

CANADA / JUDGMENT

Pirani v. Pirani

2020 BCSC 974

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2020 BCSC 974 Pirani v. Pirani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pirani v. Pirani,

2020 BCSC 974

Date: 20200630

Docket: S162270

Registry: Vancouver

Between:

Fareed Pirani, Arshad Pirani,

Sheliza Pirani, and Zaida Pirani

Plaintiffs

And

Haider Pirani, Mustaq Pirani, Mehboob Pirani,

Imran Pirani and 438702 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiffs:

S.R. Schachter, Q.C.

P.R. Senkpiel

J. Parker

Counsel for the Defendants, Haider Pirani, Mustaq Pirani, and Mehboob Pirani:

M.S. Kerwin

K.M. Mansveld

Counsel for Imran Pirani and 438702 B.C. Ltd.:

J. Milligan

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September 9-13, 16-20, 23-27 & 30, 2019

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June 30, 2020

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I. INTRODUCTION

- [1] The central issue in this trial was whether the winding up of a family trust was done within the appropriate confines of the trustees' discretion, or whether their actions were carried out in breach of their fiduciary duties. Specifically, the plaintiffs submit the trustees breached their duty of loyalty, which was underscored by a disabling conflict of interest.
- [2] The parties not only disagree about what facts the evidence supports, but also the proper analytical framework. They also disagree what evidence was relevant to the legal issues at play.
- [3] The trust at the heart of the case was wound up in 2014. It is one of four trusts structured identically, each of which owned equal shares of businesses established and owned by members of the same extended family.
- [4] The trust deed specified a final distribution date 80 years from its settlement. However, the Canada Revenue Agency had made it known that it would begin strict enforcement of taxation rules requiring distribution of trust funds no later than 21 years after the trust was settled (the "21 Year Rule"). According to the defendants, without taking action, the 21 Year Rule would have imposed a tax liability of approximately \$10 million on the trusts. On that basis, they decided to wind up the trusts. However, they also decided to restructure the trusts' corporate assets so they could direct the manner in which the businesses would operate into the future.
- [5] The plaintiffs allege that the defendants made decisions and took action focussed on a specific goal: removing other family members' ability to participate in the businesses or earn future profits in order to ensure the lions' share of wealth accrued only to themselves. The plaintiffs submit this plan was instigated and carried out to fruition by the defendant, Mustaq Pirani, with the full knowledge and complicity of the defendants, Meb Pirani and Haider Pirani (collectively, the "Defendants").
- [6] The Defendants submit that the trust deed conferred on the trustees absolute and unfettered discretion about how to distribute trust assets. Failing evidence amounting to bad faith, which they say was not established, the Court cannot second guess the trustees' decisions about distribution of trust assets. The Defendants also say the plaintiffs have failed to demonstrate that the Defendants breached their fiduciary, or any other, duty.
- [7] The Defendants assert that a significant amount of evidence adduced at trial and relied upon by the plaintiffs was irrelevant. The plaintiffs answer that position by pointing out proving bad faith inevitably requires asking a court to draw inferences from a large body of facts; it is the rare actor who is transparent about attempts to act in bad faith.

- [8] However, the plaintiffs' primary position is that from the outset, it was clear the trustees were in a prima facie conflict of interest. The importance of that submission is, if accepted, it would place on the Defendants an evidentiary burden to demonstrate that their actions were taken only in the best interest of all beneficiaries. The plaintiffs submit that the Defendants have failed to do so, and therefore their claim succeeds.

II. UNDISPUTED FACTS

A. The Parties and Their Families

- [9] There were five brothers in the Pirani family, four of whom left Uganda in the early 1970s, ousted by the Idi Amin regime. Hassanaly Pirani was the eldest brother: he did not move to Canada, but settled in Kenya.
- [10] Because all personal parties and many important actors in this case share the same last name, I refer to them by their first names. I do so only for convenience, and intend no disrespect. I have included as an Appendix to this judgment a list of the family members relevant to the case along with some of the defined terms used throughout, specifically those related to the family, its business and the trusts.
- [11] The other four brothers eventually made their way to Canada. They were: Mohamed Aly, Madatali, Pyarali, and Haider (collectively, the "First Generation"). Haider is the only brother now living. He is one of the Defendants.
- [12] Mustaq is the son of Madatali, and one of the Defendants.
- [13] Haider and Mustaq are trustees of the specific trust at issue in this case (the "MAP Trustees").
- [14] Mehboob (Meb) is the son of Mohamed Aly, and one of the Defendants. Meb's son, Imran is also a defendant.
- [15] The plaintiffs Fareed and Arshad are Meb's siblings. The plaintiffs Sheliza and Zaida are Fareed's daughters.

B. The Family Business and 1993 Estate Freeze

- [16] After arriving in Canada, the First Generation established a number of businesses, which they operated together (the "Family Business"). They were very successful. Those businesses are still in operation: they own and operate a number of hotels and motels in Canada and the United States. In addition, throughout the years, the Family Business added properties and formed new companies associated with them.
- [17] The two main entities that comprise the Family Business are Pirani Enterprises ("PEL"), and Piramco Investments Ltd. ("PIL"), (collectively the "Family Companies"). Each member of the First Generation owned equal shares of the Family Companies.

- [18] In 1993, the First Generation decided to implement an estate freeze. An estate freeze is a series of transactions by which future increases in the value of property accrue to intended heirs. The purpose is to minimize or possibly eliminate capital gains tax payable by the current owner's estate.
- [19] To accomplish this, each brother created a family trust for their own children and grandchildren. Simultaneously, each also created a holding company owned by his family trust (the "Numbered Company", and collectively the "Numbered Companies"). The creation of the Numbered Companies was necessary because transferring shares from the Family Companies directly into the trust would trigger immediate tax consequences.
- [20] Thus, each brother transferred a certain amount of his shares in the Family Companies to his Numbered Company. However, each brother also retained a certain number of shares in the Family Companies. Those shares represented the "frozen value" each brother owned, upon which tax would be paid, subject to any applicable exemption.
1. Mohamed Aly's Trust
- [21] All the family trusts were settled in October 1993. The settlor for the trust created by Mohamed Aly was his mother-in-law (the "MAP Trust"). The trustees were Mohamed Aly, his wife and Haider. After Mohamed Aly's death, Mustaq was appointed as a trustee in his place. Mohamed Aly's wife died in 2008. No trustee was appointed to replace her. Thus, Haider and Mustaq became the only trustees of the MAP Trust.
- [22] The MAP Trust's deed defined as "Primary Beneficiaries" each child or "remoter issue" of Mohamed Aly. The "Second Generation Beneficiaries" were defined as Meb, his brother Fareed, and his sister Arshad (Mohamed Aly's children).
- [23] The distribution date was set to 80 years from the date of settlement.
- [24] Part 4 addressed distribution of the trust assets. Interim distributions were addressed in clauses 4.1 to 4.4. Clause 4.1 required the trustees to pay before the 90th day of each fiscal period one quarter of the net income, divided equally amongst each of the Second Generation Beneficiaries. Clause 4.3(a) gave the trustees absolute and unfettered discretion to pay, from time to time, the whole or any part of net income not subject to distribution under clause 4.1.
- [25] Clause 4.3(b) granted the trustees absolute and unfettered discretion to pay out capital. In that event, one quarter of any distribution of capital was to be shared equally amongst the Second Generation Beneficiaries (clause 4.2). However, the balance of any capital paid out, and the whole of any net income paid out, which was not subject to distribution under clause 4.1, could be paid out by the trustees "to or for the benefit of one or more of the Primary Beneficiaries to the exclusion of the other or others".

[26] Clause 4.5 described the final distribution. It stipulated how the trustees were to distribute the trust funds remaining at the date of distribution: one quarter would be distributed equally amongst the Second Generation Beneficiaries then living. The balance was to be distributed to any of the Primary Beneficiaries then living "in such manner as the trustees in their absolute and unfettered discretion" determine, even to the exclusion of other beneficiaries.

[27] In making the final distribution of trust assets, the MAP Trustees relied on clause 4.12, which addressed accelerated distribution (the "Accelerated Distribution Clause"):

Notwithstanding any other provision of this Deed, the Trustees may at any time, if they deem it advisable for the preservation of the capital of the Trust Fund by reason of the incidence of taxation payable during the administration of the Trust or to be paid on the devolution or distribution of the Trust Fund or the termination of any interest therein, or which the Trustees may in their sole discretion deem likely to be payable under any such circumstance, declare that the trusts hereof will terminate as to the whole or such part of the capital of the Trust Fund as they consider advisable, whereupon the whole of the capital of the Trust Fund or part thereof as to which any such declaration is made, will vest in such one or more of the beneficiaries to the exclusion of the other or others in such proportions and in such manner as the Trustees in their absolute and unfettered discretion determine.

[28] Clause 5.1 required there be at least two trustees. Clause 5.2 prohibited a Primary Beneficiary or his or her spouse from being a trustee.

2. Other Family Trusts

[29] The terms of the other three trusts were identical, but for the identification of settlor, trustees and beneficiaries.

[30] Mustaq's father set up a family trust in his own name (the "Madatali Trust"). The trustees were Madatali, Haider and Meb. Like the MAP Trust, the primary beneficiaries were defined to be each child or remoter issue of Madatali. The second generation beneficiaries were specified to be Madatali's three children: Mustaq, his brother Bashir, and his sister Najma.

[31] Upon Madatali's death no other trustee was appointed, so Haider and Meb were the only trustees of the Madatali Trust.

[32] Haider and Mustaq were trustees of Pyarali's trust, and Haider and Meb were trustees of Haider's trust. Those two trusts had trustees other than Haider and Meb, but that is not material to any issue in this case.

[33] To summarize, Haider was a trustee of all four trusts, and Mustaq and Meb were each trustees of two trusts, but not the same ones. I therefore confirm, for clarity, that a reference in this judgment to trustees of the four family trusts, necessarily includes all the Defendants.

- [34] As noted, the First Generation also created Numbered Companies, which received shares in the Family Companies. They are as follows:
- a) for the MAP Trust, the defendant 438702 B.C. Ltd. ("702");
 - b) for the Madatali Trust, 438703 B.C. Ltd. ("703");
 - c) for Haider's trust, 438706 B.C. Ltd.; and,
 - d) for Pyarali's trust, 438705 B.C. Ltd.
- [35] Prior to the reorganization of the Family Companies that took place immediately before the winding up of the trusts, Meb, Fareed and Arshad were all directors of 702. However, Fareed and Arshad were removed without notice prior to the winding up of the trusts.
- [36] Each family trust owned an equal number of shares in the Family Companies. In July 1996, PIL and PEL each executed a shareholder agreement with all the Numbered Companies. The agreements specified the class and number of shares the Numbered Companies held in PIL and PEL, including the rights associated with those shares.
- [37] The agreements also stipulated that PIL's and PEL's board of directors would have only one director from each of the First Generation's immediate family, and at the time, the four brothers in the First Generation were those directors. However, the agreements also identified the First Generation's choice of successor for those directorships. Meb and Mustaq were named by their fathers, and Pyarali, who died in 2016, named his son Zahir as successors.

C. Value of Trust Assets

- [38] A contentious issue among the parties is the manner in which the Defendants valued the trust assets prior to distribution. However, it is not disputed that the distribution was based on the following (in reliance on a report prepared by Duff & Phelps, discussed at length later in this judgment):
- a) The value of 702 on May 31, 2014 was \$8,890,000.
 - b) The value of 703 was \$8,600,000.
 - c) The value of Pyarali's Numbered Company was \$8,660,000.
 - d) The value of Haider's Numbered Company was \$8,970,000.

D. Termination of the Trusts and Restructure of the Numbered Companies

- [39] The MAP Trustees (and trustees of all the family trusts) relied on the Accelerated Distribution Clause to wind up the family trusts. However, they also decided to simultaneously effect a corporate restructure of each Numbered Company. This was a complex undertaking requiring the coordination of accounting, legal and other professional advice and services. It took two years to complete the undertaking.
- [40] Planning and instructions regarding the winding up the four family trusts were coordinated and handled by the same law firm (Borden Ladner Gervais LLP ("BLG"), Vancouver). BLG did raise the idea of separate legal advice for each trust, but that was rejected. The trustees of the four family trusts thought it unwise to have "too many cooks in the kitchen".
- [41] For many years, including those relevant to this litigation, Mustaq had the most responsibility in the Family Business, and was its unofficial leader. He was credited for the family's success in expanding their operations into the United States. That may explain why Mustaq was the family's point person for addressing the 21 Year Rule, providing instructions to BLG on behalf of the Number Companies and the four family trusts. This is evidenced by the BLG retainer signed in October 2012.
- [42] Meb was also involved in the Family Business throughout the years. He was a lawyer and through his firm, he provided legal services to the Family Companies. He was paid for that work, although he testified he also provided work for which he was not compensated. However, he earned income from any legal work his law firm did for the Family Business regardless of which lawyer provided the legal services. He also had some involvement in management and operations of the Family Business over the years. Significantly, he was most recently involved in attempts to develop property the Family Companies own in North Vancouver.
- [43] Haider had been very active and successful in the Family Business for many years, but his participation declined in recent years. By the time of trial, he was frail, which was a reflection of his advanced age and declining health. However, there was no evidence to suggest he was legally incapacitated or compromised in his ability to make decisions at any time relevant to the litigation. Mustaq and Meb testified that in the years 2012-2014, Haider was involved at his full capacity in the Family Business. They both confirmed the three of them often discussed business together, which was easily done because they shared office space.
- [44] Arshad, who is a dentist, never had an active role in the Family Business; nor did Meb's son, Imran, or Fareed's daughters, Sheliza and Zaida. It is common ground that Fareed participated in the Family Business, but the extent and nature of his participation was ardently disputed between the plaintiffs and the Defendants.
- [45] With regard to the process of winding up the MAP Trust, BLG was instructed to achieve certain objectives, including:

- a) wind up the trust prior to its 21st anniversary;
- b) consolidate 100% of PIL's ownership under 702 and the other Numbered Companies;
- c) give voting control of 702 to Meb;
- d) give 20% of 702's common equity to Fareed, 20% to Arshad, and 15% to Imran; and,
- e) give all of 702's remaining equity (45%) and 100% of its future growth to Meb.

[46] The corporate reorganization of 702 resulted in the creation of new classes of shares (C, D and E) each with different rights and value. These new categories of shares were differentially distributed amongst Meb, Fareed, Arshad and Imran. The creation of these new classes of shares is how the MAP Trustees were able to confer all future growth of 702 on Meb, and split amongst Meb, Fareed, Arshad and Imran only the frozen value.

