

CANADA / JUDGMENT

Pirani v. Pirani

2020 BCSC 1711

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Supreme Court of British Columbia

DECIDED

12 November 2020

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2020 BCSC 1711 Pirani v. Pirani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pirani v. Pirani,

2020 BCSC 1711

Date: 20201112

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 on Remedy and Costs

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Place and Date of Hearing:

August 19 and 20, 2020

Vancouver, B.C.

Place and Date of Judgment:

November 12, 2020

Vancouver, B.C.

- [1] This judgment addresses outstanding matters arising from the trial decision rendered on June 20, 2020: *Pirani v. Pirani*, 2020 BCSC 974. The parties were granted liberty to return to court to address both specific orders to implement the remedy granted, and costs.
- [2] The trial decision addresses whether the winding up of a family trust was done in a manner that amounted to breach of the trustees' fiduciary duties. I concluded the trustees did breach their fiduciary duties. I addressed the appropriate remedy at paras. 332-345 of the trial decision, concluding that the plaintiffs were entitled to disgorgement.
- [3] I also decided that the plaintiffs had liberty to return to court to seek further orders or directions to implement disgorgement. The plaintiffs also sought permission to address special costs in the event they succeeded, and I granted them liberty to do so (para. 347).
- [4] Those requests were made and the hearing took place on August 19 and 20, 2020.
- [5] To a large degree, the parties' positions at trial were like ships passing in the night; they differed on the appropriate analytical framework and what evidence was relevant. As outlined in the trial decision, I concluded that the plaintiffs' analytical approach was correct, and the plaintiffs were successful on the major issues argued at trial.
- [6] I found that pattern reappeared at the hearing. The defendants' submissions regarding implementation of disgorgement repeated positions rejected at trial, and, at times, focussed on issues either not relevant or of marginal importance to the issues identified in the trial decision as being relevant at the hearing. For the most part, I have again found the plaintiffs' arguments to be persuasive.

I. THE TRIAL DECISION

- [7] The trial decision is 374 paragraphs long. For convenience, I will review some relevant extracts here so the parties' submissions on the outstanding issues can be understood in context.
- [8] I use the same defined terms from the trial decision in this judgment; for convenience I have appended to this judgment Appendix "A" to the trial decision, which contains most of those defined terms. Because the non-corporate parties share the same last name, I will refer to them by their first name, but I intend no disrespect in doing so.
- [9] By way of introduction, the plaintiffs are related as follows: Fareed and Arshad are siblings, while Shaliza and Zaida are Fareed's daughters. As for the defendants, Meb is Fareed and Arshad's brother, Mustaq is their cousin, and Haider is their uncle. Imran is Meb's son.
- [10] Since the claims against Imran and 438702 B.C. Ltd. ("702") were dismissed at trial, all references in this judgment to the defendants are limited to Haider, Mustaq, and Meb.
- [11] The following undisputed facts were canvassed in the trial decision (at paras. 9-60) and give background to the orders sought at the hearing.
- a) The defendant Haider is a member of what the parties referred to as the First Generation, which comprises four brothers who eventually settled in Canada after being forced to leave Uganda by the Idi Amin regime in the early 1970's. Haider is the only member of the First Generation still alive.
 - b) After arriving in Canada, the First Generation established a number of businesses, which they operated together (the "Family Business"). These businesses primarily own and operate hotels in Canada and the United States. Each member of the First Generation owned an equal share of the Family Business.
 - c) The two main entities which make up the Family Business are Pirani Enterprises ("PEL") and Piramco Investments Ltd. ("PIL").
 - d) In 1993, the First Generation conducted an estate freeze for tax planning purposes. Each brother created a family trust for their own children and grandchildren and a numbered company. Each numbered company was wholly owned by the respective family trust and was its only asset.
 - e) The three relevant numbered companies were created as follows:
 - i. 702 by Meb's father (for the MAP Trust);
 - ii. 703 by Mustaq's father (for the Madatali trust); and
 - iii. 706 by Haider (for his family's trust).

