

CANADA / JUDGMENT

Pirani v. Pirani

2021 BCSC 1530

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Supreme Court of British Columbia

DECIDED

6 August 2021

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2021 BCSC 1530 Pirani v. Pirani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pirani v. Pirani,

2021 BCSC 1530

Date: 20210806

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

Second Supplemental Reasons for Judgment on Remedy and Costs

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Place and Date of Hearing:

Vancouver, B.C.

March 10-12, 20, and 29, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 6, 2021

Table of Contents

Paragraph Range

[1] - [14]

I. INTRODUCTION

[1] - [14]

II. BACKGROUND

[15] - [15]

III. REMEDY

[16] - [151]

A. The Parties' Positions

[19] - [29]

B. Legal Principles

[30] - [62]

1. Atlantic Lottery Corp. Inc. v. Babstock

[42] - [50]

2. Kyle Estate v. Kyle

[51] - [55]

3. ICBC v. Lo

[56] - [60]

4. Conclusion

[61] - [62]

C. Analysis

[63] - [151]

1. Nexus Between Meb's Knowing Assistance and His Shares in 702

[70] - [78]

2. Nexus Between Mustaq's Breach and His Shares in 703

[79] - [93]

3. Non-Parties' Concerns

[94] - [118]

a) The 2014 Shareholders Agreement

[96] - [98]

b) Impact on the Family Business

[99] - [111]

c) Disgorgement to the Non-Parties

[112] - [118]

4. The Scope of Disgorgement

[119] - [151]

a) Future Growth Shares

[136] - [138]

b) Frozen Value Shares

[139] - [141]

c) Voting Shares

[142] - [151]

IV. COSTS

[152] - [182]

A. Legal Principles

[153] - [164]

B. Analysis

[165] - [182]

1. The Claim Against Imran

[167] - [176]

2. The Claim Against 702

[177] - [182]

V. STAY

[183] - [191]

VI. CONCLUSION

[192] - [195]

VII. APPENDIX

I. INTRODUCTION

[1] These are supplemental reasons in this matter relating to remedy and costs.

[2] After the trial of this action, I issued reasons on June 30, 2020, which are indexed at 2020 BCSC 974 (the "Trial Judgment" or "TJ"). I found the defendants Mehboob (known as Meb) Pirani, Mustaq Pirani, and Haider Pirani (the "Defendants") were liable for breach of fiduciary duty. As a result, I found that the plaintiffs were entitled to the remedy of disgorgement.

[3] I dismissed the claims against Imran Pirani and 438702 B.C. Ltd. (the "Successful Defendants").

- [4] For convenience, I will refer to family members whose last name is Pirani by their first name. I intend no disrespect in doing so. I will also use the same defined terms identified in the Trial Judgment, including those in the appendix, which I have also appended to this judgment for convenience.
- [5] With regard to the remedy against the Defendants, I held:
- [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.
- [6] As a result, I granted the parties leave to return to address "what, if any, associated orders or directions are needed to implement disgorgement, including what should be disgorged" (TJ at para. 345).
- [7] I granted the plaintiffs costs, but similarly gave them leave to return to court to seek special costs (TJ at para. 347).
- [8] The parties made that request, and a hearing took place on August 19 and 20, 2020. I issued reasons indexed at 2020 BCSC 1711 (the "Supplemental Judgment"). In that judgment, I ordered the defendants to pay special costs and to produce certain documents.
- [9] I also ordered the following (at para. 88):
- c) Immediate disgorgement (subject to paragraph "d" below) of:
 - i. [the defendant Mehboob Pirani's] interest in the E shares of 702 and all of the common shares of 702, and
 - ii. [the defendant Mustaq Pirani'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.

- [10] The plaintiffs' written submissions for the August 2020 hearing sought the above orders; however, counsel clarified during their oral submissions that they were not seeking those orders at that point because they agreed that a number of non-parties should first be given notice. The Defendants addressed the scope of disgorgement during their oral submissions, but it was only in support of their position that the document production sought by the plaintiffs was overly broad.
- [11] Accordingly, all parties agreed it was a mistake for me to grant the orders set out in the Supplemental Judgment at paras. 88(c) and (d).
- [12] A further hearing was convened by consent of all parties to address disgorgement with the participation of non-parties who received notice.
- [13] The parties also asked me to address at this additional hearing the issue of whether the Defendants ought to pay the costs of the Successful Defendants, as sought by the plaintiffs.
- [14] As noted above, other individuals and entities received notice, and the following made submissions at the hearing:
- a) a group of individuals whom I will refer to as the "Madatali Non-Parties", comprising
 - i. Gulbanu (Mustaq's mother), who was the settlor of the Madatali Trust. of which the defendant Mustaq was a beneficiary);
 - ii. Gulbanu's other children (and Mustaq's siblings), Bashir and Najma; and
 - iii. Safeeya and Nabila (Mustaq's daughters); and
 - b) a group of individuals and entities that I will refer to as the "Other Non-Parties", comprising
 - i. Fariyal (Meb's spouse);
 - ii. Zulekha (Haider's spouse, who was also settlor of the Haider Trust);
 - iii. Jayni and Nadeem (Haider's daughter and son, respectively);
 - iv. Zahir (son of Pyarali, a member of the First Generation);
 - v. Nazmina (Zahir's spouse);
 - vi. Zakiya (Zahir and Nazmina's daughter);
 - vii. 1010305 BC ULC (Nadeem's holding company);
 - viii. 703 (the Numbered Company formerly owned by the Madatali Trust);
 - ix. 438705 B.C. Ltd. (the Numbered Company formerly owned by the Pyarali Trust); and
 - x. 438706 B.C. Ltd. (the Numbered Company formerly owned by the Haider Trust).

II. BACKGROUND

- [15] By way of a brief overview, the following paragraphs from the Trial Judgment describe the parties, the nature of the family business, the creation of the family trusts in 1993, and the restructuring of the business and winding up of the trusts in 2014:
- [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.
- [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.
- [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.
- [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.
- ...
- [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".
- [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.

III. REMEDY

- [16] It is important to emphasize at the outset that the plaintiffs' entitlement to disgorgement as a remedy is not before me at this hearing. This issue was fully canvassed at trial (see TJ at paras. 332-345) and I determined that the plaintiffs are entitled to disgorgement. The only issue before me is what should be disgorged.
- [17] The Defendants' written submissions state that this hearing was a "re-opening and rehearing of the plaintiffs' application for disgorgement".
- [18] There is no application before me to re-open any aspect of the trial. As already noted, the parties had liberty to return to Court to address a limited issue, but that limited issue does not include the plaintiffs' entitlement to disgorgement. The parties were only given leave to address the "scope and details" of disgorgement and "what, if any, associated orders or directions are needed to implement disgorgement, including what should be disgorged" (TJ at paras. 344-345). The parties agreed it was appropriate for me to accept and consider the non-parties' evidence. Accepting that evidence does not transform this hearing into a re-opening of the trial.

A. The Parties' Positions

- [19] The plaintiffs seek orders declaring that:

- a) Meb holds his class A (voting) and class E (preferred shares) in 702 on a constructive trust for the plaintiffs;
 - b) Mustaq holds his class A (voting) and class E (preferred shares) in 703 on constructive trust for the plaintiffs;
 - c) the trustees of the Mehboob (2014) Family Trust (Meb and Fariyal Pirani) hold the class C shares of 702 on constructive trust for the plaintiffs;
 - d) the trustees of the Mustaq Pirani (2014) Family Trust (Mustaq, Nabila, and Zahir) hold the class C shares of 703 on a constructive trust for the plaintiffs; and
 - e) the defendants are jointly and severally responsible in respect of the orders for disgorgement.
- [20] The plaintiffs submit that based on the findings in the Trial Judgment and the applicable law, there is little room to refuse the orders they seek. They further submit that nothing in the non-parties' evidence or submissions or the Defendants' submissions justifies not granting those orders.
- [21] The Defendants and non-parties oppose the orders sought. They take the position that the orders sought are precluded by the applicable law and the findings of fact in the Trial Judgement.
- [22] The Defendants submit that the plaintiffs were unable to establish that Mustaq or Meb received a particular asset as a result of their wrongdoing. As a result, the required nexus between the breach and the assets sought to be disgorged is absent. The Defendants submit that this is fatal to the remedial orders sought by the plaintiffs.
- [23] I asked the Defendants to provide an alternative to their position that no order for disgorgement could be made. In response, the Defendants submit that "one example of a more principled remedy would be an order in relation to the 'growth shares' [of 702] only, but in a manner consistent with the plaintiffs' original theory of equality". However, the Defendants remain firm in their primary position that nothing can be disgorged.
- [24] The Madatali Non-Parties join issue with the Defendants regarding the disgorgement of Mustaq's shares. They submit that Mustaq cannot be ordered to disgorge shares in 703 because the plaintiffs failed to establish a causative link between his breach of fiduciary duty and what they refer to as the "Madatali Trust Assets". They submit that "if the plaintiffs are entitled to disgorgement", it ought to be limited to what they call the "MAP trust assets".
- [25] They also raise the following objections to the orders sought:
- a) the plaintiffs lack standing to seek disgorgement of the Madatali Trust assets;
 - b) the Court cannot grant remedies affecting Madatali Trust beneficiaries based on a trial in which they were not named;

- c) ordering disgorgement would thwart the settlor's intentions;
 - d) ordering disgorgement would be incompatible with the plaintiffs' "equality-based theory of the case"; and
 - e) a prophylactic approach does not support ordering disgorgement of Madatali Trust assets.
- [26] In the alternative, the Madatali Non-Parties submit that if there is any disgorgement of Madatali Trust assets, the shares should be disgorged in favour of the Madatali Trust beneficiaries, not the plaintiffs.
- [27] The Other Non-Parties oppose all of the orders sought by the plaintiffs. They submit that "if the plaintiffs are to receive a remedy, it should be damages alone". That position was clarified during submissions and counsel agreed that I could not order damages. That is clear not only because I have already ruled that the plaintiffs are entitled to disgorgement, but, perhaps more importantly, the plaintiffs elected to seek disgorgement, not damages. The law is clear that the plaintiffs have the right to elect which remedy they seek. The Court has no role in this election: *First Majestic Silver Corp. v. Santos*, 2013 BCSC 717.
- [28] Alternatively, the Other Non-Parties submit that "if disgorgement is to occur, the terms should minimize the impact on the family business and innocent third parties".
- [29] Subject to a disagreement about one term, the parties agreed that I should stay any order I grant with respect to remedy because an appeal of the Trial Judgment is extant and it is intended that the appeal will include consideration of these reasons for judgment.