[47] In addition, BLG was instructed to protect Fareed's, Arshad's and Imran's ability to monetize shares in 702, but not in a manner that could threaten 702's financial viability. This was purportedly addressed by the following stipulation. If Meb withdrew \$120,000 or more from 702 in salary, bonus, dividends, or through redemption of class E shares, then 702 was obliged to redeem, on a pro rata basis, class D shares. However, that restriction did not apply to any management fees or bonuses paid to Meb by any other corporate entity, including PIL and PEL.

[48] The other three Numbered Companies followed this model of reorganization. The only differences were the identification of and percentage allocation to particular beneficiaries. However, Mustaq did receive completely control of 703, and all of its future growth.

E. The Pleadings

[49] As noted earlier, for convenience, I refer to Mustaq, Haider and Meb as the Defendants, and Haider and Mustaq as the MAP Trustees.

[50] The plaintiffs allege that the Defendants conspired to distribute the bulk of the MAP Trust's then current value and all of its future growth to Meb and his son Imran, to the detriment of the plaintiffs. Specifically, they allege the MAP Trustees' actions and decisions improperly benefited Meb, who in turn, as a trustee of the Madatali Trust, ensured Mustaq received the largest benefit of that trust.

[51] The plaintiffs also contend that the removal of Fareed and Arshad as directors of 702 and the creation of the class D shares constituted oppression contrary to s. 227 of the Business Corporations Act, S.B.C. 2002, c. 57; that is why 702 is a named defendant. The allegation against Imran is knowing receipt.

[52] The specific allegations pleaded in the notice of civil claim, which was filed in March 2016 (the "NOCC"), include:

- a) The MAP Trustees committed breach of trust and breach of fiduciary duty, and breached the applicable standard of care. The breaches arose from the MAP Trustees' acting with mala fides, for an improper purpose while in a conflict of interest.
 - b) The Defendants are liable for conspiracy, knowing assistance and knowing receipt.
 - c) The MAP Trustees colluded with Meb to deliberately injure the plaintiffs. They acted in concert to deprive the plaintiffs of their entitlement to a share of the Family Business in a manner that was deliberate, high-handed and self-interested causing the plaintiffs to suffer loss and damage.
 - d) 702 and Meb are liable for oppression and breach of fiduciary duty because of their removal of Fareed and Arshad as directors and the creation of the class D shares.
- [53] The Defendants filed their response to the NOCC in May 2016. Their position is that the trust deed does not mandate equal treatment of the beneficiaries upon distribution. They claim the MAP Trustees had unfettered and absolute discretion to distribute the trust funds upon termination as they saw fit. Given the breadth of their discretion, the Defendants claim judicial intervention is inappropriate.
- [54] The Defendants deny all allegations of dishonestly and bad faith, pleading that they acted "reasonably, honestly, diligently and in good faith" in regard to the administration and distribution of the MAP Trust.
- [55] The Defendants in Part 3 outline the legal basis of their response in three sections titled: (a) no breach of trust; (b) no valid claims of knowing assistance and knowing receipt; and, (c) no conspiracy.
- [56] The only mention of breach of fiduciary duty in the response is at para. 46, wherein the Defendants seek special costs against the plaintiffs alleging the allegations were "unfounded, recklessly made and based on speculation". They also deny that the plaintiffs suffered loss or damage.
- [57] The defendant 702's response claims the plaintiffs do not have standing to bring an oppression claim because they had no direct financial interest in the company. It also pleaded that Fareed's and Arshad's subjective expectations that they would remain directors, or be equally treated upon distribution of trust assets was unreasonable, and in any event, not oppressive.
- [58] Imran's response denies any knowledge or participation in the winding up of the MAP Trust.

F. Witnesses

- [59] The trial lasted 19 days, of which about 15 was spent receiving evidence. The plaintiffs only called two witnesses, both adverse in interest: Meb and Mustaq. Both men were also called by the Defendants in their case. Together Meb's and Mustaq's testimony occupied about 10 days, forming the bulk of the evidence before me.
- [60] The Defendants called Fareed as an adverse witness. In addition, they called Haider and Zahir (Pyarali's son). They also called Dan Palmer (an associate at BLG who worked on the file), Tina Orwick (accountant for the Family Business) and Ajay Nehru (who was involved in some projects with the Family Business). Imran and 702 called no evidence.

III. PRELIMINARY ISSUES

- [61] The parties disagree on the scope of relevant evidence. The plaintiffs allege the Defendants failed to turn over until the eve of and during the trial many relevant documents, including some key documents.
- [62] The Defendants maintain they fulfilled their document disclosure obligations. They submit many of the documents sought by the plaintiffs were either not relevant or of marginal relevance.
- [63] The plaintiffs also condemn the Defendants' credibility. They assert on numerous occasions the testimony of Meb and Mustaq was demonstrated to be misleading. The plaintiffs submit their lack of credibility at trial is consistent and illustrative of their main theory that the Defendants did not act in good faith and failed to discharge their fiduciary duties.

A. Document Production

- [64] The plaintiffs contend the Defendants' document production has been "abysmal". Their position is that important documents were withheld for years only to be produced weeks before and during the trial itself. They also point out a key document whose disclosure they sought before litigation (the 2014 valuation report) was not even listed by the Defendants until May 2018.
- [65] The Defendants' response, in part, was that the plaintiffs' "failure to adhere to the pleadings in this action has caused enormous complexities in relation to document production, and confusion over the remedies being sought". However, no specificity is provided to explain that submission.

- [66] The Defendants also submit the Court lacks a proper record to consider the plaintiffs' allegations about document production. That is not entirely true. During the trial, the Defendants continued to produce and deliver documents. In addition, mid-trial the parties had a dispute about the scope of the exception to solicitor-client privilege as it related to trust documents. In a brief judgment pronounced on day seven of trial, I ordered disclosure of documents sought by the plaintiffs.
- [67] However, I find with the exception of one topic, I need not to address the plaintiffs' allegations about document disclosure at this time. The one topic that is relevant now is the relevance of documents about the other family trusts. The Defendants' position is that only MAP Trust documents are relevant based on the pleadings. I disagree.
- [68] The NOCC specifically alleges that "by virtue of their positions as trustees of the [Madatali] and MAP Trusts respectively, Meb and Mustaq acquired the ability to make decisions with respect to the disposition of the two trusts for their mutual benefit" (Part 2, para. 37). Also, the plaintiffs pleaded that "Haider and Mustaq improperly and unfairly benefited Meb, who in turn, was a trustee of the family trust under which Mustaq benefitted", and that this "occurred within 12 months of Haider being granted an unsecured interest free loan of \$500,00 by Mustaq and Meb" (Part 3, para. 2).
- [69] In addition, other paragraphs in the NOCC assert that the First Generation had a "common, constant, and consistent desire for a united family and for each of the brothers and their families to benefit equally for the success of the family business, even if the length of quality of their respective contribution were not equal" (Part 2, para. 17).
- [70] In light of those claims, one cannot fairly say the scope of relevance was limited to the MAP Trust. However, beyond that finding, it is unnecessary for me to make any further comment at this time about the Defendants' document disclosure.

B. Credibility

- [71] The plaintiffs submit credibility is a critical issue in this case. They submit Meb's and Mustaq's evidence was dissembling and "frequently punctuated with outright lies".
- [72] The Defendants' submissions focussed on their seeking and receiving of legal advice; credibility is not a dominant feature. The Defendants submit based on that advice and the absolute and unfettered discretion in the Accelerated Distribution Clause, there is no basis for the Court to interfere with the disposition of the trust assets. In that way, the Defendants minimize the role my credibility assessments should have on the resolution of the legal issues.
- [73] Contemporaneous documents can be a reliable guide in resolving conflicts in evidence arising from the passage of time, eroding memories and the possible self interest of parties. In particular, such documents can either corroborate or refute witnesses' testimony: *Gutierrez v. Gutierrez*, 2015 BCSC 185 at paras. 24, 51, 55, 87-88.

- [74] Many of the Defendants' documents introduced into evidence recorded instructions given to and legal advice received from BLG. On several important points, the plaintiffs contend the Defendants' testimony did not match what was recorded in those documents. Those discrepancies are relevant to the Defendants' credibility. However, in addition to those discrepancies, the plaintiffs submit the manner in which the Defendants' testimony diverged from the documents supports their position.
- [75] The parties came to a document agreement which stipulated that business records were admitted as prima facie proof that facts personally observed and recorded in the document occurred, or statements personally heard or observed and recorded were made. Many BLG documents entered into evidence fell into the category of business records. I found in almost every instance of a discrepancy, such documents were a more reliable guide to the truth than the Defendants' testimony.
- [76] Many discrepancies in Meb's and Mustaq's testimony are addressed below in the discussion and analysis of breach of fiduciary duty. However, I outline here specific examples that had a major impact on my assessment of credibility.

1. Admission

- [77] On day 13 of the trial, after Meb testified and had been cross-examined as a witness in the Defendants' case, the Defendants made admissions including the following:

When [Meb] testified on Tuesday, September 24, 2019 that he did not recollect entering into the Option Agreement he was not telling the truth. He did have a recollection of entering into the Option Agreement.

- [78] The option agreement relates to a trust asset - part of a North Vancouver hotel property owned by one of the Family Business's companies (Leisure Lodge Ltd.). For a number of years Meb (with Fareed's involvement) had pursued redevelopment of that property. The option agreement is dated November 2018, and is registered on title. The agreement's purchase price for one part of the property was \$63 million.
- [79] Given he was the driving force behind the redevelopment, it is inconceivable that Meb would not remember the agreement. So why would he lie about his recollection? The plaintiffs submit Meb lied because he realized revelation of the agreement's purchase price supported the plaintiffs' contention that the Defendants deliberately under-valued trust assets.
- [80] In 2014, Mustaq had estimated the value of all Leisure Lodge Ltd.'s property to be \$17.5 million, whereas only a portion of that property commanded in the option agreement a value of \$63 million. The plaintiffs argue that disparity is evidence of Mustaq's malfeasance in knowingly undervaluing the trust assets.

[81] It is possible that there is an explanation for the nearly 360% difference between the value of all of Leisure Lodge's Ltd.'s properties in 2014, and only a part of them four years later. However, the Defendants provided no explanation.

[82] Meb's admission is significant. He knew the accuracy of Mustaq's estimates of real estate values was a central issue at trial. Among other things, when Meb lied about his recollection, he had already been cross-examined at length as an adverse witness for the plaintiffs.

[83] I agree with the plaintiffs. I infer Meb lied about his recollection because he understood and believed the existence of the option agreement supported the plaintiffs' position in the litigation.

2. Improper Communication During Cross-Examination

[84] Similarly, Mustaq was caught making an untruthful statement while in the witness box. Mustaq provided his own estimates of the Family Companies' real estate holdings in 2014. He estimated one of the properties the family owned in Washington State (the "SeaTac Property") was worth \$12 million in 2014. An independent appraisal of the same property as of August 2015 valued it almost 50% higher (\$17.8 million). Mustaq testified the difference was due, in large part, to \$1 million spent on renovations, which started in late 2014.

[85] However, the appraisal itself stated the assessment of \$17.8 million was based on the property before renovations were completed (its appraised value when the renovations were completed as planned was \$19.1 million as of February 2016). Nevertheless, Mustaq insisted that the renovations accounted for most of the discrepancy.

[86] Mustaq was asked the next day about his previous day's evidence. He insisted his testimony was true, revealing he sought and received confirmation the previous evening by contacting the general manager of the SeaTac Property (his nephew). That communication was a clear breach of his obligation as a witness under cross-examination not to discuss his evidence with anyone.

[87] His nephew's email was available on his phone, and when asked to access it while in the witness box, he claimed it supported his testimony. It did not. The email stated, contrary to his testimony, that the renovations were not started until 2015. There is no acceptable explanation for his dishonesty, other than he knew the appraisal was detrimental to the Defendants' case.

[88] I agree Mustaq's deception was an attempt to downplay the discrepancy between his estimation of value and the independent appraisal.

3. Criteria for Distribution

- [89] The MAP Trustees' evidence about the criteria they used to distribute the trust assets was inconsistent. There were significant discrepancies amongst what they told BLG, their testimony and some of the documents.
- [90] The distribution decision was one of the most important decisions regarding the winding up of the MAP Trust, and other family trusts. A BLG document records the MAP Trustees' final distribution decision and reasons for it, as discussed at a meeting in May 2013.
- [91] With regard to the plaintiffs Sheliza and Zaida, the BLG document states they got nothing because they were Fareed's daughters with his ex-wife, and they had relocated to Australia and lost touch with the family. The veracity of this statement is dubious because Meb admitted during his testimony that his son, Imran, was very close to both Sheliza and Zaida.
- [92] The BLG document also stated that Fareed and Arshad both received 20% because they were Second Generation Beneficiaries not active in the business. No other reason was mentioned.
- [93] However, in their testimony, the Defendants insisted the allocation to Arshad was intended to be for Sheliza and Zaida, even using the phrase "in trust". That intention is not mentioned in any BLG document, including the correspondence that was eventually sent to Arshad.
- [94] It is difficult to comprehend that explanation at face value. Among other things, it is strange that the women's shares would be given to Arshad, and not their father, Fareed. Moreover, Mustaq testified at one point that Fareed's share was considered to be 40% because the 20% to Arshad was meant for his daughters. More problematic, however, is why their allocation would not be given directly to them.
- [95] Mustaq testified about this topic, but his evidence was inconsistent. At one point, he suggested Arshad was their legal guardian. The women are adults so that could not be true. However, he also suggested it was too complicated to send the money directly to them because they lived in Australia. He went so far as to say he based that conclusion on advice he received from the lawyer assisting them with US tax law (because Imran lives in California).
- [96] However, that lawyer had no expertise with Australian tax rules. As a result of plaintiffs' counsel's enquiries, the Defendants made an admission that the lawyer in question does not give advice regarding Australian tax or legal issues. Despite that, Mustaq refused to admit his testimony on that issue could be mistaken. He maintained that the lawyer told him it could be done, but it was too complicated. In any event, Mustaq admitted he made no effort to contact Sheliza or Zaida, or find out where they lived.
- [97] Haider's testimony in general was unhelpful. He admitted he had poor eyesight, some difficulty with memory, and had limited stamina. He claimed he had no recollection about the BLG memorandum or the May 2013 meeting at which distribution decisions were finalized. Yet, he testified that he believed Arshad's allocation of MAP Trust funds was meant for Sheliza and Zaida.

