

CANADA / JUDGMENT

Pirani v. Pirani

2022 BCCA 65

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 65 Pirani v. Pirani

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Pirani v. Pirani,

2022 BCCA 65

Date: 20220217

Docket: CA46942

Between:

Fareed Pirani, Arshad Pirani, Sheliza Pirani, and Zaida Pirani

Respondents/

Appellants on Cross Appeal

(Plaintiffs)

And

Haider Pirani, Mustaq Pirani, and Mehboob Pirani

Appellants/

Respondents on Cross Appeal

(Defendants)

And

Imran Pirani and 438702 B.C. Ltd.

Respondents/

Respondents on Cross Appeal

(Defendants)

And

Najma Lalji, Bashir Pirani, Gulbanu Pirani, Nabila Pirani, Safeeya Pirani,
Fariyal Pirani, Jayni Pirani, Nadeem Pirani, Nazmina Pirani, Zahir Pirani,
Zakiya Pirani, Zulekha Pirani, 1010305 BC ULC, 438703 B.C. Ltd.,
438705 B.C. Ltd. and 438706 B.C. Ltd.

Respondents

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

On appeal from: Orders of the Supreme Court of British Columbia, dated
June 30, 2020 (Pirani v. Pirani, 2020 BCSC 974, Vancouver Docket S162270),
November 12, 2020 (Pirani v. Pirani, 2020 BCSC 1711,
Vancouver Docket S162270), and
August 6, 2021 (Pirani v. Pirani, 2021 BCSC 1530, Vancouver Docket S162270).

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Zulekha Pirani, 1010305 BC ULC, 438703 B.C. Ltd., 438705 B.C. Ltd. and 438706 B.C. Ltd.:

J.S. Yates

Place and Date of Hearing:

Vancouver, British Columbia

October 27-28, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 17, 2022

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Voith

Summary:

This appeal arises from a trial judgment finding certain defendants liable for breach of fiduciary duty or knowing assistance as a result of the manner in which they reorganized the affairs of family businesses and wound up a family trust. The judge granted a remedy in disgorgement even though parties arguably affected by the remedy were not before the court when the judge determined that the appropriate remedy was disgorgement. Held: Appeal allowed and a new trial ordered. The judge made extricable legal errors in her approach to determining the scope and nature of fiduciary duties in the face of a trust deed conferring an absolute discretion on the trustees. The judge erred by failing to interpret the trustees' duties in the proper factual matrix and, accordingly, did not grapple properly with whether the trustees faced a disabling conflict of

interest and duty, or whether the no profit and no conflict rules were modified or displaced in the circumstance of the impugned transaction. As a result, the judge's conclusions are potentially undermined and a new trial is necessary. The court leaves for another day the issues involving the appropriateness of disgorgement in these circumstances.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This appeal arises out of a liability trial dealing with alleged breaches of fiduciary duty and subsequent proceedings dealing with the scope of a remedy in disgorgement. The primary issue at trial was whether, as a result of alleged conflicts of interest, the defendants, trustees of several related trusts, were liable to the plaintiffs/beneficiaries of one such trust, when they distributed the trust's assets and wound it up.
- [2] The judge found three defendants liable: two (the trustees of the trust) for breaches of fiduciary duty and one (a beneficiary of the trust and trustee of a related trust) for knowingly assisting the breach of fiduciary duty. She went on to find the plaintiffs were entitled to disgorgement of some or all of the benefits received by the defendants as a result of their breaches of duty. The scope of the remedy affected non-parties who were eventually brought into the litigation and contended the judge should have regard to their interests and not order disgorgement. Ultimately, the judge ordered disgorgement on a somewhat limited basis.
- [3] This appeal raises questions about whether the judge undertook a flawed analysis of the scope of duties owed by the defendants to the plaintiffs, particularly in face of a trust agreement that conferred an absolute discretion on the trustees to wind up the trust and exclude beneficiaries from the capital distribution. In issue, as well, is whether the plaintiffs were entitled to disgorgement in circumstances where affected third parties were not parties to the litigation, and whether the judge erred in principle in ordering disgorgement in the face of those interests after the interested parties had been given notice of the claim.
- [4] For the reasons that follow, I would allow the appeal and order a new trial.