B. Legal Principles

- [30] I outline the guiding principles for disgorgement. As noted, the issue was argued at trial. Notwithstanding that, I did not understand any party or non-party to suggest that it would be inappropriate for me to comment on the guiding principles in light of the parties' and non-parties' submissions.
- [31] However, the starting point is the discussion of law relating to remedy from the Trial Judgment, which I incorporate, but will not repeat here (at paras. 335-338).
- [32] There is a large degree of discretion in ordering disgorgement: *Strother v. 3464920 Canada Ltd.*, 2007 SCC 24 at para. 74; *Wang v. Wang*, 2020 BCCA 15 at para. 59. As Justice Cromwell notes in *Kerr v. Baranow*, 2011 SCC 10, all equitable remedies are characterized by the necessity of designing them to be responsive to the particular facts of each case:
- [71] The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, at para. 61. At para. 24, he noted the broad approach to

equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: ". . . the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] L.M.C.L.Q. 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.

- [33] This flexibility is reflected by the breadth of the scope of judicial discretion. Remedies for breach of fiduciary duty are designed not only for fairness but also to uphold the public interest in maintaining the integrity of fiduciary relationships by upholding the fundamental tenets of good faith and loyalty: *Can. Aero v. O'Malley*, [1974] S.C.R. 592 at 610; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.).
- [34] This public interest aspect is served by the prophylactic purpose of disgorgement. Disgorgement of a gain obtained in a breach of a fiduciary duty, irrespective of the plaintiff's loss, "teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary": *Strother* at para. 77 [emphasis in original].
- [35] However, there are limits to prophylactic disgorgement. Care must be taken to ensure that "the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff": *Strother* at para. 89, quoting *Warman International Ltd. v. Dwyer* (1995), 128 A.L.R. 201 at 211-212 (Austl. H.C.). Justice La Forest expressed a similar principle in *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 444, noting that "equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour."
- [36] In *Strother*, Justice Binnie, writing for the majority, found that disgorging all of the profits that Mr. *Strother* obtained from his participation in the tax shelter investment "would be punitive, not prophylactic" (at para. 94). A "cut-off" was therefore necessary, for "[a]t some point, intervention of other events and actors dissipates the effect of the breach" (at para. 90).
- [37] As already noted, the plaintiffs have elected to seek disgorgement by way of the imposition of a constructive trust over shares owned by *Meb* and *Mustaq*. A constructive trust is a proprietary remedy that may extend to "property acquired at first instance from the breach of fiduciary duty and any property to which that property can be traced": *Ruwenzori Enterprises Ltd. v. Walji*, 2004 BCSC 741 at para. 219, *aff'd* 2006 BCCA 448.
- [38] In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, the Supreme Court of Canada identified four conditions that must be satisfied before a constructive trust can be imposed (at para. 45):

- (1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
 - (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
 - (3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;
 - (4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.
- [39] Soulos concerned a real estate agent who arranged for his wife to purchase a property that his client sought to purchase. The wife then transferred the property to her husband and herself as joint tenants. The agent was found to have breached his fiduciary duty to his client and a constructive trust was ordered over the property.
- [40] The key issue in this case concerns the second condition from Soulos, that is, causation. The Defendants and the non-parties submit that notwithstanding the Trial Judgment's conclusions on liability and the availability of disgorgement, there is an insufficient nexus between the individual wrongdoing of each Defendant and the assets the plaintiffs say that the Defendants should disgorge.
- [41] Some guidance as to what constitutes a sufficient nexus can be gleaned from other cases, although the remedy granted (or not) turns on the particular facts of those cases. Counsel referred to numerous cases, but I find that the following are the most helpful and relevant.
1. Atlantic Lottery Corp. Inc. v. Babstock
- [42] About a month after the release of the Trial Judgment, the Supreme Court of Canada issued its judgment in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19. Although the underlying action was different from the case at bar, the Court provides comments about disgorgement that are both helpful and applicable.
- [43] In *Babstock*, the plaintiffs sought to commence a class action against the Atlantic Lottery Corporation (ALC), which is a corporation created by the four Atlantic Provinces with the power to approve and operate video lottery terminal games. The plaintiffs sought a gain-based remedy based on three causes of action: waiver of tort, breach of contract, and unjust enrichment. The ALC applied to strike out the claim on the basis that it disclosed no reasonable cause of action, but it was unsuccessful at first instance and its appeal to the Newfoundland and Labrador Court of Appeal was dismissed. A majority of the Supreme Court of Canada allowed ALC's appeal and dismissed the action.

- [44] The central issue before the Court concerned whether waiver of tort could be an independent cause of action for disgorgement. Justice Brown, writing for the majority, found that it did not.
- [45] He distinguished disgorgement from restitution and described it as follows:
- [23] Further, restitution stands in contrast to another measure of relief, disgorgement, which refers to awards that are calculated exclusively by reference to the defendant's wrongful gain, irrespective of whether it corresponds to damage suffered by the plaintiff and, indeed, irrespective of whether the plaintiff suffered damage at all .
- [24] In sum, then, restitution for unjust enrichment and disgorgement for wrongdoing are two types of gain-based remedies. Each is distinct from the other: disgorgement requires only that the defendant gained a benefit (with no proof of deprivation to the plaintiff required), while restitution is awarded in response to the causative event of unjust enrichment (most recently discussed by this Court in *Moore*), where there is correspondence between the defendant's gain and the plaintiff's deprivation.
- [25] Here, the plaintiffs seek disgorgement, not restitution . Disgorgement, as a gain-based remedy, is precisely that: a remedy, awarded in certain circumstances upon the plaintiff satisfying all the constituent elements of one or more of various causes of action (specifically, breach of a duty in tort, contract, or equity).

[Citations omitted; emphasis in original.]

- [46] On this basis, Brown J. concluded that "disgorgement should be viewed as an alternative remedy for certain forms of wrongful conduct, not as an independent cause of action" (at para. 27). He further observed that "disgorgement is available for some forms of wrongdoing without proof of damage (for example breach of fiduciary duty)": at para. 32.
- [47] The Defendants rely on Justice Karakatsanis's comments in *Babstock*, specifically the underlined portion, in support of their argument that the plaintiffs have failed to establish the necessary causation to obtain the disgorgement sought:
- [155] As Ernest J. Weinrib has recognized in the compensatory context, causation connects the plaintiff and defendant "as the doer and sufferer of the same injustice" ("Causal Uncertainty" (2016), 36 *Oxford J. Leg. Stud.* 135, at p. 136). The same reasoning requires a causal link between a wrong and a gain. Thus, while the appropriateness of a disgorgement remedy in contract is ultimately a contextual question, before making the award the court must be satisfied that the breach of contract is causally connected to the gain to be disgorged -- a requirement also found in other contexts in which disgorgement is an available remedy. For example, in the context of a breach of fiduciary duty, disgorgement is a familiar remedy, but it is only available where the breach of the duty is linked to the gain (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 77). Another example is that of an inventor seeking an accounting of profits, who "is only entitled to that portion of the infringer's profit which is causally attributable to the invention" -- consistent

with a common sense view of causation from the breach (Monsanto Canada Inc. v. Schmeiser, 2004 SCC 34, [2004] 1 S.C.R. 902, at para. 101).

[Emphasis added.]

- [48] In my view, nothing about that comment represents a departure from the principles discussed by Brown J. Justice Brown focused his discussion on the need to establish loss in the context of negligence. He distinguished disgorgement on this basis, saying that in certain contexts, notably breach of fiduciary duty, it is not necessary to prove that the plaintiff lost anything as a result of the defendant's breach; all that must be shown is that the defendant gained something. This is not incompatible with Karakatsanis J.'s comment above regarding causation.
- [49] Justice Karakatsanis dissented on the breach of contract claim and remedies for that breach. Her comment was in the context of her discussion of certification, specifically the third common issue (i.e., whether monetary relief can be measured on an aggregate, class-wide basis, and if so, in what amount). She stated that causation was the primary issue in relation to certifying that common issue. Her comment in para. 155 immediately follows that discussion, and must be read in that context.
- [50] In any event, the plaintiffs do not deny that there has to be a link between the breach of fiduciary duty that was found and the disgorgement sought. They submit that the Defendants and non-parties' articulation of how that causation is proven is too stringent and contrary to the difference between compensatory based remedies and gain based remedies.
2. Kyle Estate v. Kyle
- [51] The Defendants also rely on Kyle Estate v. Kyle, 2017 BCCA 329 as an illustration of the necessity for there to be a causative link between the asset to subject to disgorgement and the breach.
- [52] As in this case, the Court of Appeal referred to the parties and other members of the family by their first name since they all had the same last name. Chris was named as executor and trustee of his father's estate. He had three brothers. He also held a joint account with his father. When their father died, Chris transferred funds (about \$400,000) from the joint account into his personal account and those funds were applied to pay down a mortgage on real property previously bought by a company he owned. His brothers asked about what they believed might be missing funds, and Chris replied dishonestly. Also, he received probate of his father's will and failed to disclose the existence of the joint account or its balance.