- f) At the relevant times, Haider was a trustee of all four Pirani family trusts. Mustaq and Meb were each trustees of two of the trusts, but not the same ones.
 - g) During the relevant times, Mustaq was the unofficial leader of the Family Business.
 - h) Meb was also involved in the Family Business. He was a lawyer and provided legal services, but also had some involvement in operations. Most recently, he was heavily involved in attempts to redevelop one of the Family Business's hotels.
 - i) Haider had been a very active in the Family Business during the relevant years, but by the time of trial, his involvement had waned due to his advanced years and certain health complications, including problems with his memory.
 - j) The trustees of all four family trusts decided to wind up the family trusts in 2014. That decision was triggered by a change in enforcement of certain tax rules relating to trusts (the "21 Year Rule"). Planning and instructions regarding that process were coordinated and handled by the same law firm. The trustees were invited to seek separate legal advice but declined to do so.
 - k) In addition to winding up the family trusts, the trustees also decided to affect a corporate restructuring of the Numbered Companies at the same time. All four family trusts and Numbered Companies followed the same model of reorganization.
 - l) Among other things, as a result of the winding up of the Family Trusts and reorganization of the Numbered Companies, Meb received complete control of 702, as well as all future growth of 702. The frozen value of 702 was divided amongst Meb, Fareed, Arshad and Imran, with Meb receiving the largest share.
 - m) Similarly, Mustaq received complete control of 703 and all its future growth.
- [12] As mentioned, the parties differed on the applicable analytical approach to the case: see trial decision at paras. 148-157. In response to the plaintiff's allegations, the defendants focused on the terms of the trust deed, which they say conferred absolute discretion on the trustees to distribute trust funds upon termination of the trust. The plaintiffs, on the other hand, concentrated on the trustees' fiduciary duties, which they say were not relieved by the terms of the trust deed. Ultimately, I agreed with the plaintiffs' approach (paras. 155-157).
- [13] I then addressed the issue of breach of fiduciary duty and concluded the plaintiffs succeeded. As for the remedy, I granted the plaintiffs' request for disgorgement. However, as mentioned, I gave the parties leave to make further submissions regarding the scope and implementation of this remedy. It is to this that I now turn.

II. ORDERS TO IMPLEMENT DISGORGEMENT

[14] The plaintiffs seek immediate disgorgement of:

- a) Mustaq's interest in the E shares of 703 and all of the common

shares of 703; and

b) Meb's interest in the E shares of 702 and all of the common

shares of 702.

[15] They also seek:

- a) payment forthwith of funds held by 702 in respect of the plaintiffs' D share entitlements;
- b) a declaration that Meb, Mustaq and Haider are jointly and severally liable for the resulting remedy of disgorgement; and
- c) production of documents, which is addressed below.

[16] Without prejudice to their legal position and entitlements, the plaintiffs did not seek disgorgement of the Class D shares allocated to Imran.

[17] The defendants' primary response is the plaintiffs are not entitled to the orders sought because they "approach the issue of remedy backwards." The defendants argue the plaintiffs have failed to meet their onus of specifying the categories of assets for which they seek disgorgement and grounding their asserted entitlement to those assets in the trial decision. They submit the plaintiffs are not "entitled to hunt through the documentation of various individuals and family companies--many of which are strangers to the litigation--in an effort to identify additional things they like to receive."

[18] The defendants go further and criticize the plaintiffs' submissions by saying they lacked "fulsome, complete, and principled submissions as to the scope of disgorgement actually sought" and were "opaque and incomplete," as well as "unworkable." They accuse the plaintiffs of wanting to engage in a "roving expedition whereby [they] are entitled to examine their extended family's assets as a whole, and seek to retain indiscriminate portions thereof" which amounts to "endless document production to perpetuate this unsatisfactory state of uncertainty."

[19] The preceding descriptions are not a fair characterization of the plaintiffs' submissions, nor the remedies they seek.

[20] The plaintiffs' final submissions sought the exact orders they are now seeking (trial decision, at para. 332). In addition, at the start and throughout the trial, the plaintiffs made clear that in the event they were successful on their claim of breach of fiduciary duty, they would seek disgorgement preceded by additional document disclosure. They specifically submitted they lacked sufficient information to know the full extent of financial consequences of the breaches they alleged. The defendants cannot be surprised by any of the orders being sought.

- [21] Moreover, the plaintiffs bear no responsibility for this lack of information. The defendants controlled the Family Business and the production of documents. The defendants object to most of the further document disclosure sought by the plaintiffs and simultaneously say no orders for disgorgement can be granted because the plaintiffs failed to identify with sufficient specificity what they say should be disgorged. The defendants have put the plaintiffs in a catch-22. Their position cannot succeed.
- [22] The defendants also submitted that if granted, the orders sought would create massive operational problems for the PEL and PIL family companies as well as immense tax liabilities. They submitted the Canada Revenue Agency may become involved.
- [23] No evidence was presented in support of these propositions, nor is it clear any such evidence would be relevant to the legal issues before me. I accept such evidence may be helpful for discussing how the assets should be disgorged; however, the defendants submit these factors are relevant to what can be disgorged. I am not persuaded that is the case.
- [24] The defendants' response to the specific orders seeking immediate disgorgement overlap with their opposition to the orders sought for production of documents. I will address each in turn. To the extent the analysis of one is relevant to the other, I adopt and rely on that reasoning.