- [98] Further eroding the Defendants' credibility on this topic was evidence read-in from Imran's examination for discovery. He stated in speaking with Arshad, he did not believe she had ever been made aware that her allocation was intended to be for Sheliza and Zaida.
- [99] In support of that explanation, the Defendants pointed to two documents, both apparently authored by Haider and meant to set out his decision-making process for the MAP Trust distribution.
- [100] The two documents are similar but not identical. The Defendants assert one was made contemporaneous with the MAP Trustees' decision, and the other one was prepared in 2016 (that one is dated, and signed by Haider).
- [101] Haider's testimony about them was unhelpful. He could not explain why he would have prepared and signed one of them in 2016 (after the litigation started). He said his wife typed both documents for him, but she did not testify.
- [102] The undated, unsigned document has Mustaq's handwriting on it, including a chart purporting to record his and Haider's decision-making. However, when asked about his handwriting on that document, Mustaq's testimony was confusing, and at times incompatible with what was written down.
- [103] Also, both notes contain references to behaviour attributed to Fareed that the Defendants testified had a negative impact on the Family Business and the family's reputation. Haider and Mustaq claimed they took those impacts into account. However, most of those examples were not recalled by Haider during his examination for discovery, and at trial he denied he would have relied on some of those factors. More importantly, nothing about those factors are in the BLG document.
- [104] Additionally, the documents make no mention of an allocation to Imran.
- [105] Haider's recollection of the notes was poor. Because of that and the preceding factors, I place no weight on those documents.
- [106] The plaintiffs submit the explanation that Arshad's allocation was intended for Sheliza and Zaida was a fabrication. They say the Defendants came to realize that giving nothing to Sheliza and Zaida would reflect poorly on them. The plaintiffs assert I can infer their attempted deception is an implicit acknowledgement that the MAP Trustees failed to act in good faith. I discuss later in this judgment my assessment of the Defendants' conduct and whether it met the good faith standard. However, I do find the preceding discussion seriously diminishes Mustaq's and Haider's credibility.
- [107] The Defendants' evidence about why Imran received a 15% allocation was inconsistent amongst them and not consistent with the BLG memorandum. The BLG document records his allocation was because he was a third generation beneficiary, hard working and would use the funds wisely.

- [108] Extracts from Imran's examination for discovery was read into the record. Mustaq told Imran he was receiving the shares in the hope that one day Imran would get involved in the Family Business. This tracked Meb's evidence at one point during his testimony, but at other points Meb said he had no expectation of Imran leaving his job in California.
- [109] Neither men told Imran his allocation was a strategy to save taxes because he would end up inheriting all of Meb's shares when his father died. Mustaq testified that Meb was actually getting a 60% allocation in recognition of his contribution to the Family Business, but 15% was essentially diverted to Imran simply for tax reasons. Meb confirmed Mustaq suggested that strategy to him, which he then decided to implement for the Madatali Trust.
- [110] The MAP Trustees' decisions about distribution had to be made honestly and in good faith. It was a very important decision. It is troubling that Haider's and Mustaq's testimony was inconsistent with what they told their lawyers, conflicted with their own documents, and at times, was contradictory with one another.
- [111] This seriously erodes the Defendants' credibility. It is also consistent with their conduct being tainted with improper motive.

4. Meeting with Arthur Fish

- [112] The Defendants received initial advice about the implication of the 21 Year Rule on all four trusts from Arthur Fish. Mr. Fish is a lawyer with BLG in Toronto, who specializes in trusts. He had been hired to provide expertise on trust law for family law litigation involving Haider's daughter in Ontario. Mr. Fish identified at that time that the family needed to contemplate what to do about the 21 Year Rule. The Defendants (along with Pyarali and Zahir) met with Mr. Fish in September 2012.
- [113] Shortly after that meeting, Mr. Fish emailed Mark Chartrand, a lawyer with BLG in Vancouver, in order to introduce him to Mustaq. Mr. Chartrand was the primary lawyer that dealt with winding up the trusts. Mr. Fish wanted to provide background and recount to Mr. Chartrand the advice he imparted at the meeting. He also sent a memo to Mustaq, summarizing what was discussed.
- [114] Mustaq suggested the meeting was an informal, friendly meeting over lunch where little, if any, substantive advice was provided. He also said the meeting was arranged for Mr. Fish's convenience because he was in British Columbia to go rock-climbing with his son.
- [115] The documents are difficult to reconcile with Mustaq's description. Mr. Fish's correspondence to both Mustaq and Mr. Chartrand was lengthy and thorough, including both substantive legal advice about the duties of fiduciaries and trustees, and advice specifically tailored to the Pirani family trusts. Also, Mr. Fish wrote in an email to another lawyer at BLG Vancouver that he had spoken on the phone with one of the trustees who asked him to come to Vancouver to advise all the trustees.

[116] I do not accept Mustaq's characterization of the meeting. I also find it is more probable than not, that the mischaracterization was an attempt to detract from the significance of that advice because some of it was not followed (this is discussed later in this judgment). This diminishes Mustaq's credibility and reliability as a witness.

IV. LEGAL PRINCIPLES

[117] The parties disagree on the proper analytical approach to this litigation. As a result, their final submissions were somewhat disharmonious, as was the evidence they identified as being material to the legal analysis.

[118] To put it in simplistic terms, the plaintiffs focussed on proving their allegation of breach of fiduciary duty, while the Defendants focussed on the allegation of breach of trust, with specific focus on the Accelerated Distribution Clause, which explains the parties' different positions on that clause. The Defendants say it is determinative, whereas the plaintiffs submit it is not.

[119] However, they did not necessarily disagree on the general legal principles applicable to the opposing parties' approach, which are set out below. This highlights the tension between the parties and demonstrates the necessity to first determine the appropriate analytical framework.

A. Basic Principles of Trust Law

[120] I start with the legal definition of a trust because all the applicable legal principles flow from this fundamental starting point. Trust relationships can vary significantly; however, certain foundational principles apply to every trust. In Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed., (Toronto: Carswell, 2012) at 42 [Waters], the authors comment that the "whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment". While many definitions exist, they offered this general definition (at 3):

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

[121] The nature of trust law stems to a significant degree from the dual ownership of trust property: *TLC The Land Conservancy of British Columbia (Re)*, 2014 BCSC 97 at para. 186, rev'd on other grounds 2014 BCCA 473. A trustee holds legal title strictly for the benefit of the beneficiary. By holding legal title, a trustee is able to "deal with the trust property so as to achieve the objectives of the trust": *Larochelle v. Soucie Estate*, 2019 BCSC 1329 at para. 172, citing Alistair Hudson, *Equity and Trusts*, 8th ed., (New York: Routledge, 2014) at 47 [Equity and Trusts].

[122] As explained by the authors in *Waters* (at 42-43):

It was in Equity that the notion of the fiduciary was first conceived, and it originated to explain the position of one who at law held title and had all the appearance of full enjoyment, but who nevertheless because of Equity's intervention had no right of personal enjoyment. Here was a [person] who had the capacity to bring every proprietary and possessory action available at law, but who was personally liable to another for all he did; Equity could not deny the doctrines of the common law, and at law the trustee was title holder and possessor. The only way around that obstacle was for Equity to impose obligations upon this person with title and possession, and the nature of scope of these obligations were spelt out in the concept of fiduciary relationship.

[123] The authors go on to note "[t]he trustee was a fiduciary of his rights and powers; he not only exercised those rights and powers on behalf of the beneficiary, he owed to the beneficiary the utmost duty of loyalty" (at 43).

[124] There are four significant elements to a trust: (i) it is equitable; (ii) the beneficiary has proprietary rights in the trust property; (iii) the trust imposes obligations on the trustee; and (iv) the trustee's obligations are fiduciary in nature: *Equity and Trusts*, as cited in *Larochelle* at para. 172.

[125] In addition to a trustee's fiduciary duties, and other general principles of trust law, trustees must adhere to the terms of the specific trust and failure in this regard is a breach of trust: *Swintuch Estate v. Erickson*, 2016 BCSC at para. 47, citing *Merrill Petroleums Limited v. Seaboard Oil Company* (1957), 22 W.W.R. 529 at 557 (Alta. S.C.) The trusts in this case are discretionary. The scope of the trustees' discretion is derived from the trust instrument itself: *Edell v. Sitzer* (2001), 55 O.R. (3d) 198 at para. 158 (Ont. S.C.J.), *aff'd* (2004) 9 E.T.R. (3d) 1 (C.A.), leave to appeal *ref'd* [2004] S.C.C.A. No. 372; *Neville v. Wynne et al*, 2005 BCSC 483 at para. 39, *aff'd* 2006 BCCA 460.

[126] The legal approach to reviewing a trustee's exercise of discretion is different from that of an alleged breach of fiduciary duty. This difference is the source of the disharmony between the parties' positions. Generally, in the absence of *mala fides*, a court will rarely interfere with the exercise of discretion, and will not replace its judgment for that of the trustees even if it would have come to a different decision: *Gisborne v. Gisborne* (1877), 2 App. Cas. 300 (H.L.); *Re Larsen* (1968), 1 D.L.R. (3d) 244 at 247 (B.C.S.C.); *Yates v. Air Canada and Daveluy*, 2004 BCSC 3 at para. 106, citing *Fox v. Fox Estate* (1996), 28 O.R. (3d) 496 at 500 (C.A.).

[127] However, a plaintiff need not prove fraud to establish *mala fides*; the term is broader in this context. A court can interfere if a trustee's decision is influenced by extraneous matters: *Fox* at 500-501. In that case, a mother preferred her grandchildren over her son for inheriting the residue of her late husband's estate because her son married outside of the family's religion. Despite the absolute discretion conferred on the mother the "extraneous consideration demonstrated sufficient *mala fides* to bring her conduct within any reasonable interpretation of that term" (at 501). Besides acting contrary to good faith, the

court also cited policy reasons: it was "abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion" (at 501-502).

[128] While the threshold for judicial intervention remains high, and despite the broad definition of mala fides in Fox, it does not seem proof of mala fides remains essential. Waters identifies certain categories that may lead to judicial interference (at 989-990):

- (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

[129] This high threshold for judicial intervention applies equally to decisions about the distribution of income or assets: Edell; Martin v. Banting (2001), 37 E.T.R. (2d) 270 (Ont. S.C.J.), aff'd (2002), 46 E.T.R. (2d) 93 (Ont. C.A.). Both of these cases involved family trusts where a family member was given nothing although he or she was a beneficiary.

[130] In Edell, the court would not interfere with the exercise of discretion, finding the trustee's concern about the future of the family business was a relevant consideration. At para. 159, the court noted:

The grounds on which the court will strike down an attempt by a trustee to exercise discretionary powers - even where, as here, the discretion is intended [to] be as unfettered as possible - have been described in different terms over the years. The old approach that limited the court's intervention to cases of "mala fides" has been reformulated in the more recent cases in terms of a concept of abuse of discretion that is similar to the criteria applied in other areas of the law concerning the exercise of discretionary powers by administrative bodies and officials - including judges. Non-interference is still the general rule.

Quoted in Neville at para. 39

[131] The court in Edell further noted (at para. 163) that there is no material difference between "motives - in the sense of sentiments, such as love, generosity, anger, pride, displeasure or feelings of moral obligation - that influence a trustee in exercising the power in a particular manner - and purposes in the sense of the end results that the trustee intends to achieve". However, particular motives or purposes may be considered extraneous and therefore invalid (as in Fox). Discerning the actual motive or purpose of trustees' actions is a question of fact (Edell at para. 167).

B. Fiduciary Duties

[132] Fiduciary relationships arise in circumstances beyond that of a trustee and beneficiary. The breadth of the concept does present some challenges in applying its legal principles, as noted by the majority in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 644: "the term "fiduciary" has been described as "one of the most ill-defined, if not altogether misleading terms in our law".

[133] In *Lac Minerals*, both the majority and dissent quote from *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 384, where the Court discussed the nature of fiduciary obligations:

Professor Ernest Weinrib maintains in his article *The Fiduciary Obligation* (1975), 25 U.T.L.J. 1, at p. 7 that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion". Earlier, at p. 4, he puts the point in the following way:

[Where there is a fiduciary obligation] there is a relation in which the principal's interest can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion.

[134] The fiduciary relationship between trustee and beneficiary in relation to the trust property is one of the essential features of a trust: TLC at para. 186. The trustee's fiduciary duty encompasses a variety of obligations, the Court of Appeal put it this way in *Meng Estate v. Liem*, 2019 BCCA 127 at para. 35:

Typically, a breach of fiduciary duty captures circumstances in which there is a breach of the duty of loyalty owed by the fiduciary and includes circumstances involving acting in the face of a conflict, preferring a personal interest, taking a secret profit, acting dishonestly or in bad faith, or a variety of similar or related circumstances.

[135] Despite the fiduciary nature of the trustee-beneficiary relationship, not every failure by a fiduciary is a breach of fiduciary duty: *Lac Minerals* at 597, citing *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 at 362 (S.C.).

[136] This point was recently reiterated in *Meng Estate* at para. 33. The court quoted the same passage from *Girardet* and stated "not every potential breach of duty is a breach of fiduciary duty. a fiduciary may breach duties owed in contract or negligence without those breaches being transformed into breaches of fiduciary duty".

[137] In *British Columbia*, Justice Newbury provides helpful guidance on the fundamental nature of fiduciary duties in *Louie v. Louie*, 2015 BCCA 247 at para. 23: "I start with the two most fundamental and long standing obligations of fiduciaries - the "no conflict" rule and the "no profit" rule." She continues:

These have been stated on many occasions over several centuries, but this passage from the judgment of the High Court of Australia in *Chan v. Zacharia* (1984) 154 C.L.R. 178, summarizes the historic approach succinctly:

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

[138] In *Chan* (at 198), the Australian High Court also noted that a fiduciary:

"is not allowed to put himself in a position where his interest and duty conflict or "may conflict" or that a person is "not to allow a conflict to arise between duty and interest" .

[Citations omitted.]

[139] *Chan* was cited with approval by the majority in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at para. 75. In that case, the majority also noted the inherent relationship between the duty of loyalty and the rule of no conflict (at para. 35):

Fiduciary responsibilities include the duty of loyalty, of which an element is the avoidance of conflicts of interest, as set out in the jurisprudence . As the late Hon. Michel Proulx and David Layton state, "[t]he leitmotif of conflict of interest is the broader duty of loyalty": *Ethics and Canadian Criminal Law* (2001), at p. 287.

[140] Thus, not only is a trustee not to profit from his position, equity has an inflexible rule that "he is not allowed to put himself in a position where his interest and duty conflict": Lord Herschell in *Bray v. Ford*, [1896] AC 44 at 51 (H.L.), quoted in *Louie* at para. 23.