- [53] In time, his brother Robert sued Chris in his personal capacity for return of the \$400,000. At trial, the trial judge held that Chris had held the funds in the joint account in trust for himself and his three brothers. The funds were ordered to be disgorged, along with interest. In addition, the trial judge also ordered Chris to disgorge a portion of the increase in the value of the mortgaged property.
- [54] Justice Saunders, writing for the court, upheld the order for disgorgement of the funds in the joint account. However, she overturned the trial judge's order that a portion of the increase in value be disgorged on the basis that there was no nexus between the increase in the value and the payment on the mortgage:
- [39] Here there is no relationship between the payment on the mortgage and acquisition of the property. The amount ordered to be disgorged did not result from the breach of the fiduciary duty through payment of the mortgage. There is, in my respectful view, no basis to require payment of any portion of the appreciation of the real property in the circumstances of this case. [Emphasis in original.]
- [55] In making this conclusion, Saunders J.A. relied on the second condition in *Soulos* (at para. 38).

3. ICBC v. Lo

- [56] The plaintiffs relied on *ICBC v. Lo*, 2006 BCCA 584 in relation to the issue of causation and the scope of disgorgement. That case involved a bribery scheme concocted by Mr. Chiu, who operated a driving school, and Ms. Diaz, who was a driving examiner for ICBC. Ms. Diaz agreed to fraudulently record that Mr. Chiu's clients passed their knowledge and road tests in exchange for a fee of \$500 per transaction. Mr. Chiu earned between \$2,000 and \$8,000 from his clients.
- [57] The case was tried before a jury. Before instructing the jury on assessment of damages, the trial judge heard argument on the issue of the alternative remedies ICBC sought. As an alternative to compensatory damages, ICBC argued it was entitled to elect to recover all of the amounts paid to Mr. Chiu, the driving school, and Ms. Diaz. Its position was that the funds that Mr. Chiu received from his clients over and above what was paid to Ms. Diaz were impressed with a constructive trust and that it was allowed to trace those funds, which had found their way into the hands of Ms. Lo, Mr. Chiu's spouse. The trial judge dismissed the claim as against Ms. Lo, in part because Mr. Chiu, unlike Ms. Diaz, did not owe duties of utmost good faith to ICBC. The trial judge also rejected the claim of unjust enrichment on the basis that ICBC had suffered no deprivation corresponding to Mr. Chiu's enrichment.
- [58] ICBC appealed and the Court of Appeal set aside the dismissal, concluding that ICBC was entitled to advance its claim in equity as an alternative to compensatory damages, choosing the most advantageous one once the jury verdict was known.

- [59] In doing so it relied on *Attorney General for Hong Kong v. Reid*, [1994] 1 A.C. 324 (P.C.), *MacMillan Bloedel Ltd. v. Binstead*, [1983] B.C.J. No. 802 (S.C.) and *Soulos*, among other cases. The Court of Appeal held that the trial judge's rejection of ICBC's claim against Ms. Lo did not accord with the "broader approach to constructive trust in *Soulos* or the reasons of Dohm J. for granting the remedies he did against those who benefit from their knowing participation in the breach of trust in *Binstead*" (para. 59). Instead, the Court of Appeal found:
- [60] In this case, there is a clear causal connection between the wrongdoing to ICBC, the public licensing agency and public liability insurer, and the benefits gained in the bribery scheme by Mr. Chiu and Ms. Diaz. There is no issue that equity forbids Ms. Diaz from profiting from her breach of public duty as an ICBC employee responsible for issuing DLs. The need to maintain a high standard of conduct in relation to the duties of such employees is obvious.
- [61] Just as it would be inequitable to permit Ms. Diaz to retain the benefits she derived from her breach of trust, I am of the view that it would be equally inequitable for Mr. Chiu, who knowingly took part in the breach, to be able to retain the benefits he derived from his participation in the fraudulent scheme. If deterrence is one of the purposes of the rule of equity that forbids profiting from a breach of trust, then those who knowingly assist in the bribery must also be deterred by removing any profit they derive as a result of their knowing participation. It therefore seems to me that, in principle, Mr. Chiu's knowing participation in Ms. Diaz's breach of trust provides the foundation for the constructive trust remedies ICBC seeks in relation to all of the funds Mr. Chiu and Dragon received in furtherance of the bribery scheme.
- [60] Reid is also notable for the scope of the remedy granted. It involved a Crown prosecutor who, in breach of his fiduciary duty to the Crown, accepted bribes to obstruct the prosecution of certain criminals. In addition to a criminal sanction, he was ordered to pay approximately NZ\$2.5 million, that being the value of assets controlled by Mr. Reid "which could only have been derived from the bribes" (ICBC at para. 42). This included three properties, two of which had been conveyed into his spouse's name and one conveyed to his solicitor. The Attorney General placed caveats on the property, but their renewal was refused by the judge on the basis that the Crown had no equitable interest in the properties. That order was upheld on appeal, but overturned by the Privy Council. Lord Templeton, for the court, stated that the following principles were applicable: "that a fiduciary must not be allowed to benefit from his own breach of duty, that the fiduciary should account for the bribe as soon as he receives it and that equity regards as done that which ought to be done" (Reid at 336).

4. Conclusion

- [61] There is no dispute amongst the parties and non-parties that there must be a sufficient nexus between the wrongdoing and the assets sought to be disgorged. However, they disagree about what constitutes a sufficient nexus.

[62] It is helpful to examine how the causative link is described in some of the cases:

- a) Justice Brown in *Babstock* at para. 24: "disgorgement requires only that the defendant gained a benefit (with no proof of derivation to the plaintiff required)". Justice Karakatsanis at para. 155: "in the context of breach of fiduciary duty, disgorgement is a familiar remedy, but it is only available where the breach of the duty is linked to the gain".
- b) *Kyle Estate* at para. 39: "[t]he amount ordered to be disgorged did not result from the breach of the fiduciary duty through payment of the mortgage." So while the funds Chris wrongfully took from the joint account could be disgorged, together with the interest earned, the increase in equity to Chris's property (because he used those same funds to pay down the mortgage) could not be disgorged.
- c) *ICBC* at para. 60: "there is a clear causal connection between the wrongdoing to ICBC and the benefits gained in the bribery scheme by Mr. Chiu and Ms. Diaz". The Court of Appeal held that it was open for ICBC to pursue Ms. Lo directly for the funds she received from her spouse (Mr. Chiu), which he earned from the bribery scheme.
- d) *Reid*: the Privy Council found that the Attorney General could seek disgorgement of funds earned from bribery that Mr. Reid had transferred to his spouse and his solicitor for the purchase of real property.
- e) *Soulos*: the agent's acquisition of the property was a direct result of the breach of his duty to his client, so a constructive trust was appropriate.
- f) *Strother*: "[w]here, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss)" (at para. 77).

C. Analysis

- [63] Justice Binnie's observation in *R. v. Neil*, 2002 SCC 70 at para. 36 is apposite: "[i]t is one thing to demonstrate a breach of loyalty. It is quite another to arrive at an appropriate remedy."
- [64] The plaintiffs argue that given the Trial Judgment's findings and their election of disgorgement, the Court is duty-bound to grant the relief they seek. The plaintiffs submit that when disgorgement is ordered to serve a prophylactic purpose, "the relevant causation is a common sense causation".
- [65] The Defendants and non-parties submit that the relief sought by the plaintiffs is precluded by a number of legal barriers. Their position is not that the Court should not exercise its discretion to grant the orders, but that it cannot do so, notwithstanding the findings in the Trial Judgment on liability and availability of disgorgement.

- [66] The Defendants argue that the plaintiffs' have failed to establish the two necessary pre-requisites to ordering disgorgement: (i) that the assets sought to be disgorged were "gained" by Meb and Mustaq as a consequence of their wrongful acts (the "gain requirement"); and (ii) that there is a causative link between the wrongful acts and the assets (the "causation requirement").
- [67] I do not find this framework helpful. These two "requirements" appear to refer to the same thing. Separating them into two distinct questions unnecessarily complicates the analysis.
- [68] While the Madatali Non-Parties appear to treat causation as one question, their approach to causation seems to rely on the logic and analysis applicable to damages, which would ask "but for" the breach of fiduciary duty, what would Mustaq have gained? Their position is encapsulated in the following extract from their written reply submissions:

This Court did not, however, find that Mustaq - or anyone else - received any Madatali Trust assets because of that breach. Put differently, this Court's finding that the defendants acted wrongfully and collectively do not answer the causation question: what would Mustaq have received if the defendants had acted properly?