A. Disgorgement of Shares

- [25] The defendants oppose the orders sought for disgorgement. Boiled down to its essence, the defendants' position amounts to the following:
- a) The pleadings do not allow this Court to order Mustaq to disgorge anything from 703 because 703 was not named as a party. I understood they also take the position that the plaintiffs have no standing to seek remedies against Mustaq's family trust (and therefore 703 which is wholly owned by that trust) because they are not beneficiaries of it.
 - b) The court cannot order Meb to disgorge anything from 702 because he was not a MAP Trustee and therefore the trial decision's conclusion about breach of fiduciary duty did not arise out of his conduct.
 - c) Nothing can be ordered against Haider because the Haider family trust and 706 were not named in the litigation.
- [26] Additionally, the defendants' supplemental submissions state that the plaintiffs' pleading of "restitution for unjust enrichment - with no mention of disgorgement" is fundamentally flawed. Undoubtedly that will be an issue on appeal, but it is not something they are permitted to raise in defence to the orders sought by the plaintiffs before this Court.

- [27] To accede to the defendants' position here would be to place Mustaq, Meb and Haider in essentially the same position as they would have been but for the trial. This is despite finding they were in a blatant conflict of interest and failed to carry out their fiduciary duties honestly, in good faith, and with only the beneficiaries' interests in mind. That would be a remarkably unjust result.
- [28] The trial decision is clear that the defendants collectively breached their fiduciary duties. The defendants seek to isolate each person's liability from one another and attach it only to the trust for which they were a trustee. This does not accord with the findings throughout the trial decision that at all times Haider, Mustaq and Meb approached and conducted their fiduciary duties on each of the family trusts and Numbered Companies collectively. Without referring to or repeating large swathes from the trial decision, the following paragraphs, among others, illustrate that point:
- a) From the undisputed facts, paras. 31-32, 40-41, 46 and 48.
 - b) The following discussion of prima facie conflict:
- [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.
- c) The review of evidence about the defendants' conduct, especially paras. 175, 184, 192 and 195.
 - d) The analysis of evidence regarding the valuation of all four family trusts' assets (paras. 196-278, especially paras. 217-19).
 - e) The analysis of breach of fiduciary duty, especially:
- [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.

- [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.
- [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.
- f) In specific response to the defendants' suggestion that Meb cannot be held responsible for Mustaq's breaches of fiduciary duty because Meb was not a MAP Trustee, see paras. 256 and 320-25.
- [29] The defendants made the same arguments raised now about why the court ought not to grant disgorgement. In my view, they are attempting to re-litigate issues already decided against them. Specifically, they implicitly resurrect an argument they made during closing submissions about deficiencies in the notice of civil claim.
- [30] One cannot fairly assess the adequacy of pleadings without looking at both the notice of civil claim and the response to civil claim because the issues at trial are shaped by both. In that regard, it is relevant to review certain findings in the trial decision about the defendants' response to civil claim (see trial decision at paras. 53-56).
- [31] It is likewise important to place any comment about the parties' final submissions in context. At para. 334 of the trial decision, I commented on the defendants' final submissions, noting they "only explicitly address the appropriate remedy for a breach of trust or finding of negligence," taking the position that "disgorgement is a wholly inappropriate remedy for breach of trust" because it would "require the Court to step into the shoes of the trustees and essentially exercise the discretion" (para. 340). The defendants did not fully answer the plaintiffs' submissions that disgorgement would be appropriate in the event I found (as I did) the defendants liable for breach of their fiduciary duties. Notwithstanding the defendants' strategy to focus only on breach of trust rather than the plaintiffs' primary allegations, I did test the plaintiffs' claim against all of the defendants' submissions as if they had properly been directed to the allegations of breach of fiduciary duty (para. 159).

