlikely that he would have done so. Kelly had yet to sign hers. And if the documents signed by Gina, Richard and Rita truly reflected the intention of the parties, as suggested by Mhinder, it would have made no sense for Mhinder to return Gina's (or indeed for Gina to demand it) and to say that he had destroyed the others.
- [324] No other explanation fits with the timing, the urgency with which Bhora and Mhinder acted, and the preponderance of the probabilities. It is otherwise inconceivable that Richard, Rita and Gina would have expressly agreed to hold their properties in trust for Mhinder and Bhora, when the new family trust they had all contemplated, as described by Mhinder, was quite different and much more to their advantage. (I observe parenthetically that in his alternative argument based upon unjust enrichment, Mhinder suggests that an equitable result would be an award of a 25% beneficial interest in the assets of Richard and Rita, not 50%. There was nothing equitable about what the acknowledgements purported to create.)
- [325] It is also inconceivable that, if the family had agreed to a trust as Mhinder described, and then executed documents acknowledging it, he would have done nothing consistent with being the beneficial owner of these businesses, which is what happened.

[326] Mhinder denied that he told Gina or anyone that he had ripped up the acknowledgements. He sought to explain his agreement to return Gina's acknowledgement by saying that, at a family meeting, Richard told him not to worry about 'mom's company', R & G, as it would eventually come to Richard anyway and thereby become part of "our family trust". Richard and Gina denied any such conversation.

[327] It is not easy to understand why Richard would refer to "our family trust" if he had intentionally agreed that he held his companies and properties in trust for Bhora and Mhinder. Moreover, Mhinder said something quite different in an affidavit he swore on April 19, 2010:

Early in the new year 2002, Gina Mayer asked me to return her acknowledgement of trust. At that time I spoke with Bhora Mayer who said that all of Gina Mayer's assets would come to Richard Mayer and Rita Webb anyway and that to keep the family peace I should humour Gina Mayer.

[328] Notwithstanding the frailties of his evidence, Mhinder argued that it should be preferred because otherwise it would mean that:

(a) Mhinder was prepared to cold-bloodedly lie about his actions at the time and repeat the lie several times, (b) Mhinder did so with the intention of relying upon the acknowledgements in the future, thereby undertaking a long-term private plan to trick Richard and Rita, and (c) this was at odds with Mhinder's prior conduct and took place while Mhinder was to all appearances on good terms with the other family members, something that persisted until early 2007. All this is unlikely.

[329] Regrettably, Mhinder has amply demonstrated his preparedness to lie about his actions, and also cold-bloodedly to induce a third party to lie to support his own false evidence. But it does not necessarily follow from my findings that Mhinder callously undertook a "long-term private plan" in this instance. It may be that once it became apparent that the documents would not assist in the defence of Bhagwan's claim, he lost interest in them, said that he had ripped them up just to get the others off his back, and then promptly forgot about them until everything began to go sideways. Then, upon rediscovering them, just as with Richard's promissory note, he saw an opportunity and jumped on it. Alternatively, it may be that he was already beginning to worry about his future and tucked these documents away in case they might someday prove useful. Given all that occurred in this case, I am unable to say that the evidence renders either scenario "unlikely".

[330] Consequently, I reject Mhinder's evidence that he returned Gina's acknowledgement based on representations from Richard (or Bhora), and I accept Richard's evidence that he said no such thing.

[331] Kelly's acknowledgement, of course, was not destroyed or returned, and was executed well after the return of Gina's acknowledgement. While no one disputed that D & A was held in trust, and it was not part of Bhagwan's claim, its trust status had never been documented. I have no doubt that its attempted (but, as I find in section 8.6 below, incorrect) documentation at this time was also inspired by Bhagwan's claim.

[332] Throughout the Bhagwan litigation, all of the parties denied that the family companies were part of any trust. With respect to Richard, Rita and Gina, those denials were consistent with what they perceived to have occurred: they executed documents that purported to but did not create a trust, that were of no legal effect and which were subsequently destroyed. In these circumstances I do not find that their evidence in the Bhagwan action impairs their credibility.

[333] The same cannot be said of Mhinder.

[334] Mhinder testified that he did not produce the acknowledgements in the Bhagwan litigation notwithstanding the issues raised in that case because Bhagwan had left the trust and so what they had done after was none of his business. He tried to split hairs when confronted with his evidence in the Bhagwan action that Richard's and Rita's companies belonged to them, that they were the owners, and that Mhinder was not. He explained that he simply meant that the shares were the names of Richard and Rita. He acknowledged that his answers were incomplete and misleading. He maintained, however, that they were not "completely false".

[335] When it was suggested to him that his testimony in the Bhagwan action that Custom Pumping belonged to his niece, Rita, was inconsistent with his position that it was held in trust for him, he again said he meant that it belonged to her because she owned the shares. There followed this exchange, which is but one of many similar exchanges:

Q But according to the acknowledgements she was holding them on trust for you and Bhora?

A Yes.

Q So it didn't belong to her in a beneficial sense. She was only holding the shares in her name. And you didn't say that company, the shares are held in the name of Rita Mayer, but he holds them on trust for me and Bhora. You didn't say that, did you?

A I did not say that, no. I did not say that.

Q The statement you made here was intended, I suggest you, to mislead Bhagwan's counsel.

A It is an incomplete answer. And I agree with that. And I didn't feel that Bhagwan needed to know. He had left the trust. It's not really his business.

Q It wasn't just incomplete. It was intended to mislead him. Isn't that right?

A That -- that may have been my thinking at that time. That could well have been, yes.

- [336] I reject Mhinder's evidence. Nothing he has said about this purported trust can be relied upon in view of his myriad inconsistencies and contradictions.
- [337] I accept the evidence of Gina, Richard and Rita that they signed the documents under protest, and with the understanding, based on the assurances of Bhora and Mr. Furnemont, that the documents were not legally binding and would have no effect. It is true that they signed voluntarily in the sense that no guns were put to their heads. But they did so: reluctantly and under pressure; in the context of the strong and stern insistence of Bhora, the family patriarch; with the understanding that it related to family dynamics having to do with Mhinder; and with the assurance that it would mean nothing of any legal consequence.
- [338] The three certainties required to establish an intentional trust have not been established here. Even the trust object, which purported to be for the benefit of Bhora and Mhinder, was not the one to which, on Mhinder's evidence, the parties had agreed. Rather, he testified, what Mr. Furnemont drafted was just a start.
- [339] But perhaps most importantly, I find that there was no certainty of intention on the part of the alleged settlors. What they unwittingly created, I find, were sham trusts, incapable of transferring beneficial interests, and unenforceable. Instead of an intention on the part of Richard, Rita and Gina to hold property in trust, there was a ruse devised by Bhora and Mhinder for their own purposes, although ultimately intended to benefit the family.
- [340] In Sangha, Allan J. reviewed the law concerning sham trusts:
- [346] Canadian courts have consistently held that a trust is a sham if the parties had a common intention that the acts done or the documents executed not create the legal rights and obligations which they gave the appearance of creating: Forsyth (Re), 2010 BCSC 1720 at para. 16; In the Matter of the Bankruptcy of Larry Peter Biggar, 2005 BCSC 1657 at para. 8; Mordo v. Nitting, 2006 BCSC 1761 at para. 297; Trident Foreshore Lands Ltd. v. Brown, 2004 BCSC 1365 at para. 39, quoting Snook v. London and West Riding Investments Ltd., [1967] 2 Q.B. 786; Sran (Re), 2010 BCSC 937 at para. 57; and Duca Financial Services Credit Union Ltd. v. Bozzo, 2010 ONSC 3104 at para. 42.
- [347] Madam Justice Wedge surveyed the law of sham trusts in Mordo:
- [295] The issue of sham trusts is treated in different ways by different authors. W.J. Mowbray et al., *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000) at paras. 4 - 19 to 4 - 28 [Lewin] considers that whether a trust is invalid as a sham depends primarily on the intention of the settlor at the time the trust is created (citations omitted):

The sham concept would appear to involve a finding of fact akin to, but nevertheless falling short of, actual fraud. In the trust context, a finding will be necessary that, whilst an apparent settlor did not in fact intend to part with the beneficial interest in the trust property, nevertheless he executed documentation with the apparent effect of so parting (Lewin at paras. 4 - 21).

If at the [time of execution] the settlor genuinely intends the documentation to take effect according to its terms, and those terms are such as to create a trust, then nothing the settlor or trustees do thereafter can render a valid trust a sham (Lewin at paras. 4 - 22).

[Courts have] distinguished between the class of case where parties entered into a written agreement which was "a sham intended to mask their true agreement", and the distinct class of case where, without any question of sham, there "has been held to be some objective criterion in law by which the courts can test whether the agreement the parties have made does or does not fall into the legal category in which the parties have sought to place their agreement (Lewin at paras. 4 - 24).

[348] Intention is distinguishable from motive. Gordy and Dal could have intended to create trusts for the purpose of defeating Amarjit's legitimate claims by giving Dal a mere legal interest in his shares and Gordy the beneficial interest in them. The Trusts would then be valid but illegal trusts.

[349] Sham trusts, on the other hand, do not represent the true intention of the parties. Considering the nature of a sham transaction in a taxation context, a majority of the Supreme Court of Canada said the following in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536 at 545-546:

A sham transaction: This expression comes to us from decisions in the United Kingdom, and it has been generally taken to mean (but not without ambiguity) a transaction conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the taxpayer or the true nature of the transaction; or, simple deception whereby the taxpayer creates a facade of reality quite different from the disguised reality.

[341] In this case, I have no difficulty concluding that the acknowledgements of trust signed by Gina, Richard and Rita do not represent the true intentions of the parties who signed them, and that while the parties' various intentions may have been different, they were ad idem in this regard: none of them intended the creation of the legal rights and obligations represented by the trusts that the documents purported to acknowledge.

[342] The acknowledgement of trust signed by Mr. Furnemont is of no effect because Mr. Furnemont had no beneficial interest to hold. The document signed by Kelly is in a different category for the reasons discussed above, and I will deal with it later in relation to the claims involving D & A (section 8.0 below; see paras 569-571).

5.8 Conclusion on Mhinder's trust claims against Richard and Rita

- [343] It follows from what I have just said that Mhinder's claim based on the acknowledgements of trust signed by Richard and Rita must fail. His claim based on the alleged express "new family trust" that arose "around" '94-'95 falls with it. The two were interconnected, with the acknowledgements of trust being, according to Mhinder, the culmination and ultimate expression of what the family had contemplated earlier, even though they did not fully reflect what they had discussed.
- [344] Without the acknowledgements, which I have found to be a sham, Mhinder's evidence concerning the agreement that he says the family "contemplated" some years before is insufficient to create an intentional trust. He cannot identify a time of agreement. He gave different accounts on different occasions when he was asked about it. There was no certainty of intention. In this regard, it is not Mhinder's intention that counts. It is the intention of Richard, Rita and Gina that counts. There is no evidence of any such intention on their part unless one were to accept their acknowledgements as constituting such, which I do not. I am satisfied that Mhinder's evidence in this regard is a fabrication intended by him to reflect what he now believes should have happened, rather than what did happen.
- [345] My conclusion is fortified by the Cement Purchase and Rights of First Refusal Agreements signed by Nanaimo Concrete, Wee Tree, Arrowsmith and GCM with Lehigh/Tilbury in 1998, well after Mhinder testified this new family trust arose. Nanaimo Concrete, Wee Tree and Arrowsmith were all represented as being owned both legally and beneficially by their respective registered shareholders, Richard, Rita and Mhinder.
- [346] My conclusion is further fortified by the Settlement Agreement signed by the parties in the Bhagwan action in 2006 by which, as I set out above (see para 56), Mhinder, Bhora and the other Osborne Defendants agreed that they had no beneficial interest in any of the properties or businesses legally owned or carried on by any of the Secondary Defendants. Those Secondary Defendants, it will be recalled, included Richard, Rita, Gina and their respective companies. I am able to come to my conclusion, however, without having to rely upon the Settlement Agreement, and therefore it is unnecessary for me to resolve the factual or legal issues raised in relation to it-except to this extent: I reject Mhinder's evidence that he only signed the agreement on the basis of representations from Richard and Rita that he need not worry, they would look after him. I accept the evidence of Richard and Rita that they gave no such representations.
- [347] I note further that if I were to accept Mhinder's position in relation to the creation of an express trust, it would follow that he and his co-defendants in the Bhagwan action had perpetrated a fraud upon Bhagwan, with the two sets of defendants orchestrating a careful conspiracy of deceit. While such a state of affairs is not beyond comprehension, I conclude on the evidence that what deceit there was in relation to this issue took place in this action, not in that one.

[348] Given my finding that the parties did not intend to create a trust, is this a situation in which a trust should be imposed or declared because Richard and Rita have been unjustly enriched, knowingly received trust property transferred to them in breach of trust, or hold property that, in good conscience, they ought not be permitted to retain? For the reasons discussed above in my review of the family companies, the answer is no. In the particular circumstances of this case and this family, neither justice nor good conscience renders it inequitable for them to retain the benefit of the businesses they built.

6.0 THE DISPUTED TRUST COMPANIES CLAIM

6.1 Overview

[349] As set out in the Schedule of Corporate Parties, the DTCs comprise four corporations of which Mhinder is the sole registered shareholder: C.A.R. Aviation Ltd, Island Structures Ltd, Mid-Isle Holdings Ltd ("MIH", formerly Arrowsmith Concrete Ltd) and Chemainus Ventures Ltd.

[350] Bhora claims that all of these companies are assets of the brothers' trust pursuant to clauses 2 and 6:

2. ALL ventures engaged in shall be owned equally by all five brothers until such time as this agreement is altered or cancelled.
6. If any venture, acquisition of business or property is engaged in by any one of the brothers for his personal benefit, he must clearly define this and obtain release of this trust for the purpose of his venture.

[351] According to Bhora, any release contemplated by clause 6 had to be in writing, and Mhinder obtained no such releases for any of these companies. It follows, he asserts, that all of the DTCs are owned equally by the remaining beneficiaries, Bhora and Mhinder.

[352] Mhinder does not dispute Bhora's interpretation of the agreement, that businesses in the name of one brother are held by that brother in trust for both remaining brothers under the brothers' trust unless a release has been obtained to engage in that business for the registered owner's personal benefit. Mhinder maintains, however, that he did obtain the release of the trust in relation to the DTCs, and that there has never been a requirement that such a release be in writing.

[353] I accept Mhinder's position that such a release need not be in writing, and I reject Bhora's evidence to the contrary. Mhinder's position is consistent with Bhora's own evidence about the approach of Bhagwan to the incorporation of Arrowsmith Concrete. Bhora's position is not. Moreover, Mhinder's position is in accord with the practicalities and the preponderance of the probabilities that appear reasonable in the circumstances. In this regard, it seems to me logical that if the brothers agreed to a requirement that something be in writing, then that requirement would itself be put into writing.

[354] It will be recalled that in his lawsuit, Bhagwan alleged that the DTCs C.A.R. Aviation, MIH and Chemainus Ventures were assets of the brothers' trust. Bhora and Mhinder denied this. One of the lawyers at Blake, Cassels & Graydon LLP who acted for Mhinder and Bhora in that action was Michael Howcroft. On January 15, 2002, Mr. Howcroft prepared a memorandum to Randy Kaardal advising that he had undertaken corporate and land title searches of companies and properties listed in Bhagwan's statement of claim. In the memorandum, Mr. Howcroft summarized the results, "including the likelihood of whether these properties or companies would be inside or outside the trust arrangement between the Mayer Brothers". He continued:

The following companies list Mhinder Singh Mayer as its officer and director but Bhora Mayer advises that they do not form part of the Mayer brother's [sic] trust:

- C.A.R. Aviation Ltd.
- Chemainus Ventures Ltd
- Mid-Isle Holdings Ltd.

[355] Mr. Howcroft confirmed that Bhora was the main source of his instructions. Although he did not recall this particular discussion, he testified that he would not have written what he did unless he had received those instructions from Bhora. Bhora denied giving those instructions, maintaining that Mr. Howcroft's views must have been based on only the corporate searches. But that is not what Mr. Howcroft wrote. I prefer Mr. Howcroft's evidence and accept that his memorandum is an accurate record of what he was told by Bhora at the time.

[356] On the other hand, Bhora points out that in a "Cohabitation Agreement" between Mhinder and Kelly dated August 19, 1996, while Mhinder's assets listed C.A.R. Aviation and Island Structures Inc. as his corporations, "Aerosmith Concrete Ltd" [sic] was listed as a company held in the brothers' trust.

[357] Mr. Furnemont testified that it was his understanding that both MIH and Chemainus Ventures were owned by the brothers' trust. On this question, I am not prepared to take his understanding as definitive in the face of the evidence of the brothers and surrounding circumstances. As we shall see with D & A, Mr. Furnemont's understanding was not always complete. Indeed, he recognized this himself in March 2007 when he requested Bhora and Mhinder to identify and agree upon which companies were to be considered as part of the Osborne Group.

[358] I now turn to review the different corporations.

6.2 C.A.R. Aviation and Island Structures

- [359] The only asset of C.A.R. Aviation is a Cessna aircraft which both brothers agree has always been treated as Mhinder's personal property. Mhinder explained that the previous owner had incorporated the company to hold the aircraft, and that Mr. Furnemont advised him that it would make sense to buy the company (and thereby its asset) rather than just buying the aircraft. He did so.
- [360] As far as the evidence indicates, it appears that Island Structures was incorporated by Mhinder for the purpose of providing a storage hangar for this Cessna, and nothing else. According to Mhinder, Bhagwan approved his personal ownership of this company. That would make sense, given the limited purpose of the company and its relation to Mhinder's personal ownership of the Cessna.
- [361] Bhora does not dispute that Mhinder's Cessna is his personal property, but nevertheless insists that by reason of the agreement, Mhinder holds the shares of C.A.R. in trust.
- [362] Taking into account the evidence as a whole, including the position Bhora took in the Bhagwan litigation, his instructions to Mr. Howcroft, and the preponderance of probabilities (including Bhora's acknowledgement that the Cessna aircraft was Mhinder's private property), I find that both these companies are excluded from the brothers' trust as Mhinder's personal corporations. The approach that the brothers both took is consistent with having reached an understanding to this effect.

6.3 Mid-Isle Holdings (Arrowsmith Concrete)

- [363] I reviewed the genesis of this corporation above (section 5.6.1). Bhora argues that even if Arrowsmith should be found to have been Mhinder's personal company, that status ended with the Lehigh transaction, and the successor company, MIH, should be considered to be an asset of the brothers' trust, having not been specifically released.
- [364] Mhinder confirmed Bhora's evidence that creating Arrowsmith Concrete as Mhinder's business was Bhagwan's idea. According to Mhinder, it was initially a "grey area" as to the extent to which the company and the business venture would be his, but after Bhagwan left the trust, Bhora confirmed that the business was his to run as his own.
- [365] The business and the land were both sold to Lehigh, and Arrowsmith was re-named MIH. That left Mhinder holding the shares of the subsidiary incorporated to receive his share of the proceeds. That subsidiary was amalgamated into MIH.
- [366] Notwithstanding what was stated in a schedule to Mhinder's cohabitation agreement, I find that it was understood and agreed that Arrowsmith was Mhinder's personal company and business if not from the time of its creation, then certainly well before the Lehigh transaction. This is consistent with Bhora's own evidence concerning the origin of Nanaimo Concrete, Bhora's evidence in the Bhagwan litigation, Mhinder's evidence, the existence of a franchise agreement between Arrowsmith and OCL and the treatment of Arrowsmith, together with Wee Tree and Nanaimo Concrete, in the Lehigh sale.

- [367] There is nothing in the evidence to support the contention that after the Lehigh sale, MIH would become an asset of the brothers' trust in the absence of obtaining a new release under clause 6. I am satisfied that the nature of the succession from Arrowsmith to MIH did not require a new release. There was a continuing engagement. Otherwise, the consideration for the sale of Arrowsmith, which would properly be for the credit of Mhinder, would become the property of the brothers' trust. If Bhora wished to take the position that a new release would be required, he ought to have taken it then.
- [368] Mhinder's position is also consistent with the way that the accounting was recorded. Amounts recorded in MIH's books as owing to Mhinder were transferred to OCL's books by journal entry. There, it was credited to Mhinder's shareholder's account, not divided between the shareholders' accounts of Mhinder and Bhora.
- [369] MIH, it follows, is Mhinder's personal corporation and is excluded from the brothers' trust.

6.4 Chemainus Ventures

- [370] The evidence about how Mhinder came to hold the shares in this company is somewhat complicated, and involves a man named Steve Thorpe-Double. Mr. Thorpe-Double did not testify.
- [371] Mr. Thorpe-Double was a mechanic for the family in Crofton, and lived in Chemainus. He wanted to branch out on his own. It appears that Bhora came up with a proposal of a partnership with Mr. Thorpe-Double in an excavating company, called T-Double Enterprises, which would perform work for Mayer companies. That partnership was ultimately taken up by Gina, rather than Bhora. In addition to equipment, the business involved the ownership of property that could only be owned by a Chemainus resident (why was never explained by anyone), which was Mr. Thorpe-Double. But he would hold the property in trust for the Mayers.
- [372] Litigation ensued between Gina Mayer and Mr. Thorpe-Double, and was ultimately resolved in a manner that saw Gina receive cash and Mhinder receive the shares in the company, now Chemainus Ventures, that owned the property and its building. Chemainus Ventures still owns the property and the building. Mhinder still owns the shares.
- [373] In all of the circumstances surrounding this rather confusing history, I find, on a balance of probabilities, that Mhinder owns the company personally, and that Chemainus Ventures is not part of the brothers' trust. I take into account Bhora's instructions to Mr. Howcroft, the way in which the company developed, and the resolution of the dispute which saw, in essence, part of the consideration go Bhora's way (in the form of the cash paid to Gina for which she did not have to account to the brothers' trust), and part go Mhinder's way (in the form of the land and building). This is consistent with an understanding that both the cash proceeds and the property proceeds would be excluded from the trust. It is also consistent with the way in which the business and property were treated in the accounting, as was the case with MIH.

6.5 Conclusion re the DTCs

[374] For the reasons just discussed, I find that the four DTCs, C.A.R. Aviation Ltd, Island Structures Ltd, Mid-Isle Holdings Ltd and Chemainus Ventures Ltd, are both legally and beneficially owned by Mhinder, and are not assets of the brothers' trust.

7.0 THE EQUALITY CLAIM TO 2007

7.1 Overview

[375] This claim goes to the very root of the brothers' trust. Mhinder claims, as did Bhagwan before him, that by its terms, the brothers' trust provides for equal benefit to all beneficiaries. He maintains, however, that in the years from 1991, when he and Bhora became the sole beneficiaries, through 2006, after which they had a falling out, Bhora withdrew significantly more money than Mhinder, and must now account for the excess over equal distribution. Moreover, he alleges, Bhora collected rents from trust properties that he kept for his own benefit.

[376] In the period from 2007 on, Mhinder alleges that Bhora conducted the affairs of the trust businesses, the ITCs, in a manner that was oppressive and unfairly prejudicial to Mhinder, including dealings with the family companies, payments made to Bhora while corresponding payments to Mhinder were withheld in the course of litigation, and a number of other matters. These claims will be dealt with separately.

7.2 The equalization of draws claim

[377] I have already commented about the brothers' approach to money. In essence, they withdrew such money as they required whenever they required it. The evidence suggests that at least until 1991, Bhagwan took significantly higher drawings than the others. He had a large family. The evidence also indicates that in a number of years after 1991, Bhora withdrew more than Mhinder, although in some years the balance went the other way.

[378] The 1966 Agreement began by reciting that it shall enure to the "mutual and equal benefit" of the five brothers. All ventures were to be "owned equally by all five brothers"; all properties were to be considered held in trust as being "equally owned by all five brothers". Each brother agreed to do his part towards "equal benefit". As Mhinder points out, referring to *Royal Trust Corp of Canada v Arthur Andersen Inc (re Westar Mining Retirement Plan)* (1994), 96 BCLR (2d) 135 at para 38, quoting from *Hanbury & Martin, Modern Equity*, 14th ed. (1993):

Equity is equality. Where two or more persons are entitled to an interest in the same property, then the principle of equity is equal division, if there is no good reason for any other basis for division.