- [69] With respect, this submission misses the point. Disgorgement is not a loss-based remedy. It is not measured by what the defalcating fiduciary would have received were it not for the breach. That the wrongdoer may have received the exact same amount were it not for the breach does not automatically disentitle the plaintiffs to disgorging that asset. The prophylactic purpose of disgorgement expressly acknowledges that it may result in a windfall for the plaintiff. This is acceptable because of the overarching purpose of teaching "faithless fiduciaries that conflicts of interest do not pay." All that matters is what Mustaq gained: "the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss)" (Strother at para. 77). Thus, in this case, I conclude that the requisite "gain" refers to what the defalcating fiduciary received or obtained whether or not he or she would have received it without the breach.

1. Nexus Between Meb's Knowing Assistance and His Shares in 702

- [70] The Defendants submit that disgorgement is unavailable as a remedy against Meb because he was a beneficiary of the former MAP Trust and owed no duties to the plaintiffs. They submit that there is a conceptual difference between breach of fiduciary duty and knowing assistance that "continues at the remedy stage". They argue that remedies for knowing assistance are loss based, and therefore the plaintiff must establish that they suffered an injury "consequent to the trustee's [or other fiduciary's] misconduct": *Alers-Hankey v. Solomon*, 2002 BCCA 227 at para. 20, citing P.M. Perell, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty" (1998), 21 Adv. Q. 94 at 113. They submit that the Supreme Court of Canada has confirmed this view in *Christine DeJong Medicine Professional Corp. v. DBDC Spadina Ltd.*, 2019 SCC 30 at para. 1.

- [71] I do not agree with the proposition that remedies for knowing assistance must be loss based, nor do I think the case law cited by the Defendants stands for that proposition.
- [72] In DBDC Spadina, the Supreme Court of Canada adopted the dissenting reasons of Justice van Rensburg of the Ontario Court of Appeal (indexed at 2018 ONCA 60). Justice Van Rensburg disagreed with the majority that liability for knowing assistance had not been made out at trial. In particular, she held that the "participation" element of the fault based claim of knowing assistance was not supported by the record (at para. 160). Her judgment does not purport to say that disgorgement is unavailable for knowing assistance. The Supreme Court of Canada's adoption of her reasons does not endorse the proposition asserted by the Defendants that the remedy for knowing assistance must be loss-based.
- [73] I also do not agree that Alers-Hankey or the article by P.M. Perell quoted therein supports the proposition put forward by the Defendants. The Defendants rely generally on the Perell article and specifically on a passage discussing the difference between knowing assistance and knowing receipt, which is quoted at para. 20 of Alers-Hankey. However, the case itself is unhelpful. I was not directed to any passage in that case that states that disgorgement is unavailable for knowing assistance. The plaintiffs in that case pursued damages, which, as a compensatory remedy, is loss-based.
- [74] The Perell article is also unhelpful because it merely explains the conceptual difference between knowing assistance and knowing receipt, which was not in dispute in this case.
- [75] I return to basic principles as set out in Babstock. As applied both to the findings in this case and more generally to liability for knowing assistance, I agree with the plaintiffs that there is no juridical reason why disgorgement cannot be ordered for someone found liable for knowingly assisting a breach of fiduciary duty.
- [76] The plaintiffs submit that as an accessory to Mustaq's breach of fiduciary duty, Meb is jointly and severally liable for Mustaq's gains, citing Enbridge Gas Distribution Inc. v. Marinaccio, 2012 ONCA 650 at paras. 22-24. They also submit that Meb is liable to disgorge any benefits that he received from his intentional participation in the wrongful conduct: ICBC at paras. 46, 59.
- [77] Meb was found liable for knowingly assisting Mustaq and Haider in their breach of fiduciary duties. I found that his conduct was guided by his self-interest and therefore not in good faith (TJ, para. 346(c)). The discussion leading to that conclusion starts at para. 317 of the Trial Judgment, and below is an extract from the conclusions regarding the claim against Meb:
- [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.
- [78] I agree with the plaintiffs that the Trial Judgment's findings establish a sufficient nexus between Meb's wrongdoing and his ownership of shares in 702, which means they can be subject to disgorgement.

2. Nexus Between Mustaq's Breach and His Shares in 703

- [79] The following paragraph from the Defendants' written submissions captures their position with respect to whether I can order Mustaq to disgorge any shares in 703:

The plaintiffs have not - and cannot - establish that Mustaq owed a fiduciary duty to them in respect of 703 assets, or that Mustaq owed a fiduciary duty to the Madatali Trust beneficiaries in any sense. Mustaq owed the Plaintiffs a fiduciary duty as [a] MAP Trustee in respect of the windup and distribution of the MAP Trust - that is it. The Court found that he breached that duty, but did not find that in doing so he gained corresponding benefits. No findings of fact or law as to conspiracy were made.

- [80] The Defendants' and Madatali Non-Parties' position rests on the following reasoning:

- a) Mustaq owed a fiduciary duty to the plaintiffs because he was a trustee of the MAP Trust.
- b) As a beneficiary and not a trustee of the Madatali trust, Mustaq did not owe any fiduciary duty to the Madatali Trust beneficiaries.
- c) Mustaq did not "receive any interest - legal or beneficial - in 702's assets".
- d) Therefore, he did not receive any benefit from the windup and distribution of the MAP Trust and reorganization of 702.

- [81] The plaintiffs argue that there are three flaws in this approach.

- [82] First, neither the MAP Trust nor the Madatali Trust exist anymore, as they were wound up in 2014. Like all of the four Pirani family trusts, each trust had one asset: a Numbered Company. Those companies still exist, but they were significantly re-structured when the trusts were wound up.
- [83] Despite this, the parties opposing the orders sought continue to refer to the MAP Trust assets and the Madatali Trust assets in relation to what can, and more importantly, what cannot be ordered to be disgorged.
- [84] The plaintiffs' written submissions respond, in part, as follows:
22. The distribution of the assets on August 31, 2014 of the MAP Trust and the Madatali Trust was in the form of new shares issued by the numbered companies in the corporate restructuring. The old 702 and 703 shares, which had been owned by the old trusts, were cancelled and new shares were issued.
 23. These new shares became the personal assets of the recipients. Specifically, the new common shares in 702 and 703 became the assets of the new "Meb Pirani Family (2014)" and new "Mustaq Pirani Family (2014) Trust", respectively.
 25. the plaintiffs do not seek disgorgement of any MAP Trust assets or any Madatali Trust assets - they seek disgorgement of the personal assets of Meb and Mustaq, which they received as a result of their unlawful conduct
- [85] The plaintiffs' submissions on this point are sound: the trusts no longer exist. Mustaq received shares in 703 upon the termination of the Madatali Trust. He holds those shares in his personal capacity (although he transferred the growth shares into a family trust in favour of his children). There may be other reasons why the distinction amongst the trusts before 2014 is relevant to the remedies granted, but I do not agree that the pre-2014 status of the assets precludes the relief sought by the plaintiffs.
- [86] Second, with regard to the lack of findings in the Trial Judgment about conspiracy, the plaintiffs point out that they focused their case on the claim of breach of fiduciary duty. The fact that other claims pled were not pursued does not prohibit the orders sought if they otherwise meet the applicable legal tests.
- [87] Third, the plaintiffs submit that the Defendants' and the Madatali Non-Parties' approach fails to account for findings in the Trial Judgment regarding the collective nature of the Defendants' actions. The Defendants and non-parties accepted that there are findings in the Trial Judgment that the Defendants "acted collectively", but they submit that those are insufficient to establish the necessary causative link.
- [88] The plaintiffs submit that the "building blocks of the judgment" as outlined below, sufficiently establish a causative link between Mustaq's conduct and his shares in 703. I quote from those submissions (excluding reproductions from the Trial Judgment):

42. The first generation created four identical trusts, one for each branch of the family. Each of the Trusts became subject to a 21 year tax rule which effectively required distribution of the trust assets.
43. A corporate restructuring was not the only way to deal with the 21 year rule. The defendants could have caused the underlying assets to be sold and distributed the proceeds to the beneficiaries of the trusts.
44. The defendants were in control of the process from the beginning, receiving and ignoring advice from BLG on engaging the family in the decision making process. They had overlapping roles as trustees of trusts, beneficiaries of other trusts and directors of companies. Their overlapping role put them in a conflict of interest.

[paras. 163-164, TJ]

45. The reasons for judgment reflect the distinction between the express powers of each of the trusts and the duty of loyalty and the duty to avoid conflicts of interest.

[paras. 148-157, TJ]

46. Mustaq's breach of duty to the plaintiffs was to develop the plan to allocate growth shares and to undervalue the assets in order to benefit both Meb and himself. That is, Mustaq well knew that by harming the recipients of the D shares with an improperly low valuation, he and Meb would benefit as a result of their assets being more valuable. The reasons for judgment reflect this.

[paras. 219, 281-285]

47. In sum, the defendants obtained the shares and control of the new 702 and the new 703 as a direct result of their dishonest failure to carry out their fiduciary duties properly.

[89] In response, the Defendants and Madatali Non-Parties submit that nothing in the Trial Judgment can overcome what they say are the strict divisions between both:

- a) the duties owed to the plaintiffs and the duties owed to the beneficiaries of the other family trusts; and
- b) the trust assets in which the plaintiffs had an interest and all the other trust assets.

[90] The plaintiffs argue that this framework inappropriately views the process of winding up the MAP Trust and restructuring 702 as if those decisions occurred in a silo, isolated from the decisions regarding the winding up of the other former trusts and the restructuring of the Numbered Companies. Among others, the following paragraphs from the Trial Judgment support the plaintiffs' position:

- [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.
- [164] 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.
- [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.
- [91] The idea that the Court cannot order Mustaq to disgorge shares that he owns in 703 fails to recognize the difference in the structure of the Family Business after 2014. It also glosses over the entire process of the corporate restructuring, which resulted in, among other things, a differentiation of shares within each of the Numbered Companies.