- [32] The significance of the preceding two paragraphs is that I do not agree the plaintiffs' position has ever been unclear or lacks specificity. The defendants had every opportunity to respond to those allegations of breach of fiduciary duty and remedy for that at trial, and to the orders sought during the supplemental hearing. It is unfortunate they chose instead to revive arguments already rejected.
- [33] Given the preceding, the defendants' objections to the orders sought granting immediate disgorgement are dismissed. I grant the orders sought by the plaintiffs. I also grant an order in the alternative that, should the plaintiffs choose, the shares to be disgorged be declared to be in a constructive trust pending further advice from professionals.

B. Orders for Production of Documents

- [34] As an aid to identifying what other assets may be subject to disgorgement, the plaintiffs seek orders for the production of:
- a) financial statements, tax returns and bank statements of 702, 703, 706, PEL, PIL, and all affiliates and related entities from and after 2014;
 - b) documents relating to any distribution of funds or other assets to Mustaq, Meb, or Haider from PIL, PEL, 702, 703, 706 or any affiliates or related entities, from and after 2014;
 - c) bank account statements and tax returns of Mustaq, Meb, and Haider from and after 2014;
 - d) all constituting documents of any trusts or other legal entities used by Mustaq, Meb, or Haider in connection with the 2014 reorganization and any bank account records and tax returns of those entities;
 - e) the amount of legal fees paid by 702, 703, 706, PIL, or PEL (or any related affiliates or related entities) in connection with the defence of these proceedings; and
 - f) a list of real estate assets in Canada or the United States held by, sold by, or transferred to the defendants by PIL, PEL, 702, 703, 706, or any of their affiliates or related entities from and after 2014.
- [35] One of the concerns raised by the defendants is that the orders sought affect third parties not before the court and therefore notice ought to be given. It was my understanding that the plaintiffs agreed to provide that notice. I assume that has now taken place and I need not consider it further.
- [36] The defendants agreed to "document production that is reflective of the pleadings and the findings of the court, such as record of distributions made to 702 by [PEL and PIL] or benefits paid to the defendants as a result of corporates shares that they received in the August 2014 reorganization." Accordingly, they agreed to produce documents relating to transfers of funds or other assets from PIL, PEL, 702 and 703, but only to Mustaq and Meb (not Haider).

- [37] They also agreed to disclose the documents sought in paragraph 34(c), but only in relation to Mustaq and Meb.
- [38] The defendants' position is that the remaining orders for production sought by the plaintiffs are too broad. They submit the request for financial and other documentation from 703 and 706 and disclosure from all affiliates and related entities of PIL, PEL, 702, 703 and 706 are "wholly unrelated to the breaches of fiduciary duty found in the [trial decision]".
- [39] In my view, the defendants' opposition is largely premature because they have misunderstood the foundation for the plaintiffs' requests for document disclosure. This is not a pre-trial request for document disclosure related to an attempt to prove a claim; the defendants are liable to the plaintiffs. I find the adage that if you have nothing to hide, you ought not to fear full disclosure to be particularly apt, although not determinative.
- [40] Just because the plaintiffs seek documents from 703, 706, PIL, and PEL and their affiliated or related companies does not mean they will necessarily seek or obtain disgorgement, as against those entities. They would need to return to court if they want disgorgement of any assets held by those entities.
- [41] I agree the plaintiffs' document requests cast a wide net. However, with one exception, I do not agree what they seek is improper or not sufficiently rooted in the trial decision.
- [42] I find the defendants' position is discordant with the findings of the trial decision relating to the collective conduct of the defendants, many of which are identified above at para. 28. Most notably, the defendants collectively controlled the Family Business from 2014 onwards. They achieved that control as a direct result of their failure to carry out their fiduciary duties honestly and in good faith in the face of their prima facie conflict of interest. It is conceivable that they could shuffle assets around in a way detrimental to the plaintiffs. Given this Court has found they did not act honestly or in good faith in relation to the restructuring of the Numbered Companies which conferred total control of 703 on Mustaq, and 702 on Meb, it is reasonable that the plaintiffs want to examine the relevant documents for themselves.
- [43] The defendants' opposition to broad document production is largely a return to their primary position at trial that the only assets that can be disgorged are those owned by the MAP Trust because that was the only trust named. To the extent their position relies on submissions already discussed and rejected relating to disgorgement, their position is equally unpersuasive with regard to the issue of production of documents.
- [44] The defendants also oppose any order requiring document production from Haider on the basis that "Haider's conduct was not the primary driver leading to the conclusions regarding breach of trust." Furthermore, unlike Meb and Mustaq, Haider is not a beneficiary of his own family's trust.