[141] The majority in *Strother* (at para. 36) quoted from D.W.M. Waters, "The Development of Fiduciary Obligations", in R. Johnson et al, eds., *Gérard V. La Forest at the Supreme Court of Canada, 1985-1997* (2000), 81 at 83, who notes an essential feature of the fiduciary relationship is that the beneficiary "is entitled to expect that the fiduciary will be concerned solely for the beneficiary's interest, never the fiduciary's own".

[142] The authors in *Waters* expand on that point (at 42):

The hallmark of a trust is the fiduciary relationship which the trust creates between the trustee and beneficiary. The whole purpose of a trustee's existence is to administer property on behalf of another, to hold it exclusively for the other's enjoyment. The express trustee is expected to put the interests of the trust and the beneficiaries first in his thinking whenever he is exercising the powers, or performing the duties of, his office. His duty is one of selfless service.

- [143] Although not in the context of a trust, the Court in *Can. Aero v. O'Malley*, [1974] S.C.R. 592, discusses an example of the breach of fiduciary duty by someone preferring self interest over that to whom a duty was owed.
- [144] The defendants were former directors and officers of the plaintiff company. The allegation was they took advantage of a lucrative business opportunity for themselves and a company they formed shortly after resigning from the plaintiff. The opportunity was one which they had negotiated while still directors and officers of the plaintiff. The Court noted that the defendants had a fiduciary relationship with the plaintiff company, "which in its generality betokens loyalty, good faith and avoidance of conflict of duty and self-interest" (at 606).
- [145] The Court also notes (at 607-608) the general rule of equity that fiduciaries are not allowed to enter engagements where their personal interest would conflict with that of the beneficiaries: "If he holds any property so acquired as trustee, he is bound to account for it to his cestui que trust" (quoting Viscount Sankey from *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378, as cited in *Zwicker v. Stanbury*, [1953] 2 S.C.R. 438 at 440).
- [146] As a result, when assessing an alleged breach of trustee's fiduciary duty to avoid conflicts of interest "the subjective motivations of the fiduciary, the absence of actual harm to the beneficiary, and even whether the fiduciary in fact profited, are irrelevant": *Louis* at para. 26.
- [147] Furthermore, it may not be necessary to show that the alleged conflict of interest influenced the fiduciary's actions. In *Strother* at para. 69, the majority found that the conflict was triggered because the fiduciary had "created a substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests".

C. Analytical Framework

- [148] The plaintiffs claim the Defendants breached their overarching duty of loyalty. They contend that the evidence at trial revealed the Defendants violated their duties not to act while in a disabling conflict of interest, and not to allow their self-interest to guide their decisions.
- [149] The plaintiffs' position is that this Court's scrutiny as to whether there was a breach of fiduciary duty, on the facts presented, is independent of the wording of the trust deed. Thus, while they do contest the distribution decisions made when the MAP Trust was wound up, their claim has a broader focus.

- [150] The Defendants submit the proper approach in this case is to focus on the powers granted to the MAP Trustees under the deed and proceed from there. They emphasize that pursuant to the Accelerated Distribution Clause they had unfettered and absolute discretion to distribute the trust funds as they saw fit. They insist all decisions and actions taken were within the bounds of that discretion.
- [151] Apart from the distribution of the trust assets, they submit all other actions and decisions were administrative in nature and therefore subject only to the negligence standard. The Defendants maintain their decisions met that standard. In the alternative, they contend the plaintiffs cannot prove they suffered loss and therefore an action in negligence cannot succeed.
- [152] However, the plaintiffs' primary claim does not focus on any one decision. They submit when reviewing all the evidence, the Defendants' actions and decisions were not done in good faith so they did not discharge their fiduciary duties. While it is true that the Accelerated Distribution Clause conferred absolute and unfettered discretion on the trustees, that does not respond to the plaintiffs' main allegation.
- [153] More specifically, the plaintiffs point out that Meb and Mustaq were both trustees, directors and beneficiaries; Haider was a trustee and a director. They say that placed the Defendants in position where there was a substantial risk their duties would conflict.
- [154] However, they also contend those conflicts were exacerbated by the Defendants' decision about how to address the 21 Year Rule. The plaintiffs submit the decisions to carry on the Family Business and to complete a corporate restructuring before winding up the trusts was a deliberate scheme with two goals: to prevent interference by other beneficiaries in the Family Business and to ensure that their own families received the majority of the frozen value and all future profits.
- [155] I agree with the plaintiffs that the absolute and unfettered discretion granted under the Accelerated Distribution Clause is not a complete answer to their claims. The Defendants' fiduciary obligations crystallized the moment they were appointed as trustees, in addition to the duties or powers spelled out in the deed. It is in that sense that the nature of the discretion and the wording of the deed cannot be the full answer. More to the point, there is no power under the deed that could purport to authorize trustees to breach their duty of loyalty.
- [156] The plaintiffs bear the onus to persuade this Court that the evidence supports their claims. To limit the analysis to the exercise of discretion pursuant to the Accelerated Distribution Clause as suggested by the Defendants would effectively ignore the thrust of the plaintiffs' entire case.

[157] Only if the plaintiffs fail to prove a breach of fiduciary duty, would the analysis turn to whether the Defendants breached their duties as trustees with regard to each challenged decision or action. That analysis primarily would concentrate on the deed and powers granted under it. However, it is necessary to first assess the allegation of breach of fiduciary duty.

V. BREACH OF FIDUCIARY DUTY

[158] The plaintiffs submit that the Defendants were in a disabling conflict allowing them to take actions and make decisions motivated by self-interest. Their position is not grounded in any single action. Specifically, they do not focus only on the distribution decisions made under the MAP Trust.

[159] The Defendants deny any misconduct. Their submissions are framed within a breach of trust analysis, but I have assumed they deny a breach of fiduciary duty on the same basis. The Defendants point to their reliance on professional advice, including from their lawyers, to refute accusations of improper motive. They also allege the evidence does not bear out the plaintiffs' accusations.

A. Prima Facie Breach

[160] The burden is on the plaintiffs to establish the breach of fiduciary duty. However, they submit they have established a prima facie breach, and therefore the burden shifts to the Defendants to demonstrate their actions were in the plaintiffs' best interests. They rely on Louie at para. 21:

there is clear authority to the effect that once a prima facie case of conflict of interest has been shown, the onus generally shifts to the defendant to show that he or she was acting in the best interests of the plaintiff (in this case, the Band.) See James I. Reynolds, *A Breach of Duty: Fiduciary Obligations and Aboriginal Peoples* at 196-7; *Toronto Party for a Better City v. Toronto (City)* 2013 ONCA 327 at para. 58; *Roberts v. Canada* [1995] F.C.J. No. 1202 at para. 492 (aff'd [1999] F.C.J. No. 1529, aff'd 2002 SCC 79).

[161] Similarly, in *The Toronto Party v. Toronto (City)*, 2013 ONCA 327 at para. 58, the Ontario Court of Appeal stated that "[w]here a beneficiary alleges a breach of fiduciary duty, the beneficiary need only establish prima facie inferences of fiduciary obligations and of their breach" and the "fiduciary concept then imposes a reverse onus that shifts the burden to the fiduciary to disprove the beneficiary's allegations". The issue in that case was whether city councillors had breached their fiduciary duties to taxpayers in voting in favour of a bylaw that was later declared ultra vires.

[162] Although the factual underpinnings of *Toronto Party* differ from those in this litigation, the Ontario Court of Appeal commented generally on topics relevant to this case. Specifically, at paras. -39-41, the court reviewed principles of law relating to fiduciary obligations, which have been "described as the fiduciary duty of loyalty" comprising the avoidance of a conflict

of interest and a duty not to profit at the expense of the beneficiary (at para. 40). In that context, the court stated that "[a] measure of disloyalty resides at the core of a breach of fiduciary duty" in that, those in breach "have preferred their interests over those of the relationship's beneficiary, or to have demonstrated some other element of disloyalty" (at para. 41, citing *J.H. v. British Columbia*, [1998] B.C.J. No. 2926 at para. 36 (S.C.)).

- [163] The plaintiffs submit a prima facie conflict exists because of the significant overlap of roles occupied by Haider, Mustaq and Meb. The Defendants submit no conflict of interest arises because Haider and Mustaq were not beneficiaries of the MAP Trust and had no pecuniary interest in how those trust funds were distributed. However, that position follows from the Defendants' assertion that the focus of the trial ought to have been only on the MAP Trust. As already discussed, I disagree (see above, paras. 67-70).
- [164] Moreover, Mustaq was instructing BLG about the trusts' termination and corporate restructure on behalf of all four trusts and their Numbered Companies. The trustees of all four trusts chose to collectively address the 21 Year Rule. They also decided they would wind up the trusts and implement a corporate restructuring of the Numbered Companies as part of one coordinated process consistent with one another. They cannot then insist that each trust must be viewed in isolation.
- [165] I did not understand the Defendants disagreed with the proposition that upon demonstration of a prima facie conflict, the persuasive burden shifts onto a defendant to demonstrate they fulfilled their fiduciary duties notwithstanding the conflict. However, the Defendants do contest the plaintiffs' assertion that the overlapping functions placed them in a disabling conflict. Specifically, the Defendants submit the rule against self-dealing does not apply if the trustee is put into a position of conflict by the settlor of the trust: *Sargeant et al. v. National Westminster Bank PLC et al.*, [1990] 61 P & C.R. 518 (C.A.).
- [166] The facts of the case are somewhat complicated. However, it also involved a situation where trustees occupied overlapping roles. Specifically, three siblings were appointed trustees of their father's will. The will contained an express power to buy and sell trust property. The property at issue was three farms. During his lifetime, their father had granted the siblings tenancies on the farms. In addition, the siblings were in a partnership that farmed the property, and those tenancies were assets of that partnership.
- [167] One of the siblings died, intestate, five years after the father. The surviving siblings wanted to buy one of the farms and sell the other two. The deceased sibling's estate objected. The objection was the surviving siblings were in an obvious conflict and therefore should be prevented from exercising the power in the will to sell the farms. That is because a sale with vacant possession would garner the highest price, but the siblings wanted to sell subject to their tenancies. Accordingly, they applied to court for a declaration that they could proceed with the sale in that fashion. The declaration was granted, and upheld on appeal.

- [168] The court held that the two siblings had not placed themselves in a position where their interests and duties conflicted; that was done by virtue of the tenancies granted to them by their father, and his appointing them trustees of his estate. In that situation, the court would not intervene in advance to prevent the trustees from exercising the power of sale expressly given to them under the will.
- [169] In the case at bar, Meb is a beneficiary of the MAP Trust; the settlor was his father's mother in law. Meb became a director of PEL and PIL because his father nominated Meb to take his place pursuant to the First Generation's shareholders agreement. Similarly, Mustaq's father chose him to overtake the directorships in the Family Business, but the settlor of the Madatali Trust was Mustaq's mother. Therefore, neither was placed in a position of conflict by the settlors of their respective family's trust. Unlike the siblings in Sargeant, the same person did not put the Defendants in a position of conflict.
- [170] Moreover, the court in Sargeant stated that the surviving siblings were not barred from selling the property, but they were still obliged to fulfill their fiduciary duty to the deceased sibling's estate. It found that the argument of the deceased sibling's estate was based on "a fear or a suspicion that the trustees will not properly discharge that duty", despite there being "no evidence either that they have failed to discharge their duties in the past or that they will fail to do so in the future"; therefore, absent such evidence it was "wholly inappropriate for the court to interfere" to prohibit the sale (at 523). Unlike the trustees in Sargeant, the trustees here did not seek clarification from the court prior to making decisions and taking action while in a conflict of interest.
- [171] For all those reasons, I do not agree that Sergeant assists the Defendants' position.
- [172] In order to establish a prima facie conflict, the plaintiffs need only establish the Defendants were in a position where there was a substantial risk their duties and interests could conflict. I am satisfied the plaintiffs have met that prima facie burden. Accordingly, the Defendants bear the onus of demonstrating that, notwithstanding that conflict, they fulfilled their fiduciary duties.

B. The Defendants' Conduct

- [173] I rely on my earlier discussion of legal principles relating to the breach of fiduciary duty (paras. 132-147). Consistent with that discussion, I find the following description is a concise and helpful guide to the analysis (Waters at 968):

The duty of loyalty is a duty respecting the exercise of judgment by the fiduciary: it requires the fiduciary to exercise his judgment in what he perceives to be the best interest of the beneficiary. A conflict, therefore, is a situation which is liable to create conflicting pressures on judgment, and the no-conflict rule is activated by the presence of factors which may reasonably be perceived as affecting judgment. This is why it is activated not only by a conflicting self-interest, but also by a conflicting fiduciary duty to another beneficiary; in either case, the original beneficiary cannot be certain that the fiduciary's judgment has been exercised in the beneficiary's sole interest.

[174] The plaintiffs emphasize the Defendants' breach of fiduciary duty is demonstrated by a review of the whole of the evidence. It is not practical nor advisable to review the entirety of the evidence (see *Welton v. United Lands Corporation Limited*, 2020 ONCA 322 at paras. 57-63). I have focussed on the evidence I found most relevant.

1. Combining a Corporate Reorganization with the Trusts' Termination

[175] Upon deciding they would address the 21 Year Rule by winding up the trusts and reorganizing the Family Companies and the Numbered Companies, the Defendants were in an obvious and prima facie conflict because of their overlapping roles. The plaintiffs' position is that rather than demonstrating good faith in the face of that conflict, the evidence illustrates that from the outset, the Defendants were motivated by self interest.

[176] The Defendants deny their conduct was contrary to good faith. They submit they fulfilled their fiduciary duties.

a. Initial Advice

[177] As already noted, the Defendants (along with Pyarali and Zahir) received initial advice about how to address the 21 Year Rule at a meeting with Mr. Fish in September 2012. I have already found that this was not a casual meeting, but the first significant step in the process of addressing the implications of the 21 Year Rule.

[178] In his email to Mr. Chartrand, Mr. Fish wrote that he wanted to provide him and Mustaq with a "briefing on last week's family meeting with the summary of the issues we discussed". Mr. Fish also sent a memo to Mustaq following the meeting, which was intended to provide a "big picture" about a number of topics, including: what an estate freeze was, specifically in relation to the family trusts; the implications of the 21 Year Rule; and, the Accelerated Disposition Clause.

[179] He then laid out the options to address the 21 Year Rule:

- a) Make arrangements to pay tax in 2014,
- b) Exercise authority under [the Accelerated Disposition Clause] to wholly or partially terminate the trusts early and make discretionary distributions of capital prior to the 21st year anniversary,
- c) Partially exercise authority under [the Accelerated Distribution Clause], by doing a further estate freeze inside the trust and distributing the "freeze" shares to beneficiaries,
- d) Some combination of the above.