Background

The Establishment of the Family Trusts

- [5] In the 1970s and 1980s and into the 1990s, four brothers, Mohamed Aly, Madatali, Pyarali, and Haider Pirani ("First Generation"), established a number of successful businesses, including hotels and motels ("Family Business"). The two main entities that comprise these businesses are Pirani Enterprises Ltd. ("PEL") and Piramco Investments Ltd. ("PIL"). Each brother held an equal voting and financial interest in each of PEL and PIL and was involved in the Family Business.

- [6] In 1993, the First Generation decided to implement an estate freeze so that future increases in the value of PEL and PIL would accrue to their intended heirs. The purpose of an estate freeze is to minimize or possibly eliminate capital gains tax payable by the current owner's estate. Transactions of this kind are common and legitimate under the rollover provisions of the income tax legislation
- [7] As helpfully explained to us in correspondence from the parties as set out below (for which we are grateful), on 30 October 1993, the First Generation brothers effected an estate freeze (the "1993 Estate Freeze") and created their four family trusts: the Mohammed Aly Pirani Trust, the Madatali Pirani Trust, the Pyarali Pirani Trust, and the Haider Ali Pirani Trust (the "First Generation Trusts").
- [8] To facilitate the 1993 Estate Freeze, each of the First Generation brothers incorporated a numbered holding company: Mohammed Aly Pirani caused 438702 B.C. Ltd. ("702") to be incorporated; Madatali Pirani caused 438703 B.C. Ltd. ("703") to be incorporated; Pyarali Pirani caused 438705 B.C. Ltd. ("705") to be incorporated; and Haider Ali Pirani caused 438706 B.C. Ltd. ("706") to be incorporated.
- [9] As a result of the 1993 Estate Freeze:

the First Generation Brothers received the voting shares in their numbered companies, as a result of which they exercised voting control over PIL and PEL;

the First Generation Brothers received preferred shares in PIL representing the "frozen value" of PIL as of 1993;

the First Generation Brothers received preferred shares in their numbered companies which indirectly represented the "frozen value" of PEL as of 1993; and

common shares representing the future growth of PIL and PEL, if any, were held by each First Generation Brother's family trust.

- [10] Following the 1993 Estate Freeze, the structures of PIL, PEL, and the numbered companies were as follows:

PIL:

50 Class A voting shares were held by each of 702, 703, 705, and 706. PIL was therefore controlled by the numbered companies, which as set out below, were controlled by the First Generation Brothers;

50 Class C preferred shares were held by each of the First Generation Brothers representing an equal portion of the "frozen value" of PIL;

10 Class B common shares (non-voting) were held by each of the First Generation Brothers' family trusts. Each family trust therefore held an equal entitlement to the future growth, if any, of PIL; and

4,200 Class D preferred shares were held by Leisure Lodge Ltd.

PEL:

702, 703, 705, and 706 each held an equal number of common shares in PEL entitling them to the future growth, if any, in PEL; and

702, 703, 705, and 706 each held an equal number of preferred shares in PEL, entitling them to the "frozen value" of PEL.

Each of 702, 703, 705, and 706:

100 Class A common shares (voting) were held by the respective First Generation Brother. The First Generation Brothers therefore retained voting control over their numbered companies and, through them, PIL and PEL;

2000 Class C preferred shares were held by the respective First Generation Brother. Each First Generation Brother therefore held preferred shares in his numbered company which entitled him indirectly to 25% of the "frozen value" of PEL; and

100 Class B common shares (non-voting) were held by the respective First Generation Brother's family trust. Therefore, any future growth in PEL would accrue to the family trusts after October 1993.