[92] The decision to give Meb all of the control and future profits of 702 without informing or consulting the plaintiffs was at the heart of the plaintiffs' complaint. However, that decision was not made in isolation. It was made in concert with the decision to give Mustaq all of the control and future profits of 703. In my view, that is why Mustaq's receipt of all growth and voting shares cannot be separated from what Meb gained.

[93] In light of the foregoing, I do not agree that the plaintiffs have failed to establish the requisite nexus between Mustaq's breach of fiduciary duty and his ownership of shares in 703. Accordingly, they too may be subject to disgorgement.

3. Non-Parties' Concerns

[94] Finding that disgorgement of Meb's and Mustaq's shares in 702 and 703, respectively, can be ordered does not end the inquiry. I must also decide whether disgorgement of the shares by way of the imposition of a constructive trust should be ordered.

[95] The Defendants and Non-parties raised a number of issues that they say weighs against the Court exercising its discretion to impose a constructive trust over any shares owned by Meb in 702 and Mustaq in 703. I do not find their position persuasive and address each in turn.

a) The 2014 Shareholders Agreement

[96] The Other Non-Parties submit that among other things, the order sought by the plaintiffs against Mustaq cannot be granted because it "would make nonsense" of the 2014 shareholders agreement. They say ordering either Meb or Mustaq to disgorge would "immediately put both of them in breach of their obligations" under that agreement. They argue that the Court should avoid making an order that puts a party in breach of their agreement: *Fricke v. Mitchell* (1985), 67 B.C.L.R. 227 (S.C.); *Varelas v. Varelas*, 2015 BCSC 2245 at para. 20; *TNC Mall Properties Holdings Inc. v. The City of Moose Jaw*, 2014 SKQB 30 at paras. 90, 95.

[97] While this proposition seems non-controversial, none of the cases cited considered the issue in the context of ordering disgorgement for a proven breach of fiduciary duty or knowing assistance. All of the cases dealt with interlocutory orders (for relief from garnishment and injunctive relief). Moreover, at best, those courts made statements that it was uncertain whether such an order (i.e. one that may cause a party to be in breach of an agreement) should be made.

[98] The 2014 shareholders' agreement was part of the winding up of the trusts and corporate reorganization. It was entered as an exhibit at trial and formed part of the body of evidence upon which the Trial Judgement is based. To my recollection, the Defendants raised its terms during their final submissions at trial. In light of that and the absence of any authority on point to the contrary, I do not agree that its terms preclude granting the relief sought by the plaintiffs.

b) Impact on the Family Business

- [99] Most of the Other Non-Parties filed an affidavit, one of whom testified at trial (Zahir). Zahir is a director of PIL and PEL. Nadeem also filed an affidavit, in which he adopts the contents of Zahir's affidavit.
- [100] Zahir's affidavit does touch on subjects that he was questioned about at trial, specifically the 1996 shareholder's agreement. It was not clear to me that any expansion or inconsistency between his affidavit and his trial testimony (if there was any) was material.
- [101] Zahir also commented on his concern that disgorgement would have negative impacts, which can be categorized as follows:
- a) the possible removal or departure of Mustaq and Meb from the Family Business would result in "key existing business and financial partnerships [being] lost", "relationships with lending institutions [being put] in jeopardy", and the possible collapse of the business or the liquidation of its assets;
 - b) the plaintiffs' lack of business experience and leadership skills would harm the business; and,
 - c) the plaintiffs' ownership would force "warring factions within a fractured family being forced to run a business together".
- [102] The plaintiffs urge caution in assessing this evidence. They say this evidence must be discounted because the non-parties want the business to continue without any involvement or interferences by the plaintiffs, as if there had been no finding of wrongdoing against the Defendants. They submit that the tenor of both affidavits was to disregard the Trial Judgment's conclusions regarding the Defendants' conduct.
- [103] I agree that the non-parties' evidence must be treated with caution, but for a slightly different reason. All the affidavit evidence was rooted in the view that disgorgement in favour of the plaintiffs amounts to a betrayal of the family legacy of the First Generation. The Defendants and non-parties treat the shares sought to be disgorged as if they are interchangeable with the "Pirani family legacy".
- [104] It is true that when the trusts were set up, the bulk of the main corporate assets in the Pirani family's group of companies were owned entirely by the four trusts set up by the First Generation. Thus, a connection between the Numbered Companies and the trusts was legally established. It is reasonable to say the Numbered Companies were endowed with whatever legacy existed in the former trusts--but only until 2014.
- [105] The Pirani family legacy was effectively ended by the termination of the trusts and the reorganization of the corporate structures comprising the Family Business. This was clearly spelled out to the Defendants (and Zahir, see TJ at para. 177) early on: the trustees faced what their legal advisor described as a "watershed moment in the family's history" (at para. 181, see also paras. 194-195, 290-291).

- [106] With regard to the first two concerns identified by Zahir, I accept that disgorgement in favour of the plaintiffs may have a significant impact on the Family Business. However, I am not satisfied that the evidence adduced allows me to conclude that this impact prevents or weighs heavily against granting the remedies sought.
- [107] The plaintiffs deny that either the potential departure of Meb and Mustaq from managing the Family Business or the plaintiffs' lack of business expertise would have a meaningful impact on the Family Business. They point out that Zahir deposed that Mustaq not only expanded the business, he "professionalized the business across its operations by implementing a more formalized corporate structure and by hiring a team of well-trained managers and other personnel to help run the business" and that the "core of this well-functioning team remains to this day". That being the case, the plaintiffs submit that one cannot assume the business will be unable to continue or significantly hampered if Mustaq and Meb no longer have their voting shares, which comprise 50% control of PIL and PEL.
- [108] I disagree. The evidence that Mustaq was largely responsible for the expansion of the business into the United States was uncontested, as was the view that he was the driving force behind the Family Business's considerable success for many years (TJ at para. 41). I accept his departure, if it were to occur, would likely impact the Family Business. Nevertheless, it is unknown how long-lasting or serious that impact would be. For that reason, I am not persuaded that his departure is reason enough not to grant disgorgement as sought.
- [109] As pointed out by the plaintiffs, there was no documentary or other evidence provided to substantiate the concerns about how third parties (business partners or financial institutions) would react to disgorgement being implemented. Similarly, they argue the Court cannot assume the Family Business will collapse, or that its assets necessarily have to be liquidated. They point out that other possibilities exist: the parties might agree to hire independent management, to buy one another out, or to sell the business and distribute the assets.
- [110] Also, there was no independent evidence as to the likelihood or degree of any of the identified potential negative impacts. The non-parties' evidence is comprised of the opinions, beliefs, and feelings of Pirani family members who are not involved in the litigation and who were displeased with the Trial Judgment. While the Court is not indifferent to the opinions of the non-parties, without more concrete evidence, their views do not constitute a sufficient basis to refuse disgorgement in favour of the plaintiffs, who succeeded at trial.
- [111] With regard to the last concern, I accept that splitting control between two "warring factions" (the plaintiffs versus the Defendants plus Zahir and Nadeem) should be taken into account, but I do not find this factor prevents granting any voting control to the plaintiffs.

c) Disgorgement to the Non-Parties

- [112] Each of the Madatali Non-Parties filed an affidavit. They each expressed confusion and distress at the Trial Judgment's conclusion that the plaintiffs are entitled to disgorgement.
- [113] In addition, Bashir (Mustaq's brother) deposed that he has had a non-executive role in the Family Business for almost 50 years and is the controller of a family-owned hotel in North Vancouver. Najma (Mustaq's sister) confirmed that she has never been involved in the Family Business. Both expressed a view as to what they felt would be a fair distribution of the former Madatali Trust's assets amongst that trust's former beneficiaries.
- [114] All of the affiants deposed that they felt strongly that if anyone should receive disgorgement of assets formerly held by the Madatali Trust it should not be the plaintiffs. On that basis, they submit that if the Court agrees that Mustaq can be ordered to disgorge shares in 703, it ought to be for their benefit rather than the plaintiffs'.
- [115] I was not directed to any legal authority that would support granting such an unorthodox order. The Madatali Trust was wound up. Its beneficiaries were Mustaq and his siblings (Bashir and Najma) and their children. Presumably, they raised no objection to the process or result of the winding up of that trust. Their entitlements, whatever they were, under the former trust does not establish a legal (or other) justification to allow them to interfere with the plaintiffs' right to receive a remedy for successfully pursuing this action.
- [116] The Madatali Non-Parties acknowledge that the policy reasons supporting the prophylactic approach can overcome any discomfort with disgorgement resulting in a windfall. However, they submit that should not happen here because "it would deny innocent beneficiaries of the Madatali Trust the fruits of the trust intended to provide them with a stable financial future by transferring those fruits to a strangers of the trust". The beneficiaries of the former trust submit that their innocence in the Defendants' breach and non-participation in the trial justifies ordering disgorgement of 703 shares to them.
- [117] This position also relies on the notion that disgorgement betrays the legacy established by the First Generation. As discussed earlier (at paras. 103-105), I am not persuaded that this disentitles the plaintiffs to the remedies they seek.
- [118] To an extent, the Madatali Non-Parties positioned themselves as being akin to bona fide purchaser for value without notice. However, they are not in the equivalent position. As emphasized by the Defendants throughout the trial, the trusts were discretionary and it cannot be said that any of the Madatali Non-Parties or those Other Non-parties who were beneficiaries of the former MAP Trust, had any specific entitlement to anything upon their winding up.