- [45] Again, that position ignores the findings made in the trial decision. Significantly, Haider was a trustee of all four family trusts. I was not pointed to any portion in the trial decision where I excluded or diminished Haider's complicity and liability for the breach of fiduciary duties.
- [46] I am not satisfied, however, that the relief sought in paragraph 34(f) is sufficiently tied to the breach of fiduciary duty identified in the trial decision. Among other things, it is not clear to me why that separate category of documents would not implicitly be revealed by documents produced under paragraph 34(a). I decline to make that order at this time. The plaintiffs have liberty to re-apply for such production should they have additional information that such production is reasonably required.
- [47] Accordingly, I grant all the orders for production of documents sought by the plaintiffs, except those relating to real estate.

III. SPECIAL COSTS

- [48] The plaintiffs allege that the defendants' conduct throughout the litigation warrants an award for special costs. The plaintiffs' position is that the trial decision's determination of Mustaq's and Meb's untruthfulness (as discussed at paras. 71 to 116), are merely the clearest examples of misconduct, and that their misconduct permeated almost all the evidence adduced at trial. They allege the defendants sought to mislead the plaintiffs from the start, and that throughout the litigation, they sought to mislead the court.
- [49] The defendants' position is their conduct does not justify an award for special costs against them, and certainly not for the whole conduct of litigation, and the 19-day trial. They allege that the plaintiffs ask me to consider factors that are irrelevant because they violate the "bright line" rule. They also submit that the plaintiffs' approach is a disguised form of punitive damages and would effectively amount to punishing the defendants for mounting a vigorous defence of the claims.

A. Legal Principles

- [50] There is no dispute about the applicable legal principles. Rule 14-1 of the Supreme Court Civil Rules sets out the court's jurisdiction with respect to costs, with subrule (1)(b)(i) granting the court discretion to award special costs. This discretion "must be exercised judicially and in accordance with established principles" such that "like cases should be decided in like ways": *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 [Smithies] at para. 113.
- [51] The purpose of special costs is to chastise a litigant, for they are "punitive in nature and encompass an element of deterrence": *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914 at para. 8. The Court of Appeal in *Tanious v. The Empire Life Insurance Company*, 2019 BCCA 329 confirms this in their summary of the function of special costs at para. 53:

In contrast [to damages], special costs serve different functions. They address the results and conduct of the parties in the course of litigation and are generally awarded where there has been some form of reprehensible conduct: *Young v. Young*, [1993] 4 S.C.R. 3 at 134-135; *Marchen* at para. 69. In these circumstances, their purpose is to censure and deter litigation misconduct, not to compensate the plaintiff. Pre-litigation misconduct is not to be considered in determining whether special costs should be awarded for purposes of censure because there are other suitable mechanisms of censure that apply: *Smithies Holdings* at para. 134.

[52] "Reprehensible conduct" serves as the threshold for granting a special cost award: *Smithies* at para. 57. The meaning of "reprehensible" is broad; it exists on a spectrum, which "encompasses scandalous or outrageous conduct but also encompasses milder forms of misconduct deserving of reproof or rebuke": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.) at para. 17, cited in *Smithies* at para. 57; see also *Gichuru v. Smith*, 2014 BCCA 414 at para 78; *Mayer* at para. 8.

[53] The principles underlying special costs have been helpfully summarized by Justice Gropper in *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 73):

I have undertaken a thorough review of the cases involving special costs. Having examined the authorities provided by both sides, it is apparent to me that the courts have been somewhat inconsistent in their determination of what amounts to reprehensible conduct and that those authorities must be reconciled. Based upon my review of the authorities, I have derived the following principles for awarding special costs:

- a) the court must exercise restraint in awarding special costs;
- b) the party seeking special costs must demonstrate exceptional circumstances to justify a special costs order;
- c) simply because the legal concept of "reprehensibility" captures different kinds of misconduct does not mean that all forms of misconduct are encompassed by this term;
- d) reprehensibility will likely be found in circumstances where there is evidence of improper motive, abuse of the court's process, misleading the court and persistent breaches of the rules of professional conduct and the rules of court that prejudice the applicant;
- e) special costs can be ordered against parties and non-parties alike; and
- f) the successful litigant is entitled to costs in accordance with the general rule that costs follow the event. Special costs are not awarded to a successful party as a "bonus" or further compensation for that success.

[54] Gropper J.'s comments at para. 65 are also relevant in this case: "[f]raudulent claims and untruthful testimony are a particularly reprehensible form of conduct deserving of rebuke."