[11] Each of the four trusts had identical terms, although they had different settlors, trustees, and beneficiaries with a couple of exceptions. One such exception was that Haider, a defendant, was a trustee of all four trusts. The beneficiaries of each trust were family members of the First Generation brother who had established it.

[12] The trusts involved in this litigation are the MAP and Madatali Trusts, implemented by Mohamed Aly and Madatali, respectively.

[13] Mohamed Aly had three children: Mehboob ("Meb"), Fareed, and Arshad. Meb is a defendant. Fareed and Arshad are plaintiffs. Each of these children is a beneficiary of the MAP Trust. Its trustees at the material time were Haider, the last surviving First Generation brother, and Mustaq. Mohamed Aly and his wife had been trustees, but they had passed away by the times material to this action. Mustaq was appointed trustee when Mohamed Aly died.

[14] Madatali had three children: Mustaq, Bashir, and Najma. Mustaq is a defendant in this action. Each of the siblings is a beneficiary of the Madatali Trust. Its trustees at the material time were Meb and Haider.

- [15] Although individuals who were beneficiaries generally were not trustees of other family trusts, that was not a universal rule. From the outset, Meb, a beneficiary of the MAP Trust, was a trustee of both the Madatali Trust and the Haider Trust, the family trust implemented by Haider. Mustaq, a beneficiary of the Madatali Trust, was an initial trustee of the Pyarali Trust, the family trust implemented by Pyarali and, later, a trustee of the MAP Trust.
- [16] Each of the family trusts defined "Primary Beneficiary" and "Second Generation Beneficiaries". For the MAP Trust, a Primary Beneficiary was each child or remoter issue of Mohamed Aly, and the Second Generation Beneficiaries were Meb, Fareed, and Arshad.
- [17] In July 1996, the First Generation caused PEL and PIL to execute a shareholder agreement with each of the numbered companies ("1996 SHAs"). The 1996 SHAs specified the classes and numbers of shares each numbered company held in PEL and PIL, and provided that each family trust could name one director to the boards of PEL and PIL. The First Generation would hold these positions during their lifetimes. The 1996 SHAs also named a successor director to the boards of PEL and PIL for each brother. Mehboob was named as a successor to his father, Mohamed Aly. Mustaq was named as the successor to his father, Madatali.
- [18] As noted, each First Generation brother was involved in running the Family Business. So, too, were Meb and Mustaq. The same was not true of Arshad, Meb's sister. Fareed, Meb's brother, participated in the operations of the Family Business, but, at trial, the parties disputed the extent of his involvement. Only a few of the Second Generation Beneficiaries across all four trusts played any active role in the Family Business. It is not clear to what extent the Second Generation Beneficiaries had the opportunity actively to participate in the running of the Family Business, but it is clear that some of them pursued other businesses and professions. This fact played a critical role in the reorganization that spawned this litigation and is the subject of it.
- [19] This reorganization refers to a corporate restructuring of each of the numbered companies, which took place immediately before each of the four family trusts was wound up. The circumstances surrounding these events is described in more detail below.
- [20] As matters stood at the beginning of the reorganization, Meb was a trustee of both the Madatali Trust and the Haider Trust, and a beneficiary of the MAP Trust. He was actively involved in the Family Business, a director of PEL and PIL, and a director of 702. Mustaq was a trustee of both the MAP Trust and the Pyarali Trust, and a beneficiary of the Madatali Trust. He was similarly involved in the Family Business, a director of PEL and PIL, and a director of 703. Haider was a trustee of all four trusts, although a beneficiary of none. He was involved in the Family Business, and a director of PEL and PIL.
- [21] What should be clear from this summary is that, from the outset, the structure of the Pirani family business empire and the foundational principles upon which it was based involved individuals occupying multiple, overlapping roles. Some trustees were actively involved in running the Family Business. Trustees acted as directors of the numbered companies and of

PEL and PIL. Some beneficiaries were actively involved in the Family Business. Some beneficiaries of one trust were trustees of another trust. Haider was a trustee of all four trusts. All of this was known to the First Generation. They clearly established their respective family trusts in a coordinated fashion, since the trusts are essentially identical.