[379] Mhinder testified that it was his understanding "right from the get-go" that the brothers were all "equal partners". He acknowledges, however, that when it came to draws, the brothers did not apply the concept of equality to the amounts of money they withdrew. In particular, while Bhagwan remained a member, it was typical that he would take more in drawings than the others; indeed, the 1966 Agreement recognized in clause 4 that some brothers' needs would be greater than others:

IT IS AGREED that the financial needs of the brothers will vary and therefore it is agreed that equalization of drawings shall not be considered until such time as mutually agreed upon.

[380] This clause was, however, deleted by the 1984 Agreement. Mhinder argues that the effect of this deletion was to make equality the invariable rule, while Bhora contends that its effect was to end any recourse to an equalization process.

[381] According to Mhinder, he discussed the matter of draws with Bhora and Mr. Furnemont in 1991 after Bhagwan left the trust. Mhinder testified that he was quite worried about Bhagwan leaving. Before, the trust had been run essentially on the basis that it was 'one for all and all for one, but Bhagwan was boss'. In this discussion, Mhinder testified, Mr. Furnemont explained:

that Bhagwan had taken more money than all-double than-more than double the money than all of the other brothers put together in the years that he was there. And Marc stating that--Marc and all of us say, hey, that ain't going to happen anymore. That will not happen anymore. And Marc was an accountant. So I trusted him that-to enforce that.

[382] Mhinder went on to explain the depth of Mr. Furnemont's involvement as accountant, financial planner and "our financial guy", indicating that he assumed from that point on that, financially, he and Bhora would be treated equally.

[383] Mr. Furnemont agreed that he was part of a discussion with Bhora and Mhinder following Bhagwan's departure in 1991, and that he told the brothers that Bhagwan had taken out much more money than they had over the years. The context was that there would now be more cash available to Bhora and Mhinder as Bhagwan was no longer taking the lion's share. He denied, however, that there had been any agreement that Bhora and Mhinder would receive equal amounts in the future:

If that had been part of the conversation, I would recall it because it would have been a substantial change in the way the business was being run and things would have been handled very differently thereafter. So, no, I did not receive any kind of instructions about making sure that everyone received the same amount of money. There were quite a few years where Mhindy took more money out than Bhora, just as there were years where Bhora took more money out than Mhindy. And neither of them objected to that through the course of the years.

[384] I accept Mr. Furnemont's evidence, and prefer it to that of Mhinder. It accords with what the parties did. But it does not of itself answer the question of whether Mhinder is now entitled to equalization.

[385] Mr. Furnemont began working for the Osborne Group the same year that the agreement was amended. Consistent with the excerpt quoted above, he testified that throughout the time of his employment, the brothers had a "commune approach", where it did not matter how much each withdrew or collected or received. At the end of the year, the shareholders' accounts were "equalized", and:

everybody was T4'd the same, everybody reported the same taxable income . It was explained to me it doesn't matter who takes what during the year, everything was to be equalized every year because the needs of the shareholders will vary from year to year. And that was the philosophy when I started working back in '84.

[386] This "equalization" process did not equalize the amount received by each brother. That was never the intention, according to Mr. Furnemont. The idea was that at the end of each year, the balances of the shareholders' accounts would be adjusted to become equal. When there were five brothers, he would add up the total balance of the five shareholder loans, divide by five, and adjust all to the same level. This would reduce the overall tax situation (the brothers' taxes being paid by OCL), while maintaining the ability of each brother to take what he needed when he needed it.

[387] Mhinder points to Mr. Furnemont's annual "equalization" entries in the OCL general ledger as potentially obscuring any inequality in draws over time by making it more time-consuming to calculate any cumulative effect. The reality is, however, that the practice was a long-standing one, and nothing was concealed.

[388] Mhinder's claim was supported by expert evidence provided by Rosanne Walters, CPA, CA, CBV. Ms. Walters' initial report was produced on May 15, 2008, and addressed activity in the shareholders' accounts over the years 2005 and 2006. Regrettably, Ms. Walters indulged in language best omitted from expert reports, including conclusions on various scenarios that she opined would be "unfair to Mhinder".

[389] I found Ms. Walters' conclusions somewhat difficult to follow, particularly after the completion of cross-examination. This is particularly so with respect to what effect my finding in the previous section that MIH is not a trust company, but is Mhinder's company, would have on her conclusions. These conclusions were phrased unhelpfully, in the form of what equalization entry would be required to equalize the shareholders accounts, an entry which, she stated, "if done would be unfair to Mhinder".

[390] In reviewing the equalization entries, she noted that deficits in Mhinder's shareholder's account with OCL were on occasion reduced by the transfer of a shareholder's loan from MIH, which was credited only to Mhinder's OCL account, not to Bhora's. This was true except for one occasion in 2005 when the credit of an MIH shareholder's loan was divided

equally between Bhora and Mhinder. Ms. Walter acknowledged in cross-examination that the effect on "unfairness" depended upon who owned MIH. I have found that Mhinder owns MIH. Given Mr. Furnemont's evidence, I am unable to find that the apparent accounting error in 2005 caused any loss.

[391] Returning to the question of equality, Mhinder submits that the trust agreement as amended must be interpreted as requiring that Mhinder and Bhora be treated equally in all respects in relation to the brothers' trust. He then argues that any change from that proposition after their 1991 discussion could only be effective with Mhinder's informed consent, which was never given.

[392] On the question of interpretation, there can be no doubt that the agreement refers repeatedly to equality. The 1984 deletion of clause 4 removed any reference to recognizing that the brothers' financial needs would vary, and any reference to postponing equalization that was thereby required.

[393] Just why that occurred is not clear. Mhinder recalled only being told that the amendment was to deal with what would happen upon a brother's death, a different clause in the 1984 Agreement. Yet, in the Bhagwan litigation, he testified on discovery in 2004 that when the 1984 amendment was presented to him, he understood the change to mean that distributions would no longer have to be equalized at the end of the day, a change that he viewed as unfairly to the benefit of Bhagwan. When asked in this trial if those answers were truthful, he replied:

To what my head was thinking at that time, I would say yes. You know what, I just don't know what I was thinking at that time.

[394] Before me, Mhinder maintained that as best he could recall, he had not realized until 1991 that Bhagwan was taking more money than other brothers, but it is clear that his recollection was different in 2004, and I do not accept that he was unaware either before or after 1984. But of course his understanding of the effect of the amendment at that time is not determinative.

[395] Bhora's evidence was consistent with that given by Mhinder in the Bhagwan litigation in 2004. Bhora said that the brothers were all together to discuss the proposed amendment, and Bhagwan took the lead. He said that no one had ever raised the issue of equalizing draws, so they should remove the clause. That way there would be no equalization demand on the death of a brother. The understanding was that they would continue with the practice that if a brother needed something, he would simply ask for it.

[396] Intention, of course, must be discerned from the agreement, not from the recollection of Mhinder and Bhora. What the parties clearly agreed was that clause 4 should be deleted. Reading the agreement as a whole without clause 4, the only reasonable conclusion is that what is left is equality: equality of ownership and equality of benefit.

- [397] Does this necessarily require equal draws? As originally drafted, it would seem that the brothers did not think so, given the content of clause 4. But does "equality of benefit" require cash withdrawals to be identical notwithstanding different needs and circumstances? I do not think it does in the absence of clause 4, but even if I am incorrect in this, I do not think it matters.
- [398] Bhora points out that Mhinder at all times had access to the books and records of all of the companies, received copies of corporate tax returns and financial statements, and frequently signed the financial statements and tax returns on behalf of the directors. Nothing was hidden, and, in Bhora's submission, Mhinder ought not to be able to hide behind a wilful disinclination to pay attention as a basis for claiming ignorance of a course of conduct in which he had participated for many years.
- [399] Moreover, Bhora asserts, Mhinder's evidence does not establish long-term inequality. Taken at its highest, it suggests that over the years 2001-2006, Bhora benefited from rent receipts he kept and draws in excess of an equal division by some \$641,053 (per Ms. Walters), which assumes, as I have found, that the DTCs should be treated as Mhinder's. But there is no evidence of what transpired during the years 1991-2000. Given that there were some years between 2001 and 2006 when Mhinder withdrew more than Bhora, it cannot be safely inferred that an inequality favouring Bhora would be found over the entire span of 1991-2006.
- [400] In my view, there are two difficulties with Mhinder's position that Bhora must account for an imbalance of draws in his favour over the years they were the sole trustees and beneficiaries, even assuming that his interpretation of the agreement is correct. The first is the evidentiary problem described in the preceding paragraph. It is impossible to compare the relative drawings of Bhora and Mhinder over the entirety of the relevant period. Consequently, the amount of any imbalance cannot be ascertained on the evidence before me, and the onus of proving this claim is on Mhinder.
- [401] The second is the undisputed course of dealings among the brothers that accepted unequal draws which varied in accordance with their relative needs, not only up to 1984 when clause 4 was deleted, but for many years thereafter. Mhinder does not forcefully deny that he was aware of this, but maintains that he and Bhora agreed, with Mr. Furnemont, to bring the practice to a halt after Bhagwan's departure in 1991. But I have rejected his evidence about that agreement, and I am therefore left with the fact that he understood the situation, and was content to proceed on the basis on which the brothers had operated since inception: so long as they acted in good faith, and so long as funds were available, each was free to withdraw what he needed when he needed it.
- [402] The decision in *Langley, Bevans and Julson v Brownjohn*, 2007 BCSC 156, is helpful. There, Madam Justice Ballance confirmed at para 70 the point made by Mhinder that any deviation from the trust provision, here of equality, could only be made with Mhinder's informed consent. But as Ballance J. noted at para 69:

It is settled that where a capacitated, adult beneficiary consents to or concurs in a breach of trust prior to its being carried out, or acquiesces to the breach after its occurrence, that beneficiary is barred from suing the trustee in the event that a loss results from the breach: *Re McNeill* (1911), 19 W.L.R. 691 (B.C.S.C.); *Waters' Law of Trusts in Canada*, supra, page 1237.

- [403] Here, what Mhinder alleges, in essence, is that Bhora, as co-trustee, breached his duty to maintain equality between the beneficiaries by helping himself to draws that, overall, exceeded what Mhinder took. But the evidence falls short of demonstrating overall inequality, and certainly shows no want of good faith by Bhora, either in the amounts he withdrew, or in interfering in any way with Mhinder's withdrawals. There is no evidence that Mhinder was ever limited or restricted in his withdrawals. And to the extent Bhora may have withdrawn more than Mhinder, I find that Mhinder concurred in the practice both as trustee and as beneficiary at least until 2007. He cannot, therefore, claim against Bhora for any loss from that alleged breach.
- [404] Viewed properly, that practice was not lacking in equality in any event. The brothers were equally entitled to withdraw what they needed when they needed it. Given the surrounding circumstances, I conclude that that was what they meant by "equal benefit". Mr. Furnemont described the arrangement as commune-like, and Mhinder quoted Welbier's description of the trust agreement as "Communist". Indeed, Karl Marx's words would appear to be apt: "From each according to his ability, to each according to his needs" (Karl Marx, *Kritik des Goethaer Programms*, 1875).
- [405] Consequently, on any interpretation of the agreement, Mhinder's claim against Bhora for an accounting for inequality in the draws over the years 1991-2006 fails.

7.3 The Gina rents claim

- [406] This claim, like several raised in this litigation, arises from a puzzling set of circumstances.
- [407] The brothers owned a number of properties. Some were owned by Bhora and Mhinder jointly, while others were registered in their individual names. Whether those registered only to Mhinder were his personal properties or assets of the brothers' trust I address below in section 9.0.
- [408] Most of these properties were leased out. For many years, Gina attended to collecting the rents. She then took care of paying the expenses on the properties, and remitted the balance to OCL. OCL paid her a fee of \$750/month for this service.
- [409] Along with her remittance, Gina provided to Mr. Furnemont a monthly accounting of the rents received and expenses paid, including her management fee, and Mr. Furnemont prepared schedules of rents and expenses which he provided to the outside accountants, Park & Braithwaite (where Mr. Fitterer was employed), for the preparation of tax returns. Normally, the income and expenses were divided equally between Bhora and Mhinder for tax purposes.

- [410] Gina changed this practice beginning in 2001. That year, she stopped paying the net rents over to OCL and instead paid the rental monies from trust properties (in the name of Bhora and Mhinder) into a joint bank account she had with Bhora. She continued, however, to provide an accounting to Mr. Furnemont, who continued preparing schedules of rents and expenses for inclusion in the tax returns. Bhora was now receiving income upon which Mhinder was paying tax. This continued through 2006.
- [411] What happened is not disputed. Why it happened is another matter. Bhora and Gina endeavoured to explain how this came to pass, and once again I found it difficult to make sense of their explanation. The real question is whether Mhinder knew and approved of the practice. It is his evidence that he did not.
- [412] Bhora said that the practice started because he was not being paid a salary in 2001, unlike Mhinder who was paid as an employee of Island Aggregates. He could not simply take a draw, Bhora said, as OCL was short of cash. Marc Furnemont therefore proposed that he hold on to all of the rents in lieu of taking a salary.
- [413] According to Bhora, Mhinder knew of this, and supported it. Bhora described a conversation among Gina, Mhinder, Mr. Furnemont and him at Fast Eddie's restaurant in Nanaimo. Gina, he said, was unhappy with the arrangement. She said to Mhinder that it was wrong that Bhora was not getting wages, but getting rent instead. Mhinder shut her down, saying, "Gina, what are you worried about? Marc knows what he's doing and Bhora is getting his wages through the rent".
- [414] Gina gave a similar account, explaining that the change was urged on her by Bhora and Mr. Furnemont. When she told the others she was uncomfortable with it during the lunch at Fast Eddie's, and would rather that Bhora received a salary, she quoted Mhinder as responding, "What difference does it make to you? Marc looks after it. Do you want to pay more taxes?"
- [415] Both gave somewhat inconsistent evidence elsewhere. But my real difficulty with their explanation is that it does not accord with common sense. The evidence did not indicate that OCL was short of cash and unable to pay a salary to Bhora. If it was, why not pay all of the rent over to OCL and take a portion back? Bhora's habit, as we have seen, was to withdraw funds from wherever they were available, so a salary was largely symbolic. And how would this arrangement save anyone tax? None of this was explained.
- [416] Mr. Furnemont was also mystified. He testified that Bhora had come to him and explained that in order to take fewer draws from OCL, he was simply going to keep the rent money. This did not make accounting sense to Mr. Furnemont, who tried to explain to him that it made no difference whether he kept the rent and withdrew a lower amount from OCL, or deposited the rent and withdrew a larger amount from OCL. Bhora said, "No, Marc, I've talked about it with Gina and Mhindy, everybody figured it's simpler to do it this way".

- [417] Mr. Furnemont acquiesced. From his perspective, while it made no sense in his accounting world, it also made no difference. This is because the effect of the equalization process meant that whether a brother received money in the form of rents otherwise payable to OCL or in the form of draws from OCL did not matter.
- [418] With respect to the question of how this practice came about, I am unable to accept the evidence of Bhora and Gina that it was Mr. Furnemont's suggestion. Mr. Furnemont's evidence makes more sense, and I prefer it. Mr. Furnemont was unable to say from his own knowledge that Mhinder was aware of this change in practice, and in all of the circumstances, I conclude that Mhinder was not. His alleged statements to Bhora and Gina at Fast Eddie's are not in accord with the surrounding circumstances or the evidence of Mr. Furnemont.
- [419] But does it matter? According to Mr. Furnemont, it made no difference to the bottom line because of the way in which the shareholders' loans were equalized. I accept his evidence, but it was given in the context of his assumption that Mhinder was aware of the practice. I have found, however, he was not. The situation is accordingly different from Mhinder's claim arising out of the alleged imbalance in the draws. Here, there is clear evidence that Bhora was keeping amounts that in the accounting were attributed to Mhinder over the years in question, being 2001 through 2006.
- [420] Unlike regular draws taken as needed pursuant to long-standing practice and clearly recorded in the books, keeping rents to oneself that were otherwise recorded as being received equally by the brothers would conceal what was happening from a brother who was unaware of what was going on. It would therefore violate the principle of equal benefit I have described in the previous section because of the lack of transparency. Withdrawing funds in accordance with one's needs satisfies the spirit of the agreement only if it is done openly. In this instance, I find, it was not.
- [421] It follows that, notwithstanding Mr. Furnemont's evidence, we cannot know whether Mhinder would have objected had he known, or what Bhora would have done had the practice been halted. I therefore conclude that Mhinder is entitled to an accounting from Bhora for all of the rents collected by Gina over the years 2001-2006 that were paid into Bhora's and Gina's joint account. This shall be referred to the Registrar if the parties are unable to agree.

8.0 THE CLAIMS RELATING TO D & A CRUSHING

8.1 Overview

- [422] No one disputes that, since its inception, the registered owners of the shares in D & A, first Dan Allarie, then Kelly Mayer, did not hold the beneficial interest in those shares, but held them in trust. The question is, for whom? It was never in the name of one of the brothers, and was not part of the brothers' trust. Nothing was ever put in writing, at least not until Kelly signed her acknowledgement of trust on January 24, 2002, in which she purported to

confirm that she held the common shares of D & A in trust for Bhora and Mhinder. But was she in a position to do so?

- [423] Mhinder contends that it was always understood that the beneficial owners were him and Bhora, and that Kelly confirmed this when she signed her acknowledgement of trust on January 24, 2002. Unlike the circumstances surrounding the acknowledgements of trust signed by Richard, Rita and Gina, no one told Kelly that the document was not intended to be legally binding, and Kelly did not take it that way. That is why she crossed out the paragraph that dealt with her properties. She did not dispute that she held D & A in trust, but was not about to agree that she held her properties in trust for anyone.
- [424] Richard and Bhora both maintain that the company's beneficial owner is, and was always intended to be, Richard. Indeed, it was created to supply Richard's company, Nanaimo Concrete. That, they say, was the point of its existence. Although there is no trust deed to this effect, Richard submits that the court should find that Kelly holds the shares of D & A in trust for Richard pursuant to either an intentional trust or a substantive constructive trust. On this basis, Richard asserts, it would be unconscionable for Kelly to retain the shares, and they should be transferred to him.
- [425] This matters not just in relation to the ownership of the company and its assets, but also in relation to D & A's claims against Island Aggregates, NCC, Bastion Management, Richard Mayer and Bhora Mayer for damages for conversion, and against NCC, Island Aggregates and Bastion Management for compensation for work performed. These claims have been pursued by D & A at the direction of Kelly. If I find that Richard is the beneficial owner of D & A and is entitled to have the shares transferred to him, these claims will presumably be abandoned.
- [426] The difficulty, as we shall see, is that during the years of its operation, no one paid much attention to the status of D & A, at least until Bhora and Mhinder fell out. As we have seen in other contexts, as long as things were going well, no one seemed to care very much. All would benefit. But just as with the Lehigh sale, the prospect of all benefiting from cooperation among businesses owned by family members did not necessarily give rise to equitable interests.
- [427] Matters came to a head in the first half of 2007, and it will be necessary to consider those events in the wider context of that tumultuous period. But to resolve these issues, we have to begin at the beginning.

8.2 Pre-history: Spruston Aggregates Ltd.

- [428] Crushing operations at the Spruston Pit had been historically conducted through Spruston Aggregates Ltd, a company within the brothers' trust. This company was the subject of Bhagwan's first lawsuit, which I mentioned in paragraph 50 above. There, Bhagwan claimed that while Spruston Aggregates' shares were registered in the name of Marc Furnemont, Mr. Furnemont held it in trust for the Mayer brothers.

- [429] That trust was created on February 5, 1985, when the five brothers signed a formal trust deed by which Marc Furnemont became the registered shareholder of all of the shares of Spruston Aggregates and agreed to hold them in trust for the brothers.
- [430] According to Mr. Furnemont, whose evidence on this aspect I accept, this came about at Bhagwan's request. Not long after Mr. Furnemont joined the Osborne Group, Bhagwan came to him and explained that there were union issues in that company. The brothers, he said, wanted someone not named Mayer to be the face of the company when dealing with those issues. They wanted Mr. Furnemont to take on that role and represent the company in labour negotiations. The trust deed was accordingly prepared, this time professionally. Just how this assisted the brothers was not explored, but it is consistent with the development of the change in focus discussed above in section 5.4.
- [431] Then, Mr. Furnemont testified, the brothers came to him four or five years later to say that they would like him to hold the shares for his own benefit, in appreciation for the work he had done for them. The idea was that he could run the business on his own and make some extra money on the side. According to an affidavit sworn by Bhora on January 14, 1993, in the context of Bhagwan's first lawsuit:
5. Marc Furnemont has been doing accounting work for the Osborne Group of companies since approximately 1984. In early 1989, my brothers Bhagwan and Mhinder Mayer and I wished to dissociate ourselves from the Company [Spruston Aggregates] for a number of reasons. We also agreed that we should reward Mr. Furnemont's conscientious work with an opportunity to establish himself in business and we agreed to allow Mr. Furnemont to have the shares of the company free from the trust arrangement. To that end we agreed to tear up the trust agreement dated February 5, 1985.
 6. At that time the company had no equity but the intention was that Mr. Furnemont would operate the company and retain any profits from doing so.
 7. Mr. Furnemont has not held the shares of the company in trust for the Mayer Brothers since early 1989.
- [432] Once again, this approach was consistent with the change in focus discussed in section 5.4 above. The timing fits with the establishment of Nanaimo Concrete at the end of 1988.
- [433] But, as Mr. Furnemont ruefully confessed, directing a gravel crushing operation was not his forte. He ran the gravel pit for about three years, he testified. The company continued for a short time after that before he realized he simply was not cut out for that business, and Spruston Aggregates ceased gravel crushing and screening activities at the Spruston Pit. There was little to the operation then. OCL owned the pit; all Spruston Aggregates had by that time was some old equipment and the right to use it. Nanaimo Concrete carried out some crushing and washing after Spruston Aggregates stopped.

[434] Replacing that operation led to the incorporation of D & A on August 9, 1993. From that time until July 20, 2000, the sole director, officer and registered shareholder was Mr. Allarie. It is not disputed that he held those shares in trust, but nothing was recorded that identified the beneficiary, or, for that matter, the settlor. The property most certainly did not come from Mr. Allarie.

8.3 The Allarie years

8.3.1 Furnemont

[435] According to Mr. Furnemont, he was introduced to Dan Allarie and was told that Mr. Allarie was going to be setting up a company that would be carrying on the crushing and screening at the Spruston Pit. Mr. Furnemont could not recall who introduced him to Mr. Allarie. He proceeded to incorporate the company and set up the books. He did not recall any specific discussion about who owned the company other than Mr. Allarie.

8.3.2 Bhora

[436] Bhora testified that it was Richard who expressed an interest in taking over the operations that Spruston Aggregates had abandoned. But, said Bhora, he and Mr. Furnemont told him that he should not get directly involved because the operation had been union certified. If Richard took over the operation, it might allow the union to certify at Nanaimo Concrete. They therefore told Richard that he should not show any legal interest in the operation and should not tell people, including employees, that it was his business. For that reason, the shares were put in the name of someone from outside the family (as had been done with Mr. Furnemont in relation to Spruston Aggregates), being Dan Allarie.

[437] Mr. Allarie, explained Bhora, was a person with crushing experience who was looking for work. He came in from Alberta and was hired by Nanaimo Concrete while D & A was set up. But the beneficial interest was intended to be Richard's, Bhora explained, and the company's purpose was to carry out crushing and washing for Nanaimo Concrete.

8.3.3 Richard

[438] From the time that Richard established Nanaimo Concrete and acquired the Nanaimo ready-mix business in 1988, he got his gravel from the Spruston Pit, through Spruston Aggregates. He was unclear about who owned Spruston Aggregates.

[439] In the early 1990s, Richard testified, he learned that Spruston Aggregates was going to cease operations. He still needed materials, and so Nanaimo Concrete picked up running the operation, which was not extensive. Richard would send employees out to run the wash plant. He also acquired crushing equipment, so that Nanaimo Concrete could take over crushing operations.