- [55] Nevertheless, untruthful testimony will not always justify awarding special costs, as Justice Voith notes in *Sull v. Pengelly*, 2019 BCSC 1565 at para. 30: "[d]ishonest testimony alone is insufficient to warrant an award of special costs;" Likewise, simply lacking credibility is not enough to warrant a special cost award: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107.
- [56] Rather, as Voith J. comments, "something more egregious in the impugned conduct at issue is required" to establish a claim for special costs. This "something more" includes, "for example, multiple instances of deliberate lying designed to mislead the court, forgery of documents, or the deliberate concoction of evidence to support a party's position": *Sull* at para. 30.
- [57] Therefore, in deciding to award special costs, courts must identify conduct that goes beyond mere untruthfulness or a lack of credibility, namely conduct that actively seeks to mislead the court.
- [58] *Unternaher v. Wheat Sheaf Inn Ltd.* (1998), 114 B.C.A.C. 299 (C.A.), cited in *Westsea* at para 70, is an example of "something more egregious" being found. In that case, the Court of Appeal reversed the trial judge's decision and determined that special costs were appropriate because the corporate defendant's employees had lied and by doing so, attempted to mislead the court: *Unternaher*, at para. 12; see also *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at para. 73; *Mayer* at paras. 12-15.
- [59] *Lee v. Kuo*, [1996] B.C.J. No. 1858 (S.C.) is another example of "something more." In that case, the court awarded special costs against two of the defendants, because the one defendant "fabricated a self-serving story" and the other was "argumentative, evasive, and equivocal, constructing his evidence to suit his purposes" (at para. 11).
- [60] Ultimately, special costs are a discretionary remedy. They are determined on a case-by-case basis and are fact driven: *FFS HK Ltd. v. P.T. 25 (Ship)*, 2011 BCSC 1418, at paras. 8-10; see also *Westsea* at para. 38. There must be an evidentiary basis to support an award for special costs: *Tanious* at paras. 58 and 73, citing *Reilly v. Lynn*, 2003 BCCA 49 at para. 145.
- [61] Voith J.'s comments in *Sull* reinforce the discretionary nature of special costs (at para 24, citing *Garcia* at para 28): "it is often a combination of factors and 'no single one of which would necessarily have been sufficient in itself', that will support a finding that a party's conduct is reprehensible and deserving of a special costs award."
- [62] As I explain below, I am persuaded on the evidence and my findings in the trial decision that the defendants' litigation conduct was reprehensible, deserving of rebuke, and exceptional. The plaintiffs are therefore entitled to special costs.

B. Conduct at Trial and Examinations for Discovery

- [63] The defendants' submissions suggest the trial decision found "aspects of the litigation regrettable," the defendants' conduct "regrettable in certain instances," and warned I not let the "substantive claims and conduct [I] found objectionable" to influence the assessment

costs award. The defendants also submitted "it would be wrong to impose an order for special costs based on generalized assertions or impressions such as general references to 'untruthful and misleading evidence through the discovery process and at trial' without specifics."

- [64] Those submissions do not fairly capture the plaintiffs' position; they also significantly downplay findings made in the trial decision.
- [65] The incidents described in the trial decision at paras. 77-88 alone are sufficient to justify an award of special costs, at least for costs associated with the trial. Mustaq's behaviour described in the trial decision at paras. 84-88 was not only reprehensible, it was outrageous. It is deserving of censure. It is appropriate and just to award special costs against him for that conduct in order to deter others from believing they can brazenly lie on the witness stand for the express purpose of misleading the court.
- [66] Meb's behaviour described at paras. 77-83 of the trial decision is equally deserving of rebuke. In light of the fact that he was a practicing lawyer for many years, I am surprised he would return to this Court and suggest lying to the court was merely "regrettable" or "objectionable." His behaviour was reprehensible, outrageous, and egregious. He likewise deserves to have special costs awarded against him.
- [67] As I made clear in the trial decision and which I confirm now, the issues with their conduct at trial were not limited to their impaired credibility; rather, it was "[m]ore troubling" that "both Meb and Mustaq [misled] the Court" (at para. 297).
- [68] To be very clear, I am not relying on my negative credibility findings as justification for special costs. My conclusion about special costs arises from having reviewed again the entire trial decision, the parties' supplemental submissions, extracts from the transcripts put into evidence at the supplemental hearing, the parties' submissions at trial, and my observations and recollection of the witnesses' testimony and their demeanour at trial. From all of this, I conclude the defendants' conduct at trial and at the examinations for discovery was reprehensible and egregious, thus deserving of rebuke and justifying an award of special costs.