- [22] As a prelude to examining the reorganization that led to the litigation, it is worth noting the judge's characterization of the roles played in the Family Business by the defendants and plaintiffs. She summarized the situation thus:
- [41] For many years, including those relevant to this litigation, Mustaq had the most responsibility in the Family Business, and was its unofficial leader. He was credited for the family's success in expanding their operations into the United States. That may explain why Mustaq was the family's point person for addressing the 21 Year Rule, providing instructions to BLG on behalf of the Number Companies and the four family trusts. This is evidenced by the BLG retainer signed in October 2012.
- [42] Meb was also involved in the Family Business throughout the years. He was a lawyer and through his firm, he provided legal services to the Family Companies. He was paid for that work, although he testified he also provided work for which he was not compensated. However, he earned income from any legal work his law firm did for the Family Business regardless of which lawyer provided the legal services. He also had some involvement in management and operations of the Family Business over the years. Significantly, he was most recently involved in attempts to develop property the Family Companies own in North Vancouver.
- [43] Haider had been very active and successful in the Family Business for many years, but his participation declined in recent years. By the time of trial, he was frail, which was a reflection of his advanced age and declining health. However, there was no evidence to suggest he was legally incapacitated or compromised in his ability to make decisions at any time relevant to the litigation. Mustaq and Meb testified that in the years 2012-2014, Haider was involved at his full capacity in the Family Business. They both confirmed the three of them often discussed business together, which was easily done because they shared office space.
- [44] Arshad, who is a dentist, never had an active role in the Family Business; nor did Meb's son, Imran, or Fareed's daughters, Sheliza and Zaida. It is common ground that Fareed participated in the Family Business, but the extent and nature of his participation was ardently disputed between the plaintiffs and the Defendants.

The Reorganization of the Numbered Companies and the Wind Up of the Family Trusts

- [23] I now turn to the restructuring of the numbered companies and the wind up of the trusts. This series of related transactions, as they relate to the MAP Trust, were the subject of the plaintiffs' claims.
- [24] The decision to reorganize the families' affairs was precipitated by a desire to avoid the tax consequences resulting from the so-called 21-year rule. Although each trust deed stipulated a final distribution date 80 years after settlement, the Canada Revenue Agency made it clear it would strictly enforce taxation rules requiring distribution of trust funds no later than 21 years after each trust was settled. In this instance, that would involve a tax liability of approximately \$10 million on the trusts.
- [25] At the same time, this decision was also driven by a desire to direct the manner in which PEL and PIL would operate into the future.
- [26] The transactions amounted to an estate freeze. Put simply, the general plan involved a corporate reorganization that "froze" the current value of the numbered companies' shares in the PEL and PIL and distributed new classes of shares in varying amounts among the beneficiaries of each trust. Additionally, new classes of shares were created to capture the future growth or decline in the value of PEL and PIL. Generally, the latter shares were distributed to those beneficiaries actively involved in running the Family Business, and their families. Those beneficiaries not so involved were excluded from participating in the benefits of future gains or losses. Finally, shares granting voting control were created and conferred on those family members actively involved in the Family Business, to the exclusion of those who were not.
- [27] In undertaking the wind up and the final distribution of trust assets, the trustees of the MAP Trust purported to act pursuant to a power granted to them under clause 4.12 of the trust instrument. This "Accelerated Distribution Clause" provides as follows:

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

[Emphasis added.]