- [440] According to Richard, it was Mhinder who suggested to him that it would be a good idea to keep the crushing operations separate from the concrete operation to avoid unionization issues, and the way to do this was to start another company. Dan Allarie was willing to do this. Mhinder explained to Richard that Dan Allarie would hold the shares and be the president, but he would hold the shares only until Richard wanted them to be in his name.
- [441] Richard and Mhinder also discussed pricing. Once D & A was underway, they would set a price per ton based on the cost to D & A plus enough for maintenance of the equipment.
- [442] In 2000, Mhinder told Richard that Dan Allarie was leaving. Mhinder said that he had talked to Kelly, and she was willing to hold the shares for Richard. Richard testified that he was content with this (why this would be necessary was not explained).

8.3.4 Allarie

- [443] Mr. Allarie said that his first contact with the Mayer family was around Thanksgiving of 1991. He was looking for a job, and wrote to a number of potential employers, including the Mayco plant at Coombs (Arrowsmith). Mhinder was interested in his experience with crushing and screening, and offered him an interview. That went well, and Mr. Allarie moved from Alberta to Vancouver Island in early January 1992, when he became employed by Nanaimo Concrete. He understood that Mhinder was running Nanaimo Concrete. Richard, he believed, was running the batch plant and concrete trucks and gravel trucks.
- [444] Mr. Allarie testified that his work at Nanaimo Concrete involved setting up a crushing plant. Mhinder explained to them that they wanted to set up a crushing spread so that they could do their own crushing for their concrete plant. When they got close to completing this, D & A Crushing was created. In this, he dealt with Mhinder and Marc Furnemont. They wanted to get him on a salary to start up and run the crushing operation, and wanted his name on the company. He does not recall dealing with Bhora. He saw this as giving him job security, and the ability to approve how things were built.
- [445] Mr. Allarie could not recall that D & A was to be separate from Nanaimo Concrete to avoid union problems, although he had a vague recollection about an organizing drive going on.
- [446] Once operations were underway, Mr. Allarie was the foreman and running things, but Mhinder was the one who decided where they were going to crush (most of the crushing was at the Spruston Pit, but they crushed also at Duke Point, and at Whiskey Creek for Arrowsmith Concrete). Mhinder was also involved in the ongoing process of making conveyors and improving the crusher.
- [447] Mr. Allarie was asked who he understood was the owner of the equipment being used for the crushing operation. He gave two somewhat inconsistent answers. The first was that "as far as I realized it was Mhindy and the Mayer Brothers". The second was that he thought the equipment "was part of the company". With respect to the ownership of D & A, the following exchange took place:

Q What was your understanding about who owned D & A?

A I understood it was pretty well Mhindy and the Mayer brothers.

Q And what, if anything, was your understanding about who owned the Spruston Pit?

A That, I believe, was under Island Aggregates, I'm not sure. I think it was Mhindy. Mhindy Mayer's.

[448] I give no weight to Mr. Allarie's evidence about corporate ownership or the ownership of equipment, not because of any problem with his credibility, but because this was clearly not a matter to which he turned his mind in any way that would assist in resolving the issue, and his recollection is in any event unreliable. The Spruston Pit was owned by OCL until it was purchased by NCC in 2001. Island Aggregates did not exist until Nanaimo Concrete was sold to Lehigh in 2001. Both these events took place after Mr. Allarie left D & A in 2000.

[449] Moreover, Mr. Allarie acknowledged that no one told him expressly who owned D & A, and it is only natural that most of his contact would be with Mhinder, the operations man. Accordingly, it is not surprising that to Mr. Allarie, Mhinder was the Mayer who was principally involved in the operation. During Mr. Allarie's tenure, nearly all of D & A's product went to Nanaimo Concrete. About once a year, they would go to Whiskey Creek and crush for Arrowsmith.

[450] In 2000, Mr. Allarie had to return to Alberta for family reasons. At that time, he signed over his shares. He cannot recall how the discussion went. His recollection is limited, but as far as he understood, it was Mhinder and Mr. Furnemont who dealt with the transfer of his shares to Kelly.

8.4 The Kelly years through 2006

8.4.1 Kelly

[451] Kelly became director and sole shareholder of D & A on July 20, 2000. She testified that Mhinder told her that they needed someone to take the company over because Dan Allarie was leaving for Alberta. Kelly protested that she knew nothing about the company, but Mhinder told her to go see Marc Furnemont, and she did.

[452] According to Kelly, Mr. Furnemont told her that they needed to put the company into the name of a family person in order to take advantage of the small business tax credit. Kelly agreed to do this. At the time, she thought that it was Mhinder's company, but, she said, she later learned that Bhora owned it too. She was not in fact told it was Mhinder's company, but assumed that it was. I pause to note that just as with Mr. Allarie, Kelly's understanding in the absence of documentation is of little assistance. Her understanding clearly varied, the source was usually her husband (who was hardly disinterested) and at one time she took the position that the company was entirely hers.

- [453] In 2002, as we have seen, Kelly signed a declaration of trust that Mr. Furnemont had drafted on the instructions of Bhora and Mhinder, declaring that she held D & A in trust for the two brothers. It was Mhinder who asked her to sign it, and she had no difficulty with that aspect of the document as it accorded with her understanding.
- [454] Kelly described her role with D & A as looking after accounts receivable and payable, signing cheques, attending auctions with her husband, and looking after brokerage and borrowing matters. She was paid a wage. Marc Furnemont directed the office staff about how to make up bills and what to bill for crushing, and reviewed banking. He would also set the prices for crushing, including screening and washing, and would measure the gravel piles at the pit.
- [455] Kelly believed that she signed the transfer portion on the back of the share certificates at the time she first met with Mr. Furnemont, understanding from him that this was to make it easier to transfer the shares in the event of her death.

8.4.2 Furnemont

- [456] Mr. Furnemont seems to have been the person who administered D & A. He testified that in 2000, Bhora came to him and explained that Mr. Allarie was moving to Alberta, and that Kelly would take over the crushing business. There was no discussion about her holding the shares in trust for anyone.
- [457] Mr. Furnemont sat down with Kelly and reviewed the financial statements, explaining where the company was. He said that he was not sure she knew about accounting matters, and wanted to discuss "a few things that I felt any owner should be involved in". There was no discussion about a need to put it in her name in order to take advantage of the small business tax rate, or about the small business tax rate at all. There was also, he said, no discussion about signing off on the share certificates so that they could be transferred more easily on her death.
- [458] For the years 2003 and 2004, Mr. Furnemont prepared invoices from D & A to Island Aggregates billing for price adjustments based on actual production. The price adjustment billed for 2003 was just under \$100,000, while that for 2004 was nearly \$170,000. These were based on discussions with Richard about how the business was growing, and how D & A was producing a lot for Island Aggregates. If it continued to produce at such levels, it would need additional resources to buy equipment that would enable it to keep servicing Island Aggregates' needs. The idea was to pay a bit more now so that D & A was in a better position to borrow funds in the future to increase its capacity. The adjustment was based on an additional \$1.00 per ton. A similar adjustment was made for 2005 at the rate of \$0.75 per ton. Mr. Furnemont described this as part of the long-term planning to make sure production would be sustainable. Richard agreed, and the changes were made. It is noteworthy that this discussion involved only Richard and Mr. Furnemont, and did not include Kelly, Mhinder or Bhora.

[459] The total of these price adjustments in the years 2003-2005 came to just under \$470,000, which Richard agreed Island Aggregates would pay.

8.5 The events of 2007

8.5.1 Overview

[460] To this point, D & A's business carried on relatively smoothly. That changed in 2007, along with so much else involving the Mayer family.

[461] In 2006, as we have seen, the Bhagwan litigation was settled. Mhinder had been employed by Nanaimo Concrete since its inception, and remained an employee of Island Aggregates after the Lehigh sale. For reasons no one could explain, Mhinder vanished from the payroll of Island Aggregates on May 20, 2004, and reappeared on January 3, 2006. It made no difference to his activities, or, seemingly, to anything else. His salaried income was a relatively small part of his total income.

[462] Although employed by Island Aggregates, Mhinder was active in a number of areas. He assisted Richard in the Duke Point project undertaken by NCC after Lehigh decided not to pursue the development of a cement terminal at Lot 14. Richard decided to pursue the development of a barge ramp facility, and Mhinder was in charge of the design and construction of the ramp. Mhinder also had some involvement in overseeing crushing operations at the Spruston Pit and at Duke Point. These, of course, involved D & A as well as Island Aggregates. D & A's operation at the Spruston Pit supplied sand and various types of gravel to Island Aggregates, which in turn supplied Lehigh and others. D & A's operation at Duke Point supplied fill mined from Lot 11 for use by NCC in its Duke Point project on Lot 14.

[463] Mhinder was lending assistance as well in Rita's condominium development project at the Nanaimo waterfront.

[464] Then, as we move into 2007, a number of events occurred. Their precise timing, and the extent to which they are interrelated, are difficult to determine from the evidence of the participants, which was all over the map. In saying so, I do not mean to be critical. It is not at all surprising when five or six people give divergent evidence about a series of events they all experienced from different perspectives a decade ago. In fact, it is to be expected (as Akira Kurosawa illustrated in his celebrated film *Rashomon*), and I must sort it out as best I can.

8.5.2 January and February

[465] By January 2007, Richard found that he was having cash flow problems with Island Aggregates. One of the ways he sought to address this was to borrow funds. He testified that he went first to Mhinder, who could not provide any funds himself. Mhinder suggested that he asked Marc Furnemont whether OCL had any money to lend. Marc Furnemont indicated that OCL could lend \$300,000, to which Bhora agreed. This led to the well-

documented loan from OCL to Island Aggregates of \$300,000 advanced March 16, 2007, to which Mhinder subsequently objected, and which was later subordinated to the BDC loan.

- [466] Another way Richard dealt with his cash flow difficulties was to review the costs he was incurring for the supply of materials from D & A. Two problems emerged. One was what Richard concluded was the pricing charged by D & A, to which he had agreed earlier in discussions with Mr. Furnemont. This was now eating into what little profit he could make on the sale of the processed materials to Mayco (Lehigh). The other was an apparent mysterious shortfall in D & A's inventory. Both of these, it would appear, came to Richard's attention around the same time, in late January 2007. The matter of the pricing, I find, he proceeded to deal with fairly quickly, in early to mid-February, by raising the issue with Mhinder. The question of the shortfall in inventory required investigation, and took longer to come to the fore.
- [467] Then, in approximately the middle of February, Mhinder sought a meeting with Richard and Rita. It is worth remembering that over the years, Richard and Rita had developed a closer relationship with Mhinder than they had with their own father. It is not clear to what extent that remained the case by this time; it certainly was no longer the case afterwards.
- [468] Rita testified that she had coffee with Mhinder in early 2007 before a meeting concerning the condominium development. Mhinder told her that he did not want to work with Bhora anymore. Rita suggested that he work it out with Bhora, and if he could not, wind up the trust assets, split them 50:50 and move on. Mhinder said he would never wind up the trust.
- [469] Perhaps a couple of weeks later, Mhinder met with Rita and Richard (I find this happened in the middle of February based on evidence from Richard). He reiterated that he did not want to work with Bhora anymore, but said that he did want to work with them. He made them an offer-the one that I suggested above (see para 288) was curiously similar to Bhora's description of Mhinder's justification for the acknowledgement of trust documents.
- [470] According to Rita, Mhinder proposed that they should transfer their properties and businesses to him, and pay him \$10,000 per month net to manage them until he was 85. At that time, he would return the businesses and properties to them. He then pulled out the acknowledgement of trust documents that Richard and Rita had signed, telling them that if they did what he wanted, he would return these to them.
- [471] Rita testified that she was utterly taken aback by this proposal, and hurt by his implied threat with the acknowledgement of trust documents that he had said he had destroyed. She asked him why he wanted these businesses in his name, and he answered that he needed them in his name--particularly Duke Point--"for his pride".
- [472] Richard's recollection of the proposal was a bit different. He testified that Mhinder made what he described as a "demand" for 60% of the Duke Point project, 50% of the gravel pit and control of the Front Street condominium project. Richard did not mention properties, which Rita specifically recalled. Mhinder, he said, sought wages of \$10,000 per month till

he was 85, at which time he would return the controlling interests in the three projects. Richard, too, was surprised and dismayed by Mhinder pulling out the acknowledgements of trust.

- [473] Richard said that Mhinder was upset as he discussed this, and pounded the table. Richard was stunned. He testified that the meeting came to an end, and then Mhinder called the following Sunday (February 25) to ask if Rita and he would accept his terms. Richard told him no. At that point, Mhinder essentially resigned. He told Richard that he would have to go by himself to a meeting to take place the following day in Vancouver concerning the Duke Point project (Mhinder had been scheduled to attend it), and made it clear that he was not prepared to help Richard anymore.
- [474] That was the end of Mhinder's employment with Island Aggregates. Richard gave some confusing evidence about this. He said on the one hand that he and Mhinder did not argue about this, and that he took it as an indication that Mhinder was tired and stressed out, expecting him to come around after a little time off. At the same time, he talked about being at loggerheads with Mhinder about D & A's pricing, and very upset about Mhinder's demand for control of the businesses.
- [475] Mhinder had quite a different take. He said that at the start of February 2007, things were fine with Bhora, but he had some personal concerns. At the meeting with Rita, he discussed that the condominium project was finally getting going, and that they had to stick with it. He said that he did not want Bhora to whip them into another venture because they did not have time for that. He therefore proposed to Rita that she and Richard put properties of which they owned 100% into his name as to 60% to make sure that they would not become encumbered. He said he would sign whatever papers were necessary to ensure that he would return the properties in 25 years.
- [476] Mhinder explained that he also wanted to complete the Duke Point project and revisit the cement terminal project that Lehigh had abandoned, putting up silos. He wanted to carry on with these existing projects, and not get the family distracted into new ventures. He thought that Rita was on board with this. He was wrong.
- [477] Mhinder said that he then raised the same matters in a meeting with Richard and Rita where certain properties would be put 60% into Mhinder's name so they would not become encumbered, and he would return them in 25 years. He did not, he testified, raise any issue about being paid \$10,000 a month at that time.
- [478] By way of context, Mhinder explained that he wanted to protect these projects from being encumbered by Bhora to support new ventures Bhora might dream up. Notwithstanding that he began this part of his evidence by saying that things with Bhora were fine, Mhinder maintained that if he said "black", Bhora would say "white". He wanted to be sure that he was in a position to call all the shots, and felt better by approaching "the kids" first. He was surprised that they were not on board.

- [479] According to Mhinder, this was followed up by a telephone call from Rita telling him that they were to meet that night at Bhora's office. At that meeting, Bhora lit into Mhinder right away, telling him that he had left the trust and was "outta here". Mhinder was floored, and said "I'm not". Rita asked him what he was going to do. He responded that if that is how "you kids" feel, he would carry on with the "brothers' trust stuff", starting with the cement plant at Gulf Coast Materials.
- [480] It was after this, according to Mhinder, in late February 2007, when he spoke to Richard about the Duke Point project and told him that he was done, and would not attend the meeting scheduled for Vancouver.
- [481] According to Bhora, Mhinder had spoken to him in January 2007 about Richard having some financial issues, and suggesting that Bhora talked to Mr. Furnemont about a loan from the Osborne Group. Bhora proceeded to do so, understanding that Mhinder agreed to this. This was the \$300,000 loan from OCL to Island Aggregates.
- [482] Bhora then spoke of what he believed were two telephone calls, the first one from Richard saying that Mhinder was not going to work for him and would not go to Vancouver for a meeting. This had left Richard in a tough spot. The next call was from Mhinder, telling him that Mhinder wanted nothing to do with working for him. He described Mhinder as becoming more remote, not saying much of anything, other than to make it clear that he did not want to have anything to do with him.

8.5.3 March and April

8.5.3.1 Problems with D & A

- [483] Mhinder described how on March 1, 2007, Richard called a meeting with the senior staff at D & A and told them all that Mhinder was not going to direct them any longer, and Richard would now be giving them direction. In his purportedly contemporaneous note of his discussion with those D & A employees, dated March 1, 2007, Mhinder recorded:

Dan H[elgeson]. Dan A[llarie] and Blair said does Rick think he own's [sic] D & A Crushing because they thought Kelly Mayer owned D & A .

I told Dan H, Dan A & Blair Rick does not own D & A Crushing.

- [484] Richard also testified about that meeting. Given Mhinder's resignation and Island Aggregates' need for aggregate production, Richard needed to make sure things were going to go smoothly at D & A. He called together the senior staff to talk about equipment and production volumes. The meeting took place on March 5, 2007, which date accords with Dan Allarie's note of the meeting in his time records. It does not accord with Mhinder's note. According to Richard, Mhinder interrupted that meeting and told him that he had no business talking to "my guys". Mhinder's note does not mention that confrontation. I prefer Richard's evidence.

- [485] Richard said that as a result of this confrontation, and some discussion about Kelly owning D & A (which I find came from Mhinder, not from the employees), he took it upon himself to get the corporate records, only to discover that Kelly had beat him to the punch. She had already removed the share certificates from the corporate records office. He testified that he talked about this with Mhinder who said, 'if you have any issues regarding D & A you talk to Kelly, she's in charge--it's nothing to do with me'.
- [486] According to Kelly, she went to the lawyer's office to pick up the shares because she wanted to ensure they were held safely while Mhinder and Bhora were involved in a dispute. It was not intended to be a pre-emptive move in terms of ownership. I am unable to accept that evidence. Whatever Kelly might have thought, and I found her generally to be a credible witness, I am satisfied that she did this on Mhinder's initiative precisely to pre-empt a move by Richard to assert ownership.
- [487] Mhinder's notes include two different entries for March 2. The first records:
- Met with Rick & Rita in afternoon. Talked re maybe some compromises. i.e. I buy from Rick some waterfront land at Duke Pt.
- [488] The second note reads:
- After talking to Marc I told Rick & Rita that I would purchase the property where the silos were to be built, I would carry on and finish Duke Point property and I would pursue silos etc. and at my age 76 I would return it back to them. I would also make my will to this effect. I said I don't want litigation but if push I will.
- [489] The two notes are inconsistent. The second seems to include the discussion Rita and Richard talked about in February, somewhat modified, while the second seems to suggest a compromise of that first proposal. According to Richard and Rita, whose evidence on this point I prefer, there was no such meeting other than the February discussion.
- [490] Mhinder records a note on March 5 to the effect that he had a meeting with Bhora and Richard in which he took them to assert that as of March 1, "You Mhindy have left". Mhinder told them that he did not want litigation, but "if I am pushed I will". He next recorded that he made an appointment with Randy Kaardal in Vancouver.
- [491] This seems to equate to Mhinder's earlier evidence that he had been called to a meeting in February after his meeting with Richard and Rita, where Bhora told him that he was out of the trust. Richard could recall a meeting with Bhora and Mhinder where Mhinder complained about being unhappy with working with Bhora, but he could not recall any discussion about Mhinder being out.

- [492] Mhinder made a diary note for March 10, 2007, recording a telephone call from Richard about who owned D & A, and complaining that Kelly had picked up the shares, which only an owner could do [the shares were, of course, in Kelly's name]. There was a discussion about whether D & A was a trust company at which time Mhinder raised the question of whether Gina's company, R & G, was a trust company. Mhinder said to talk to Kelly.
- [493] Richard agreed that he had a phone call with Mhinder, possibly that day, and an earlier discussion on March 7, also noted in Mhinder's diary. He did not agree about the contents of the discussions. According to Richard, he was very upset that Mhinder had interrupted his meeting at D & A, and was asserting operational control. He was also upset that when he went to pick up the share certificates, Kelly had already taken them. But that was not his immediate focus. He knew that D & A was not going to go anywhere. After all, Richard owned the company D & A sold to, and the pit that D & A worked in. His concern was making sure of his supply over the short term.
- [494] In his entry for March 21, 2007, Mhinder recorded a meeting he attended with Rita, Bhora and Richard. His note indicates that Rita said that her understanding was that D & A was "Mindy's [sic] & Bhora's". Mhinder asked her in response, who owns R & G, which Rita later replied, her mom. Mhinder's note goes on to record:
- Rita said I & Bhora should solve your differences and not take it out on Rick & Rita. I said I could understand that Bhora and Gina give to their kids. But what drives me to give real estate, labour & life to Rick and Rita. At the time of BHAG [sic] settlement both Rita & Ricky said don't worry Mhindy, they will take care of me. I said that we have gone through a month now and I want now to retire from Rita's & Rick's (so-called) business. I wanted \$10,000/month (net) until 2032.
- [495] Neither Richard nor Rita recalled such a meeting in March. They did recall a meeting in April attended by those persons together with Kelly and Gina, at which some of the same issues were discussed. Rita was clear that it was never her understanding that D & A was "Mindy's & Bhora's", and indeed she was surprised to hear Bhora say words to that effect at the April 19 meeting. I accept her evidence, and I am satisfied that Mhinder's note is self-corroborating reconstruction. It does, however, demonstrate how he perceived things, and the nature of his dissatisfaction.
- [496] On March 27, Kelly Mayer, accompanied by Dan Helgesen and Dan Allarie, met with Richard at his Mack Nanaimo office. Kelly said that the meeting happened on March 24, but the March 27 date is confirmed by Mr. Allarie's time record. Richard testified that Kelly came to tell him what prices she had worked out for crushing. According to Richard, he had no interest in hearing from her once she made it clear that she was purporting to be the owner of D & A, and he told her that he had nothing to say to her.

- [497] Dan Helgesen testified as a witness for Mhinder. He had been closely associated with Mhinder for many years, and it was during his cross examination that it emerged for the first time in this litigation that he and Mhinder had owned two properties together, although they were registered in Mr. Helgesen's name only.
- [498] Mr. Helgesen's recollection of this meeting was that pricing was discussed, and that Richard said that he could get it done for what Mr. Helgesen viewed as a ridiculously low price, something in the range of \$1/ton. In Mr. Helgesen's opinion, a more realistic cost per ton would be \$2.50. He then testified that after this meeting, Kelly decided to stop crushing at the Spruston Pit because she understood that Richard would crush it himself if D & A could not do it for his price. This was a unique perspective on how it came to be that D & A halted crushing at the Spruston Pit. I found Mr. Helgesen's evidence to be generally unhelpful, particularly his gratuitous comments on who he thought owned various companies.
- [499] Kelly's evidence did not match Mr. Helgesen's. She testified that the meeting was not about prices (which subject came up at a later meeting on April 19), but rather was for the purpose of discussing the quality of the crushing specifications. She could not recall whether they discussed the ownership of D & A.
- [500] The next event of significance was Mhinder's purported discovery of the \$300,000 loan from OCL to Island Aggregates, which had been paid out on March 16.

8.5.3.2 The \$300,000 Loan - Mhinder's change in attitude

- [501] In his diary, Mhinder recorded for March 23:

I went to CIBC Nanaimo got the transaction slip & found out that March 16/07 OC wrote a cheque for \$300,000. I phoned Mark and asked him what the \$300,000 cheq was for her. He said he didn't know & would follow me back. Mark phoned me one hour later and informed me that it was a loan to Island Agg.

- (1) I asked him why I wasn't informed of this. Mark said it was normal business & at a great rate of return.
- (2) I also said that I had a discussion with Mark March 9/07 and that I wanted to be informed of all transactions of trust assets.
- (3) I was very unhappy as Mark works for me.

- [502] There is no doubt that in March 2007, Mhinder began taking an un-customarily close interest in the financial affairs of the brothers' trust. On March 9, 2007, he asked Marc Furnemont for a list of properties encumbered by mortgages, the details of Bhora's wages back to 1991, and a list of mortgages besides those relating to the Front Street project. He also told Mr. Furnemont that he wanted to be a signatory in relation to all purchases, sales, payments or relocation of trust assets. At that time, the signing authority was with Bhora and Mr. Furnemont, as it had been for many years.