[180] Next, he addressed how the decision should be made, identifying three main topics: protecting family harmony, protecting the business and protecting the First Generation. With regard to the family's harmony, he wrote:

You have been blessed with an unusually close-knit family. Like all gifts, this one will be lost if it is not cherished and protected. I therefore recommend that you ensure that all the adult beneficiaries are made aware of the 21 year issue and that discussions are underway about how to deal with it.

[Emphasis added.]

[181] Describing the circumstances as a "watershed moment in the family's history", Mr. Fish identified considerations related to the continuation of the Family Business. Mr. Fish strongly recommended that the family "engage in a discussion about future ownership and management of business as a prelude to any trust distributions". Specifically, he wrote:

the various trustees will need to eventually to consult directly with their adult beneficiaries, it was appropriate to start the discussions by having the family members active in the business report back to their respective families and initiate a discussion that will ultimately be continued by the trustees. These discussions might include such issues as establishing a fair balance between the benefits available to those active in the business and the benefits to be provided to passive owners.

[182] In furtherance of that, Mr. Fish provided a practical suggestion of "some kind of family [council] to regularly provide information to family members who own shares but do not work in the business".

[183] The Defendants (and Zahir) also met with BLG Vancouver lawyers together with Ms. Orwick in mid-December 2012. Mr. Chartrand's colleague, Gary Wilson, who specialized in trust law, provided advice consistent with Mr. Fish's. Specifically, he reminded the attendees that trustees had an obligation of good faith to take into account the best interests of all potential and actual beneficiaries, even if they ultimately decided upon an uneven distribution.

[184] The Defendants did not follow Mr. Fish's advice to discuss the issues with all adult beneficiaries. The plaintiffs were not informed about any of the plans for winding up the MAP Trust or 702's corporate reorganization until June 2014, by which time all decisions had been finalized. Although the details took time to iron out, the Defendants had finalized their decisions and plan of action over a year before that communication. Documents as early as January 2013, record their intention to confer all future growth and control of 702 to Meb.

b. Restructuring the Numbered Companies

[185] The Defendants instructed BLG to implement a corporate restructuring of all Numbered Companies, followed by the winding up of the trusts. This required a complex series of transactions and the work to accomplish both goals took almost two years to complete.

- [186] In their opening statement, the Defendants stated they considered various options in addressing the 21 Year Rule. However, the evidence does not bear this out. Instead, I agree with the plaintiffs that the plan, which was implemented, was essentially a foregone conclusion from the beginning of the process.
- [187] There was never any question that the Family Business would continue. However, early in the planning process, the Defendants decided the continuation of the Family Business would only be for the benefit of those actively involved at that time. They identified those people to be Haider's son Nadeem, Mustaq, Meb and Pyarali's son Zahir.
- [188] The way they accomplished this, in the case of the MAP Trust, was first to remove Fareed and Arshad as directors of 702. Similarly, Mustaq's brother was removed as a director of 703.
- [189] The Numbered Companies were then restructured with the creation of new classes of shares, which had significantly different rights. That differentiation allowed the trustees to achieve what they wanted from the outset: to confer all future growth and complete control of the Numbered Companies on those identified as being currently active in the Family Business. This was in addition to whatever share of the frozen value would be allocated to those same people. The actual distribution of the shares was implemented pursuant to the Accelerated Distribution Clause to wind up the trusts.
- [190] Mustaq confirmed that he never considered distributing any part of the future growth of 702 to Fareed or Arshad. Nor was it contemplated they would conduct an orderly sale of assets to generate cash to divide amongst the beneficiaries. Meb suggested that would amount to a "fire-sale", and Mustaq testified such sale would not be profitable. While that may be a reasonable assumption, there was no evidence presented to substantiate those statements. The relevance of that evidence is that it shows the Defendants' minds were focussed on their desire to be able to continue to operate the business in the future, rather than what might be in the best interests of all beneficiaries.
- [191] The plaintiffs assert the real reason the Defendants did not explore any other plan was that would not allow them to accomplish the goal of having the identified people control the Family Business, and exclude the plaintiffs from 702's future growth. Meb's testimony was revealing on this issue. In answering why continuing the Family Business was essential he said, "there were four of us that were at least fully occupied in this business" and if they sold the assets, they would all have to look for something else to do. Meb also confirmed during his testimony that Fareed and Arshad were removed as directors of 702 to eliminate the need for them to approve of the corporate restructuring of 702. That restructuring paved the way for him to receive complete control of 702.

[192] There is no dispute that the corporate restructure was interwoven with and an essential element of addressing the 21 Year Rule. Numerous BLG documents confirm that except for ironing out details unique to each trust, the Defendants never wavered from the basic design of the plan as described above.

[193] However, that plan, which included the corporate restructuring of the Numbered Companies, was not necessary to avoid negative tax implications. As Mr. Palmer confirmed, the 21 Year Rule did not necessitate an estate freeze and corporate reorganization. This harkens back to Mr. Fish's initial advice that the family had other options.

c. Conclusions

[194] The Defendants received advice about options to address the 21 Year Rule, but also how to go about choosing one of the options. They were strongly advised to inform and seek the view of all adult beneficiaries before decisions were finalized. Why? Because legally their duty as trustees required them to approach the complex task of winding up of the trust and make decisions only in the best interests of all beneficiaries. I note they were also advised to do this to maintain family harmony (see above, para. 180), but this does not detract from the legal foundation for this advice.

[195] Given the overlapping roles within the Family Business and family trusts, they needed to do something to address the existing conflicts. They were obliged to ensure their judgment was not swayed by self interest, or indeed anything not consistent with the best interests of all beneficiaries. They did not follow any of the advice they received from Mr. Fish at the outset. It is difficult to conclude how they discharged their fiduciary obligations without following that sound legal advice.

2. Valuation of Trust Assets

[196] The plaintiffs assert the clearest illustration of the breach of fiduciary duty was the Defendants' conduct regarding the valuation of trust assets. The Defendants agreed that obtaining a reliable assessment of how much the trust assets were worth was a vital step in planning how to address the 21 Year Rule. They obtained a calculation report from Duff & Phelps, a well-known firm, to calculate the value of assets as of May 2014 (the "2014 Report").

[197] The plaintiffs submit the information on which the 2014 Report was based, compromised its reliability, objectivity and independence. The plaintiffs allege the Defendants were aware of that deficiency, but chose to do nothing about it. They also allege that inaction was motivated by the Defendants' self-interest, thus amounting to a breach of their fiduciary duties. They also allege the Defendants knew the calculation report significantly undervalued the Family Companies' properties.

[198] Further, the plaintiffs submit the Defendants were aware of the 2014 Report's limitations, but wanted people to believe it was truly independent and unassailable. The plaintiffs say this explains what they characterized as the Defendants' evasive and misleading responses to the plaintiffs' and the Court's enquiries about the valuation of trust assets.

[199] The Defendants' position is that they sought and relied on professional advice, which they claim they followed. They say to the extent there may have been deficiencies in the 2014 Report, at most that might constitute negligent conduct (which they deny). They assert nothing about obtaining the valuation report amounted to a breach of fiduciary duty.

a. The 2011 Report

[200] As mentioned earlier, Mr. Fish met Haider in relation to Haider's daughter's family law litigation in Ontario. In his email to Mr. Chartrand following the September 2012 meeting with members of the Pirani family, Mr. Fish wrote that a "thorough valuation" of the Family Business had been prepared by the managing director of Duff & Phelps for use in Haider's daughter's divorce proceedings. He further stated that "an independent real estate appraiser was engaged to estimate the value of the hotel properties".

[201] Duff & Phelps had provided a calculation report assessing the value of the Haider's family trust for use in that family law litigation (the "2011 Report"). Because it was used for family law litigation, there were two valuation dates: the date of marriage (August 1998), and date of separation (May 2008). Therefore, although the report is dated in 2011, it did not calculate the value of the trust later than May 2008.

[202] The 2011 Report relied on the real estate values for all properties provided by management and Doug Bastin of Grant Thornton LLP. Mr. Thornton was not a certified real estate appraiser, but a "Certified Management Consultant who specializes in the hotel industry and had been previously engaged by certain of the subject entities to perform appraisals for financing purposes". However, none of his appraisals were given to Duff & Phelps, apparently because their appraisal date was not close enough in time to either valuation date.

[203] Mustaq denied he had any involvement with the preparation of the 2011 Report; he even denied reading it. However, documents challenge the veracity of his evidence. Among other things, he forwarded the 2011 Report to Mr. Chartrand on October 10, 2012. Also, documents show that Mustaq came up with his own estimates for properties, which he directly compared to Mr. Bastin's figures.

[204] I find on a balance of probabilities that Mustaq knew about the 2011 Report at the time it was prepared, including being aware of values attributed to property owned by the Family Companies.

- [205] The Defendants point out that for the most part, Mr. Bastin's figures were lower than Mustaq's, and those were the figures relied upon by Duff & Phelps. They suggest Mustaq's deference to Mr. Bastin's figures contradicts the plaintiffs' claim that the Defendants undervalued trust assets.
- [206] However, the plaintiff's allegation of under-valuation is directed at the 2014 Report. Furthermore, preferring Mr. Bastin's lower values was beneficial to Haider's family trust in his daughter's litigation. Haider's daughter's former spouse was making a claim on the trust assets. In the event he was eventually successful, the lower values would be advantageous to Haider, and indirectly to all the Numbered Companies.
- b. The 2014 Report
- [207] The values in the 2014 Report were used to calculate the payout to all beneficiaries, because it represented the Numbered Companies' "frozen value".
- [208] Both the 2011 Report and the 2014 Report were calculation valuation reports. That is a specific type of report whose parameters are defined by the Canadian Institute of Chartered Business Valuators. Calculation reports are subject to a number of restrictions and limitation, set out at numerous places in the 2014 Report. At paragraphs 11.1 to 11.3, the authors explain the difference between three different types of valuation reports: comprehensive, estimate and calculation. Each report differs in terms of the scope of review, amount of disclosure provided to the authors and the level of assurance. In that matrix, a calculation valuation report provides the lowest degree of assurance.
- [209] There are numerous references in the documents confirming the 2014 Report was merely a calculation report. Duff & Phelps' engagement letter, dated January 8, 2014, stated clearly they were hired to provide a calculation report.
- [210] It is also clear from the report itself that Duff & Phelps had no role in assessing the real estate values. Specifically, in Part 6, "Scope of Review", Duff & Phelps confirmed the conclusions in the report were based on information included in appendix B. That appendix contains a list of statements relating to its scope of review. Paragraph 2 specifically identifies that the schedule of real estate values relied upon by the authors was prepared Mustaq. Also, paragraph 3 under Part 9 "Assumptions", states that the real estate value estimates, which were provided by Mustaq, "approximate the fair market values of the properties". Duff & Phelps also confirmed it did not audit or verify any of the documents or information provided to them by Mustaq or any other third party. Its conclusions were dependent upon the accuracy of the information provided. This is repeated in the 2014 Report at paragraphs 6.2, 8.5 and 8.6.
- [211] The authors also referred to information obtained from discussions with Ms. Orwick. Ms. Orwick was one of the Defendants' witnesses. Her testimony primary relied on documents regarding her involvement with the termination of the trusts and corporate re-organization; she had little independent recollection. However, she was clear that with regard to the

preparation of the 2014 Report, she merely facilitated the exchange of information amongst herself, Duff & Phelps, Mustaq and BLG. Many documents show her supplying information to Duff & Phelps to describe and explain the corporate structure of the Family Business.

[212] She testified that contrary to her usual practice, she "was really only helping to facilitate some information" and therefore she "was just forwarding things" as a middle person. Specifically, she forwarded to Mustaq any "Mustaq-related" issues. This draws into question the Defendants' characterization in their opening statement that she played "a central role in the planning" for the corporate reorganization.

[213] The 2014 Report also referred to the letter of representation signed in mid-July 2014 (although a draft was sent earlier) by Meb, Mustaq, Zahir and Haider. The following are extracts from that letter:

[The signatories, referred to as "We"] understand that [Duff & Phelps], [referred to as you] are preparing certain financial calculations as to the value of the Pirani Family Trusts as at May 31, 2014 being the "valuation date".

We further understand that in preparing your financial calculations as to value, you are relying on certain financial statements and other information provided by us. As well you are relying on assumptions provided by us. We confirm that those assumptions are our role responsibility and are not to be independently verified by you.

[214] Correspondence confirms that from the outset, Duff & Phelps were relying on Mustaq to estimate values of the underlying assets. In December 2013, Duff & Phelps specifically asked for estimates of values for all hotels, health clubs, land and rental properties, including agreements for purchase and sale. Ms. Orwick conveyed that request to Mustaq. She also asked if he wanted her to "create a spreadsheet that summarizes the properties and the value that was used in 2008" [this is a reference to the 2011 Report] for him to use in determining the current value, which she did provide.

[215] The 2014 Report contains a table with values for 15 properties. Those values are identical to those provided to Duff & Phelps (via Ms. Orwick) and prepared by Mustaq. He testified the values represented his "rough and ready calculation" of the properties' values. Other than the chart of values taken from the 2011 Report, no notes, calculations, spreadsheet or other information was presented in evidence to support his figures. Mustaq admitted he simply used a calculator to complete his estimates.

[216] Similarly, Mustaq also provided values for three residential units owned by the Family Companies. He responded within minutes to Ms. Orwick's email about those values. He confirmed he based the values on casual conversations and brochures he may have seen for other condos for sale in the area.

- [217] The evidence is clear that not only did Mustaq provide the real estate values, those values were a critical component of the 2014 Report. As noted at paragraph 5.1(1) of the 2014 Report, the authors state the fair market value of the family trusts were "for the most part, based upon the value of the certain real estate investments" and with no independent appraisals.
- [218] I find Mustaq was aware that Duff & Phelps would not independently verify or obtain confirmation of his estimated values. I also find he knew his estimated values would be the primary factor driving Duff & Phelps' calculation of each trust's value. I base these conclusions on the documentary evidence which I prefer to Mustaq's testimony about his state of knowledge. I also take into account Mustaq's experience with the 2011 Report.
- [219] In addition to being trustee of two of the family trusts, Mustaq was a beneficiary of the Madatali Trust. By providing the underlying values for all of the Family Companies' real estate holdings, he was both privy to and influencing information that was vital to the process of winding up the trusts. This placed him an advantageous position vis-à-vis the other beneficiaries of the family trusts. This is a concrete example of the conflict the Defendants were in because of their overlapping roles.
- [220] Accordingly, the Defendants bear the onus of proving that Mustaq was able to discharge his duty of loyalty to all beneficiaries while he was in a privileged position with access and input to important information.

c. Methodology

- [221] In terms of Duff & Phelps' methodology, the 2014 Report was largely a mathematical exercise, albeit a complex one. It involved adjusting the equity in the various businesses owned by the Numbered Companies. Duff & Phelps replaced the book value of each companies' property (which represented the cost of the asset) with Mustaq's estimated value. Duff & Phelps' calculation was then based on the unaudited financial statements as adjusted. Mustaq agreed with the following description of the methodology: "they took a financial statement and they took the book value of various properties and they increased it to whatever value you provided".
- [222] Mustaq acknowledged he is not qualified nor has experience conducting real estate appraisals. In terms of his estimations, Mustaq described his methodology:

Q: Tell me what you [went] through in terms of the thought process. [Ms. Orwick] provides you with this chart*. It doesn't have the 2014 values in it. Run me through how you came about it when you did your rough and ready.