4. The Scope of Disgorgement

- [119] The parties have taken an "all-or-nothing" approach to disgorgement. On the one side, the plaintiffs submit that Meb and Mustaq ought to disgorge all of the shares they received as a result of the corporate reorganization and winding up of trusts by way of the imposition of a constructive trust over those shares. This includes shares received by them but placed into family trusts, for which they are trustees together with others (for Meb's trust, his wife; and for Mustaq's trust, his daughter and cousin).
- [120] The result would be to transfer complete control of 702 and 703 to the plaintiffs, effectively giving them 50% control over the Family Business. Moreover, they would become the beneficial owner of all of 702's and 703's share of the Family Business's future growth, again representing 50% of the Family Business's future growth. They would also become the beneficial owner of frozen value shares in 702 and 703, in addition to the frozen value shares that they already own.
- [121] In other words, granting the orders would mean Meb and Mustaq received absolutely nothing from the former trusts set up by their fathers in 1993.
- [122] The Defendants' and non-parties' position occupies the opposite extreme: the plaintiffs should receive nothing. This is despite plaintiff's success at trial at proving both: (i) that Mustaq was in a prima facie conflict of interest and failed to prove on a balance of probabilities that he carried out his fiduciary duties in good faith, and (ii) that Meb knowingly assisted Mustaq in breaching his fiduciary duties. Their primary position is not only that the Court should not exercise its discretion to order the remedies sought, but that it cannot do so.
- [123] A fundamental precept of justice is that a successful litigant is entitled to a remedy. It is therefore difficult to understand how the Defendants' position can prevail because it "would amount to allowing wrongdoers to profit from their wrongful conduct, a result a court of equity [cannot] countenance" (*Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448 at para. 44). That imperative is heightened in breach of fiduciary cases where disgorgement, as a prophylactic remedy, is specifically designed to deter others from engaging in the same wrongful conduct: *Strother*, paras. 75 and 77; *ICBC* at para. 61.
- [124] I acknowledge that the Defendants, when pressed, did suggest an alternative of equally dividing the shares in 702 amongst the former MAP Trust beneficiaries. However, that was explicitly based on a "theory of equality", which was an aspect of the plaintiffs' claim of breach of the MAP Trust's terms (as opposed to breach of fiduciary duty). That claim was not pursued at trial.
- [125] In any event, I am not persuaded that it is an appropriate remedy on these facts. Among other things, it would mean that Mustaq, who breached his fiduciary duty, would suffer no consequence whatsoever.
- [126] At the same time, however, I am not persuaded that the plaintiffs' position is appropriate. In my view, it crosses the line from prophylaxis to punishment: *Strother* at para. 94.

- [127] Mustaq was credited with effectively and successfully running large portions of the Family Business for years. There was no evidence that he engaged in any other wrongdoing or impropriety as a trustee or fiduciary until the process that led to the trusts' termination. Depriving him of all shares in 703 would have the effect of stretching the finding of breach of fiduciary duty all the way back to 1993 when the trusts were established.
- [128] Mustaq's breach of fiduciary duty is firmly rooted in the process undertaken to address the 21 Year Rule. That process commenced approximately two years before the trusts were wound up in August 2014. Given that Meb's liability is contingent upon Mustaq's, the remedy against him similarly cannot reach that far back in time.
- [129] Accordingly, I am not persuaded that either option proposed by the parties would be just, fair, or consistent with the legal principles regarding remedies for breach of fiduciary duties. As Strother demonstrates, disgorgement need not be an "all or nothing" proposition. It is, as noted, a discretionary remedy. In this case, the answer lies somewhere in the middle.
- [130] It is important to fashion a remedy that achieves the prophylactic purpose of disgorgement, while ensuring that there is a causative link between what is disgorged and the precise nature of the wrongdoing; Strother at para. 77. Former cases offer some guidance, but the factual matrix here differs significantly from all of the authorities provided to me.
- [131] Complicating the analysis is the fact that the breach did not create or enhance the value of the underlying assets. Often plaintiffs seek that profits earned as a result of the breach be disgorged. For example, Strother and Soulos both involved the defendant taking advantage of an opportunity at the expense of the plaintiff and ICBC and Reid involved funds whose genesis was the wrongdoing itself. But neither the profit arising from those opportunities, nor the funds generated by the bribes would have existed but for the breach. That is not the situation before me. There is no suggestion in this case that any defendants breached their duties in how they operated the Family Business; the breach was only in how the trust assets were distributed and restructured.
- [132] The Trial Judgment's conclusion about breach of fiduciary duty was based on a holistic view of all of the actions taken in addressing the 21 Year Rule (see paras. 174-278). Having found that the Defendants were in an inherent conflict of interest, their conduct was analyzed to determine if they fulfilled their duties to act in good faith in the best interests of all the beneficiaries (at paras. 158-172). While all of their actions were analyzed in terms of deciding whether the Defendants acted in the best interests of the plaintiffs, not all actions are equally significant in terms of designing the remedy. It is critical to identify precisely how they breached their duties, in order to ensure that there is a sufficient relationship to each class of shares that the plaintiffs seek to disgorge.

- [133] Despite the complexity of the undertaking, the Defendants received clear and simple advice about how to conduct themselves in the best interests of the beneficiaries, which they did not follow (at paras. 177-184). This allowed them to avoid any interference or challenge when they decided to significantly restructure the MAP Trust's only asset (702) for the purpose of conferring only on Meb the ability to earn income for himself and his children well into the future. To achieve this they had to differentiate the types of shares in 702.
- [134] While the collective nature of the decisions and actions of the Defendants were material to the conclusions on liability, I do not regard them to necessarily have the same materiality when deciding what remedy is appropriate. Similarly, the creation of different classes of shares was integral to the conclusions on liability, but that does not necessarily mandate that all shares must be treated equally in terms of remedy.
- [135] In my view, the remedy should be informed by the differentiation of shares in light of the wrongdoing that was perpetrated. It is therefore appropriate to analyze each class of shares separately.
- a) Future Growth Shares
- [136] As a preliminary matter, the Defendants and Non-Parties argued that disgorgement could not be ordered against those shares that Meb and Mustaq transferred into family trust they created for their own families at the time of the reorganization (the class C shares representing the future growth). I do not agree. My recollection is that upon termination, the shares were distributed to Meb and Mustaq personally and they then chose to put them into trusts. There was no evidence that the beneficiaries or anyone else gave value for the shares. A subsequent gratuitous transfer of funds obtained in breach of a fiduciary duty cannot shield those funds from recovery: *Ruwenzori* at paras. 214-215, 217; *Reid* at 330; *ICBC*.
- [137] The Trial Judgment's conclusions about Mustaq's gross undervaluation of all trust properties and Meb's knowledge and failure to correct that are key. The important point was that the gross undervaluation was combined with their knowledge that only Meb (for 702) and Mustaq (for 703) would receive shares to allow them to earn income from the Family Business into the future. The following passages are relevant:
- [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.
- [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.

- [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.
- [298] I emphasize that the problem was the conflict between their self-interest and their fiduciary duties.
- [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.
- [138] The above paragraphs demonstrate a strong link between Mustaq's and Meb's wrongdoing and their exclusive receipt of the growth shares in their respective numbered companies. By deliberately undervaluing the Family Business, they artificially inflated the value of the growth shares to their own benefit and to the detriment of the plaintiffs. I am therefore satisfied that Meb and Mustaq must disgorge all of the growth shares they received in 702 and 703, respectively.

b) Frozen Value Shares

- [139] This same link does not exist for the frozen value shares owned by Meb and Mustaq. The deliberate undervaluation of the Family Business affected the value of Meb's and Mustaq's frozen value shares just as much as it did the plaintiffs'. While the frozen value shares were distributed unevenly, this alone is not enough to justify disgorging all or even some of the Defendants' frozen value shares.
- [140] As discussed, the plaintiffs did not pursue a "theory of equality" at trial and so the trustees' decision to distribute the shares unevenly is not, on its own, the cause of their breach. The trustees did have unfettered discretion under the Accelerated Distribution Clause to distribute the trust assets at they saw fit. I emphasize, as I did in the Trial Judgment (at paras. 150-157), that this does not undermine the finding of Mustaq's breach of fiduciary duty and Meb's knowing assistance. However, unevenly distributing the shares was not the locus of the breach; restructuring the business in a manner that they knew would benefit themselves while disregarding the best interests of the plaintiffs was.
- [141] Moreover, I have already found that it would be inappropriate to disgorge all of Meb's and Mustaq's shares. The frozen value shares is where I draw the line. Those shares, while undervalued, represent the value of the company accrued prior to 2014. As noted above, disgorging these shares would have the effect of stretching the breach all the way back to 1993 when the trusts were first formed and would strip them of any equity in the Family Business. I conclude that this would be punitive, not prophylactic.

c) Voting Shares

- [142] The voting shares were a key component of Mustaq and Meb's plan to consolidate all of the control and future growth of their respective numbered company in themselves. Indeed, this was the stated purpose of the corporate reorganization (see TJ at paras. 45, 184, 189, 283). The decision to carry this plan out was made in breach of Mustaq's duty of loyalty to the plaintiffs (at paras. 194-195). Meb was fully aware of this and took steps to ensure it happened:
- [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 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.
- [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.
- [143] Control of 702 was both the means and the end of the Defendants' plan (at least vis-à-vis 702). Meb's voting shares therefore formed part of his gain and so must be disgorged.