- [503] It was in response to this that Mr. Furnemont wrote to Bhora and Mhinder requesting them to confirm which companies were included in the Osborne Group. He included a list of all of the DTCs and ITCs plus D & A, asking them each to initial whether they were or were not included in the Osborne Group. Interestingly, while Mhinder initialed all of the DTCs as not being included in the Osborne Group, he made no designation in relation to D & A.
- [504] On March 12, 2007, Mr. Furnemont wrote to Mhinder, enclosing a list of trust properties and information pertaining to Bhora's wages. With respect to signing authority, he stated:
- You have also asked to sign all the cheques drawn on the Osborne Group accounts. I do not have the ability to change signing authorities at the bank. This is something that Bhora has to do in conjunction with you.
- [505] There is also no doubt that in the latter part of March, Mhinder objected to the \$300,000 loan from OCL to Island Aggregates. He maintained that he had not been asked about it, and insisted that the monies be replaced forthwith in OCL's account. That did not happen, and Mhinder includes this failure as part of his oppression claim.
- [506] It is, perhaps, possible that Mhinder was unaware until after March 16, 2007, of the full details of the loan from OCL to Island Aggregates. He was not a detail kind of man when it came to such matters. I find, however, that, as both Bhora and Richard testified, he had certainly approved in concept a loan to Island Aggregates in January 2007. Mhinder points to discrepancies in the evidence of Richard and Bhora about such matters as whether the amount of the loan was discussed with Mhinder, and who first proposed it. In the circumstances, these are to be expected, and their evidence, particularly that of Richard, nevertheless rings true. There is really no reason why Mhinder would not agree given the ease with which funds were transferred among members of the Mayer family, his relationship to Richard and to Island Aggregates and his general apathy towards administrative matters.
- [507] What changed between January, when the loan was discussed and approved by both Mhinder and Bhora, and the middle of March, when the funds were advanced, was the entire relationship Mhinder had with his family.
- [508] In the aftermath of the Bhagwan litigation, I find, Mhinder had become increasingly concerned about his status. The projects being managed by Richard and Rita were apparently thriving. While he was involved in those projects, Mhinder basically remained an employee (as he had been since Bhagwan's days) notwithstanding the large draws he was able to take from OCL. He was not in control of anything, and as reported by Rita, his pride was taking a beating. His proposal to take over control of Rita's and Richard's projects had been rebuffed. His influence at D & A had been challenged. And he had withdrawn from his employment with Island Aggregates. He was feeling threatened, and consumed by questions of entitlement that Bhagwan had raised. He was no longer willing to cooperate. One casualty of this change, I find, was his attitude towards the \$300,000 loan notwithstanding his earlier approval.

[509] His notes reflect his thinking at this time, but not, in most cases, the thinking of others.

8.5.3.3 The inventory issue

[510] The inventory shortfall, Richard testified, had been brought to his attention by Doug Lum, manager of Mayco, in late January 2007. Mr. Lum was in the habit of visiting the pit, and he told Richard that he was concerned about the amount of supply available in the event that he had a large job to fill. Richard went to the pit himself and noted that the piles were low. He talked to Dan Helgesen, who was managing the operations. He relayed his concerns to Mhinder. He went over the financials, and concluded both that the amounts charged by D & A were high, and that they should have had much more supply on the ground than they did. He asked Marc Furnemont to check into it. Mhinder's attitude was that if there had been an error, it was not a big deal. It could be fixed.

[511] One of the tasks Mr. Furnemont performed for D & A was measuring the stockpiles at the Spruston Pit twice a year. He reported that in mid-to-late February 2007, Richard called him to say that Island Aggregates had run out of a particular type of gravel, which made no sense as there should have been a lot in D & A's inventory.

[512] Mr. Furnemont went straight to the pit and looked at the piles. There was indeed a lot less than he had expected. He went back to the physical inventory done two years before, at the end of 2004. He said that he did this in order to find where things had gone sideways. By tracking production records and sale records, he calculated that there was a significant shortfall between the inventory that should have been on hand given production records, and the actual physical inventory. It followed that D & A's production records were significantly exaggerated. Applying the production price D & A charged to Island Aggregates yielded an amount by which Island Aggregates had been overcharged. This totalled some \$267,000. He concluded this review in late March. Mr. Furnemont said that he reviewed this individually with both Richard and Kelly, and explained that D & A would have to pay it back to Island Aggregates. He reported that Kelly seemed to accept this with a shrug.

[513] Mr. Furnemont never explained how this shortfall could have developed over a period during which he was responsible for checking the inventories twice a year. One would have expected the problem to have become apparent much earlier. For some reason it did not, and Mr. Furnemont seemed uninterested in discovering why that was. Nevertheless, I accept the evidence of Mr. Furnemont and Richard that a shortfall indeed occurred.

[514] Mhinder led evidence from Fred Lucht, Mr. Helgesen and Mr. Allarie about how production was tracked and measured. It is clear to me from their evidence (which was not always consistent) and from the records that there was very little precision at D & A when it came to measuring production. It seemed a rather haphazard system, and the record keeping was highly questionable.

- [515] Richard saw the inventory shortfall as a significant problem, and I conclude that he was justified in doing so. It impacted his core business. But I also find that its significance was enhanced in his mind by the dispute he was now having with Mhinder and Kelly about the ownership of D & A. If, as he saw it, Kelly was now asserting ownership of D & A, having secured the shares, she was going to have to pay him full value for the overstated production, and he would have to take steps to fix the inventory problem.
- [516] The upshot of this was two events that drove a further wedge between Bhora and Richard on the one hand, and Mhinder and Kelly on the other. These were an aggressive position taken by Richard on monies he claimed were owed by D & A, including the inventory shortfall of \$267,000; and an equally aggressive move at the Spruston Pit, where he brought in an outside company, Johel Brothers, to start crushing.

8.5.3.4 The D & A invoice

- [517] As noted above, Mr. Furnemont reviewed with Kelly his findings about production shortfalls, indicating that Island Aggregates had been overbilled by D & A. He produced five invoices making adjustments in this regard, totaling \$267,000 plus GST. These adjustments had been processed, having been discussed by Richard and Mr. Furnemont. Kelly now learned of them.
- [518] According to Kelly, Mr. Furnemont then produced a further invoice, or statement of adjustments, that included not only the adjustments for the alleged overbilling, but also adjustments for glass recycling fees claimed to be owing to Island Aggregates, and all rental charges for shop and office rental at Fry Street for the period from September 1993 right through to February 2007. With the inclusion of GST, the total now came to \$511,256.
- [519] Mr. Furnemont explained that he calculated the original production adjustments for overbilling, and reviewed them with Richard. Richard wondered what else was out there. Mr. Furnemont came across this question of glass recycling. D & A accepted waste glass for recycling and charged the customers a dumping fee, even though the glass was dumped on property owned by NCC. D & A would then process the glass into fill, and charge Island Aggregates for the processing. In the past (as Richard explained it) Island Aggregates received the recycling fees, including the dumping fee for glass. Richard thought it had been mistakenly credited to D & A instead of Island Aggregates. In these circumstances, they decided it was appropriate to make a further adjustment to transfer the glass dumping fees from D & A to Island Aggregates. If Island Aggregates was to pay for the processing, it should be credited with the dumping fee it had historically received.
- [520] According to Mr. Furnemont, Richard then raised the question of the Fry Street rental charges. He was unhappy and feeling ripped off. D & A used Richard's shop at Fry Street to store equipment and repair it. If it was not his company, then he was going to charge rental. That was accordingly calculated and included. Mr. Furnemont proceeded to make the adjustments in the books of the companies.

[521] He testified that he reviewed these with Kelly and that she raised no objection at the time. This did not last, and heated discussions followed later. She was particularly outraged that adjustments had been made to D & A's accounts without her approval. In late April, Kelly sent memos to Mr. Furnemont requesting reversal of the credit memos relating to these charges, and advising that nothing was to be done involving D & A without going through her. In the meantime, through her new accountant, D & A applied for a GST rebate for all of the GST included in these adjustments.

8.5.3.5 Moves at the Spruston Pit

[522] In the meantime, in late March, Richard retained the Johel Brothers to move their equipment into the Spruston Pit and to commence crushing operations. He testified that this was necessary because D & A simply was not producing what he needed, and was running into equipment problems. Mr. Helgesen gave very vague evidence about this, saying that the inventory may have been low for some of the product, but not all, and that the equipment was generally working, although things tend to break down from time to time.

[523] Mhinder attempted to portray this move as inspired by Bhora, but I am satisfied that it was Richard's move. Bhora did indeed assist him by helping direct the Johel Brothers when they set up at Richard's request, but I accept the evidence of Richard and Bhora that this was Richard's, not Bhora's, intervention. The pit, after all, was owned by Richard's company NCC, and its production went to his company Island Aggregates.

[524] Mhinder's note for March 26 reads:

Dan Hel. said @ 3:00 that Bhora was at Spruston directing Kelly Smith at the D8 to grade ground directly beside D & A's crusher. Dan asked Bhora why they couldn't set up Johel's crusher further away from D & A's crusher as there was lots of room. Bhora told Dan H that he wouldn't be needing down to crush any more.

Rick called me at 7:00 p.m. told me that D & A would not be required to crush @ Spruston maybe later on with impactor for 1¼ rock. I asked Rick as D & A has been crushing for 20 + years give them any notice. He said no.

[525] Richard denied any such conversation. He said that he was trying to be very quiet, and felt that he had no other option but to bring in an outside crusher. There was very little product on the ground at the Spruston Pit, and the equipment was not working properly. He was afraid that he would be left without any product. It was not his intention to kick anyone out, and D & A did continue to crush for a period of time.

[526] The Johel Brothers remained at Spruston Pit for two weeks. D & A's records show some crushing production of its own in early April, but nothing at Spruston Pit after April 10. At that point, D & A moved its generator out to Duke Point to do some crushing there.

8.5.3.6 Bhora files caveats and Mhinder enquires about rents

[527] As their relationship deteriorated in March 2007, Bhora took the position that Mhinder was improperly asserting sole ownership of five properties that were registered in Mhinder's name. This was not a position he had previously advanced. But, he testified, from his perspective it was a fundamental feature of the brothers' trust right from the outset that it did not matter in which brother's name a property was registered, it was an asset of the trust. "That," he said, "was one of the things that dad said. It didn't matter whose name it got put in".

[528] To prevent Mhinder from dealing with these properties outside of the trust, Bhora filed caveats against them on March 22 and 23, 2007 (see paragraph 60 above) and subsequently commenced action. I deal with Bhora's claim that these properties are assets of the brothers' trust in section 9.0.

[529] On March 29, 2007, Mhinder wrote to Gina advising that any rents collected on properties registered solely in his name were to be remitted to him at the start of every month, and asking for information about the renters. He went on:

I understand from Marc Furnemont that since you have started collecting on my above rental properties he has not seen any of that money. With that I need a total report of all rent collected and an account of where you have desposed [sic] of the monies.

Mhinder hand-delivered the letter.

[530] Gina wrote back on April 4 asking Mhinder to clarify whether he was the sole owner of the properties he listed and asking which other properties he meant to include. The following day, Mhinder wrote back:

Gina, after receiving your letter April 4/07 I asked Marc he said he has received no rents on some of the properties that you are said to manage.

Gina this is to inform you that you will not be collecting rent on properties that are in my name. Your services are no longer needed and I request an accounting of past rents collected by you.

[531] Gina did not respond to this letter. Mhinder contacted tenants to request that rents be remitted to him rather than Gina, but Gina continued to collect the rents.

[532] On April 27, 2007, Bhora wrote Mhinder noting that Gina had been collecting the rents for the past 15 years or more:

on behalf of both of us, and the rents have been reported as income received by both of us.

As you know, although your name appears on title to the Properties (exclusively, in some cases, and jointly with me, in others), the Properties are held in trust pursuant to Trust Agreements to which we are parties . On the basis of the trust, I have, as you know, lodged caveats against each of the Properties.

[533] Bhora went on to note that Gina had been collecting the rents and remitting the proceeds to OCL, but that, as discussed in section 7.3 above, was not true for the years 2001-2006.

8.5.3.7 The meeting of April 19

[534] By April 19, on any view of the evidence, there were problems in the Mayer family. On this date, the family met at Bhora's office on Front Street to discuss them. Everyone was there: Bhora and Gina, Mhinder and Kelly, Richard and Rita.

[535] Mhinder made several pages of notes purporting to record what was discussed at this meeting. On the subject of the ownership of D & A, Mhinder recorded:

Bhora says -

D & A was always held in trust for the Mayer family. This is quite well-established and will be proven.

Bhora says -

D & A is owned by Mhindy & Bhora

Bhora says -

Doug Lum says Island Agg not competitive, will [lose] contract.

Bhora says Rick has established new prices with Doug Lum.

Bhora [says] we must work together

This is going to take Bhora, Mhindy & Kelly to figure out what to do.

Bhora's statement D & A is [owned] by Mhindy & Bhora. Kelly is holding D & A in trust for Mhindy & Bhora.

[536] Rita said that the discussion began with Kelly speaking for Mhinder, saying that it was she who owned D & A. She does not recall Bhora saying anything about D & A being "in trust for the Mayer family" but did recall him saying, to her surprise, that D & A was owned by Mhindy and Bhora. She was surprised because, she testified, she had always understood that it was owned by Richard.

[537] Richard, too, recalled Bhora saying something about D & A being owned by Mhindy and Bhora. He said that he asked Bhora about this afterwards because it was always his understanding (like Rita's) that D & A was held in trust for him. Bhora, he said, replied that he was simply trying to stir things up.

[538] Bhora himself did not recall saying that he and Mhinder owned D & A, but he did recall Kelly saying that she did. That made him quite unhappy. He did recall saying that they should all work together. He was feeling frustrated. Bhim had left, Bhagwan had left, and now Mhinder seem to be heading away. He was unable to do anything about it.

- [539] Mhinder's notes record Rick saying that he did not want to kick anyone out, but that he could wash for \$1.04/ton, and crush for \$1.50/ton. Richard's recollection is that he talked about the prices needing to be reduced by \$1.00/ton.
- [540] Mhinder further records Kelly talking about the need to give back what Bhora and Mhindy had given to Rick & Rita's businesses that got them where they are now. Rita testified that he could not remember Kelly saying this, but Kelly did try to take the lead in the meeting, and it is possible that she said this. Richard did recall Kelly saying words to this effect, the context being Mhinder again producing the acknowledgements of trust, and asking to be paid \$10,000/month. Kelly was trying to justify that. Richard recalls arguing with Kelly, saying that she had not been around to see what happened with the businesses, and maintaining that he had paid for everything he had.
- [541] There is then a further record of what Bhora said:
- Bhora's talk.
- If it weren't for Mack & Island when we were in court, we would not have survived
- 1988 - we were broke. [That's] why Rick took over Mayco. Bhagwan pleaded with [his eldest son] to take over Mayco business.
- [542] Again, Rita could not remember these points being discussed, and thought it unlikely that anything would have been said about Bhagwan's son, but could not be sure. Richard also had no memory of this being discussed, but agreed it might have been. He noted that Bhagwan's son had never wanted to get into the business, and had come and gone as he pleased. His name had come up over the years from time to time.
- [543] Mhinder's notes end with the entry: "Rita says older generation lavished the kids Rick & Rita".
- [544] Rita denies saying anything of the kind. Her evidence was that she never said that and never felt that. In her view, she worked very hard for her businesses and never got to sit back and relax. She worked and worked, did not marry till she was 34, and did not have children until she was 36, all because she was so focused on working. She also talked about Richard's incredible efforts.
- [545] According to Kelly, there was a lot of anger at this meeting, and it was not pleasant. Bhora said that there were a lot of problems, and that Ricky had figured out some new crushing prices. Richard then talked about having to produce for \$1/ton. Kelly said that this was unachievable and could not be done. Richard responded that he would get someone else to do it if Kelly would not (this is reminiscent of Mr. Helgesen's evidence about what was discussed at the March 27 meeting. Mr. Helgesen was not at this meeting).
- [546] Kelly said that Mhinder got agitated at this point and left the meeting. It was then that she tried to get them to understand how hard and how long Mhinder had worked for everyone. She did not recall Bhora saying anything about the beneficial ownership of D & A. Gina said

something to the effect that D & A was not Kelly's company. Kelly said, it's the same as R & G, we hold them in trust for Bhora and Mhinder. She also recalls Gina saying words to the effect that perhaps she and Kelly would be able to talk some sense into Bhora and Mhinder, to get them down from their fight.

[547] As I indicated above, it should surprise no one that the six persons who attended this meeting would have different recollections of what was discussed. I find the evidence of Rita and Richard to be the most reliable. Mhinder's notes, I find, appear to be accurate in some respects, but incomplete. Moreover, I find that some of his notes are pure fabrication, designed to bolster his own position. In this last category I include his first note about Bhora that ends with the unlikely phrase "This is well-established and will be proven" [there was of course nothing at all well-established about the ownership of D & A], and his last note attributed to Rita about the older generation 'lavishing the kids'.

[548] In less than a month, the first of the many lawsuits that make up this litigation was filed.

8.6 All right, so who owns D & A?

[549] On behalf of Kelly and Mhinder, the submission was made that if, on the state of the evidence, I am unable to find a trust and identify the beneficial owner, then the result must be that the company belongs wholly to its registered legal owner, Kelly.

[550] That result, in my view, would be unjust and inequitable unless it is truly impossible to ascertain the beneficial owner. Although Kelly did purport to be the legal and beneficial owner at one time, I am satisfied that that was for strategic reasons and never reflected even her own understanding.

[551] The contenders, on the evidence, are Richard on the one hand, and Bhora and Mhinder on the other.

[552] On behalf of Mhinder, it is argued that any claim of Richard to an intentional trust fails for want of certainty of objects. This is because neither Mr. Allarie nor Kelly was ever made aware of a trust condition in Richard's favour. As I noted above, both understood that they were holding the shares in trust for someone, but were never told for whom.

[553] Mhinder goes on to submit that the requirement of certainty of objects cannot be avoided by recasting the argument to one of a substantive constructive trust (see paras 135-138 above). This is because, Mhinder asserts, Kelly could be required to answer to Richard only if she were under a pre-existing equitable obligation to him enforceable by means of a substantive constructive trust. Equitable obligations, Mhinder argues, are not owed in the air, and Kelly could not be under an equitable obligation to an unascertained person.

- [554] I am not persuaded that this is a correct analysis. We are dealing, of course, with an exceedingly unusual situation, arising out of an extraordinarily casual approach to a very formal legal concept. There is no trust deed or instrument, or anything in writing, creating the trust. The parties agree, however, that the shares of D & A have "in trust" stamped all over them.
- [555] When I take into account the evidence as a whole, I conclude, on a balance of probabilities, that the beneficial interest in the shares of D & A belongs to Richard pursuant to an intentional trust notwithstanding the ignorance of its objects of the two successive trustees.
- [556] I begin with the fact that the Mayer brothers had no intention of keeping, beneficially or otherwise, a crushing operation at the Spruston Pit. On the contrary, they chose to give their beneficial interest in Spruston Aggregates away. There was, it should be remembered, not much to it. As Bhora swore in his affidavit, there was no real equity. It did not own the pit. It had no contracts. It had some aging equipment, and was soon abandoned by Mr. Furnemont.
- [557] Into the breach, I find, stepped Richard. It was his company, Nanaimo Concrete (later Island Aggregates) that needed the aggregate produced from the Spruston Pit. No other Mayer company had a similar need. Arrowsmith had its own supply at Whiskey Creek. So when Mr. Furnemont abandoned the operation, it was Nanaimo Concrete under Richard's direction that started washing gravel in the pit. Moreover, Richard acquired equipment to take over crushing operations. His initial intention, I find, was to absorb the crushing operation at the Spruston Pit into Nanaimo Concrete.
- [558] I accept Richard's evidence that Mhinder suggested to him that he should keep the crushing operations separate from the concrete operation to avoid unionization issues. Bhora's evidence supports this, and it is consistent with the approach taken by the brothers and other family members since at least 1988. The same approach led to the creation of Spruston Aggregates. In other instances, land was acquired under corporations established independently from the corporations operating the businesses.
- [559] While Richard testified that it was Mhinder who talked to him about setting up a trust, Bhora testified that it was he and Mr. Furnemont who did so. While I have no doubt that Bhora did discuss this with Richard, I accept Richard's version that the main impetus came from Mhinder. This accords with the evidence of all the principals that Richard's relationship with Mhinder was closer than his relationship with his own father at this time. Mr. Furnemont testified (and I accept) that he did not know who the beneficial owner was to be when he set up the corporation.
- [560] Mr. Furnemont could not remember which member of the Mayer family gave him the instructions to set up the company with Mr. Allarie as the shareholder. Those instructions most certainly did not come from Mr. Allarie. I am satisfied on the evidence as a whole that they came from Bhora on behalf of Richard. That is no doubt why Bhora was under the impression that it was he and Mr. Furnemont who discussed the concept with Richard, and

it was Bhora who normally dealt with Mr. Furnemont on such matters. Mhinder, as we have seen, was uninterested in matters of administration. It follows, I find, that the settlor of the trust was Richard.

- [561] I acknowledge that both Richard and Bhora gave inconsistent evidence in affidavits sworn in 2008, but I accept the evidence they gave at trial notwithstanding the discrepancy. I do so because their trial evidence fits with the evidence as a whole, and the preponderance of probabilities. I take into account as well that in 2008, there was a serious conflict within the family about D & A, and both Richard and Bhora were dealing with a situation in which the legal owner was carrying on as the sole owner. They were dealing with matters de facto, rather than de jure.
- [562] I also accept that Mhinder suggested to Richard that the shares be registered in Dan Allarie's name. Mr. Allarie came from Alberta at Mhinder's suggestion, had the appropriate crushing experience, and was not a Mayer.
- [563] In this regard, I find it significant that Mr. Allarie was an employee of Nanaimo Concrete, Richard's company. He said he thought Mhinder ran the company, but as I commented above, his understanding was uninformed and unhelpful. It was as an employee of Nanaimo Concrete that Mr. Allarie agreed to hold the shares, and it was in that capacity that he worked to help set up a crushing plant.
- [564] It will be recalled that Mr. Allarie testified that no one expressly told him who owned D & A, although he understood "it was pretty well Mhindy and the Mayer Brothers". I have already rejected that as meaningful evidence on this issue. What I did find meaningful was his evidence about why he understood he was working on setting up a crushing plant. When asked, "What did Mhindy tell you?", he answered:
- He wants to set up a crushing spread so they can do their own crushing for their concrete plant.
- Mhinder was, of course, an employee of Nanaimo Concrete, and "their concrete plant" was Nanaimo Concrete's plant - owned by Richard.
- [565] This confirms the basic concept that "they", being Richard's Nanaimo Concrete, could do its own crushing for its own plant with equipment its employees built. But it was to be accomplished through a different company whose shares Mr. Allarie was to hold. It would make no sense for the beneficial owner to be anyone other than Richard in these circumstances.
- [566] Conceptually consistent with this, and inconsistent with any alternative, is Richard's purchase of the Spruston Pit through NCC in 2001, and his development of the gravel resource through the purchase of the Weyerhaeuser lands.
- [567] The evidence, then, establishes all three certainties. To the extent that it was Mhinder and Mr. Furnemont who dealt with Mr. Allarie, they did so, I find, on behalf of Richard as settlor, as did Bhora in dealing with Mr. Furnemont. In this singularly unusual context, I

find that it does not matter whether Dan Allarie or Kelly Mayer were certain about the objects of the trust. The trustee being muddled ought not to vitiate a trust that the evidence establishes with certainty, as I find to be the case here. What matters is whether, on the evidence, I am able to find that the three certainties have been established and can enforce the trust. What may have seemed uncertain before has, after 60 days of trial, become clear.