A: I would have asked our Seattle office to give me some numbers. And then I would have done some calculations as far as the US properties are concerned and come up with what I thought my opinion was.

Q: What factors went into that?

A: The factors, in my view I think I mentioned, would be purely my knowledge of the hotel properties of these condos, hotel properties as to what they were trading at. And cap rates, which is basically the return. So that's the calculations that I would have done.

Q: Is that it?

A: From my point of view, yes.

[*Ms. Orwick's chart took the 2008 values of the properties from the 2011 Report.]

[223] Given the methodology adopted by Mustaq, and the lack of any verification or assessment of his estimates, I find Duff & Phelps were not given sufficient information to produce a report that could provide an independent or objective estimate of the value of trusts assets in 2014.

[224] The Defendants adduced no evidence to support the accuracy or even reasonability of Mustaq's values. I also find his methodology was casual, and lacked vigour, as a result, it was not an appropriate substitute for obtaining an appraisal.

[225] Additionally, there was evidence that suggested his estimations may have been gross underestimates. I refer and rely on the discussion of the value of the SeaTac Property and North Vancouver properties, within the analysis of credibility (see above, paras. 77-88).

[226] I find that evidence combined with the preceding discussion about the 2014 Report, demonstrates that Mustaq's estimates were most probably inaccurate, possibly by a very large margin.

[227] The Defendants needed to demonstrate, via evidence at trial, that Mustaq's quantification of trust assets was honestly done, in good faith, and in a manner fair to all beneficiaries. Given the causal methodology he employed, and the evidence suggesting his estimates were gross underestimates, that conclusion is difficult to draw.

d. Testimony about the 2014 Report

[228] Mustaq's testimony about many aspects of the 2014 Report contradicted answers he gave at his examination for discovery. The examination for discovery took place less than a month before trial, which heightens the significance to his credibility of the discrepancies.

[229] Also, a number of times during his testimony, the Court had to direct Mustaq to answer the question asked. On several other occasions, he either expressed or appeared to have a lack of understanding of the question asked. I find that behaviour was not commensurate with his obvious intelligence and business acumen. Instead, I find there were a number of times when Mustaq understood the question, but chose to answer evasively or vaguely.

[230] One example is typical of the shortcomings in his testimony. In part of his examination for discovery read into the record, Mustaq claimed he had no recollection whether he provided Ms. Orwick his views on the worth or value of the Family Companies' properties. He also said he had "no clue" whether Ms. Orwick spoke to anyone other than him about

the values given to Duff & Phelps. Given his role as the family's point person, the correspondence referred to earlier about his estimates and the importance of the valuation to the trustees' determinations, Mustaq's lack of recollection was disquieting.

- [231] Plaintiffs' counsel stated the documents revealing Mustaq's role in providing values to Duff & Phelps were not disclosed until shortly before the trial. The plaintiff asserts I can find Mustaq's lack of recollection was by design rather than genuine. When confronted with that allegation during the trial, Mustaq's answers were not convincing. I find he was not forthright in giving answers at his examination for discovery to questions about his role in valuing the trust assets.
- [232] Mustaq also claimed he was unaware until the later part of 2014 that the 2014 Report was only a calculation report. He also claimed he was unaware until shortly before trial what a "calculation report" really was, saying he had to google the term to find that out. I do not accept that testimony in light of the statements made in the report itself and the representation letter (see above, paras. 208-214). Nor is the claim in keeping with Mustaq's extensive and successful experience in the hotel business.
- [233] I find that Mustaq knew at all relevant times that Duff & Phelps were preparing a calculation report. It is implausible that with his experience and success in the Family Business, he would have been unaware until shortly before trial what a calculation report was. I reject his testimony on this point as contrived.
- [234] At their examinations for discovery, both Meb and Mustaq claimed they did not carefully read the 2014 Report. Mustaq's evidence was that he merely "gleaned" the report. This is at odds with emails exchanged amongst Ms. Orwick, Mustaq and Mr. Chartrand in June and July 2014 sharing detailed comments about a draft of the 2014 Report. Given Ms. Orwick's role was as a facilitator of information, I infer Mustaq was involved in a review of the report.
- [235] One chain of email communication is particularly enlightening. Mr. Chartrand provided comments on a draft of the 2014 Report by email, dated July 2, 2014, to Mustaq and Ms. Orwick. In the email, Mr. Chartrand stated he was "surprised that real estate appraisal or valuation reports were not obtained". He cautioned the lack of "back-up valuation or appraisal reports" could be problematic.
- [236] Mr. Chartrand forwarded that email to Mr. Wilson and emphasized his concern about the lack of appraisals. Among the reasons Mr. Chartrand highlighted the lack of appraisals was in the June 20, 2014 email accompanying the draft report, Duff & Phelps itself drew attention to the "significant representation that we are relying on" for the property values.

- [237] Mustaq first testified he could not recall if he was surprised by Mr. Chartrand's concern. He later claimed he was not surprised. He also stated "it did not occur to him" that the 2014 Report relied upon values he provided. As discussed above, I have already found Mustaq knew the values he provided to Duff & Phelps were being relied upon for their calculations, so I reject his testimony on that point.
- [238] Other evidence not only supports that conclusion, it confirms that Duff & Phelps at all times relied upon Mustaq's information as representing an approximation of the fair market value of the real estate.
- [239] In response to her initial enquiry, Duff & Phelps emailed Ms. Orwick in November 2012 asking if they would be "relying on management for real estate appraisal values". Ms. Orwick replied, specifically seeking clarification on what that reliance meant. In its response the next day, Duff & Phelps wrote it assumed it would not be "incurring the cost of obtaining independent property appraisals". It further stated it "required market values for the properties" and assumed those would be provided by "Mustaq and others".
- [240] Given Ms. Orwick's testimony that her role was as facilitator of information, I find it more probable than not that she would either have forwarded those emails, or directly conveyed that information to Mustaq. Mustaq did not deny he saw the emails at the time, but he testified he could not recall.
- [241] I find Mustaq knew Mr. Chartrand's concern was not just that he provided the estimates, but that Duff & Phelps assumed those estimates approximated the real estate's fair market value.
- [242] Mustaq's testimony about how he responded to Mr. Chartrand's concern is problematic for other reasons. During his testimony, Mustaq downplayed Mr. Chartrand's concern saying he "didn't think much of it". He also stated Mr. Chartrand's surprise arose by the way he approached things "as a lawyer".
- [243] In elaborating on that point, he suggested that the values he gave Duff & Phelps were of the businesses operating on the property, and not the value of the real estate. Even if that was his intent when he gave the values to Duff & Phelps (and I do not make that finding), it is clear from the 2014 Report, Mr. Chartrand's email and other documents, that Duff & Phelps relied on the values Mustaq gave as representing the fair market value of the real estate (see above, para. 217).
- [244] Mustaq testified that he would not have told Mr. Chartrand not to worry about the lack of appraisals because Mustaq and the other directors were confident with the values in the 2014 Report. Mustaq confirmed he was confident, but agreed it would be false to say the others were. He also agreed that he would not have "made reference to highest and best use because that wouldn't have been true".

- [245] After giving that testimony, however, Mustaq was confronted with a draft of the 2014 Report that had Mr. Chartrand's hand-written notes on it. Among other things, the notes record a telephone discussion Mr. Chartrand had with Mustaq on either July 4 or 9, 2014. The parties agreed Mr. Chartrand's note accurately reflects what he was told.
- [246] Mr. Chartrand's note directly contradicts Mustaq's testimony. I find that Mustaq specifically told Mr. Chartrand not to be concerned by the lack of appraisals, and assured him the 2014 Report was based on the properties' highest and best use. I also find that Mustaq was aware that the values he provided were specifically relied on as representing fair estimates of the real estate's values, and not the value of the operation of the businesses on the land. Therefore, I find it more probably than not that Mustaq was untruthful to Mr. Chartrand.
- [247] It is not disputed that the Defendants did nothing to address Mr. Chartrand's concern about the lack of appraisals. Mustaq attempted to explain that inaction on the basis that getting appraisals would delay the winding up of the trusts. However, he agreed at the time he made no enquiries about how soon appraisals could be obtained. He justified the failure to make enquiries on Mr. Chartrand's email. In his July 22, 2014 email, Mr. Chartrand did not say the appraisals should not be obtained because of delay. He wrote that if appraisals were ordered the deadline of August 31 would be delayed. However, it is clear he was referring to a working deadline to gather information prior to implementing the transactions in advance of the trusts' termination. Mustaq understood the difference between their working deadline and the trust termination deadline.
- [248] When testifying in chief in the Defendants' case, he identified (without being asked) that the latter date (which he referred to it as the "big date") was the end of October.
- [249] I find Mustaq knew Mr. Chartrand's concern was that there were no independent real estate appraisals to back up Mustaq's estimates. I find Mustaq's testimony that he believed there was insufficient time to get appraisals done was insincere. This is buttressed by his reassurance to Mr. Chartrand in the telephone conversation of July 4 or 9, 2014.
- [250] The Defendants submit the trustees were not obliged to obtain independent real estate appraisals. They point to Mr. Fish's September 2012 email to Mr. Chartrand, where he recounted telling the family "it would be most appropriate to use the work performed by Duff & Phelps" in the 2011 Report and have it updated. However, in giving that advice, Mr. Fish was under the misapprehension that the 2011 Report was based on thorough and independent real estate appraisals, which it was not (see above, paras. 200-206). In any event, the correspondence and evidence relating to what Mustaq knew about the 2014 Report post-dates Mr. Fish's email.

- [251] The Defendants also intimated that the degree to which Ms. Orwick was involved in the process, moderates their liability for any deficiencies in the 2014 Report. I have accepted Ms. Orwick's testimony that unusually, on this file, she was mostly a facilitator for the exchange of information. Accordingly, there is no basis upon which Mustaq can say he deferred or relied on her.
- [252] Meb acknowledged it was very important in this process to obtain an independent and accurate valuation of trust assets. He stated that had he known the 2014 Report was based on Mustaq's values, that would have been a conflict of interest and he would have taken action to correct that. Yet he maintained he did not know. That assertion is difficult to accept because, as noted earlier, the 2014 Report is very clear in identifying Mustaq as the source of the real estate values.
- [253] Also, Meb's testimony was internally inconsistent. With regard to the representation letter (see above, para. 213), he acknowledged he knew at the time that Mustaq was the only person in the family dealing with Duff & Phelps, and his signature on the letter was his acknowledgement that he too was bound by Mustaq's representations. Moments later, however, he would not acknowledge that he knew Mustaq had provided the "fundamental input" for the 2014 Report.
- [254] Meb met with Mr. Chartrand on August 22, 2014. Mr. Chartrand followed up with an email sending Meb the draft 2014 Report and his July 2, 2014 email (in which he expressed surprise at the lack of appraisals). It is implausible that Meb would be unaware following that meeting and correspondence that Mr. Chartrand's concern was driven by the lack of independent sources for the real estate values.
- [255] I find Meb was aware that the calculations in the 2014 Report depended upon figures provided by Mustaq. He took no steps to redress what he admitted was an inherent conflict of interest.
- [256] I find Meb's and Mustaq's testimony about the quality of the 2014 Report, Mustaq's role in it and their knowledge about both, was not credible. I am satisfied that both Meb and Mustaq understood the 2014 Report was not an objective valuation of trust assets because it lacked independent verification of his estimates. I do not believe Meb's assertion that he was unaware the extent to which Mustaq influenced the final valuation. I do not believe the excuse that Mustaq thought there was insufficient time to obtain appraisals.

e. Disclosure

- [257] The plaintiffs first requested a copy of the 2014 Report in June 2014. My understanding is that it was not included on the Defendants' list of documents until May 2018. The plaintiffs allege the Defendants' stated reasons for not disclosing it were both unreasonable and not true. They submit that demonstrated the Defendants' dishonesty and lack of good faith. They also say I can infer from that conduct that the Defendants knew the 2014 Report's deficiencies would reveal their lack of good faith.

- [258] The Defendants submit their decisions about disclosure were informed by legal advice. They point out there are limitations on documents trustees are legally obliged to provide to beneficiaries: *Martin Estate (Re)*, 2009 BCSC 1407 at paras. 30, 32-34, citing *Schmidt v. Rosewood Trust Ltd.*, [2003] 2 A.C. 709 at paras. 66-67. The Defendants say deciding what constitutes "trust documents", and whether to disclose them to beneficiaries requires the trustees to exercise a trust power subject only to a standard of negligence.
- [259] Those submissions do not fully respond to the plaintiffs' position. The plaintiffs say the Defendants' conduct in relation to disclosure is consistent with, and therefore supportive of, their primary position that self-interest dominated the Defendants' decision-making rubric, thus violating their fiduciary obligations.
- [260] On behalf of the Defendants, BLG sent Fareed and Arshad a letter dated June 3, 2014 advising them of the upcoming MAP Trust termination. This was the first notice either received about the 21 Year Rule and how the MAP Trustees would be addressing it.
- [261] In September 2014, Fareed and Arshad's counsel at the time, Hugh McLellan, wrote to BLG seeking disclosure of the 2014 Report, specifically to know "the basis for the determination of the Class "D" share value". On behalf of the Defendants, Mr. Wilson informed Mr. McLellan the MAP Trustees would not disclose the report for five reasons:
1. The Valuation is a commercially-confidential document.
 2. It would be contrary to the interests of beneficiaries as a whole, to disclose the Valuation to your clients.
 3. Disclosure of the Valuation would promote disharmony among various Pirani family members, including numerous beneficiaries of the Trust and three other related trusts, notably because some of the beneficiaries are involved heavily in the family business and others are not involved at all.
 4. A beneficiary of the Trust and various other Pirani family members have objected to the disclosure of the Valuation.
 5. Information in the Valuation could prejudice the Pirani-family if disclosed; irreparable harm would ensue if the Valuation came into the possession of a competitor, despite any confidentiality agreement that would attempt to prevent that from happening.
- [262] The plaintiffs repeated their demand, and the Defendants again refused.
- [263] In a September 9, 2014 email to Mustaq and Haider, Mr. Wilson reiterated previously communicated concerns that he and Mr. Chartrand had about not disclosing the 2014 Report. Specifically, he warned the Defendants that the "risk of minimal disclosure is that it may very well engender suspicion that the trustees are purposely not disclosing information that would show that the trustees have not acted in good faith in exercising their discretionary powers to make the distribution." This email did not change the Defendants' minds.