- [144] However, I am not satisfied that Meb ought to disgorge all of his voting shares. Doing so would simply reverse the roles of Meb and the plaintiffs, giving the plaintiffs the power to exercise complete control of 702. While I make no finding that the plaintiffs intend or are inclined to exercise that control improperly, in exercising my discretion I find it would be inappropriate to ignore the scope and nature of the deep divisions within this family. In that light, the remedy should remove the possibility of one party exerting control to the detriment of the other.
- [145] Accordingly, I order Meb to disgorge 50% of his voting shares in 702. This evenly splits the control in 702 between Meb and the plaintiffs. Of course, this will require the parties to come to an agreement if they are to achieve anything. This may well provoke further conflict, but it prevents a situation where one party is at the mercy of the other.
- [146] I decline to make a similar order regarding Mustaq's voting shares in 703. As with the growth shares, complete control of 703 was part of Mustaq's gain from his involvement in the corporate reorganization and winding up of the trusts. However, I am not persuaded that a constructive trust over any of those shares is appropriate under the fourth Soulos factor, namely that it would be unjust in the circumstances.
- [147] It is clear from their evidence and submissions that the Madatali Non-Parties are aligned with the Defendants in the family conflict. Giving the plaintiffs any control over 703 could prejudice them because the redemption of their frozen value shares is contingent on approval from the directors of 703. Again, I make no finding that the plaintiffs intend or are inclined to exercise control improperly, but that does not make the concern irrelevant.
- [148] I also find it appropriate to take account of the fact that the plaintiffs would never have received any ability to exert control over 703 absent the breach. It is also appropriate to make note of the other concerns raised by the other non-parties related to the ongoing operation of the Family Business (see paras. 106-108). As I have already discussed these factors do not preclude disgorgement of shares in 703, but they are relevant to how I exercise my discretion.
- [149] I find one further factor relevant to disgorgement of Mustaq's voting shares. Giving the plaintiffs all the voting shares in 703 has the potential to impact the Other Non-Parties because it could give the plaintiffs an outsized influence on the affairs of the Family Business, depending on how much control of 703 that they have and how their shared control of 702 is exercised. As with the Madatali Non-Parties, it is evident that the Other Non-Parties are not on favourable terms with the plaintiffs.
- [150] For those reasons, I am not persuaded that it is appropriate or just that Mustaq disgorge any of his voting shares in 703.
- [151] For the sake of clarity, I note that the concerns relating to the voting shares in 703 do not apply to the growth shares in 703. While the growth shares contain some of the value that should have been attributed to the frozen value shares, they do not affect the Madatali Non-

Parties' interests in the same way (or those of the Other Non-Parties). As noted, if the Madatali Non-Parties had wished to remedy that, they could have brought their own claim against the Defendants. Disgorging the voting shares, on the other hand, has the potential to directly affect their interests on an ongoing basis.

IV. COSTS

[152] In the Trial Judgment, I dismissed the claims against the Successful Defendants (Imran Pirani and 702). On that basis, those defendants issued a bill of costs to the plaintiffs, who have declined to pay it. The plaintiffs now seek what is referred to as a Sanderson or Bullock order in relation to the Successful Defendants' costs. The Defendants and Successful Defendants submit the plaintiffs cannot meet the legal requirements to justify such an order.

A. Legal Principles

[153] As set out in R. 14-1(9) of the Supreme Court Civil Rules, costs follow the event and are awarded to a successful party unless otherwise ordered. The Successful Defendants rely on that rule in seeking to have their costs paid by the plaintiffs. The plaintiffs invoke R. 14-1(18), which grants the court a discretion to order that one defendant's costs be paid by another defendant, whether directly (a Sanderson order) or indirectly by having the unsuccessful defendant reimburse the plaintiff for paying the successful defendant's costs (a Bullock order).

[154] The legal principles are not controversial. The party seeking to displace the normal rule that costs follow the event bears the onus to persuade the court that some other order should be issued: *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376. In that case, Justice Southin, writing for the court, confirmed that displacing the normal rule requires an exercise of the court's discretion, which must be done on a principled basis (at para. 24).

[155] The test for Sanderson/Bullock orders is set out in *Brooks-Martin v. Martin*, 2011 BCSC 497 at para. 7:

- a) first, the plaintiff must establish that it was reasonable to have sued the successful defendant together with the unsuccessful defendant; and
- b) second, there had to be "some conduct on the part of the unsuccessful defendant which makes it just to require the unsuccessful defendant to pay the costs of the successful defendant".

[156] The first element is the threshold requirement. It is primarily assessed from the point of view of the plaintiff: *Brooks-Martin* at para. 8. In *Grassi*, Southin J.A. noted that the test requires something more than a finding that it was reasonable to sue the successful defendant:

- [133] I do not go so far, as some of the cases have suggested, as to say that such an order should be made "whenever it was reasonable for the plaintiff to have sued the successful defendant", if, by "reasonable", one is looking at the matter from the perspective of counsel for the plaintiff. One must bear in mind that the present rule as to joinder of causes of action is so broad that the causes of action alleged against the various defendants may be completely different, even though they arise out of the same transaction.
- [157] As an illustration, she referred to *Can-Dive Services v. Pacific Coast Energy* (1993), 77 B.C.L.R. (2d) 128 where the plaintiff was a subcontractor on a construction project. The plaintiff sued the contractor for breach of contract and the owner and the owner's engineer for negligence. Justice Southin noted that it may well have been reasonable to sue the owner and engineer together, even though the claims were ultimately dismissed. However, that did not, on its own, justify requiring the contractor to assume the plaintiffs' obligation to pay costs of the owner and engineer. She held there must have been "something which the unsuccessful defendant did, such as asserting the other defendant was a culprit in the case, to warrant his being made to reimburse the plaintiff for the successful defendant's costs" (at para. 33).
- [158] As in *Can-Dive*, the threshold step will not be met where the plaintiff alleges independent and unrelated causes of action against two or more defendants: *Brooks-Martin* at para. 8.
- [159] The threshold question was also discussed by Justice Bruce in *Roy v. 1216393 Ontario Inc.*, 2013 BCSC 1036. In that case the plaintiffs sued the defendants for damages concerning the sale of a vacant strata lot as part of a new development. The plaintiffs had purchased a lot, but the sale could not be completed because the same lot had already been sold to prior purchasers. Those purchasers successfully sued for specific performance, leaving the plaintiffs to claim damages against the company for breach of contract. The company admitted its breach of contract, but relied on a clause in the contract that limited the plaintiffs' damages to a return of their deposit.
- [160] The plaintiffs later amended their pleadings and added Dennis Kretschmer as a defendant. He was one of the developers of the property and was the developer responsible for managing the development in B.C. The plaintiffs sued him for deceit, alleging that he made misrepresentations concerning the prior purchasers.
- [161] The action had a complicated and extensive history. The first trial was successfully appealed and sent back to trial and the following two trials were mistrials. The matter eventually proceeded before Bruce J.
- [162] At trial before Bruce J., Mr. Kretschmer did not concede any of the findings that were made at the first trial and so required the plaintiffs to re-litigate the entire claim. Justice Bruce allowed the plaintiffs' claim against Mr. Kretschmer, but dismissed their claim against the company.

- [163] With regard to whether a Bullock or Sanderson order was appropriate, Justice Bruce noted the threshold question was whether it was reasonable for the plaintiffs to join Mr. Kretschmer in its action against the company, "in order that the matter might be thoroughly threshed out": Roy at para. 17, quoting from *Robertson v. North Island College Technical and Vocational Institute* (1980), 26 B.C.L.R. 225 (CA) at 228. She also cited Grassi, commenting that the "threshold question does not depend on whether the plaintiffs allege the same cause of action against the defendants or whether the claims arise out of the same factual matrix" (at para. 19). In her view, there must be something that connects the actions of the defendants to render it reasonable to join them in the same action.
- [164] She concluded that the contractual claim against the company was independent from the claim against Mr. Kretschmer; his misconduct was not connected to the sale of the property by the company (at para. 20). Accordingly, she found that a Bullock or Sanderson order was not appropriate.

B. Analysis

- [165] The plaintiffs say that they meet the threshold in this case. They submit that one must look at the litigation as a whole: they were challenging both the process and result of the winding up of a family trust and the corporate reorganization that followed it. While the plaintiffs' primary claim was breach of fiduciary duty and/or breach of trust, they also claimed negligence and knowing assistance.
- [166] Both the Defendants and Successful Defendants argue that the plaintiffs cannot meet the threshold with regard to the orders they seek against either Imran or 702.
1. The Claim Against Imran
- [167] The plaintiffs are all beneficiaries of the former MAP Trust, but two of them (members of the third generation) received no trust assets upon it being wound up. The plaintiffs say that they named Imran as a defendant because he was the only member of the third generation who actually received an allocation.
- [168] They also point out that Imran was the son of Meb, who received the lion's share of the former MAP Trust's assets and against whom a claim for knowing assistance was successful. In that way, the plaintiffs submit that Imran's involvement in the litigation was directly connected to the conduct alleged against the Defendants.
- [169] Imran submits that it was not reasonable for the plaintiffs to name him as a defendant for a number of reasons. First, he points out that the court found at trial that "the evidence does not go so far as establishing Imran is liable for knowing receipt" (at para. 313). In my view, the insufficiency of evidence does not go to the threshold, but rather to the second step of the test.