- [568] But what about Kelly's acknowledgement of trust signed January 24, 2002? And the comment of Bhora at the meeting of April 19, 2007, that "D & A belongs to Mhindy and Bhora", which most attendees agree he said?
- [569] As to the first, I have already commented on the questionable manner in which these documents came to be signed. It is true that Kelly, who signed hers at Mhinder's insistence, raised no objection and, unlike Richard, Rita and Gina, was not told that the document would not be legally binding. She obviously thought it would be, because she deleted a paragraph by which she was not prepared to be bound.
- [570] On behalf of Richard, it is submitted that the document can have no legal effect, because Kelly altered it significantly before she signed it, and those changes were not accepted by Bhora, who had signed the document on December 24, 2001, well before Kelly made the changes.
- [571] That would not, of course, remove all evidentiary value from the document. But the fact that, as drafted, it included Kelly's properties, in which Bhora and Mhinder clearly had no interest, as well as the shares in D & A, suggests that its authors had in mind a goal other than recording true beneficial ownership. In any event I agree with Richard's further submission that Kelly cannot purport to acknowledge or create a trust that is contrary to a trust obligation with which the shares were impressed when she received them. In other words, it is not open to Kelly, as an acknowledged trustee, to deprive Richard of his beneficial interest by signing in ignorance a document acknowledging a different beneficiary. That would be unconscionable.
- [572] With respect to Bhora's comment at the meeting of April 19, I accept Richard's explanation that Bhora was not asserting a fact, but rather was trying to "stir things up" in the context of Kelly having asserted her beneficial ownership. That context is missing from Mhinder's notes, but I am satisfied of its existence.
- [573] I conclude that the evidence has established the three certainties. The clear intention was that the shares of D & A be held in trust. The clear subject of the trust was the shares of D & A. And, I find, the clear object (and, indeed, the only object that makes sense on the evidence) was that the shares be held for the benefit of Richard until such time as he required them to be transferred back. It will be recalled that both Mr. Allarie and Kelly signed in advance the back of the shares consenting to their transfer.

- [574] Accordingly, I order Kelly to transfer the shares of D & A to Richard forthwith. I further order that Kelly be removed as director of D & A, and that Richard or his nominee be appointed as director of D & A in her place. Richard has leave to apply for any necessary ancillary orders in this regard.
- [575] Richard submits that in the event I come to this conclusion, I should order Kelly to repay D & A for monies paid to her by that company after May 1, 2007. Most of these monies came from the sale of equipment, and Richard submits, "there is no injustice in making such an order. Kelly never paid for the equipment that she sold." I am not convinced that this would be an appropriate order to make on the current state of the evidence. There is no doubt that Kelly withdrew funds, some for management duties, which she certainly performed, and there is no doubt that Kelly also deposited funds to the credit of D & A so that it could pay its liabilities. In the circumstances, I think it appropriate to order that Kelly account to Richard for her handling of funds. If an accounting satisfactory to the parties is not forthcoming, the matter will be referred to the Registrar.

8.7 D & A's claims

- [576] As a result of my finding that Richard is the beneficial owner of D & A, and that the shares must be transferred to him, I am left with a situation in which D & A is pursuing claims at the behest of someone (Kelly) who has lost any right she may have had to direct D & A. Moreover, those claims are all brought against Richard and his companies, although Bhora is also included as a defendant.
- [577] In these circumstances, I conclude that the proper course is to stay all of the claims of D & A until further order of the court.

9.0 THE TRUST PROPERTIES CLAIM

9.1 Overview

- [578] This is the claim that started the litigation in 2007, and I reviewed some of the circumstances in section 8.5.3.6. It relates to five properties registered in the name of Mhinder that are described in the pleadings as "Mhinder Mayer's Personal Properties", five further properties described in the pleadings as "Additional Mhinder Trust Properties", plus one further property that, it emerged during the trial, Mhinder had owned silently with Dan Helgesen. Bhora asserts that they all are, or were, assets of the brothers' trust.
- [579] The relevant clauses of the trust agreement are the third and sixth:
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.
 6. If any venture, acquisition of business or property is engaged in by any one of the brothers for his personal benefit, he must clearly define this and obtain release of this trust for the purpose of his venture.

[580] Bhora testified that in no case did Mhinder obtain the trust's release in relation to any of these properties. Bhora is the sole registered owner of the property on Jones Road, which he concedes is a trust property.

9.2 "Mhinder Mayer's Personal Properties"

[581] These properties comprise:

1. 1005 Farquhar;
2. 1007 Farquhar;
3. 212 Fry Street;
4. 218 Fry Street; and
5. 1090 Spruston Road.

[582] According to Bhora, these were always considered to be trust properties. The two on Farquhar had been rented, and the rent money came into Osborne contracting right up until 2007.

[583] Mhinder was unable to demonstrate a specific release from the trust in relation to these properties, but observed that they were treated as belonging exclusively to Mhinder in the tax returns and the shareholder accounting based on Bhora's and Mhinder's instructions to Mr. Furnemont. Mhinder paid some of the expenses of these properties personally. In Mhinder's submission, the reasonable inference from this evidence is that the brothers had reached an understanding that these properties were Mhinder's personal properties, held outside of the trust.

[584] Mr. Furnemont confirmed that he was instructed to treat all five of these properties as belonging exclusively to Mhinder, so that 100% of either the income or the loss of those properties was attributed to him on his tax returns, as opposed to 50%, which was the case with other properties. Mr. Furnemont testified that his instructions in this regard came from both Bhora and Mhinder.

[585] Given Mr. Furnemont's evidence, which I have no reason to doubt, I accept Mhinder's submission that the reasonable inference to draw is, and I find, that the brothers understood and agreed that these were all Mhinder's personal properties, not trust properties.

[586] Bhora and Gina are the registered owners of the property on Rainbow Road on Salt Spring Island. That property was treated in the accounting as Bhora's personal property, just as was the case with Mhinder Mayer's Personal Properties. It follows that the same inference arises, and I find that the brothers understood and agreed that the Rainbow Road property was Bhora's personal property, not a trust property.

9.3 "Additional Mhinder Trust Properties" and Northfield Road

[587] These properties comprise:

1. 2690 Elk Street;
2. Reid Road, Salt Spring Island (held as a joint tenant);
3. Colvilleton Trail on Protection Island;
4. Water Lot Lease, Protection Island; and
5. Green Horn Place.

[588] I agree with Mhinder's position that the lot on Colvilleton Trail and the Water Lot Lease, both on Protection Island, come within the "personal homes" exception in clause 3 of the trust agreement. Although they have separate legal descriptions, they are both adjuncts to Mhinder's personal residence on Protection Island. I am satisfied that the brothers never intended the trust to extend to such properties.

[589] Mhinder maintains that the Green Horn Place of property, in which he held a joint tenancy, was outside the brothers' trust, and that in any event there is nothing to suggest he profited from its sale in 2004. In the circumstances, I agree that the claim in this regard is moot. No accounting is necessary.

[590] Mhinder concedes that the Elk Street and Reid Road properties were never understood to be held outside the brothers' trust. Mhinder's interest in the Elk Street property was as a joint tenant for three years ending on the sale of that property in 2003. Mhinder still holds his interest in the Reid Road property. Originally, Dan Helgesen was the other tenant. Currently, Mhinder owns the property jointly with Kelly.

[591] Although there is no evidence that he profited on the sale of his interest in the Elk Street property, Mhinder should account for his tenure as owner, including rentals, expenses and proceeds of disposition.

[592] As Mhinder's interest in the Reid Road property is a trust asset, it should be added to the list of properties to be sold in the winding up. Kelly indicates that she will not require the formality of a partition proceeding, but asks for the opportunity to purchase the property for its fair market value before it is listed for sale. In view of other property dealings within the family, including Gina's in the wake of the Accredited foreclosure, I conclude that this is a reasonable way to proceed and I so direct.

[593] There remains the question of the property at 1737 Northfield Road (see paras 208 and 307-312 above), Mhinder's interest in which was first disclosed during the cross-examination of Dan Helgesen in this trial. Mhinder concedes that there was no agreement that this property would be held outside the brothers' trust (Bhora could hardly agree to it when he knew nothing about it), and maintains that he gained \$18,284 on the sale of the property. At first Mhinder denied any gain; I conclude that Bhora is entitled to an accounting in relation to this property, and I so direct.

10.0 THE ACCREDIT MORTGAGE CLAIM

- [594] As I note above in section 5.6.10.1, the Nanaimo waterfront project was financed through Great Pacific Financing, later called Accredited Mortgage. The Accredited Mortgages, totaling \$2,550,000, were signed by Mhinder, Bhora and Gina as "borrowers [mortgagors]". Rita, her companies, the other family companies and the ITCs all signed as "covenantors".
- [595] The project went into foreclosure. Accredited commenced foreclosure proceedings against the mortgagors and covenantors, and the order nisi was pronounced on February 3, 2011. According to the Agreed Statement of Facts, a number of properties owned by Mhinder and Bhora were sold and the proceeds paid to Accredited to be applied against the secured debt. Gina paid a further \$1,200,000 to Accredited to obtain a discharge registered against her home on Maple Bay Road. The total amount of the Accredited debt, inclusive of interest and costs, came to \$4,642,964.65.
- [596] Mhinder claims that he, Bhora and Gina have borne the entire burden of the foreclosure proceeding notwithstanding that the project was undertaken to benefit the entire family. Mhinder seeks proportionate contribution from those covenantors who remain solvent. Besides Mhinder, Bhora and Gina, these are the ITCs, Chemainus Ventures, MIH, Gina's companies Aqua Pod and R & G, Rita, her companies New Archer Holdings and Custom Pumping, and Richard's companies Island Aggregates, Mack Nanaimo and NCC.
- [597] This claim turns on the question of whether a designated "borrower" can claim contribution from a "covenantor".
- [598] Mhinder relies on Maddaugh & McCamus, *The Law of Restitution*, Canada Law Book, looseleaf addition updated to December 26, at p. 9-17:
- A right to contribution, analogous to that applicable among co-sureties and co-insurers, has also been applied to other co-obligors, including partners, co-mortgagors, co-trustees, joint tenants and directors of the corporation. Indeed, as with the doctrine of subrogation, the application of the principle is not restricted to certain limited categories of cases, but may extend to any co-obligors who are subject to a common liability, and where one of them has discharged more than a proportionate share of that mutual obligation.
- [599] Mhinder asserts that the reality of the transaction was that Front Street Projects was the borrower, and Mhinder, Bhora and Gina were simply persons who pledged their credit so that Front Street Projects could obtain the funds. Apart from the labelling, he argues, their position was no different from that of the covenantors. He submits that contribution is an equitable doctrine and that equity looks to the intent, rather than the form.
- [600] Mhinder then turns to clause 15 of the Standard Mortgage Terms, which are applicable to these mortgages and which include these subclauses:

15.(1) As the lender would not have agreed to lend the principal amount to the borrower without the promises of the covenantor and in consideration of the lender advancing all or part of the principal amount to the borrower at the request of the covenantor, the covenantor promises

- (a) to pay all the mortgage money when due, and
- (b) to keep and perform all the borrower's promises and agreements.
- (4) The covenantor is a primary debtor to the same extent as if the covenantor had signed this mortgage as a borrower and is not merely as a guarantor or surety, and the covenantor's promises and agreements are joint and several with the borrower's promises and agreements. This means that the covenantor and borrower are both liable to perform all the borrower's promises and agreements.
- (5) If more than one person signs the mortgage form as covenantors, the promises are joint and several.

[601] On this basis, Mhinder submits that the solvent covenantors are liable to make contribution so that the burden is born equitably among the borrowers and covenantors together.

[602] I have already commented that the "family collective" analysis rejected in Sangha cannot help Mhinder in this case. If Mhinder's "new family trust" claim had been established, which I found was not the case, then Gina should be looking to Mhinder and Bhora for recovery of what she contributed, and there could be no claim against the covenantors.

[603] Given my findings, it is my view that Mhinder's claim turns upon the contractual provisions set out in the Standard Mortgage Terms (see, for instance, *Jiricny v Jiricny*, [1996] BCJ No. 2174 (CA)). Those terms altered the traditional relationship between mortgagees, mortgagors and guarantors, in which the obligation of the guarantor was considered secondary to that of the mortgagor, and guarantors had a right to be indemnified by the principal debtor; see *Van De Mortel v Bank of Montreal*, 2007 BCSC 1049 at paras 34-35. That right of indemnity did not work the other way.

[604] The Standard Mortgage Terms replace the categories of mortgagor and guarantor with those of borrower and covenantor. A principal difference is that, by clause 15, borrowers and covenantors are both primarily liable to the lender on the "borrower's promises and agreements". The obligation of the covenantors is no longer secondary.

[605] This allows the lender to treat the covenantors as though they were borrowers, or 'co-obligors', rather than as parties whose obligations were secondary to those of the borrowers. But does it give the borrowers the right to treat the covenantors as 'co-obligors', and claim contribution from the them?

[606] The Standard Mortgage Terms have now been in effect for more than a quarter of a century, and the parties were unable to direct me to any authority considering this question.

- [607] The defendants argue that the last sentence of clause 15(4) modifies the preceding provision that the covenantor's promises and agreements are joint and several with the borrower's promises and agreements. It modifies it by making it clear that it makes them both equally liable to the lender. That, the defendants submit, is very different from being liable to contribute as between the two classes of borrowers and covenantors.
- [608] I agree with the defendants' position. It is difficult to understand why the Standard Mortgage Terms would otherwise maintain two separate classes of "borrowers" and "covenantors". When I look at the Terms as a whole, it is clear that the classes are indeed intended to be separate. Clauses 5 through 9 set out in detail the obligations of the borrower, and what happens to the borrower in the event of default. The effect of clause 15 is to give the lender the same rights against the covenantors, those rights being joint and several vis-à-vis the lender. This eliminated the obligations of a mortgagor to a guarantor, and facilitated the ability of a lender to recover funds from the covenantor, the covenantor's obligation becoming primary, rather than secondary. It is not, in my view, intended to give borrowers rights against covenantors. That would need to be done expressly, and thus expressly accepted by the covenantors.
- [609] I can see no basis apart from these terms for making the order Mhinder seeks. Before things went awry, payments under the mortgage were made by Rita through Front Street Projects and through her other companies. No doubt Mhinder, Bhora and Gina all assumed that they would never be called upon. But they accepted the risk. The addition of the covenantors was at the demand of the lender to add to its security, not at the request of the borrowers to spread their risk.
- [610] Mhinder's Accredited Mortgage claim is dismissed. There are funds held in court to the credit of the foreclosure action in the total of \$91,394.95. I am not in a position to make any order concerning their disposition because that is a separate action. The three borrowers are, of course, at liberty to apply in that proceeding.

11.0 THE CLAIM AGAINST MARC FURNEMONT

- [611] Mhinder submits that Mr. Furnemont wronged him in two ways. First, Mhinder alleges that Mr. Furnemont failed to exercise reasonable care as a Certified General Accountant in maintaining the books and records by which the relative financial positions of Bhora and Mhinder should have been recorded. As a result, says Mhinder, the unequal treatment favouring Bhora was not brought to his attention until 2007. Second, Mhinder asserts that as his relationship with Bhora was breaking down in the spring of 2007, Mr. Furnemont took Bhora's side and "facilitated Bhora's scheming to defeat Mhinder".
- [612] In this regard, Mhinder contends that Mr. Furnemont owed him a duty of care. He was not simply an employee of OCL, but was (as I have previously observed) deeply involved in the administration of nearly all the family companies, assisting all family members who were active in business. Mhinder points out that Mr. Furnemont had access to his bank accounts, reviewed his bank statements from time to time, and kept a supply of cheques signed in

blank by Mhinder in case of need (see section 13.1 below). This, of course, was Mhinder's choice, given Mhinder's lack of interest in financial details and administration. And, as I have noted, Mr. Furnemont arranged for the movement of funds among members of the family, and prepared schedules for the preparation of their tax returns by outside accountants.

[613] Mhinder concedes that a question arises as to the consequence of the wrongs he alleges against Mr. Furnemont. He maintains, however, that Mr. Furnemont's misconduct exposed him to the risk that he will not be able to cover what he claims from Bhora by way of an accounting of the unequal treatment and recovery of net benefits. Specifically, Mhinder submits:

At the end of the day, it may be that Mhinder has suffered only nominal damages. But if Bhora should prove unable to pay monies that he is found to be owing to Mhinder, Mr. Furnemont should be responsible for the shortfall to the extent of (a) the loss in respect of unequal treatment in the shareholder accounting (\$641,603.45) and (b) the interest deficiency on the \$300,000 loan (\$44,300).

[614] The first allegation of negligence is based in part upon the expert opinion of Ms. Walters in reference to the CPA Canada Standards, General Accounting Section 1000 concerning the objective of financial statements. Ms. Walters concluded:

Based on our review of the general ledgers during the period from 2000 to 2007, we noted that there were inconsistencies between the accounting of financial transactions between the shareholders and between years reported upon. These inconsistencies prevented the general ledgers and the financial statements from being presented in a manner that was consistent with [Section 1000].

[615] From this it was argued that Mr. Furnemont was negligent because, in maintaining the general ledgers of the Osborne Group, he failed to adhere to generally accepted professional standards as set out in Ms. Walters' report. The principal concern here relates to Mr. Furnemont's shareholders' loan equalization entries.

[616] I am unable to accept that argument. First, Ms. Walters was obliged to concede in cross-examination that section 1000 sets standards for financial statements, not for the maintenance of general ledgers. Mr. Furnemont did not prepare financial statements. Those were prepared by Park & Braithwaite, who reviewed the general ledgers and were well aware of the equalization entries. Park & Braithwaite raised no concern about these, because, as Mr. Fitterer testified, the practice was long-standing, and never raised as a concern by Mhinder or anyone else. As I have already found, this manner of accounting had been employed on the instructions of the brothers' trust since Mr. Furnemont joined the Osborne Group, and all necessary information concerning this process was known to Mhinder even if he chose to pay no attention to it. Both Mr. Fitterer and Ms. Walters acknowledged that the manner in which Mr. Furnemont maintained the general ledgers, employing the shareholders' equalization process, did not conceal anything and was set out

in plain and obvious terms.

- [617] Second, I have already concluded (section 7.0 above) that Mhinder has no claim for equalization notwithstanding the existence of an apparent accounting error in relation to MIH. Any error in that regard can hardly be laid at the feet of Mr. Furnemont given the lack of clarity between the brothers.
- [618] Turning to the second ground of alleged negligence, there is no doubt that as the relationship between Mhinder and Bhora deteriorated from March 2007 on, Mr. Furnemont found himself in an invidious position. That is why he resigned in September 2007 after 23 years' service to the Mayer family. I am unable, however, to find any breach of duty by Mr. Furnemont over this period.
- [619] It will be recalled that in March 2007, Mhinder raised an objection to the \$300,000 loan from OCL to Island Aggregates, and insisted on having signing authority. Mr. Furnemont quite properly pointed out to Mhinder that the matter of signing authority had to be resolved between Mhinder and Bhora and the banks. It was put to Mr. Furnemont that he could simply have refused to sign any further cheques without Mhinder's approval, but that would put on Mr. Furnemont's shoulders a burden that was not his to bear: solving Mhinder's problems with his brother.
- [620] In the particular instance of the \$300,000 loan, it is clear that Bhora approved it in every detail. Any accounting to Mhinder should be from Bhora, not Mr. Furnemont. But, as I have already found, Mhinder also approved it notwithstanding his later protestations.
- [621] In these circumstances, Mhinder's claim in negligence against Mr. Furnemont is dismissed.

12.0 GULF COAST MATERIALS AND THE OPPRESSION CLAIM

12.1 Overview

- [622] After the change in focus that saw the brothers' trust retreat from ready-mix concrete operations in the years after Bhagwan's departure, GCM was the only remaining ITC in that business. Other concrete operations in the family that were not ITCs had been sold in the Lehigh transaction in 2001. In the years after that, GCM had been operated under the direction of Bhora and Mhinder as directors, but neither was directly involved in its operation. That was managed by a non-family member, who for several years up to 2007 was Mike Grundy.
- [623] In late 2006, Mhinder began to turn his attention to GCM. He gave jobs there to his stepson, Ian Bestwick, and to Mr. Bestwick's school friend, whom I shall call D.

- [624] By March 2007, Mhinder had left his employment with Island Aggregates. Without consulting Bhora, he concentrated his attention on GCM and developed a plan to replace GCM's batch plant on Salt Spring Island. He involved both Mr. Helgesen and Mr. Allarie in this project. Mr. Helgesen and Mr. Allarie were on D & A's payroll, but later switched over to the payroll of GCM. They fabricated material in the shop in Nanaimo, and were assisted by Mr. Bestwick and D. The new plant was installed and operational by July 2007.
- [625] By this time, it will be recalled, the brothers had already commenced litigation. As recounted above in section 3.4, that litigation intensified over the ensuing years. This conflict spilled over into the operation of GCM until, on October 7-8, 2011, Bhora effectively ousted Mhinder from his position as de facto general manager of the operation.
- [626] Over the intervening years, the company had performed well under Mhinder's management and paid substantial management fees to OCL. Its success was due in part to a contract for the supply of concrete with Jim Dent Construction, which undertook a major project in the Gulf Islands for BC Hydro. That project finished in 2009. The business performed less well thereafter, and Mhinder maintains that after Bhora took over operational control in 2011, he ran the business into the ground.
- [627] Mhinder points to the way Bhora treated him over these years, culminating with his ouster and Bhora's subsequent mismanagement, as oppressive conduct. He points to dealings between GCM and other ITCs under Bhora's control and family companies, mainly Richard's, as favouring the family companies at Mhinder's expense.
- [628] Conflict between Bhora and Mhinder over the GCM operation began as soon Mhinder took over the company's management. From Bhora's perspective, it had been run successfully for many years under the management of Mr. Grundy, yet without any discussion or agreement, Mhinder had taken over the management and had dismissed Mr. Grundy and another employee, insinuating his own employees into the business.
- [629] From Mhinder's perspective, as a co-owner of the business and co-beneficiary of the brothers' trust, he was perfectly entitled to take over management of GCM. He felt that his brother had left him little alternative. With respect to the employees, he was obliged to make personnel changes for the better function of the business, as was his right and responsibility as manager.
- [630] I do not propose to review all of what happened between the brothers in relation to GCM in detail. The fact is, they were no longer acting in any kind of cooperative manner, which is what the successful operation of the brothers' trust required. Given the context of their escalating conflict, matters at GCM were unlikely to end well, and what occurred does neither of them credit. It included an ongoing disagreement about personnel leading among other things to some employees being unpaid while others were paid to do nothing, and complaints to the Employment Standards Tribunal. There was a significant dispute about the use of pump trucks and in particular Mhinder's use of an MIH pump truck on GCM jobs. Communications were marked by increasingly abusive accusations by Bhora.

There was at least one physical altercation, and finally, the descent of Mhinder into forgery, theft and deceit (see paragraphs 100-107 above).

[631] The culmination was what Mhinder describes as Bhora's "coup" in October 2011 and subsequent mismanagement that led to the decline of GCM's profitability and the enrichment of the family companies. The difficulty is in extracting what is actually claimed as a result of these allegations. Mhinder's claims relating to Bhora's management of GCM contracted significantly during the course of the trial in the face of evidence that Mhinder had consented to a number of the transactions that he alleged were improper.

12.2 The oppression remedy

[632] The oppression remedy comprises a statutory claim, founded on section 227 of the Business Corporations Act, SBC 2002, c 57 ("BCA"):

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.

(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

(a) directing or prohibiting any act,

(b) regulating the conduct of the company's affairs,

(c) appointing a receiver or receiver manager,

(d) directing an issue or conversion or exchange of shares,

(e) appointing directors in place of or in addition to all or any of the directors then in office,

(f) removing any director,

(g) directing the company, subject to subsections (5) and (6), to purchase some or all of the shares of a shareholder and, if required, to reduce its capital in the manner specified by the court,

- (h) directing a shareholder to purchase some or all of the shares of any other shareholder,
- (i) directing the company, subject to subsections (5) and (6), or any other person, to pay to a shareholder all or any part of the money paid by that shareholder for shares of the company,
- (j) varying or setting aside a transaction to which the company is a party and directing any party to the transaction to compensate any other party to the transaction,
- (k) varying or setting aside a resolution,
- (l) requiring the company, within a time specified by the court, to produce to the court or to an interested person financial statements or an accounting in any form the court may determine,
- (m) directing the company, subject to subsections (5) and (6), to compensate an aggrieved person,
- (n) directing correction of the registers or other records of the company,
- (o) directing that the company be liquidated and dissolved, and appointing one or more liquidators, with or without security,
- (p) directing that an investigation be made under Division 3 of this Part,
- (q) requiring the trial of any issue, or
- (r) authorizing or directing that legal proceedings be commenced in the name of the company against any person on the terms the court directs.