C. Conduct Regarding Document Disclosure

- [69] Whether the non-disclosure of relevant documents meets the threshold of reprehensible conduct is the subject of some debate: Sull at para. 31. However, as Voith J. notes in Sull, "material non-disclosure, on its own, may warrant special costs particularly if the material non-disclosure is egregious, gives rise to delay, and is 'obstructive' in its purpose and result" (at para. 33).

- [70] I do find that the defendants' conduct regarding document production in this litigation was reprehensible. Their delayed disclosure of both the 2014 Report and numerous other relevant documents, as well as one instance of material non-disclosure, lengthened the proceeding and made it more complex and expensive.
- [71] At the hearing, the defendants (and to a lesser degree, the plaintiffs) reviewed their correspondence and pre-trial exchanges about document disclosure at some length in support of their positions. I do not find the correspondence put before me to be very helpful on this issue, although it did provide some context for the parties' positions. Specifically, I find Gropper J.'s remarks in *Westsea* at para. 75 to be apposite, namely that "the court's examination of whether to award special costs ought not to require a detailed examination of the correspondence record between the parties to determine whether they conducted themselves properly."
- [72] The 2014 Report was perhaps the most critical document at trial (see definition at para. 196 of trial decision, and more generally paras. 272-278). At the hearing, defendants' counsel conceded not listing that document in the first list of documents was wrong, but emphasized it was eventually listed--albeit more than two years after the notice of civil claim was filed.
- [73] The defendants argued that the delayed disclosure of the 2014 Report, along with other documents, arose from a "good faith" disagreement between counsel as to the scope of relevance. The only evidence the defendants adduced at the hearing was an affidavit attaching counsel's correspondence. In other words, they did not provide their own affidavit.
- [74] As I now explain, I have difficulty accepting this position.
- [75] Any suggestion that the defendants did not, or could not, know the critical role the 2014 Report would play in the litigation cannot be taken seriously. The plaintiffs specifically pleaded the defendants' liability was based in part on an under-estimation of trust assets. I infer from the lack of direct evidence from the defendants that they had no good reason to delay producing one of the most critical documents in the litigation. There is no doubt that the late disclosure of the 2014 Report contributed to complicating the litigation and lengthening the trial, in the sense Voith J. noted in *Sull*.
- [76] While late disclosure of one document may not be sufficient on its own to grant special costs, the 2014 Report was absolutely critical to the case and the impact of its late disclosure was significant. Nor would it be fair or accurate to view its late disclosure in isolation. The defendants attempted to treat document production as a topic isolated from the defendants' testimony at trial and evidence at the examinations for discovery. However, those issues were intertwined, which was unsurprising given the nature of the issues raised by the pleadings.
- [77] I find that late disclosure of relevant and important documents was perhaps the defining feature of the defendants' document production in this litigation. It was unnecessary for me to comment further on that issue in the trial decision. I do so now.