- [170] Second, Imran argues that the claim of knowing receipt was independent from the claims of breach of fiduciary duty and knowing assistance. I disagree. The whole point of the claim is that Imran was alleged to have been in knowing receipt of an allocation of shares made as a result of Mustaq's breach of fiduciary duty and Meb's knowing assistance. Without the allegation of wrongdoing against Mustaq and Meb, Imran's receipt of shares could not be challenged. The interconnection is clear.
- [171] Third, Imran submits that it was unreasonable for him to be named as a defendant because the plaintiffs did not make any allegations against him in the notice of civil claim. I agree with Imran on this point. It was only during final submissions at trial that the plaintiffs alleged that Imran should be liable for knowing receipt.
- [172] In their notice of civil claim, the plaintiffs did not mention Imran in their summary of the causes of action claimed against the various defendants (at part. 3, para. 8). Indeed, the only two mentions of Imran beyond the background facts (see part 1 at paras. 26 and 41) are primarily focused on his father, Meb:
- a) part 3, para. 4, in which the fact that the bulk of the present value and all of the future value of the MAP trust was distributed to "Meb and his son, Imran"; and
 - b) part 3, para. 7, in which it is noted that "in contrast to Meb's son, Imran, Fareed's two daughters received nothing".
- [173] The plaintiffs point out that Imran's response to civil claim provides a substantive defence to the allegation of knowing receipt (paras. 4 and 5). They submit that he cannot now say that it was not properly pled because he responded to it. In my view, the fact that Imran's counsel correctly inferred what was ultimately claimed against him at trial should not relieve the plaintiffs of their obligation to put him on notice with sufficiently clear pleadings.
- [174] The plaintiffs submit that since Imran received a significant allocation, while the two plaintiffs who were also third generation beneficiaries did not (Sheliza and Zaida), a possible remedy may have been to set aside the distribution to Imran. I agree that reasoning is logical, but it does not relieve the plaintiffs of the burden of giving him sufficient notice in the pleadings of why he was being sued.
- [175] The Successful Defendants and the Defendants also submitted that it was not necessary to name Imran in order to challenge to the winding up the MAP trust, but I did not understand the plaintiffs to claim that it was. Therefore, I need not consider that argument.
- [176] The plaintiffs have not met the threshold step of establishing that it was reasonable to sue Imran together with the Defendants.

2. The Claim Against 702

- [177] The Defendants argue that it was also unreasonable to name 702 as a defendant because it was not necessary in order to pursue the claims of breach of fiduciary duty and knowing assistance.
- [178] I note that there is a potential inconsistency in the Defendants' position because they argue in relation to disgorgement that the relief sought against Mustaq is unavailable because the plaintiffs failed to name his numbered company.
- [179] However, the claim against 702 was specific: the plaintiffs alleged oppression. 702 argues that this claim was independent from the other claims that were brought. In response, the plaintiffs' rely on the following finding from the Trial Judgment:
- [188] The way they accomplished [a continuation of the family business benefitting only those actively involved], 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.
- [180] 702 submits that just because the plaintiffs were removed as directors does not mean it was reasonable to bring a claim of oppression.
- [181] I agree. While Fareed and Arshad's removal as directors was a discreet step in the winding up of the trusts and the corporate restructuring, it was not a central element of the allegations of breach of fiduciary duty or knowing receipt. It was part of the factual matrix, but that does not mean that the oppression claim was so intertwined with the claims brought against the other Defendants that it was reasonable to sue them together. The connection was procedural and practical only; there was insufficient legal nexus between the claims.
- [182] The plaintiffs have also not met the threshold step in relation to 702. Accordingly, the plaintiffs have not established their entitlement to a Sanderson or Bullock order with regard to either Imran or 702. I find it unnecessary to consider the second step.

V. STAY

- [183] The parties agreed that in light of the impending appeal, it was appropriate to stay any order granted in relation to the remedy. With the exception of one term, they also agreed to the terms attached to the stay.
- [184] They agreed pending the appeal, subject to further order of the Court or agreement in writing by the parties:
- a) with the exception of the payment of CA\$3,500 per month to Meb as salary and US\$3,500 per month to Mustaq as salary, no assets or monies of PIL/PEL, 702, 703 (or any of their affiliates) shall be disbursed or distributed directly or indirectly by way of salary dividend, share redemption, loan, payment, or otherwise, to the personal defendants, to any companies or trust in which they have an interest, or to any third parties on their behalf. Without limiting the generality of the foregoing, this prohibition includes payments to

lawyers for the benefit of the personal defendants.

- b) Meb and Mustaq will not cause their family trusts to distribute any funds to anyone.
- c) The personal defendants shall cause PIL, PEL, 702 and 703 (or any of their affiliates) to only carry on business in the ordinary course and ensure that no real estate assets of these entities will be transferred, sold, assigned or otherwise disposed of pending the appeal and security will only be granted in respect of these corporate assets in the ordinary course, provided that the financing is used solely for corporate, not personal, purposes. For certainty, this does not restrict PIL, PEL, 702 and 703 (or any of their affiliates) from retaining counsel and paying legal fees and disbursements in the ordinary course of their business, and solely for corporate, not personal, purposes.

[185] The Defendants seek to add the payment of directors' fees to Meb and Mustaq to the exception carved out of the general prohibition in the first clause of the proposed stay. The Defendants submit that Meb and Mustaq continue to be directors and there is no good reason to deprive them of those fees since they remain obligated to perform their duties. They submit that this preserves the status quo.

[186] The plaintiffs do not agree. They point out that Zahir's evidence was that the companies have a skilled management team. The plaintiffs' position is that team can keep operations going in the ordinary course pending the appeal.

[187] I am not satisfied that Zahir's reference to a management team was that it could act as a substitute for Mustaq. As noted above, I find that the plaintiffs' position undervalues the nature of Mustaq's role in the Family Business.

[188] More importantly, I did not understand the plaintiffs to have challenged Mustaq's business acumen in overseeing the business. Certainly the evidence was undisputed that through his skill and business prowess, the Family Business was successful in expanding into the United States. The evidence was also undisputed that all family members looked upon Mustaq as the de facto head of the Family Business as Haider's role diminished due to his advanced age. In my view, this justifies allowing him to continue to receive those director's fees.

[189] While there was controversy about the value of Meb's contribution to the Family Business's success, I am satisfied that he has been involved to a degree sufficient to justify payment of director's fees.

[190] I understand and appreciate that given the degree of distrust that exists between the parties, leaving open the ability for Meb and Mustaq to receive unquantified payments concerns the plaintiffs. That is a valid concern and to address it, I add this clarification. My expectation is that any fees paid will be consistent in amount and frequency with fees that have been paid in the past. I have no evidence as to the schedule of past payments or to the amount typically paid, but if it comes to light that there has been a marked increase in either amount or frequency of directors' fees paid since the Trial Judgment was released,

the plaintiffs have leave to return to Court to seek a change to the wording of the stay.

[191] Therefore "directors' fees" can be added to the wording of the first clause in the proposed stay (para. 184) in a way that makes grammatical sense. I trust counsel will agree on the exact wording.

VI. CONCLUSION

[192] To summarize, I have concluded the following:

- a) There is a nexus between both Mustaq's breach of fiduciary duty and Meb's knowing assistance and the shares they received in their respective numbered companies.
- b) Neither Mustaq's status as a former beneficiary of the Madatali Trust nor the non-parties' concerns prevent me from ordering disgorgement of Mustaq's shares in 703.
- c) Ordering disgorgement over all of Meb's and Mustaq's shares, as sought by the plaintiffs, is inappropriate because it would deprive the Defendants of any equity in the Family Business. Such an order would be punitive, not prophylactic.
- d) Not ordering disgorgement of any of Meb's and Mustaq's shares, as sought by the Defendants, is similarly unacceptable, as it would deprive the plaintiffs of any remedy for the Defendants' wrongdoing.
- e) The growth shares ought to be disgorged because they are clearly linked to Mustaq and Meb's deliberate undervaluation of the Family Business.
- f) The frozen value shares should not be disgorged because it would have the effect of stretching the breach back to 1993, when the family trusts were first settled.
- g) 50% of Meb's voting shares should be disgorged because they were similarly connected to the underlying purpose behind the corporate reorganization. None of Mustaq's voting shares ought to be disgorged because the potential prejudice to the non-parties outweighs the prophylactic purpose of the remedy.
- h) The plaintiffs' request for a Sanderson or Bullock order in relation to the Successful Defendants is dismissed.

[193] In light of this, I order the following:

- a) Meb must disgorge all of his class C growth shares in 702, currently held in trust for his family, and 50% of his class A voting shares in 702;
- b) Mustaq must disgorge all of his class C growth shares in 703, currently held in trust for his family;
- c) the shares shall be disgorged by way of a constructive trust imposed over those shares in favour of the plaintiffs; and

- d) the order for disgorgement is stayed pending appeal on the terms specified in para. 184 above, with the above-noted amendment (at para. 191) to the first term (a) that in addition to their maximum monthly salary, Mustaq and Meb be permitted to receive directors' fees from PEL, PIL, 702, or 703 in a manner consistent with how they have historically been paid directors' fees.

[194] Although I did not grant all the orders sought by the plaintiffs, overall I find that they were substantially successfully on the issue of remedy. Therefore, they are entitled to the costs of this hearing as against the Defendants.

[195] Imran and 702 were entirely successful and are entitled to costs of this hearing, assessed at Scale B.

"Sharma J."

VII. 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, Sheliza 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 28 October 2026 · Esheria