[633] The applicable principles were usefully summarized by the Court of Appeal in *Jaguar Financial Corporation v Alternative Earth Resources Inc*, 2016 BCCA 193:

[112] To be entitled to relief under the oppression remedy a petitioner must show that it held a reasonable expectation with respect to the conduct of the affairs of the company, and that the reasonable expectation was disappointed by conduct that was oppressive or unfairly prejudicial. The reasonable expectation must be assessed on an objective and contextual basis: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 62, 68.

[113] The reasonable expectations of the shareholders are assessed in a two-stage process. First, the subjective expectations of the complainant must be established. Second, an objective analysis of the complainant's expectations must be conducted to determine whether the expectations were reasonable.

[114] When analysing decisions of directors, the court applies the business judgment rule: that is, deference should be accorded to business decisions of directors taken in good faith in the performance of their duties. Directors owe their duty to the corporation, not to the shareholders, and the reasonable expectation of shareholders is simply that the directors act in the best interest of the corporation.

- [115] In considering proof of a claimant's reasonable expectations, the Supreme Court of Canada in BCE distils from the cases the following factors which form its analytical framework: general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the claimant could have taken to protect itself, representations and agreements, and the fair resolution of conflicting interests between corporate stakeholders.
- [634] In *Mennillo v Intramodal Inc*, 2016 SCC 51, the Supreme Court of Canada undertook a very similar analysis of the equivalent provision in the Canada Business Corporations Act, RSC 1985, c C-44, section 241.
- [635] Mhinder claims relief on the basis that he was unfairly deprived of his role in the management of GCM (and any other ITC) notwithstanding his reasonable expectation, as a co-beneficiary and co-trustee of the brothers' trust, of equal treatment, and that the affairs of GCM in particular, and the ITCs in general, were managed by Bhora in a manner unfairly prejudicial to his interests as an equal beneficial shareholder by favouring Bhora's family over Mhinder and the interests of the ITCs.

12.3 Personnel matters

12.3.1 Mr. Grundy

- [636] Much was made of Mhinder's dismissal of Mr. Grundy. There were certainly complaints from the existing staff about the way Mhinder treated them when he took over control of the management, although Mr. Grundy did not testify. Bhora did not accept the dismissal, and supported Mr. Grundy. As a result, Mr. Grundy continued to be paid (salaries were paid through the office in Nanaimo) although he did not continue to work.
- [637] Mhinder maintains that Bhora should account for the wasted salary paid to Mr. Grundy after Mhinder dismissed him. But Mr. Grundy was a long-term employee and may well have been entitled to continued salary by way of notice. I did not hear from him, and although Mhinder proffered a reasonable explanation for his actions in dismissing Mr. Grundy, it is impossible for me to say on the evidence whether Mr. Grundy was dismissed for cause. Consequently, the evidence does not allow me to conclude that Bhora was wrong to continue paying salary to Mr. Grundy.

12.3.2 Mr. Helgesen

- [638] Bhora refused to recognize Mr. Helgesen's employment with GCM, as he had been a D & A employee. Bhora made his position in this regard clear from the start, both to Mhinder and Mr. Helgesen. Mhinder nevertheless proceeded to treat Mr. Helgesen as an employee. Because Bhora, as president of the company, remained administratively in charge, Mr. Helgesen was not paid for his work. Instead, Kelly lent him money in lieu of salary on the understanding that she would get it back from Mr. Helgesen once Mhinder and Bhora had sorted things out, and Mr. Helgesen was paid by GCM. Ultimately, Mr. Helgesen complained to the Employment Standards Tribunal, where the matter evolved into a

protracted and bitter dispute.

- [639] After a lengthy administrative process, judicial review (Gulf Coast Materials Ltd v Helgesen, 2010 BCSC 1169) and reconsideration, the Employment Standards Branch concluded that Mr. Helgesen had been an employee, and was entitled to an award of approximately \$55,000 on the basis that the amount lent by Kelly should be treated as wages paid by GCM. In the Gulf Coast Materials decision, Mr. Justice Davies commented:
- [73] It is obvious that the resolution of the dispute between Mr. Helgesen and Gulf Coast was, unfortunately, hijacked by hard-fought issues concerning the corporate governance of Gulf Coast and other related ongoing disputes between Mhinder Mayer and Bhora Mayer .
- [640] Bhora then took the extraordinary step of commencing action on behalf of GCM against the Employment Standards Branch, alleging misfeasance in public office. The notice of civil claim was struck, with costs to the defendant: Gulf Coast Materials Ltd v British Columbia (Ministry of Jobs, Tourism and Skills Training), 2016 BCSC 980.
- [641] In my view, both Bhora and Mhinder acted stubbornly in relation to Mr. Helgesen's employment. Mr. Helgesen and Kelly were, in a sense, the victims of their contrariness. But neither Mr. Helgesen nor Kelly has advanced a claim in this proceeding, and the circumstances do not otherwise give rise to a claim for relief on Mhinder's part.

12.3.3 D and Mr. Bestwick

- [642] D was fired at Bhora's direction on October 6, 2011, allegedly for failing to provide information about missing company funds. I accept that D did not take any money from GCM; only Mhinder did that. Regrettably, what D did do was follow Mhinder's direction to prepare a revised (and false) dispatch sheet for September 1, 2011, that omitted the delivery to B for which Mhinder was paid cash (see paragraphs 102-104 above). D testified that he was unaware that by doing so, he was concealing anything. He was simply doing what his boss told him to do. That might be so, but that conduct would possibly justify his dismissal even if Bhora was unaware of it until later. The point was not fully argued.
- [643] Mr. Bestwick was another casualty of the dispute between the brothers. I found him to be a careful and reliable witness. As part of his remuneration for moving over to Salt Spring to work for GCM, GCM agreed (per Mhinder) to pay for his rental accommodation. When matters deteriorated between Bhora and Mhinder in the spring of 2007, Bhora stopped the rent payments. Bhora also refused to authorize the payment of overtime to Mr. Bestwick, and further applications to the Employment Standards Branch ensued. But Mr. Bestwick has no claim in this proceeding.
- [644] The main force of Mr. Bestwick's evidence related to obstructive and abusive behaviour on Bhora's part, and I accept that it occurred. It is consistent with the abusive language Bhora habitually used in his emails to Mhinder. But, as I discuss below, it must be viewed in context.

12.3.4 Ms. Thompson

- [645] In the fall of 2009, Bhora inserted Pauline Thompson into the GCM office on Salt Spring. Bhora did so because he was concerned that he was not getting proper reporting from the plant. Given the breakdown between the brothers, he had reason to be so concerned. Mhinder viewed Ms. Thompson with suspicion as someone who was Bhora's agent to report on his activities. There is no doubt that Ms. Thompson considered herself to be on team Bhora, and was particularly concerned about the disappearance of pumping revenue, discussed below. There were valid reasons for this concern. There is also no doubt that Mhinder did his best to frustrate her in any way possible.
- [646] Another partisan of Bhora inserted into GCM, but this time with Mhinder's agreement, was Brian McLeod. Things did not go well between Mr. McLeod and Mhinder, and Mhinder terminated his employment soon after he started. I found much of Mr. McLeod's evidence to be implausible, and his testimony about some rather strange actions on the part of Mr. Bestwick and D was never put to those witnesses when they testified. In the result, I give Mr. McLeod's evidence no weight.

12.4 The pump trucks

- [647] Pump trucks are an important adjunct to the delivery of ready-mix concrete to building sites. They allow concrete to be delivered from the mixer truck to where it is needed at the site by means of a boom or a line, rather than a wheelbarrow.
- [648] In early 2007, GCM owned two pump trucks, a boom unit on a 1985 truck, #107, and a line unit, #113. At the end of March, it acquired another boom unit, #137, on a 1997 truck, which it leased from Rita's company, Custom Pumping. Custom Pumping had bought it from Island Aggregates for \$170,000.
- [649] In October 2007, Custom sold unit #137 to GCM for \$185,000, taking the old #107 in trade for \$25,000. Bhora engineered this transaction without Mhinder's involvement. He then arranged for the removal of unit #107 from Salt Spring.
- [650] It was unit #137 that had the unfortunate encounter with a Hydro line in July 2007. It was inspected by Island Nondestructive Inspection Ltd ("INDI") on July 26, 2007, and pronounced fit for certification with a recommendation that its two front tires be replaced. According to Bhora, this was done.
- [651] WorkSafe BC had issued orders in relation to unit #137 as a result of its contact with the Hydro line. On January 28, 2008, a WorkSafe inspector attended to see that the orders had been carried out. He concluded that they had. But according to Mhinder, he raised questions which led Mhinder to query whether the unit was in fact safe to operate without further certification. He arranged for Mr. Helgesen to fax the INDI inspector to question whether his certification was still valid given that (1) the boom pins had not been removed and inspected, and (2) the front tires had yet to be changed.

- [652] The INDI inspector found himself caught in the middle. With respect to (1), he noted that the owner was free to carry out such an inspection at any time. With respect to (2), he agreed that the tires should have been replaced by then, although he had received conflicting information from Bhora. He reported that he was uncomfortable with the situation, and refused to be involved any further on the sensible ground that his reports were being used as leverage in internal company or family conflicts.
- [653] Mhinder purported to remain concerned that unit #137 was not safe to use (although he presumably could easily have made it safe had he chosen to do so), and kept it out of service. Bhora removed it in March 2008, to have it thoroughly inspected, and did not return it until late November 2009.
- [654] Mhinder, however, needed the use of a pump truck in connection with GCM's services. He solved the problem by purchasing a used boom pump truck on March 28, 2008, through MIH for US\$252,000. Thereafter, he provided concrete pumping services to GCM's customers with this truck, for which he billed through MIH.
- [655] Bhora complains that Mhinder thereby appropriated profits from concrete pumping for what he claimed was his own company, MIH, when they belonged to the brothers' trust company, GCM. He also maintains that Mhinder used GCM employees in delivering those pump services. Bhora professed ignorance to Mhinder at the time, demanding to know who owned the pump truck that was sitting in GCM's yard. I say "professed", because the truck's owner, MIH, was stenciled on its side. There was nothing particularly secret about it, but Bhora justifiably sought confirmation of both the use of the truck and the manner in which it was used
- [656] Bhora returned unit #137 to GCM on Salt Spring Island on November 26, 2009. Bhora had renamed it unit #180, but I will continue to use the original designation of #137. Thereafter, Mhinder nevertheless continued to use the MIH pump, which he considered to be better. While Mhinder sought to paint unit #137 as practically derelict, I am not convinced. He failed to persuade me that it was in the interests of GCM and its customers to deliver pumping services via MIH's unit instead of unit #137.
- [657] I accept that Mhinder ought not to be faulted for purchasing a pump truck through MIH and providing pumping services to GCM customers through MIH from April 2008 up to November 26, 2009. The relationship between him and Bhora did not permit the purchase of a new pump truck by GCM, and the evidence disclosed no practical alternative given unit #137's absence. But once unit #137 returned to active duty, Mhinder ought to have used it in place of MIH's truck, and must account accordingly. He must also account for the use of 'GCM employee time' in the delivery of MIH pump services throughout the entire period after April 2008.

[658] What would have been apparent to Bhora, looking over GCM's finances, is that gross revenue was down by no small amount because of the loss of revenue from pumping services.

12.5 Bhora's takeover of GCM's management

[659] As an instance of alleged oppression and unfair prejudice, Mhinder claims that he was expelled by Bhora from the management of GCM, and has since been denied any role in the management of any of the ITCs. This, Mhinder submits, cuts to the core of his reasonable expectations of participation in the business as an owner.

[660] As a matter of formality, Mhinder was not dismissed; he was nevertheless effectively ousted when he acknowledged what I accept was a *fait accompli* on the part of Bhora. This is because after Bhora moved in and installed replacement management staff on October 7-8, 2011, there was really nothing left for Mhinder to do. But Bhora had at least two legitimate reasons for moving as he did. First, there was the disappearance of pumping revenue. Second, there was an apparent disappearance of cash revenue, later confirmed in three instances to be theft on the part of Mhinder, exacerbated by his falsification of corporate records.

[661] In these circumstances, it is impossible to say that any expectation Mhinder had of continuing to be involved in the management of GCM was reasonable. Nor could he reasonably have expected to be involved in the management of any other ITC, having previously eschewed an administrative role, and having now demonstrated his unfitness to manage, at least during the currency of the brothers' conflict.

[662] It is worth recalling that it was in the context of an interlocutory application by Mhinder to restrain Bhora's unilateral management of GCM that Mhinder swore a false affidavit denying theft, and persuaded B to swear a false affidavit corroborating him (see para 105 above). This is compelling evidence of both Mhinder's subjective expectation (he knew he could not support a right to involvement in management if he had stolen funds and falsified documents, and therefore had to lie about it), and the objective absence of reasonableness.

12.6 Whether Mhinder left the brothers' trust

[663] In Bhora's submission:

This court has the inherent jurisdiction to find that Mhinder had left the Trust prior to 2011 as a result of his actions, in particular those at GCM between 2007 and 2011. Those actions were such that he both flagrantly violated the express terms of the Trust, and also breached his duties as a co-trustee.

- [664] In the result, contends Bhora, clause 2 of the 1984 Agreement (replacing clause 7 of the 1966 Agreement) applies to limit Mhinder to a share of the original value of the trust assets. In supporting this argument, Bhora relies upon *Miles v Vince*, 2014 BCCA 289, where the court discusses what circumstances justify the removal of a trustee.
- [665] I agree that Mhinder's actions in diverting pump revenue to MIH and stealing cash from GCM were inconsistent with his duties as a trustee of the brothers' trust. But the question here is whether Mhinder must be taken to have left the trust voluntarily, in accordance with what the agreements provide when a brother "wishes to leave the trust". This focuses the issue on Mhinder as beneficiary, not as trustee, because it goes on to deal with how the departing brother's share in the assets of the trust is to be valued. I am satisfied that at no time did Mhinder wish or purport to give up his position as a beneficiary of the trust. Accordingly, clause 2 of the 1984 Agreement has no application.

12.7 Bhora's dealings with family companies

- [666] Mhinder alleges that once Bhora took management of GCM away from him, he proceeded to direct GCM to deal with the family companies as suppliers, and did so as well on behalf of other ITCs. The problem, says Mhinder, is that Bhora favoured these family companies by entering into transactions with them on non-commercial terms to the benefit of his family and to the detriment of GCM and other ITCs, all without consultation with or the consent of Mhinder. Combined into this claim are earlier instances when Mhinder alleges Bhora, in his management of OCL, favoured the family companies to OCL's detriment.
- [667] In doing so, pleads Mhinder, Bhora, with the assistance of Mr. Furnemont, conducted the affairs of the ITCs in a manner that was oppressive and unfairly prejudicial to Mhinder. This resulted, Mhinder alleges, in the ITCs suffering losses that Bhora has refused to cause them to take steps to recover.
- [668] It is important to understand that Bhora was legally in a position to make decisions on behalf of the ITCs without Mhinder's consent. This is because, according to the companies' articles, as confirmed by an interlocutory decision of Mr. Justice Burnyeat, Bhora had the executive power as president of the companies, and could cast a second, or deciding, vote if he and Mhinder were not *ad idem* as directors. In Mhinder's submission, Bhora abused this power in order to favour his family at the expense of the ITCs.
- [669] In reviewing Mhinder's claims in this regard, it is pertinent to recall the Court of Appeal's statement in *Jaguar Financial* at para 114 (quoted above in para 633) concerning the business judgment rule. Most of Mhinder's complaints about Bhora's management of GCM and the ITCs are properly analysed on this basis, and generally, I find that Bhora made the decisions he did as business decisions taken in good faith. The same may be said of Mhinder's decisions in managing GCM. Though their dealings with each other were tainted by mutual resentment and distrust, they both sought to manage in accordance with their perception of the best interests of the companies in question—at least until Mhinder resorted to diverting pump revenue from GCM to MIH, and stealing cash. Then, business

judgment was no longer in play.

[670] Mhinder further claims that the transactions between the ITCs and the family companies were undertaken in breach of the brothers' trust and that Richard, Rita and Gina and their companies benefited from those breaches by receiving trust property with knowledge of the breach (as to knowing receipt of trust property, see para 134 above). This raises the question of what constitutes trust property under the brothers' trust. I propose to resolve that question before turning to the various transactions at issue.

12.7.1 Trust property, knowing receipt, and the rule in *Foss v Harbottle*

[671] In Mhinder's submission:

the overlay of a trust arrangement on top of an array of companies and assets held in the names of individual brothers gave rise to ambiguity. Was it the shares of OCL that were held in trust, or its assets? In fact, it was both. The shares were clearly held in trust, but OCL was used to administer funds held in trust for the individual brothers. OCL was both a trustee and the subject of the trust.

[672] It follows, Mhinder argues, that if, for instance, OCL made an improvident commercial loan of \$300,000 to Island Aggregates at a below-market rate of interest, without Mhinder's consent (see section 8.5.3.2 above), that equates to knowing receipt of trust property by Richard and Island Aggregates.

[673] I disagree.

[674] Normally, the ownership of shares in a corporation does not give the shareholder a property interest in that corporation's assets. Rather, the shareholder's rights include the right to a proportionate part of the value of the assets of the corporation upon a winding-up (a process presently underway with respect to the ITCs), and the right to oversee the management of the corporation by its board of directors by way of votes at shareholder meetings; see, for instance, *BCE Inc.* at para 35, and *Blackwell v Stewart*, 2015 BCSC 1716 at para 10-17. Does this preclude the beneficial owner of shares from having also a beneficial interest in the assets of the company? In the context of the brothers' trust, I conclude that it does.

[675] As I read the trust agreements in relation to businesses, what is held in trust by any brother for the benefit of all is the shares in the particular business, not its assets. That beneficial ownership did not restrict any brother in his management of the company in question. This follows from the general tenor of the 1966 Agreement and more specifically from Recital B of the 1978 Agreement (see para 24 above). Among the brothers, it was acknowledged that management of trust companies was the responsibility of each company's directors and officers.

- [676] OCL indeed evolved into the principal operating entity of the brothers' trust, but its assets were not treated as trust assets. As agent for the brothers, it collected rents on properties held by them in the trust, but those monies were included as income of the brothers on their tax returns, not as income of OCL. Given the unique way in which the brothers managed their trust, it would be wrong in any event to confuse the manner in which they accessed funds with a beneficial interest in the assets of any company. Draws could come from anywhere at any time, according to what was expedient, and would lead to equalizing entries that adjusted the brothers' shareholders' loans. No one ever purported to undertake an exercise in dividing trust assets when distributing draws, and every ITC maintained independent books, issued independent financial statements, and filed independent tax returns.
- [677] It follows that Bhora's dealings on behalf of ITCs with Richard, Rita, Gina and their companies were not dealings in trust property, but rather were business transactions that Bhora entered into on behalf of entities of which he was the lawfully appointed manager, and of which Mhinder was, beneficially, an equal shareholder. Accordingly, Mhinder's claims against Richard, Rita, Gina and their companies for knowing receipt of trust property in relation to these business transactions with ITCs cannot succeed.
- [678] The question then becomes whether Mhinder is limited to the shareholder's remedy of seeking to bring a derivative action in the name of the company against, for instance, Bhora for breach of his duties as a director in entering into improvident business transactions.
- [679] This raises the vexing matter of the application of the rule in *Foss v Harbottle* (1843), 2 Hare 461, 67 ER 189 (Ch), discussed at length but not resolved by the Court of Appeal in *Mayer CA* at paras 106-125, and by me in *Mayer v Mayer*, 2013 BCSC 1958 at paras 70-76.
- [680] The rule in *Foss v Harbottle*, prevents a shareholder from claiming directly in respect of a wrong done to the company. An exception to the rule is where the shareholder has a personal claim arising out of a relationship between the shareholder and the wrongdoer that is different from the relationship the shareholder derives through his shareholding in the company, resulting in losses that are not merely "reflective" or "derivative" of losses suffered by the company such as a diminution in share value: see *Mayer CA* at para 106, and *Robak Industries Ltd v Gardner*, 2007 BCCA 61 at para 14. The onus of establishing the application of the rule is on the defendants, but they will succeed to the extent that the shareholder can be shown to lack an independent relationship and an independent loss.
- [681] In the present context, it comes down to whether Mhinder's claims against Bhora and the family defendants seeking to recover benefits obtained from alleged breaches of trust are merely reflective of losses suffered by the ITCs for which they have causes of action, such as for breach by Bhora of his duties as a director in entering into improvident transactions (see *Mayer CA* at para 122, which gave the example of a claim for "damages against Bhora for breach of his duties as a director in making improvident sales of corporate assets and in misappropriating corporate profits").

- [682] Mhinder argues that he comes within this exception because of the nature of the trust relationship. He contends that the "independent relationship" requirement is satisfied because there was no clear line drawn between the assets of the trust and the assets of the ITCs. This, with respect, is circular. In my view, as discussed above, the line was clear: it was the shares of the ITCs that were held in trust, not the assets of those companies.
- [683] Moreover, the Court of Appeal's conclusion that "Mhinder has satisfied the first condition, a relationship with the defendants different from their relationship with the companies" (para 116) turned on the pleadings alleging that the defendants were knowing participants in and recipients of the benefits of Bhora's breaches of his duty as a trustee.
- [684] The reason the Court of Appeal could not resolve the question is because it could not be answered "without weighing the relevant evidence and finding the necessary facts" (para 123). I have now done so, concluding that the assets of the ITCs were not trust property (and of course, that the DTCs were not part of the brothers' trust).
- [685] Mhinder further maintains that the "independent loss" requirement is satisfied on the assumption that his constructive trust claim is made out. Such a claim, he submits, would not be available in an action brought by the ITCs. But as I have already determined, his constructive trust claim has not been made out.
- [686] In any event, in the present context, the purported restitutionary remedy would be the same as the remedy available to the company in respect to the same transaction. In relation to the \$300,000 loan from OCL, for instance (and ignoring Mhinder's consent), the claim could be for no more than the difference between the interest paid and the interest that would have been payable at any higher commercial rate that Mhinder could establish. Clearly there can be no direct connection between that loss and Mhinder's status for the purpose of establishing a proprietary restitutionary remedy. It follows that even if Mhinder could be said to have an independent claim, it would not be for an independent loss.
- [687] I conclude that Mhinder is left with his derivative claims against Bhora, and his oppression claims against Bhora and the ITCs.
- [688] With this in mind, I turn to consider the specific transactions of which Mhinder complains.

12.7.2 Canac Kitchens loan

- [689] On December 15, 1995, OCL lent \$250,000 to a company owned by Gina known as Canac Kitchens. It was secured by a promissory note. According to OCL's financial statements, \$125,000 was written off in 1996, and the remaining \$125,000 was written off in 1998 as uncollectible.
- [690] Mhinder submits that this write-off required his informed consent, given that the person who benefited from it was Bhora's wife.

- [691] On all of the evidence, particularly evidence given by Mhinder on discovery that he accepted as true at trial, I find that Mhinder was aware that the loan was made by OCL to Canac, a business owned by Gina. He said that Mr. Furnemont reported this to him. Mhinder acknowledged that he voiced no concern at the time. But was he aware that the debt was written down to \$125,000 in 1996, and written off altogether in 1998?
- [692] There is no doubt that the status of the Canac loan was accurately recorded in the financial statements of OCL in 1995, 1996, 1997 and 1998.
- [693] Mr. Furnemont testified that he had a specific recollection of Dave Braithwaite, the independent accountant who prepared the financial statements, pointing out to Mhinder one of the two write-downs, and it was Mr. Furnemont's understanding that Mhinder was aware. He was challenged on the basis of discovery evidence he had given to the effect that Mr. Braithwaite "would have" pointed out the write-downs, but maintained at trial that he had a specific recollection of Mr. Braithwaite doing so on at least one occasion.
- [694] It is clear from the evidence that the independent accountants, whether Mr. Braithwaite or Mr. Fitterer after him, took time to review financial statements and tax returns with Mhinder; whether Mhinder paid much attention is another matter. In all of the circumstances, I accept Mr. Furnemont's evidence. The natural inference is that Mhinder did indeed give his consent, and that his consent was sufficiently informed. I so find.
- [695] This claim is dismissed.