- [264] I am persuaded that at least some of the stated reasons for not disclosing the 2014 Report did not represent views genuinely held by the Defendants.
- [265] More importantly, the reasons themselves disclose the possibility the MAP Trustees failed to abide by their fiduciary duties. They are obliged to act in the interest of all beneficiaries. Two requested a copy of the report, providing a valid reason for wanting to see it. The Defendants say one beneficiary objected. What they do not say, is how they balanced the apparently competing interest of those beneficiaries to decide what was in the best interest of all. They could not explain that in their testimony either. The bald statement in the letter that they concluded it was not in everyone's best interest, is unsatisfactory.
- [266] Haider did not recall denying Fareed's and Arshad's request for information. He stated his attitude would have been, if they ask for information, they should get it. He agreed it would surprise him if he had denied them information.
- [267] I acknowledge Haider admitted to problems with his memory, so I do not regard his lack of recall to be material. However, what is relevant about this testimony is that he confirmed his natural instinct was to disclose information. This suggests the possibility that Mustaq denied disclosure without consulting Haider, or at the time, Haider agreed not to disclose for reasons against his better judgment. Neither scenario reflects well on the MAP Trustees.
- [268] As noted, one of the reasons for non-disclosure was the objection of a beneficiary of the MAP Trust. Mustaq confirmed he had no contact with Sheliza or Zaida, and minimal contact with Imran. I conclude the objecting beneficiary was Meb.
- [269] Meb was not only a beneficiary under the MAP Trust, he was a trustee of two other family trusts. The correspondence about disclosure occurred after Meb's meeting with Mr. Chartrand on August 22, 2014. I made a finding that Meb knew by that point that Mr. Chartrand was concerned by the lack of appraisals, and therefore, I also found Meb was aware the 2014 Report was not objective.
- [270] Based on the foregoing, I infer that the refusal to disclose the 2014 Report to Fareed and Arshad was largely motivated by both Meb's and Mustaq's self-interest not to expose the report's frailties. That conduct is contrary to the MAP Trustees' fiduciary duties.
- [271] The Defendants also submit the lack of disclosure was immaterial because the MAP Trustees had absolute and unfettered discretion to distribute trust assets as they saw fit. That submission misses the point. The disclosure issue in terms of analyzing their fiduciary duty was whether they acted fairly, honestly and in good faith having regard only the interests of the beneficiaries. I conclude otherwise.
- f. Conclusions about Valuation of Trust Assets

- [272] Duff & Phelps was an independent valuator operating at arms' length from the Family Business. However, I conclude that the 2014 Report was not an objective valuation because its conclusions were heavily dependant upon on Mustaq's estimates of real estate values. This is obvious from reading the report itself. Mustaq's estimates were not verified, and were unsupported by any documentation, opinion, advice or research. This meant the conclusions in the 2014 Report cannot be regarded as an independent valuation.
- [273] Despite this, Mustaq insisted during his testimony that the 2014 Report was a truly independent, arms' length and objective valuation of the trusts' assets. Based on the preceding discussion of evidence and my findings about his knowledge I do not accept his stated belief was sincere.
- [274] The Defendants bear the onus to persuade me that with regard to procuring an assessment of the trusts' value, Mustaq was able to fulfill his duty of loyalty notwithstanding his existing conflict.
- [275] It may not be necessary in every case of winding up a trust to obtain a professional, independent and objective valuation report of trust assets. For instance, it may not be prudent to incur the expense of a valuation report in the case of a person carrying out their deceased parent's testamentary wishes for a small estate.
- [276] However, in this case, the trust's assets were the respective Numbered Company, which were part of the Family Business, worth probably in the tens of millions of dollars. I cannot see how the trustees could fulfill their fiduciary duties to all beneficiaries without having obtained an independent and objective valuation. Furthermore, because of the structure of the trust wind up, allocating frozen value and future growth differently between the beneficiaries, the accuracy of the 2014 Report was critically important.
- [277] The Defendants' position is that to the extent the 2014 Report may have been deficient, at most that would demonstrate possible negligence on Mustaq's part. I disagree.
- [278] The critical issue is not whether Mustaq was legally required to obtain independent appraisals. Nor could it be determinative whether he consulted, obtained or relied upon professional advice. The issue is, in the face of his conflict, did he fulfill his duties as a fiduciary to act only in the best interest of the beneficiaries.

C. Analysis of Breach of Fiduciary Duty

- [279] Having concluded the plaintiffs did establish a prima facie breach, the onus was on the Defendants to demonstrate notwithstanding the conflict, they fulfilled their fiduciary obligations.
- [280] I conclude they have not met that onus for the following reasons.

- [281] It is important to analyze their conduct in context. It is materially significant that despite the existence of separate trusts and Numbered Companies, the Defendants created and implemented a plan that dealt with four trusts together. They chose to act collectively to address the 21 Year Rule.
- [282] The trustees decided to implement an estate freeze for the purpose of differentiating the type of shares they wanted to bestow amongst the beneficiaries of each trust. Although I make no finding on this, the quality and independence of a valuation of trust assets may have carried less significance if the trustees knew they would be equally dividing all trust assets. However, that was not the case. I add that Meb and Mustaq acknowledged that obtaining a fair and independent valuation of trust assets was vital to the process of winding up the trusts.
- [283] By no later than May 2013, the trustees of each trust had decided what percentage of the frozen value would be distributed to which beneficiaries. They had also decided upon whom they would confer the control and all future growth of each of the Numbered Companies: for 702 that person was Meb, and for 703 that person was Mustaq.
- [284] In my view, one cannot separate out the Defendants' decision (as directors in the Family Business) to restructure the Numbered Companies, from their distribution decisions as trustees, which conferred all future growth in each company to only specific pre-determined beneficiaries.
- [285] To the extent the Defendants assert their decisions as trustees was somehow isolated from their decisions about the corporate reorganization, I do not find the evidence supports that conclusion. Specifically, Meb's insistence that he had "no involvement" in the MAP Trustees' decision to allocate to him all the future growth in 702 rings hollow on the facts of this case. The Defendants collectively made decisions about the running and future operations of the Family Business.
- [286] The Defendants' answer to the plaintiffs' claims is the conflicts at issue were inherent to the structure of the four trusts. As a result, one cannot find they failed to meet a good faith standard, relying on, among others, *Clock Holdings Ltd., v. Braich*, 2008 BCSC 1697, and *Sargeant*. Their position was at most, their actions might amount to negligence.
- [287] That position cannot succeed; the issue is how they acted, not whether they could act. The cases relied upon by the Defendants do not stand for the proposition that any aspect of a fiduciaries' duty of loyalty is diminished just because they were permitted to act while in *prima facie* conflict by virtue of the trust instrument or some other factor.
- [288] The Defendants' burden in this case was to adduce evidence to establish that in the face of those conflicts, they nevertheless carried out their duties honestly and in good faith, with regard only to the best interests of the beneficiaries. On the whole of the evidence, I am not satisfied they met that burden.

- [289] My assessment of Meb's and Mustaq's credibility was material to that conclusion, but it was not determinative. In addition to not placing weight on portions of their testimony because it diverged with documents, I noticed a common feature in that testimony. Based on my observations, Meb and Mustaq frequently downplayed what I found to be the true extent of their knowledge or concern about critical events at the time those events occurred.
- [290] However, the evidence that was key to my conclusions on breach of fiduciary duty was what Meb and Mustaq did not do in light of their overlapping roles. On these points, the evidence was not disputed. The Defendants did not follow Mr. Fish's specific advice to engage, at some level, all adult beneficiaries in a discussion about how to address the 21 Year Rule before making final decisions. Upon their legal advisors expressing surprise and concern about the lack of underlying appraisals for the 2014 Report, they took no steps nor made any enquiries to redress that concern. Mustaq made no effort to contact Sheliza or Zaida. No one alerted Fareed and Arshad of their removal as directors of 702 until it had already been done. This is an illustrative, but not exhaustive, list.
- [291] In my view, this behaviour is inconsistent with someone being guided only by the best interests of the beneficiaries. When viewed together with what I found was their unsuccessful attempts at trial to downplay how much they knew, the most plausible explanation for their behaviour is that their primary concern at all times was their self-interest. In my view, that is the crux of their breach.
- [292] The Defendants settled on a plan to address the 21 Year Rule. They wanted to implement what is possibly not an uncommon model: an estate freeze, and distribution of trust assets, conferring only on some the future growth of a business. However, that plan created the substantial risk that their fiduciary duties may be pitted against duties arising from their roles and directors, and (for Meb and Mustaq only) their self-interest as beneficiaries. It is important to recall that the only assets each trust held was its family's Numbered Company.
- [293] In this milieu, a valuation report assessing how much each trust was worth was a critical piece of information. Logic dictated that the lower the valuation of the trusts' assets, the smaller the pool of money to be distributed amongst potential beneficiaries receiving frozen value. If the frozen value was an underestimate of the true value of the assets, that was advantageous only to those beneficiaries on whom the future growth was going to be allocated.
- [294] As an example, if the frozen value of one of the trusts was \$9 million, but its true value was \$14 million, the \$5 million difference was available only to the selected beneficiary who was receiving future growth. This would be in addition to whatever share of the \$9 million that person was allocated.
- [295] Thus, Meb and Mustaq had a personal financial interest that favoured an underestimation of trust assets. That conflict was not imposed upon them. Instead, it was created by the Defendants' joint decision to confer on Meb and Mustaq all future growth in their family's Numbered Company. The vehicle of that distribution was the distribution of trust funds,

but the decision to give themselves all future growth was made at the beginning of the process. Indeed, the decision not to equally share future growth amongst all the beneficiaries was why they had to create new classes of shares in the Numbered Companies before the distribution of trust funds.

- [296] The plaintiffs adduced evidence that seriously questioned the accuracy of Mustaq's estimates. That evidence strongly suggests that for the SeaTac Property and the properties in North Vancouver, the value he gave to Duff & Phelps was grossly low. The Defendants failed to counter that evidence.
- [297] More troubling, on that very, issue both Meb and Mustaq mislead the Court (see above, paras. 77-88). I conclude, from that lack of evidence and that testimony, that it is more probable than not that both Meb and Mustaq believed the figures supplied by Mustaq were inaccurately low. Given their roles as directors they knew the impact of the corporate restructure. Therefore, they understood how an undervaluation would benefit them as compared to beneficiaries who were to receive only a portion of the trusts' frozen value. They did nothing about that. That conduct is dishonest, not in good faith and a blatant breach of their fiduciary duties.
- [298] I emphasize that the problem was the conflict between their self-interest and their fiduciary duties. That is what distinguishes the situation from Edell. It is also precisely why, in part, they were advised at the beginning of the need to inform and involve all beneficiaries.
- [299] Even if I had found that Mustaq and Meb did not realize until seeing a draft of the 2014 Report the extent to which Mustaq's estimations dictated the final calculations (a finding I do not make), had they been acting honestly and in good faith, they would have taken steps to address that. They did not.

VI. SECONDARY CLAIMS

- [300] The plaintiffs allege the removal of Fareed and Arshad, and the creation of the class D preferred shares in 702 were oppressive acts contrary to Business Corporations Act, S.B.C. 2002, c. 57, s. 227, and seek a declaration to that effect pursuant to that statute. The plaintiffs allege Imran was in knowing receipt, and that Meb knowingly assisted the MAP Trustees' breach of their fiduciary duty.

A. Knowing Receipt

- [301] The plaintiffs make a claim of knowing receipt against Imran.
- [302] Imran's position is that claim cannot be pursued against him. He says the allegation of knowing receipt was raised for the first time during final submissions, and he was prejudiced by being unaware of it while evidence was adduced. He also takes the position that the NOCC makes no allegations against him and seeks no relief specifically against him.

- [303] While knowing receipt is alleged in the NOCC (Part 2, paras. 8) only Meb, Haider and Mustaq are named in that paragraph. While the plaintiffs identified in their opening statement that Imran is a defendant because he received trust funds, they did not say he had done anything wrong by that receipt.
- [304] Furthermore, Imran points out his shares are held by Pirani Legacy ULC, which is not a named defendant and therefore, it is unclear if any relief is available against him.
- [305] In the alternative, Imran submits the plaintiffs have failed to prove on the evidence that he is liable for being in knowing receipt of trust property. The burden is on the plaintiffs to prove the elements of the cause of action.
- [306] I agree the plaintiffs have not met that burden and dismiss the claim on that basis. I make no comment on Imran's assertion that he was taken by surprise by the plaintiffs' final submissions.
- [307] In *Vancouver Coastal Health Authority v. Moscipan*, 2019 BCCA 17 at para. 57 [Coastal Health], the Court of Appeal notes the leading cases on knowing receipt are *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, and *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 (released concurrently).
- [308] In *Citadel*, the Court commented that both knowing assistance and knowing receipt are categories of liability which "relate to strangers to the trust who knowingly participate in a breach of trust" (at para. 21). The Court stated, at para. 46, "the distinction between the two categories of liability is fundamental: whereas the accessory's liability is "fault-based", the recipient's liability is "receipt-based"."
- [309] Although he was dissenting, Justice Iacobucci's description of the test for knowing receipt at para. 53 of *Gold* was agreed with by the majority in *Citadel* (at para. 13). Justice Iacobucci held a plaintiff must prove the following to establish knowing receipt in order to recover the disputed property:
- (1) That the property was subject to a trust in favour of the plaintiff;
 - (2) That the property, which the defendant received, was taken from the plaintiff in breach of trust; and
 - (3) That the defendant did not take the property as a bona fide purchaser for value without notice. The defendant will be taken to have notice if the circumstances were such as to put a reasonable person on inquiry, and the defendant made none, or if the defendant was put off by an answer which would not have satisfied a reasonable person.
- [310] This contrasts to knowing assistance, where the "plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust" (*Gold* at para. 32, emphasis in original).