- [78] I specifically agree with the plaintiffs that the defendants produced a large amount of critical documents about a month before trial and even during trial. There was also an important document that, remarkably, plaintiffs' counsel found themselves. This document was relevant to the valuation of trust assets, specifically one of the Family Business' hotels. As noted in the trial decision, Meb lied about not recalling the existence of the document (more importantly, the content of the document) because he knew it supported the plaintiffs' allegation that the trust assets were grossly undervalued (see trial decision at para. 83). Not disclosing this document was a material non-disclosure and egregious conduct deserving of rebuke.
- [79] As mentioned above, the defendants rely on what they say was a "good-faith disagreement" between counsel as to the scope of document production and privilege. However, this argument is firmly rooted in their position that the document requests from the plaintiffs had a "dubious basis in law" and were onerous and overly-broad. The defendants maintain they acted reasonably and responsibly in not disclosing the documents. The defendants also appear to blame the plaintiffs for their delayed disclosure, arguing that timelier document production was thwarted by the plaintiffs' failure to articulate their claim with sufficient particularity.
- [80] I disagree. The plaintiffs' notice of civil claim specifically alleged the actions of the MAP Trustees (Mustaq and Haider) were carried out improperly and in breach of their fiduciary duties. The plaintiffs alleged Mustaq and Haider acted "with mala fides, in conflicts of interest, and for an improper purpose." The plaintiffs also alleged Mustaq and Haider colluded with Meb to deliberately injure the plaintiffs. In addition, the plaintiffs specifically pleaded the valuation report significantly undervalued trust assets. This was a predominant issue at trial, and one on which the plaintiffs succeeded.
- [81] Moreover, in their notice of civil claim, the plaintiffs' factual pleadings were not limited to the MAP trust. Most notably, they included a section titled "Mustaq's and Meb's Self-Interest" where they alleged, among other things, 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). The plaintiffs also pleaded that "Haider and Mustaq improperly and unfairly benefited Meb, who in turn, was a trustee of the family trust under which Mustaq benefitted" (Part 3, para. 2).
- [82] The trial decision described the relevant portions of the response to civil claim:
- [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.
- [83] In June 2019, about three months before trial, counsel for the defendants described the plaintiffs' requests for documents beyond those relating to the MAP Trust as "a commission of inquiry" resembling "a voyage on the Flying Dutchman with a crew condemned to roam the seas interminably with no set destination and no end in sight." That posture was premised on the defendants' view that nothing but the MAP Trust documents were relevant to the litigation. As noted in the trial decision, this was not a fair interpretation of the pleadings (para. 70).
- [84] Counsel draft pleadings and engage in document production (including, presumably, communicating to the other side) on instructions. On a plain reading of the response to civil claim, the defendants' denial of breach of fiduciary duty is articulated only in support of a claim for special costs. Thus, their pleading largely avoids the primary claim made against them by insisting that the proper framework to resolve the issues is breach of trust or a claim in negligence.
- [85] Defendants are free to re-frame issues and claims made at trial, but they take certain risks if--like the defendants in this case--they do so without also responding to a major allegation in the notice of civil claim. It would be naïve to ignore the possibility that the defendants' response to civil claim was designed to promote minimal disclosure obligations, while casting the plaintiffs' requests as overly broad and unspecified. More to the point, the defendants did not provide any evidence to suggest this is not a reasonable inference to draw.
- [86] For all those reasons, I reject the defendants' position that their late document disclosure was premised on good faith disagreements between counsel.
- [87] Having presided over the trial and dealt with the continuing disclosure (and evidence of material non-disclosure) during trial, I find the defendants were deliberately obstructive in their document production (see Sull at para. 33). This conduct was an extension of their behaviour at trial and in the litigation in general. It is reprehensible and deserving of rebuke and thus justifies an award of special costs.

IV. CONCLUSIONS

- [88] For all the reasons explained in this judgment, I order the following:
- a) Payment forthwith in trust to plaintiffs' counsel of funds held by 702 in respect of the plaintiffs' D share entitlements.
 - b) A declaration that Meb, Mustaq and Haider are jointly and severally liable for the resulting remedy of disgorgement.

- c) Immediate disgorgement (subject to paragraph "d" below) of:
- i. Meb's interest in the E shares of 702 and all of the common shares of 702, and
 - ii. Mustaq's interest in the E shares of 703 and all of the common shares of 703.
- d) In the alternative to the preceding paragraph, the plaintiffs may choose to delay the above orders for immediate disgorgement for the purpose of their consulting appropriate professionals regarding the tax consequences, and if they so choose, then I order the following:
- i. a declaration that any and all class E shares in 702 in which Meb has an interest are held in a constructive trust in favour of the plaintiffs until such time as the plaintiffs chose to effect a complete share transfer, and
 - ii. a declaration that any and all common shares in 703 in which Mustaq has an interest are held in a constructive trust in favour of the plaintiffs until such time as the plaintiffs choose to effect a complete share transfer.
- e) The defendants produce within 21 days of this judgment the following:
- i. Financial statements, tax returns and bank statements of 702, 703 and 706, PEL, PIL, and all affiliates and related entitles from and after 2014.
 - ii. Documents relating to any distribution of funds or other assets to Mustaq, Meb, or Haider from PIL, PEL, 702, 703 or 706 or any affiliates or related entitles, from and after 2014.
 - iii. Bank account statements and tax returns of Mustaq, Meb and Haider from and after 2014.
 - iv. All constating documents of any trusts or other legal entities used by Mustaq, Meb or Haider in connection with the 2014 reorganization and any bank account records and tax returns of those entities.
 - v. The amount of legal fees paid by 702, 703, 706, PIL, or PEL (or any related affiliates or related entities) in connection with the defence of these proceedings.
- f) Special costs of this litigation payable by the defendants to the plaintiffs.

"Sharma J."

APPENDIX "A"

(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 ligation, 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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Prepared on 27 October 2026 · Esheria