12.7.3 OCL loans to Bastion and NCC, and the 2009 postponement agreements

- [696] The background is reviewed above in section 5.6.10.2. Mhinder submits that there is no credible evidence that he consented to the terms of these loans, and points out accurately that he knew nothing about the postponement agreements (concluded well after the commencement of litigation). He maintains that commercial terms would have taken into account the risk to OCL as second mortgagee. Allowing an interest rate premium of 2% to reflect this, Mhinder submits that the loss to OCL was \$342,763.
- [697] The interest rate premium calculation is based upon a report from Ms. Walters which simply sets out the amount of additional interest that would have accrued to OCL if the rate charged were increased by an additional 1%, an additional 1.5%, or an additional 2%. I accept the accuracy of her calculations. What is missing is any opinion or other evidence that establishes that the rates charged by OCL were in fact uncommercial to a point that constitutes conduct unfairly prejudicial to Mhinder. That is something I am asked to infer by comparing the rates charged with the CIBC prime rates, which are in evidence.
- [698] The June 1996 loan to Bastion related to the sale of the Farquhar Street property. The interest rate was 7.75%, then slightly below CIBC prime, although the prime rate fell soon after. I have already found, however, that OCL received ample consideration for this transaction (see section 5.6.2 above).

[699] The 2001 loan to NCC, which included OCL's loan to Bastion, was set at 7.00%, compared to a prime of 6.00%. The postponement agreements made in 2009 resulted in Bastion and Island Aggregates paying OCL interest at 6.00% at a time when the CIBC prime rate had fallen to 2.25%.

[700] In these circumstances, particularly given benefits that accrued to OCL beyond the collection of interest, I do not find it reasonable to infer that the interest rates charged by OCL were in fact uncommercial to a point that constitutes conduct unfairly prejudicial to Mhinder, or that a loss arises from the postponement of principal payments under the postponement agreements.

[701] These claims are dismissed.

12.7.4 Salary paid by GCM to Rita from 2001 through 2006

[702] The total of these payments over the six years in question comes to \$276,571.

[703] I accept Rita's evidence concerning the nature of her employment. It included rendering assistance to Mhinder at Gulf Coast, as well as to Bhora and Mr. Furnemont, and later included document management in relation to the Bhagwan litigation. It came to an end after the Bhagwan action was settled. I also accept Rita's evidence that Mhinder was aware of her employment.

[704] Mhinder maintains that he did not give his informed consent to the payments. I infer that he did from the fact that he was aware of her employment, benefited from her work, and had access to the financial information concerning her remuneration. The situation is not dissimilar to Mhinder's hiring of his stepson and his stepson's friend to work for GCM.

[705] This claim is dismissed.

12.7.5 Rental of extra office space at 265 Fry Street

[706] From 2007 to October 2008, OCL rented office space from Bastion at 55 Front St. at a monthly rent of \$335. In October 2008, Bhora caused OCL to move to premises at 265 Fry Street at a monthly rent of \$1,500. OCL continued to occupy that space until June 2013, when Bhora moved the office back to 55 Front St. at a monthly rent of \$990.

[707] Mhinder maintains that Bhora offered no valid explanation for this move, which cost OCL \$65,240 over the duration of the Fry Street tenancy. That assumes that there would have been no increase in the rent at Front Street between 2008 and 2013, an assumption I am not prepared to make on the evidence before me.

[708] There is no doubt on the evidence that OCL obtained what it paid for. Bhora testified that he made the move because of the need to have additional space for Mhinder, which Mhinder requested notwithstanding that he was spending most of his time on Salt Spring Island. Then, in 2013, the Front Street space became available again when Bastion moved staff from there to the Mack Nanaimo offices at McCulloch Road, and Bhora made the decision to move back.

[709] Given the relationship between the brothers over the period in question, I am unable to conclude that Bhora's explanation is unreasonable and amounts to conduct unfairly prejudicial to Mhinder. It was a management decision intended to accommodate Mhinder and ought not now to be second-guessed.

[710] This claim is dismissed.

12.7.6 OCL's \$300,000 loan to Island Aggregates in March 2007

[711] I dealt with this claim in the section 8.5.3.2 above, finding that Mhinder consented to it, although he later objected. In the present context, I note further that the loan's interest rate of 6.00% was the same as the then-current CIBC prime rate. It remained at 6.00% while the CIBC prime rate fell below 4.00% by early 2002, increased back up to 5.00% in April 2003, and increased again to 6.25% by July 2007, before declining below 3.00% by March 2009.

[712] This claim is dismissed.

12.7.7 GCM's purchase of a pump truck from Custom in October 2007

[713] As reviewed above in section 12.4, Custom Pumping sold unit #137 to GCM for \$185,000, accepting in trade GCM's old unit #103 for \$25,000. Custom Pumping had bought unit #137 from Island Aggregates for \$170,000.

[714] Mhinder was not involved in this transaction. On the basis of expert evidence of Michael Seibold that valued unit #137 at \$125,000 as of October 2007, and the trade-in unit at \$35,000, Mhinder submits that the appropriate purchase price was \$90,000. This would indicate that Bhora improvidently overpaid by \$70,000.

[715] Mr. Seibold conceded that unit #137 could be worth considerably more if it was in good condition.

[716] The defence expert, René Mutsaerts, valued unit #137 at \$132,000, and the trade-in unit at \$33,000.

[717] As neither expert had been in a position to inspect either vehicle, I did not find their opinions helpful. They could be right, or they could be wrong. What the parties did at the time is more instructive.

- [718] On the evidence, it was Mhinder who originally acquired unit #137 for Island Aggregates. Island Aggregates sold it to Custom Pumping for \$170,000. Custom Pumping, I accept, spent about \$10,000 on repairs and reconditioning. The unit was then inspected and certified, and Custom Pumping leased, then sold it to Gulf Coast for \$185,000, taking unit #107 in trade for \$25,000. Unit #137 was a newer vehicle with a larger boom.
- [719] Custom Pumping ultimately sold unit #107 for \$5,000, finding that it would be too expensive to repair it. This suggests that unit #107 was worth considerably less than what Custom allowed for trade-in, easily offsetting, I find, any excess in the purchase price given Custom's costs. In short, I find on the evidence that this transaction was reasonable; I am unable to find any unfair prejudice to Mhinder.
- [720] This claim is dismissed.

12.7.8 Loss of profit at GCM through Bhora's dealings with family companies.

- [721] This claim alleges loss arising from the transfer of gross profit from GCM to the family companies due to Bhora dealing with those companies on uncommercial terms in order to favour his family at the expense of GCM and Mhinder as beneficiary.
- [722] These allegations were the subject of expert evidence from Ms. Walters on behalf of Mhinder and from Jaime Fernandez, MBA, CPA, on behalf of Richard Mayer and the family companies.
- [723] Ms. Walters was asked to provide analysis concerning the "loss of gross profit experienced by [GCM], as a result of the purchases of goods and services from (the family companies)". She reviewed the sales of GCM for the years 2007-2014, noting that sales declined from a high of \$2,570,000 in 2008 to \$1,700,000 in 2009 and 2010. She considered this decline to be consistent with that experienced by many industries during the recession. Then, in 2011, sales were \$1,600,000 and continued to decline to a low of \$977,000 in 2014. Reviewing gross margin, she noted that an average gross margin of 38% for the years 2007 to 2011 declined to 32.9% in 2012, 23.9% in 2013 and 20.3% in 2014.
- [724] Ms. Walters went on to observe that purchases of materials, freight costs and contract labour were paid mainly to third parties (e.g. Lehigh cement) in 2007-2011, and were replaced with purchases from family companies in 2012-2014, while wage costs increased in the latter period.
- [725] From these observations, Ms. Walters produced two scenarios. Scenario #1 assumed that "expected gross profit" in the years 2012-2014 was equivalent to actual gross profit margin percentage earned in the years 2007 to 2011. Applying this "expected gross margin" to actual sales, she calculated the lost gross profits at \$370,382. Scenario #2 applied that same "expected gross margin" to "expected sales" based on the hypothetical that the level of sales in 2011 were maintained in 2012-2014. The loss on this scenario was \$996,837.

[726] In her supplemental report, Ms. Walters recalculated the loss of gross margin under scenario #1 by removing some fixed costs and also including an estimate of losses for the latter part of 2011, reducing the estimated loss to \$350,101.

[727] Ms. Walters then turned her attention to her earlier observation that the purchase of goods and services previously made from third parties began to be supplied by the family companies in the fall of 2011, which, she said, impacted how the materials were priced, transported and processed. She reviewed the gross profit earned by the family companies based on their financial statements, then applied that profit margin to the companies' sales to GCM in order to arrive at what, in her view, they earned in gross profit from sales to GCM. This came to a total of \$279,468. Ms. Walters then said this:

As indicated above, while GCM suffered losses of gross profit, after late 2011, the defendant companies earned gross profit on products and services sold to GCM.

In other words, approximately \$279,468 of gross profit previously earned by GCM was moved to the defendant companies in the period after late 2011. The remaining gross profit of \$70,633 (\$350,101-\$279,468) was lost on disbursements to third parties (i.e. BC ferries) or direct labour wages.

[728] I am unable to accept this reasoning. While it is obviously true that the family companies earned gross profit on products and services sold to GCM, it is equally obvious that so did the suppliers with whom GCM dealt before late 2011. But Ms. Walters ignores that. It cannot possibly follow that, as she suggests, the gross profit earned by the family companies represents gross profit lost by GCM, as if profit on the supply of products and services to GCM would not otherwise have been earned.

[729] I have a number of other difficulties with the manner in which Ms. Walters reached her conclusions, and I reject her evidence. I prefer the analysis and opinion of Mr. Fernandez.

[730] In my view, Ms. Walters' opinions were based largely on assumptions rather than on analysis, and many of her assumptions were not supported by the evidence. She did not purport to carry out a valuation of the business, or any analysis of economic or industrial factors. Thus, she applied a gross profit margin of 37.8%, being the average for the years 2007-2011, to sales for 2012-2014, assuming that the difference was due solely to the change in management and dealings with suppliers. This ignored, among other things, any changes to the industry overall (of which she made no investigation beyond commenting on the effects of the recession in 2009-2010), and the effect of the significant BC Hydro contract over the years 2007-2009.

[731] On the question of the so-called transfer of gross profit from GCM to the family companies, Ms. Walters made no attempt to compare the profit margins of the family companies with profit margins of arm's length companies, or how the family companies treated arm's length clients in relation to ITCs. In addition, her approach relied on the total gross margins of the family companies without taking into account that those companies' dealings with

arm's length customers constituted 98% of their sales (as an example, Mack Nanaimo's total sales for 2014 came to \$17,000,000; sales to ITCs came to \$29,000) and generated higher gross margins than those earned from GCM. As Mr. Fernandez pointed out, in fact the gross margin for the family companies was often lower on sales to GCM because of the need to be competitive.

- [732] With respect to the impact of labour costs, Ms. Walters attributed part of the declining profit after Bhora took over the management of GCM to the increase in labour costs under his tenure, notwithstanding a reduction in sales. For comparison purposes, she used the years 2009-2010 as representative of the state of affairs under Mhinder's management. But direct wage costs in those years were considerably less than the years both before and after, and Ms. Walters was unaware that the costs for 2009-2010 did not include any amount for Mhinder or Dan Helgesen, both of whom were working hard for GCM at the time.
- [733] Yet It was Mr. Fernandez's opinion, after analysing the sales made by the family companies, that those businesses charged no more for goods and services provided to GCM and other ITCs than they charged their arm's length clients for the same goods and services, and in many instances charged less. I found his analysis persuasive. It was important, because it attacks the underpinning of the suggestion that by dealing with family companies, Bhora was sacrificing profit for GCM and transferring it to the family companies for the benefit of his family.
- [734] Ms. Walters responded with a critique of Mr. Fernandez's methodology, opining that it was based on a sample size that was not sufficiently large to be representative of the population in question. A proper statistical approach, in her view, would have involved a sample size that was four times larger, and she suggested that if Mr. Fernandez had employed that approach, "his findings may have been different". In accordance with her instructions, however, Ms. Walters never employed the methodology she said was superior, and so had no different answer to provide; she could not say that Mr. Fernandez's conclusion was incorrect. Her own approach had involved no analysis at all of what the family companies were charging, but moved from the premise that GCM's costs went up after it started dealing with them. But as Mr. Fernandez demonstrated, on a number of occasions the family companies charged a lower rate to the ITCs than they did to their arm's length customers, rather than a premium.
- [735] I find that Mr. Fernandez's approach was appropriate in the circumstances. It is possible that the methodology advocated by Ms. Walters would have led to a more precise result, but only at a cost of time and money that would have rendered it impractical; which is, I expect, why she did not pursue it herself. As it is, I accept Mr. Fernandez's conclusion, and find that it accords with the evidence.
- [736] In this regard, I note the following.

- [737] Although Mhinder alleged that Mack Nanaimo provided parts and services not required, there was no evidence of that. I accept Richard's evidence that servicing costs increased after Bhora took over management of GCM because the equipment was in a poor state, often with expired certifications. Mhinder adduced no evidence whatsoever to indicate that work performed by Mack Nanaimo on GCM equipment was unnecessary.
- [738] Although Richard indicated that the cost of supplying cement powder to Gulf Coast through R & G, which acquired the powder at cost from Lehigh, was no higher than Gulf Coast had paid before, it was evident that this was based on an erroneous calculation of carbon tax refunds and freight subsidies. In fact, the price charged by R & G was higher in the range of \$3.00 per ton. But there were advantages to GCM in dealing with R & G as opposed to Lehigh. R & G was more flexible in its delivery schedule; it was prepared to leave its trailers on site for extra storage capacity; and it was willing to extend credit, which Lehigh was not.
- [739] I note further that R & G's sales to GCM were higher in the period 2002-2008 than they were in 2012-2014, after dipping considerably in 2009-2011. Obviously Mhinder had no problem dealing with R & G before 2009.
- [740] In these circumstances, I find, it cannot be said that Bhora caused GCM to deal with R & G on uncommercial terms.
- [741] A similar analysis applies to GCM's dealings with the other family companies. Where slightly higher prices were charged, there were other commercial advantages. Mhinder's allegations do not stand up to a careful review of the evidence.
- [742] As I see it, GCM's gross profits began to decline with the end of the BC Hydro contract in 2009, and continued to decline. Demand for concrete on Salt Spring Island fell. By then, the brothers were deep into litigation and cooperation was no longer possible. These factors affected GCM adversely. But on no reading of the evidence is it possible to conclude that Bhora had set out to line the pockets of his wife and children at the expense of the brothers' trust, which is the essence of what Mhinder claims.
- [743] This claim is dismissed.

12.7.9 Credit arrangements and interest rates

- [744] As I mentioned above, one of the advantages that accrued to the ITCs (particularly GCM) from dealing with the family companies was the availability of credit. Lehigh insisted on the payment of accounts within 30 days; the family companies did not. This was particularly advantageous to GCM and other ITCs (and hence to Bhora and Mhinder) because the family companies charged no interest on overdue accounts until late in 2013.

- [745] Bhora, I find, had encountered difficulty keeping up with accounts due to the family companies for some time. GCM in particular fell far behind. Because of the effect of this on his cash flow, Richard stopped making the voluntary principal payments due on the loans from OCL in 2011, though interest-only payments continued as per the BDC postponement agreements discussed in sections 5.6.10.2 and 12.6.3 above.
- [746] Richard, whose evidence in this regard I accept, then came up with the idea of offsetting the outstanding accounts receivable from the ITCs against what was left of the \$300,000 loan from OCL, a concept that was agreeable to Bhora. This would eliminate his interest payments and improve his balance sheet. These trade accounts receivable came to a total of \$335,205.38. Richard obtained the necessary permission from the BDC in February 2013; in the result, the \$300,000 loan was repaid in full and Richard's companies' trade accounts receivable from the ITCs were substantially reduced.
- [747] As noted, until this occurred, Richard was paying OCL interest on the \$300,000 loan, and continued to pay interest on the \$600,000 loan; but the ITCs were not paying interest to Richard's companies on their outstanding accounts. This was to the advantage of Mhinder and Bhora, and the disadvantage of Richard.
- [748] After this, the ITCs continued to fall behind on their outstanding accounts from the family companies, no doubt taking advantage of the cheap credit. Richard became increasingly frustrated because this impacted his companies' cash flows and balance sheets. He had his own debts to pay. In order to encourage Bhora to keep his accounts up to date, Richard decided late in 2013 to start charging interest on outstanding accounts receivable from the ITCs at the rate of 2% per month. The interest was charged only by Richard's companies. Neither Custom Pumping nor R & G Equipment followed his example.
- [749] Ultimately, in May of 2015, Richard, on behalf of his companies, and Bhora, on behalf of the ITCs, entered into another contra agreement. It is set out all of the monies owed by the ITCs to Richard's companies, and vice versa. Each was to provide the other with a certified cheque for \$735,572.49. The outstanding accounts receivables from the ITCs, including interest, would be paid in full, as would the outstanding debt from Bastion and NCC to OCL on the \$600,000 mortgage. The mortgage would be discharged. Outstanding management fees owed by Richard's companies would be covered as well.
- [750] All of this occurred, of course, in the context of this litigation being well advanced, and Mhinder in essence being frozen out of the administration of the ITCs for the reasons discussed above. Mhinder was neither consulted about this nor advised of it.
- [751] Mhinder alleges that this was a cooked-up deal between Richard and Bhora to benefit Richard's companies at the expense of the ITCs. In essence, he asserts that they agreed that Bhora would allow the accounts payable to Richard's companies to grow, unpaid, with interest accruing at an unreasonably high rate of 2% per month (compared to the loan interest Richard was paying in the range of 6%-7% per year), until the amount owing reached a level that would allow the setoff to be made. In this way, Mhinder submits, the

debt owed by Richard's companies (Bastion and NCC) was extinguished artificially, to the disadvantage of Mhinder and the ITCs.

- [752] Mhinder was doubtless in a vulnerable position throughout this time, and it is not surprising that he became concerned. But the evidence does not support his claim.
- [753] First, the interest rate charged by Richard of 2% per month was, I find, a standard industry rate for outstanding accounts receivable. GCM's invoices specified the same rate for its outstanding receivables. It is, of course, considerably higher than the rate Bastion and NCC were paying on the OCL loans, but those loans were secured. Accounts receivable directly affect cash flow and the bottom line, and amounts owing beyond a set time, such as 30 days, customarily bear interest at much higher rates than secured loans.
- [754] Second, Richard did not begin charging interest on the outstanding accounts receivable until well into 2013. The ITCs had had the distinct advantage of interest-free credit for a considerable time before that.
- [755] Third, given the propensity of the ITCs to exploit that advantage, one normally not commercially available, I find it was reasonable for Richard to start charging interest in 2013, and reasonable for him to charge the rate that he did. The continued success of his businesses required trade accounts to be paid within a reasonable time. The ITCs were not doing that.
- [756] Fourth, I am satisfied as discussed above that the accounts receivable had been incurred in relation to commercial transactions between the companies in the ordinary course of their business, and were not some kind of sham.
- [757] Fifth, I find that these transactions generally benefited the ITCs. They were able to continue business operations because of the extension of cheap credit, and ultimately discharged outstanding debt that had begun to accrue interest at 2% per month at a cost only of offsetting an amount due that was earning a much lower rate.
- [758] Far from a conspiracy between Bhora and Richard to benefit Richard's companies to the detriment of the ITCs, I find that this was a resolution of tension between Bhora and Richard arising from the ITCs taking advantage of Richard's willingness to extend credit. Mhinder submits that a transaction such as this would never have been concluded but for the relationship between Bhora and Richard. This is so only to the extent that no supplier acting commercially would have offered interest-free credit for so long, or would have allowed the accounts receivable to grow so large while continuing to supply the debtor. This was not a case of the ITCs rendering assistance to Richard's companies to Mhinder's disadvantage. The assistance went the other way.

[759] This claim is dismissed.

12.7.10 Unequal Expense Allowances

[760] Mhinder has complained that as this litigation developed, Bhora expensed a number of litigation-related expenses to OCL and GCM of a type for which Mhinder received no reimbursement. These include travel expenses, meal expenses and automobile expenses and were reviewed by Ms. Walters in her report of July 13, 2015. But as Ms. Walters acknowledged in cross-examination, her report just quantified the difference, and did not purport to explain it. She did not take into account, for instance, the fact that after October 2011, Mhinder was no longer working for the ITCs, so that it would be expected that Bhora's business expenses chargeable to the ITCs would be considerably higher. As Ms. Walters conceded, it could be analysed in so many different ways; she was asked to look at it in just one way.

[761] Mhinder does not appear to have pursued this claim in his closing argument, and I will say no more about it.

12.7.11 The Schnitzer Steel Claim

[762] It is with this claim that Mhinder opened his case. He alleges that Bhora and Gina sold scrap steel from property owned by an ITC, Timberland, to Schnitzer Steel for cash in June 2015, and failed to account for it.

[763] The steel was trucked to Schnitzer's facility in two tranches: one for which Schnitzer paid \$1,699.25, and a second for which Schnitzer paid \$2,147.25.

[764] It rapidly became apparent that Mhinder's allegation was incorrect with respect to the first tranche. Schnitzer's records indicate that this steel was delivered by Gina's company, R & G, for which Schnitzer paid R & G cash. Further records demonstrate that shortly after, Gina deposited \$1,699.25 to the account of OCL, where it was credited to Timberland.

[765] There is no record of a similar deposit of the second amount paid by Schnitzer of \$2,147.25. The difficulty is that although the Schnitzer records show R & G as the supplier of this second tranche of scrap, the carrier is listed as "Ryler Holdings Ladysmith". It is the carrier that received the cash. No evidence links that carrier to Bhora and Gina. Gina denied receiving that cash, and I have no reason to doubt her. But even without her evidence, the claim is unsupported and fails for want of proof.

[766] This claim is dismissed.

12.7.12 The General Security Agreement

[767] On July 15, 2015, GCM granted a General Security Agreement ("GSA") to Island Aggregates, R & G Equipment, and Custom Pumping. This agreement secured obligations then outstanding of \$156,673.92 to Island Aggregates, \$50,121.80 to R & G, and \$65,919 to Custom Pumping, plus any future obligations incurred. The security comprised GCM's equipment (trucks, loaders, forklift, etc.), together with the property on Rainbow Road from which it operated.

[768] Mhinder submits that the GSA was inappropriate and should be set aside as another instance of oppression. He maintains that it was granted without his knowledge or consent, and improperly threatens his position in the winding up of the ITCs (specifically GCM) by putting Island Aggregates, R & G and Custom Pumping ahead of him, as creditors, when it comes to distribution. In his submission, this demonstrates yet again Bhora's propensity to acquiesce in whatever his family requested without regard to Mhinder's interests.

[769] Mhinder relies in part on evidence given by Bhora at trial under cross-examination. I observe that Bhora has been unwell for some time, and was unwell during the course of this trial. He had a tendency to lose patience and agree with certain suggestions just to get it over with. The evidence Mhinder relies upon includes the following exchange from Mr. Gomery's cross examination of Bhora:

Q So as far as you were concerned after Mhinder said what he said in October 2011 he was out?

A Yes.

Q And you didn't have to look after his interests anymore?

A Well, he--I had to look after the interests of the company.

Q But not Mhinder's interest?

A If he was out, no. You're absolutely right.

Q And your view was he was out?

A Fair enough.

Q And that's the basis on which you've been proceeding?

A Fair enough. Going around in a circle, but that's okay.

[770] Contextually, the issue of Mhinder being "out" refers to Bhora's claim, discussed and dismissed above in section 12.6, that Mhinder had left the trust. At the time that the GSA was granted, they were fully engaged in litigious warfare. But the pertinent point is that Bhora, I find, was in fact looking after the interests of the company in this regard, which was the asset in which Mhinder remained interested, whether or not Bhora acknowledged it.

[771] Was it, then, inappropriate for Bhora to agree to the GSA? What advantage accrued to GCM? The advantage, say Bhora and Richard, was that GCM was able to stay in business until it came time to wind it up. This is because, on the strength of the GSA, the family companies continued to supply GCM on credit, including the supply of an additional pump truck.