- [311] The Court addressed how it makes sense that a lower threshold be required to prove knowing receipt, given its fundamental characteristic is that it is "receipt-based". Indeed, it is sufficient if the plaintiff proves constructive knowledge (Citadel at para. 48). A plaintiff can meet the test by proving "that a breach of trust is being, or is intended to be, committed, or until there has come to the attention of the person something that should arouse suspicion in an honest, reasonable man and put him on inquiry" (Coastal Health at para. 60, quoting *Groves-Raffin Construction Ltd. v. Bank of Nova Scotia* (1975), 64 D.L.R. (3d) 78 at 138 (B.C.C.A)).
- [312] Thus, it is not clear that the plaintiffs had to prove Imran did anything wrong; rather, they have to prove that he had knowledge or constructive knowledge of circumstances that would cause a reasonable person to be on notice of impropriety.
- [313] The plaintiffs adduced evidence from Imran by reading in excerpts from Imran's examination of discovery. I agree that evidence does not go as far as establishing Imran is liable for knowing receipt.
- [314] That evidence does establish that probably a few months before the termination of the MAP Trust, Imran was aware of the corporate reorganization. However, it was not clear that he knew at the same time he would be receiving shares from the MAP Trust (as opposed, to as a result of the reorganization). He knew he was required to enter into a pre-nuptial agreement with his then fiancé. However, he stated he was unsure if he would inherit money directly from the trust, or whether it would be part of his inheritance from his father (Meb).
- [315] Even if that evidence was sufficient to establish Imran had knowledge he was about to receive money from the MAP Trust, the plaintiffs did not point to any circumstances known to him, or which could be reasonably attributed to him, to put him on notice that a breach of trust may have been committed.
- [316] For all those reasons, the claim against Imran is dismissed.

B. Knowing Assistance

- [317] The plaintiff allege Meb is liable for knowingly assisting Mustaq and Haider in the breach of their fiduciary duties.
- [318] In *Imperial Parking Canada Corporation v. Anderson*, 2015 BCSC 2221 at para. 250, Justice Burke set out the test for knowing assistance:

In *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 at 808-810 (S.C.C.), the Supreme Court of Canada set out the four requirements for a finding of liability in knowing assistance or participation:

- (a) There must be a fiduciary duty;
- (b) The fiduciary must have breached that duty fraudulently and dishonestly;

- (c) The stranger to the fiduciary relationship must have had knowledge of both the fiduciary relationship and the fiduciary's dishonest conduct; and
- (d) The stranger must have participated in or assisted the fiduciary's fraudulent and dishonest conduct.

See also *DBDC Spadina Ltd. v. Walton*, 2018 ONCA 60 at para. 211, *aff'd* 2019 SCC 30.

- [319] Waters, at 516-522, discusses knowing receipt and knowing assistance, pointing out that liability for the latter does not depend on the receipt by the defendant of any trust property, citing *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787. When considering the nature of the breach, Waters (at 517) comments that the majority preferred not to follow a line of cases which held liability could only arise upon proof of fraudulent or dishonest breach. Instead, the majority held that the "taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability" in cases of knowing assistance (*Air Canada* at 826).
- [320] I am persuaded that the plaintiffs have established that Meb is liable for knowingly assisting the MAP Trustees breach of fiduciary duty.
- [321] Meb was involved and had knowledge about the corporate restructuring and winding up of trusts. The evidence was clear, but for decisions about the specific percentage allocations, the Defendants discussed amongst themselves the corporate restructuring and termination of the trusts as cohesive plan.
- [322] Specifically, Meb was aware early in the process that he and Mustaq would receive control and all future growth of their family's Numbered Company. I find that he understood that decision combined with the overlapping roles meant the trustees were acting in a conflict of interest.
- [323] He admitted that the 2014 Report's reliance on Mustaq's estimate of real estate values was an inherent conflict of interest, but he claimed he did not know that at the time. I did not accept that evidence, and found he was aware. He did nothing to correct that flaw.
- [324] He knew all trustees had a fiduciary duty to only act in the best interests of all beneficiaries. He knew they had been strongly advised to involve the adult beneficiaries in the process, in order to discharge their fiduciary duty. He knew they did not do so. Specifically, despite his habit of speaking with Arshad weekly for an hour to 90 minutes, he mentioned nothing about the 21 Year Rule or the plans to address it.
- [325] Based on the foregoing, I am satisfied the plaintiffs have proven the claim of knowing assistance against Meb.

C. Oppression

- [326] In early July 2014, Mustaq instructed BLG to prepare the necessary documentation to remove Fareed and Arshad as directors of 702 and Bashir (Mustaq's brother) as director of 703. Fareed and Arshad only found out about their removal after it had already taken place.
- [327] To succeed in an oppression claim, the plaintiff must identify reasonably held expectations that were violated by the allegedly oppressive actions. The failure to do so may be fatal. In *Goetz Investments Inc. v. Partners In Motion Pictures Inc.*, 2015 BCSC 547 at para. 73, the court concluded the affidavit supporting the oppression claim did not sufficiently identify the plaintiffs' expectations as shareholders, nor whether those expectations were reasonable. Therefore, the claim failed.
- [328] The plaintiffs must also demonstrate that the violation of their reasonable expectations involved unfair conduct and prejudicial consequences: *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69 at paras. 61, 89-90.
- [329] To the extent Fareed's and Arshad's claim is based on their removal as directors, relief is unavailable to them. Oppression is a remedy available for interference with the rights or interests of shareholders, not of directors: *Safarik v. Ocean Fisheries Ltd.* (1995), 12 B.C.L.R. (3d) 342 at para. 81 (C.A.); *Carr v. Cheng, Dorset College Inc.*, 2007 BCSC 1693 at para. 37.
- [330] In any event, the evidence adduced at trial was insufficient. Arshad did not testify, but excerpts from her examination for discovery were read into the record. She was unsure if she was a director of 702, and believed Fareed and Meb were shareholders of 702. Similarly, Fareed was aware he was a director, but did not know who the shareholders were.
- [331] Accordingly, the plaintiffs have not adduced evidence sufficient to establish Fareed's or Arshad's reasonable expectations were violated. For those reasons, I dismiss their claim of oppression.

VII. REMEDY

- [332] The plaintiffs' position is that disgorgement is the appropriate remedy in this case. Specifically, they seek disgorgement and related accounting of:
- a) Mustaq's interest in the E shares and all the common shares of 703;
 - b) Meb's interest in the E shares and all the common shares of 702; and,
 - c) Imran's interest (derived through Meb) in the D shares of 702.
- [333] The plaintiffs have few documents about 702's business operations after August 2014. Failing agreement between the parties, they seek a further hearing to address issues about accounting and disgorgement.

- [334] The Defendants' submissions only explicitly addresses the appropriate remedy for a breach of trust or finding of negligence. They did submit disgorgement is wholly inappropriate remedy for breach of trust. They submit the Court should refer the matter back to the trustees with directions.
- [335] In their opening statement, the plaintiffs emphasized that an appropriate remedy for breach of fiduciary duty does not necessarily have to be based on proof of damage or loss. In *Louie*, Madam Justice Newbury notes that the "subjective motivations of the fiduciary, the absence of actual harm to the beneficiary, and even whether the fiduciary in fact profited, are irrelevant" to proving a breach of the "no conflict" aspect of fiduciary duty (at para. 26). She commented that this prophylactic approach, emanating from *Bray and Phipps v. Boardman*, [1967] 2 A.C. 46 (H.L.), has been applied in Canada: *Can. Aero* at 607 and *Canadian Metals Exploration Ltd. v. Wiese*, 2007 BCCA 318 at para. 20.
- [336] However, she also identifies the emergence of an alternate approach that is more flexible, and not strictly prophylactic (at para. 28). It is discussed in *Waters* at 971-72, which Newbury J.A. quotes (from the third edition of *Waters* at 917). The authors describe the alternate approach as follows:

Rather than finding a strict prohibition against conflicts of interest and duty, this approach may look directly to the underlying fiduciary duty, the duty to act in the best interests of the beneficiary. On this approach, if the trustee did so act, there may be no reason to require the disgorgement of a gain, even though a conflict of interest may have been apparent on the surface. If he did not actually compromise the beneficiary, why penalize him? That is why, on this approach, a court may be willing to consider such issues as whether the trustee was in good faith, and whether the gain (which the beneficiary now seeks) was one which could not possibly have accrued to the beneficiary. A number of Canadian cases seem to adopt this more relaxed attitude.

- [337] However, Madam Justice Newbury comments (at para. 28):

The authors do not exhibit any particular enthusiasm for the alternative approach and indeed suggest that the choice between a rule that favours the beneficiary "who may well start with the real informational disadvantage vis-à-vis his trustee" and a rule that permits a trustee to "argue his way out of a prima facie situation of conflict when he might have avoided the whole difficulty by gaining an informed consent or court approval before he entered into the situation", "surely cannot be hard to make" (at 917).

- [338] Regardless of the approach adopted on the facts before the court in that case, Justice Newbury concluded "it simply cannot be said that the defendants" did not act to the detriment of their fiduciaries (at para. 29; see also *Strother* at para. 77).

- [339] I come to the same conclusion here. In this case, the plaintiffs' interests were compromised, and the conflicts were blatant rather than ones that were merely apparent on the surface. More importantly, I am satisfied that the Defendants did not conduct themselves with honesty and good faith in discharging their fiduciary duties, which would seem to make the alternate approach inapplicable.
- [340] The Defendants submit disgorgement is a wholly inappropriate remedy because it would require the Court to step into the shoes of the trustees and essentially exercise the discretion under the Accelerated Distribution Clause.
- [341] I disagree. Disgorgement means just that: the Defendants must "give up" what they gained. In ordering that, a court is not stepping into the trustees' shoes, it is granting an equitable remedy.
- [342] It is not clear to me that sending the matter back to the trustees could ever be an appropriate remedy for a failure to discharge fiduciary duties because they acted in self-interest in the face of prima facie conflicts. Regardless, it is not an appropriate remedy in this case.
- [343] Because fiduciary relationships arise in a number of diverse circumstances, fashioning the appropriate remedy must pay close attention to the circumstances of each case (see *Louie* at para. 28, citing *Waters*). This was not a case where there was any doubt about the existence of the fiduciary duties; those duties largely define the trustee-beneficiary relationship. I see no reason why disgorgement, accompanied by accounting or other procedural measures, is not appropriate.
- [344] Accordingly, I am satisfied that the plaintiffs have established their entitlement, generally, to disgorgement. However, both parties accepted as reasonable the possibility that they would need to make further submissions regarding the scope and details of any remedy granted, in the event the plaintiffs succeeded on an aspect of their claim.
- [345] Accordingly, the parties have liberty to return to address the Court on what, if any, associated orders or directions are needed to implement disgorgement, including what should be disgorged. Should they wish to do so, I would ask counsel to contact the Registry and seek a judicial management conference before me. I would ask that request be made no later than 30 days from the date of this judgment.

VIII. CONCLUSIONS

- [346] Based on my review of all the evidence, and these reasons for judgment, I conclude:
- a) I am satisfied that the plaintiffs established Haider and Mustaq were in a prima facie conflict as the MAP Trustees because of their overlapping roles. They failed to persuade me that they conducted themselves in good faith and with honesty in the face of that conflict. I conclude that Mustaq's duty of loyalty was impaired by his self-interest. I conclude Haider and Mustaq breached their fiduciary duties to the plaintiffs.

- b) I am persuaded that the evidence establish that Meb knowingly assisted Mustaq and Haider in their breach of their fiduciary duties. I also conclude his conduct was not in good faith because he was guided by his self-interest.
- c) With regard to the process of winding up of the family trusts and the steps taken to restructure the Numbered Companies, the Defendants acted collectively. I conclude they all were in a prima facie conflict from the outset of the process. Mustaq and Meb failed to persuade me that in light of that, they adhered to their duty of loyalty to all beneficiaries. I conclude their actions and decisions were influenced by their self-interest and their conduct was not in good faith throughout that process.
- d) The claim against Imran for knowing receipt is dismissed.
- e) The claim against 702 and Meb for oppression is dismissed.
- f) Given these conclusions, it is unnecessary for me to address the claims of breach of trust, conspiracy and negligence.
- g) As a result of the breaches of fiduciary duty, and knowing assistance, the plaintiffs are entitled to disgorgement, and may seek directions and further orders in relation to that. If that is required, they must request through the Registry a hearing before me and the request should be made no later than 30 days from the date of this judgment.

IX: COSTS

[347] The plaintiffs are entitled to costs, but they reserved their right to seek special costs. They have leave to return to court for that purpose, if necessary. I ask that they make that request within 30 days of this judgment.

"Sharma J."

APPENDIX

(Defined terms used in the judgment are in bold.

Not all defined terms used in the judgment are included.)

Defendants - Haider, Mustaq and Meb

First Generation - the four Pirani brothers who immigrated to Canada, specifically:

A. Mohammed Aly (deceased)

B. Madatali (deceased)

C. Pyarali (deceased after litigation commenced)

D. Haider (one of the Defendants)

With respect to the two trusts primarily at issue in this litigation, the following descendants of the First Generation are material (this is not an exhaustive list of descendants with respect to Madatali):

Mohammad Aly's children

1. Meb (one of the Defendants)

Meb's son: Imran (defendant)

2. Fareed (plaintiff)

Fareed's daughters: Sheliza and Zaida (both plaintiffs)

3. Arshad (plaintiff)

Madatali's children

1. Mustaq (one of the Defendants)

2. Bashir

3. Najma

MAP Trust - set up by Mohammed Aly

Beneficiaries: Meb (one of the Defendants), Imran (defendant), Arshad, Fareed, Shaliza and Zaida (all four are plaintiffs)

MAP Trustees: Haider and Mustaq (both Defendants)

Madatali Trust - set up by Madatali

Beneficiaries: Mustaq (one of the Defendants), Bashir and Najma, and their children

Trustees: Haider and Meb (both Defendants)

Family Business - the group of companies, which own the hotels and motels started and operated by the First Generation, plus properties added throughout the years. Not all of these are trust assets

PEL - Pirani Enterprises, a major corporate asset within the Family Business

PIL - Piramco Investments Ltd., a major corporate asset within the Family Business

Family Companies - PIL and PEL, which are a subset of the Family Business and are trust assets

Numbered Companies - four corporations, each wholly owned by one of the family trusts. With respect to the two trusts primarily as issue in this litigation, the following Numbered Companies are material:

702: one of the Numbered Companies, wholly owned by the MAP Trust (defendant)

703: one of the Numbered Companies, wholly owned by the Madatali Trust

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