[772] Mhinder has advanced a number of claims based on his proposition that the affairs of GCM were conducted in a manner oppressive to his interests as a beneficial owner. I have dismissed all of them. In the result, the evidence does not allow me to conclude that the GSA was detrimental to GCM and its ability to continue in business, or that it was

oppressive and unfairly prejudicial to Mhinder. In the absence of a finding of sham supply transactions, which the evidence does not support, it is difficult to see how Mhinder can complain if legitimate creditors are paid what they are due.

[773] I decline to set aside the GSA.

13.0 MISCELLANEOUS CLAIMS

13.1 Cheque Claims against Richard and Rita

[774] Mhinder claims against Richard and Rita for monies advanced to them in the form of cheques on Mhinder's account. The total advanced to Richard was \$129,000 between January 1995 and April 2000. The total advanced to Rita was \$246,000 between October 1993 and September 2003.

[775] We have already seen that Mhinder chose to pay little attention to administrative matters, and this included his bank account. He gave his chequebook to Mr. Furnemont to manage. And in order to avoid being interrupted in the midst of his work, he pre-signed a number of cheques so that Mr. Furnemont could issue them as required. I accept Mr. Furnemont's evidence that he advised Mhinder whenever he did so.

[776] Some of the cheques cashed by Rita were filled in in her handwriting.

[777] Mhinder alleges, in essence, that without his knowledge or consent, his money was transferred to Richard and Rita through pre-signed cheques, facilitated by Mr. Furnemont.

[778] I am unable to accept Mhinder's evidence that he neither knew of nor consented to these cheques being issued, although I am prepared to believe that he gave little thought to them after they had been issued, and may well have forgotten all about them. I accept Rita's evidence that any of the cheques issued to her that she had filled in were ones that had not been pre-signed; rather, she obtained Mhinder's signature after filling them in. Moreover, it is clear, and I find, that Mhinder was in receipt of his bank statements, which included cancelled cheques. I reject any suggestion that any or all of Richard, Rita and Mr. Furnemont attempted to defraud him.

[779] With respect to all of the cheques issued to Richard, and most of those issued to Rita, it is also evident that any claim on them is time-barred pursuant to the 1996 Limitation Act. Mhinder argues that he should nevertheless be entitled to pursue his claims pursuant to a remedial constructive trust on the ground that damages would be an inadequate remedy due to the existence of a limitation defence. The law, he submits, allows him to pursue a post-trial process of tracing in order to pursue proof of the requirement of a direct link to an equitable property right (in Rita's case, Wee Tree) as discussed in the BNSF Railway case at paras 64-68 (see paras 135-138 above). That case, of course, dealt with the sufficiency of pleadings, not with findings.

- [780] I have already rejected Mhinder's claim to an equitable interest in Wee Tree. As I have commented before, there are significant difficulties with Mhinder's position, arising largely out of the manner in which members of the Mayer family exchanged funds. Look at Richard. Mhinder maintains that he advanced cheques totaling \$129,000. Yet Richard, as we have seen, advanced Mhinder cheques totaling \$395,000. Although Mhinder maintained that these were on account of the \$900,000 promissory note, I have rejected that contention (paras 236 and 246-248 above).
- [781] Turning to Rita, Mhinder's claim is not time-barred with respect to two payments, totaling \$76,000, made in 2002 and 2003. Rita testified that she was struggling at that time to keep up with the Accredited mortgage payments on behalf of Front Street Projects, and that she asked Mhinder for assistance. Mhinder made the advances.
- [782] I accept Rita's evidence. I find that Mhinder was aware of all of these payments at the time they were made, though he kept no track of them. He also received monies from Richard and Rita, and kept no track of them either. There was no attempt to defraud him, nor was there any understanding that these advances were loans that had to be repaid. They were typical of the sort of dealings that frequently occurred among members of the Mayer family, and give rise to no claim. They are quite distinct from interest-bearing loans such as Mhinder's company, MIH, advanced to Front Street Projects, and OCL advanced to Island Aggregates.
- [783] These claims are dismissed.

13.2 Claims against Gina

- [784] Mhinder advances two claims against Gina.

13.2.1 The Rents Claim

- [785] The first arises out of the Gina rents claim, discussed above in section 7.3. I have already determined that Mhinder is entitled to an accounting from Bhora with respect to these rents. Here, Mhinder maintains that Gina is jointly liable to him on the ground that she knowingly assisted Bhora in a breach of trust.
- [786] There can be no doubt, on the evidence, that Gina was fully aware of the brothers' trust. Moreover, she had been collecting the rents on behalf of the brothers' trust, and submitting the net proceeds to OCL, for many years. For this, she charged and was paid a fee. It is clear that she was fully aware of how things were supposed to work.
- [787] I have already rejected Gina's evidence that Mhinder knew about Bhora's decision to have her pay the net proceeds into her and Bhora's joint account instead of to OCL, and her evidence that this was in accordance with Mr. Furnemont's advice. In these circumstances, the only reasonable inference is that she knowingly assisted Bhora in paying all the rents to his benefit (and hers) in breach of trust.

[788] It follows that Mhinder is entitled to claim against Gina jointly with Bhora in relation to what amounts are found to be owing in this regard.

13.2.2 The Gabriola Property Claim

[789] The second claim relates to property on Gabriola Island that Gina purchased in 1992 for \$4,500 and still owns.

[790] The evidence establishes that Gina and Mhinder entered into a contract of purchase and sale of the property on February 12, 2002, for a purchase price of \$10,000. Mhinder wrote a cheque to Gina for \$10,000, which Gina deposited.

[791] According to Gina, they later agreed to rescind this transaction, and she returned Mhinder's payment, sending him a cheque drawn on her account for \$10,000. According to Mhinder, there was no agreement to rescind the contract, and it had simply escaped his attention that the sale had never been completed. Mhinder denies receiving a cheque from Gina; on the evidence, he never cashed it if he did.

[792] Mhinder acknowledges that it is past time when specific performance could have been ordered, and so seeks the return of his \$10,000 with interest.

[793] On any reading of the evidence, Gina owed Mhinder \$10,000, and whether through Mhinder's carelessness or not, that payment has not been made. Gina argues that it would be inequitable to award Mhinder interest given that she attempted to repay the amount, and he simply misplaced her cheque. The fact remains that Gina has had the use of the money; Mhinder has not. Mhinder is entitled to judgment against Gina for \$10,000 together with interest under the Court Order Interest Act, RSBC 1996, c 79.

13.3 Claims of Mid-Isle Holdings

[794] MIH advances two claims against Richard's companies, the Garco building claim, and the converted containers claim.

13.3.1 The Garco Building Claim

[795] The first relates to one of two very large Garco steel buildings that had been used in the construction of a rapid transit line in the Lower Mainland, and were located in Port Moody. Mhinder had been instrumental in arranging the purchase, through NCC, and then bought one of the buildings from NCC through MIH for cost of \$250,000.

[796] The buildings were disassembled and transported to Duke Point where they have remained ever since. By the time Mhinder sought to extract MIH's building in 2012, the family was at war.

[797] Richard's solicitor originally took the position that the ownership of the item was in dispute and that its removal would amount to both trespass and theft. That was not a justifiable position. The fact is that Richard does not dispute that the building belongs to MIH. The problem, he says, is that the parts of the two buildings are mixed together and need to be

sorted out under supervision. Moreover, he contends, Mhinder should pay him for storage and moving costs over the period of approximately eleven years that the building pieces have been left on NCC's property.

[798] I note that neither Richard nor NCC ever asserted any right to storage costs from the time that the buildings were delivered to Duke Point until well after Mhinder announced his intention to take possession of MIH's building. Given that the pieces of the two buildings were mixed together, it seems to me that, effectively, Richard had licensed MIH to maintain its pieces there at least until such time as Richard gave notice that Mhinder should remove them. He never did so. On the contrary, he initially denied Mhinder access altogether, disputing his ownership. In these circumstances, I am unable to discern any proper basis for charging storage.

[799] MIH is entitled to its building. The question is how its pieces are to be extricated from those belonging to NCC. Richard proposes that a procedure should be established by which a third party, with the benefit of the plans for the buildings, will supervise the removal of one of them. I agree. If the parties are unable to agree to such a procedure, they are at liberty to apply. NCC is not entitled to storage fees.

13.3.2 The Converted Containers Claim

[800] This relates to what Mhinder alleges is the conversion by Bastion of seven containers and equipment that MIH purchased in 2001 for \$29,400. Mhinder maintains that these containers and their contents were stored at Bastion's yard at 1125 Farquhar Street, and were last seen there at the end of 2007. He claims damages for conversion in the amount of what he paid for the containers as a "reasonable though probably modest indication of their value in 2007".

[801] This claim turns on the sufficiency of Mhinder's evidence. He produced invoices establishing the purchase of the seven containers from SAR Transit in May, July and August 2001 by Arrowsmith Concrete. Two of them are described as containing miscellaneous tools, safety supplies and equipment. He testified that they were originally stored at Duke Point but after a break-in of one of them, "we move them all into 1125 Farquhar Street yard". He was, however, unable to provide any information that would identify his containers, or independently establish their location at 1125 Farquhar Street.

[802] As might be expected, Richard's companies have bought numerous containers over the years, and own approximately 26 of them. He was unaware of any containers belonging to Mhinder being stored at 1125 Farquhar Street. He testified about containers at Fry Street to which Mhinder and Kelly were granted access at their request to remove some personal items. According to Richard, Mhinder and Kelly did not assert ownership to the containers themselves, and those containers are presently located at the Spruston Pit.

- [803] The question therefore boils down to whether I can accept Mhinder's testimony as establishing, on a balance of probabilities, that he stored Arrowsmith's containers at 1125 Farquhar Street, and that they disappeared. In this particular instance, I find I can. Mhinder's evidence about these containers was free of embellishment and in accord not only with the receipts he produced, but the course of dealings between the parties. He clearly bought the containers, and there is no other explanation for their disappearance. Mhinder himself is not in a position to locate them because he has been denied access to the properties where they might be located.
- [804] In these circumstances, Mhinder is entitled to judgment. I accept that the purchase price is a reasonable estimate of the value of these containers, but they are depreciating assets, and allowance should be made for storage from 2007 on, when Mhinder left his employment with Island Aggregates and shifted his focus to Salt Spring Island. I allow \$12,000 as a reasonable amount for storage, leaving a net award of \$17,400. To offset the depreciation of the containers and their contents, I allow no pre-judgment interest.

13.4 Claim of Island Aggregates

- [805] By counterclaim, Island Aggregates claims against Mhinder and MIH in relation to a silo that it claims it owns, but was misappropriated by MIH and Mhinder. Mhinder disputes Island Aggregates' ownership, and that is the real issue here. Mhinder acknowledges that if Island Aggregates is the owner, he must return the silo and account for \$28,000 in revenue MIH received for renting the silo out. I conclude that Island Aggregates is indeed the owner.
- [806] For a period of time, the silo was leased to GAIA Contractors for the storage of cement as part of a Nanaimo construction project. It was stored at Timberlands Road, and required attention to bring it into a working condition. In March 2006, R & G billed Island Aggregates to move the silo to Fry Street for this purpose. Island Aggregates billed GAIA for rent beginning in April 2006, and for moving the silo to Vancouver in August 2006. Then, we see that in May 2009 MIH billed GAIA for leasing, transportation and mobilization of the silo. MIH continued to invoice GAIA through 2015.
- [807] At some point between 2007 and 2009, the silo turned up on Gulf Coast's property on Salt Spring Island.
- [808] According to Mhinder, he originally acquired the silo along with another in about 1985 from the Nanaimo Regional District. They were effluent silos at the district's sewer treatment plant that the district no longer used. One went into use at Arrowsmith Concrete in 1989 while the second sat at Timberlands Road. Then when GAIA needed a silo, Mhinder was there to provide it. He intended to lease it to GAIA through MIH, but, Mhinder testified:

Marc said, "no, Mhindy, you can't put it under Mid-Isle Holdings because Mid-Isle Holdings now doesn't have a PST number. You can't do that." He said will put it under Island Aggregates. So the silo went down there. It went under Island Aggregates. Island Aggregates got paid for it.

[809] Mhinder went on to explain that when GAIA asked for it to be moved to Vancouver, he agreed to that, sent the silo to Vancouver, and then billed GAIA through MIH. He did not explain the silo's sojourn at GCM.

[810] Mhinder's explanation for how it came to be that Island Aggregates billed GAIA instead of MIH does not hold up. Mr. Furnemont denied telling Mhinder that MIH could not be the lessor because it did not have a PST number. In fact, Mr. Furnemont pointed out, MIH still had the PST number that had been assigned to its predecessor, Arrowsmith Concrete. I accept Mr. Furnemont's evidence.

[811] According to Richard, he purchased the silo through Island Aggregates from OCL along with other equipment stored at Timberland Road. Given the course of dealings thereafter, and the supporting evidence of Bhora, I accept Richard's evidence in this regard. It is consistent with the steps he was taking at that time to acquire equipment in relation to his new ready-mix plant at 1125 Cedar Road. What neither party was able satisfactorily to explain is how the silo came back to GCM in about 2007 or 2008. Nevertheless, it clearly did. That brought it under Mhinder's control, since he had assumed the management of GCM in 2007. What then happened, I find, is that Mhinder was able through his many connections to take advantage of an opportunity to lease it out again, and did so in the name of MIH in May 2009. But it was not his to lease.

[812] Mhinder's evidence about the silo's origins is, I find, a revisionist history. Very likely he did have a hand in acquiring the two silos from Nanaimo Regional District, but on behalf of OCL, not Arrowsmith. He may well have taken one to Coombs for use with the Arrowsmith plant, but the other silo, the one in question, remained with other OCL equipment at Timberland Road until purchased by Island Aggregates. This is consistent with the flurry of invoicing dealing with the silo's transport, repair and the initial rental to GAIA. The rest was opportunism on Mhinder's part. There is no documentary connection between the silo and MIH before May 2009.

[813] Island Aggregates is entitled to judgment on its counterclaim. Mhinder must return the silo, and account for the rental MIH received.

13.5 Claim of R & G

[814] This relates to a 16-foot fibreglass boat that R & G bought with a 60 hp Yamaha outboard engine and trailer for \$2000 in 1989.

[815] The boat and trailer were last seen on property belonging to Kelly and Mhinder, although the Yamaha outboard has been replaced by a Johnson outboard. According to Kelly, it sits there still. There is no evidence about how the change in engines came about.

[816] R & G is entitled to an order requiring Mhinder and Kelly to return the boat, trailer and Johnson engine.

13.6 Abuse of Process Claim

[817] Richard, Rita, Gina and their companies claim damages from Mhinder for the tort of abuse of process. If they are minded to pursue this claim in view of these reasons for judgment, then the matter should be argued along with their claim for special costs.

14.0 CONCLUSION AND SUMMARY

[818] What follows is a summary of my conclusions in the order in which I have addressed them in my Reasons (so far as is possible). Reference should be made to the Table of Contents.

[819] The New Family Trust Claims. Mhinder's claims to a beneficial interest in the family companies and properties, whether by way of an intentional or constructive trust, are dismissed.

[820] The \$900,000 Promissory Note Claim. Mhinder's claim against Richard on Richard's \$900,000 promissory note from the Lehigh sale is dismissed.

[821] The Disputed Trust Companies Claim. Bhora's claim that Mhinder's shares in the DTCs are assets of the brothers' trust is dismissed. Mhinder is the sole legal and beneficial owner of the DTCs.

[822] The Equality Claim to 2007. Mhinder's claim against Bhora for an accounting for inequality in draws from the brothers' trust over the years 1991-2006 is dismissed.

[823] The Gina Rents Claim. Mhinder is entitled to an accounting from Bhora for all of the rents collected by Gina in relation to the trust properties over the years 2001-2006 that were paid into Bhora's and Gina's joint account. This accounting shall be referred to the Registrar if the parties are unable to agree.

[824] The Claims Relating to D & A Crushing. The beneficial owner of the shares in D & A is Richard. Kelly shall transfer her shares in D & A to Richard forthwith, and is to be removed as a director of D & A. Richard or his nominee shall be appointed as a director of D & A in place of Kelly. Richard has leave to apply for any necessary ancillary orders. I decline at this time to order Kelly to repay D & A for monies paid to her after May 1, 2007, but Kelly shall account to Richard for her handling of funds on behalf of D & A, including those contributed by her, and this shall be referred to the Registrar if necessary. Thereafter, there will be liberty to apply.

[825] All of the claims of D & A are stayed until further order of the court.

[826] The Trust Properties Claim. The properties described as "Mhinder Mayer's Personal Properties" are all legally and beneficially owned by Mhinder. The property on Rainbow Road is legally and beneficially owned by Bhora and Gina.

- [827] With respect to the properties described as "Additional Mhinder Trust Properties", the lot on Colvilleton Trail and the Water Lot Lease on Protection Island are excluded from the brothers' trust by the "personal homes" exception. The Green Horn Place property appears to have been held outside the brothers' trust, but is moot in any event. The Elk Street, Reid Road and 1737 Northfield Road properties were not excluded from the brothers' trust. Mhinder should account to Bhora for his dealings with the Elk Street and Northfield Road properties. The Reid Road property should be added to the list of properties to be sold in the winding up, with Kelly having the option to purchase the property at its fair market value before it is listed for sale.
- [828] The Accredited Mortgage claim. Mhinder's claim for contribution is dismissed.
- [829] The Claim against Marc Furnemont. Mhinder's claim against Marc Furnemont in negligence is dismissed.
- [830] The Gulf Coast Materials and Oppression Claims. Mhinder's claims against Bhora arising out of Bhora's takeover of the management of GCM are dismissed. Mhinder must account for cash taken, for pumping revenue earned through MIH after November 26, 2009, and for the use of GCM employees in the provision of MIH pumping services.
- [831] Mhinder's claims against family members for knowing receipt of trust property are dismissed. His claims arising out of the alleged oppressive dealings by Bhora with family companies are also dismissed. These include the claims in relation to the Canac Kitchens loan, OCL's loans to Bastion and NCC, the 2009 postponement agreements, salary paid by GCM to Rita, rental of extra office space at 265 Fry Street, OCL's loan of \$300,000 to Island Aggregates, GCM's purchase of a pump truck from Custom Pumping, loss of profit at GCM after 2011, credit arrangements and interest rates charged, unequal expense allowances, the Schnitzer Steel payments, and the General Security Agreement.
- [832] Whether Mhinder Left the Brothers' Trust. Bhora's claim that Mhinder left the brothers' trust is dismissed. Mhinder remains a beneficiary.
- [833] Cheque Claims against Richard and Rita. These claims are dismissed.
- [834] Claims against Gina. Mhinder's claim against Gina personally in relation to the Gina rents claim for knowing assistance is allowed. Gina is jointly liable with Bhora to account to Mhinder for the rents collected in relation to the trust properties from 2001-2006 that were paid into her and Bhora's personal account. Mhinder's claim against Gina in relation to the Gabriola Island property is allowed and Mhinder is entitled to judgment against Gina in the amount of \$10,000 plus interest pursuant to the Court Order Interest Act.
- [835] Claims of Mid-Isle Holdings. With respect to the Garco building claim, the parties are to agree on a procedure by which a third party, with the benefit of the plans for the buildings, will supervise the removal of MIH's building. If they are unable to agree on a procedure, they are at liberty to apply. NCC is not entitled to storage fees.

- [836] With respect to the converted containers claim, MIH is awarded damages of \$29,400 against Bastion Management, against which I set off \$12,000 for reasonable storage costs, yielding a net award to MIH of \$17,400. MIH is not entitled to prejudgment interest on that amount.
- [837] The Claim of Island Aggregates. Island Aggregates' claim against Mhinder and MIH in relation to the silo is allowed. Mhinder/MIH must return the silo and account to Island Aggregates for revenue received for renting the silo out.
- [838] The Claim of R & G. This claim is allowed. Mhinder must return to R & G forthwith its 16-foot fibreglass boat, trailer and Johnson engine.
- [839] The Abuse of Process Claim. The claim of Richard, Rita, Gina and their companies against Mhinder for damages for the tort of abuse of process must await further submissions if they are inclined to pursue it after reviewing these Reasons for Judgment. They are at liberty to apply.
- [840] Costs. Richard, Rita, Gina and their companies have advanced a claim for special costs. The plaintiffs seek leave to address the issue of costs and potential indemnification following the release of these Reasons for Judgment. I am of course unaware of what discussions the parties may have had concerning the potential settlement of this matter. In all of the circumstances, it would be inappropriate to make any order for costs at this time. The parties are at liberty to apply.
- [841] A Concluding Word. As Mr. Gomery aptly put it, "This is complicated litigation with many moving parts". I have done my best to resolve the many complex issues raised by the parties in the face of some significant evidentiary difficulties. It is possible that one or more of the parties will consider that a moving part has gone missing, and, of necessity, I have left some matters outstanding as discussed above. With respect to these, the parties are at liberty to apply, and no doubt this litigation, begun over a decade ago, could continue for some time yet, consuming increasingly scarce resources. Nevertheless, with the resolution of these issues that have driven the members of this family apart, it is my hope that they will be able to summon such goodwill as may yet remain in order to find a means to bring their dispute to a final conclusion now. To Mhinder in particular, I say that your claims, developed fully since Mayer CA, were advanced as thoroughly and persuasively as could be. This is the result.

"GRAUER, J."

SCHEDULE OF CORPORATE PARTIES

A. The Identified Trust Companies (ITCs)

All parties acknowledge that the shares of these corporations are assets of the brothers' trust:

- Osborne Contracting Ltd ("OCL")
- Osborne Industries Ltd

- Holman Transport Ltd
- Gulf Coast Materials Ltd ("GCM")
- Mayer Truck & Equipment Ltd
- Timberland Investments Ltd

B. The Disputed Trust Companies (DTCs)

The shares of these corporations are registered solely in the name of Mhinder Mayer, who asserts both legal and beneficial ownership. Bhora Mayer alleges that although these shares are in Mhinder's name, the DTCs are assets of the brothers' trust just like the ITCs.

- C.A.R. Aviation Ltd
- Island Structures Ltd
- Mid-Isle Holdings Ltd ("MIH"), formerly Arrowsmith Concrete Ltd
- Chemainus Ventures Ltd

C. The Family Companies

The parties agree that these are not assets of the brothers' trust. The shares of these corporations are registered in the names of, respectively, Bhora's wife, Gina Mayer, and his children, Richard Mayer and Rita Webb. Those family members assert both legal and beneficial ownership, with which Bhora agrees. Mhinder alleges that Richard and Rita hold the shares of their respective companies in trust for Bhora and him pursuant to a new family trust (evidenced by acknowledgments of trust signed by Richard and Rita), or alternatively, pursuant to a constructive trust.

Mhinder further alleges that in managing the ITCs, particularly GCM, Bhora dealt with these family companies on terms that were uncommercial, to the benefit of his family and the detriment of GCM and other ITCs (and therefore to the detriment of Mhinder as a beneficiary of the brothers' trust):

- R & G Equipment Ltd (Gina)
- Aqua Pod Flotations Ltd (Gina)
- Archer Holdings Ltd (Rita)
- Custom Pumping Ltd (Rita)
- Front Street Projects Ltd (Rita)
- Island Aggregates Ltd, formerly Nanaimo Concrete Ltd (Richard)
- Mack Sales & Service of Nanaimo Ltd ("Mack Nanaimo") (Richard)

- Bastion Management Ltd (Richard)
- New Concrete Concept Ltd ("NCC") (Richard - subsidiary of Bastion Management)

D. D & A Crushing Ltd

The shares of this corporation were originally registered in the name of Dan Allarie (hence the initials), and are presently registered in the name of Kelly Mayer (Mhinder's wife). It was never part of the brothers' trust. Kelly does not assert beneficial ownership. Bhora and his son Richard claim that Kelly holds the shares in trust for Richard pursuant to either an intentional trust or a substantive constructive trust, while Mhinder contends that the beneficial interest belongs to him and Bhora pursuant to an acknowledgement of trust signed by Kelly.

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Prepared on 26 October 2026 · Esheria