- [28] To summarize the details of the reorganization and winding up vis-à-vis the MAP Trust, the existing equity in 702 was divided amongst Meb (45%); Fareed (20%); Arshad (20%); and Imran, Meb's son (15%). This was done using two classes of shares, each with the same face value, but different rights and restrictions. Meb received class E shares, whereas Imran, Fareed, and Arshad received class D shares. Each reflected the frozen value of PEL and PIL at the time of the distribution. Meb also received full voting and management control of 702 (via class A shares) and equity representing its future growth, if any (via class C shares).
- [29] Class D shares received no voting power and no right to dividends. With respect to class E shares, if Meb withdrew \$120,000 or more from 702 in salary, bonus, dividends, or through redemption of class E shares, 702 was obliged to redeem, pro rata, class D shares. This restriction did not apply to management fees or bonuses paid to Meb by any other corporate entity, including PIL and PEL.
- [30] Once the reorganization was complete, the MAP Trust was wound up.
- [31] 703 was reorganized in the same manner as 702, and the Madatali Trust was wound up. Mustaq received full voting and management control of 703 (class A shares), a portion of its current equity (class E shares), and equity representing its future growth, if any (class C shares). The other numbered companies were also reorganized, and the family trusts wound up.

The Trial Judgment

- [32] In March 2016, Fareed, Arshad, and Fareed's two daughters, Sheliza and Zaida, sued Meb, Mustaq, Haider, Imran, and 702. As it relates to the MAP Trust, the plaintiffs objected to the structure of the reorganization. Their pleaded theory was that the structure violated their entitlement to benefit equitably, fairly, or equally from the MAP Trust. The plaintiffs contended the unequal distribution of benefits violated that principle. They said the structure reflected a coordinated plan, implemented by the defendants in breach of their duties as trustees and fiduciaries, because the structure advanced the defendants' self interest in the face of what are often referred to as the "no conflict" and "no profit" rules.
- [33] The plaintiffs claimed Haider and Mustaq had implemented the reorganization and wound up the MAP Trust in order to benefit themselves; they had failed to act in the best interests of all of the beneficiaries. With respect to Meb, the plaintiffs said he had knowingly assisted those breaches of duty. His motivation, it was suggested, was that by knowingly assisting the breaches of duty by the trustees of the MAP Trust, he and his family would benefit as beneficiaries of the Madatali Trust. They alleged other causes of action such as conspiracy and oppression which are not in issue before us.
- [34] After a relatively lengthy trial, the judge issued reasons indexed at 2020 BCSC 974 [Pirani].

- [35] At the outset, it may be helpful to identify certain dominant themes within the judgment which underpin the judge's ultimate conclusions and which are also the focus of the issues with which we must grapple on appeal. These themes include: the fiduciary duty was to act solely in the best interests of all the beneficiaries and the failure to do so was a breach of the duty of loyalty; it was wrong for the trustees to act in a coordinated fashion on behalf of all of the trusts; the fact of overlapping roles leading to disabling conflicts; and the "foregone conclusion" to implement a plan that preferred currently involved individuals and families to others.
- [36] The first critical finding of the judge is that Haider and Mustaq owed fiduciary duties to the plaintiffs. Those duties included a duty of loyalty. In concrete terms, the judge accepted that as fiduciaries, Haider and Mustaq were bound not to place themselves in a position where their duty and interest conflict or might conflict, or to benefit from their conduct. These rules are frequently expressed as the "no conflict" rule and the "no profit" rule. The judge repeatedly (see, for example, paras. 8, 190, 194, 195, 278, 288, 291, 324) defined the relevant fiduciary duty as a duty to act only in the best interests of all beneficiaries.
- [37] The judge agreed with the plaintiffs that to establish a prima facie conflict, the plaintiffs need only establish the defendants were in a position where there was a substantial risk their duties and interests could conflict: Pirani at para. 172. She adopted the following from Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) [Waters, 4th ed.] at 968, as a guide:

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

- [38] Key to the judge's analysis of whether a prima facie conflict of interest existed, was the overlapping roles held by each of Haider, Mustaq, and Meb. However, her reasons are not entirely clear about what exactly the overlapping roles were. Certainly, it would appear for Haider the conflict was between his roles as trustee of the MAP Trust, director of PEL and PIL, and in the Family Business generally, as well as his duties to the numbered company associated with his trust. For Mustaq, it would be between his roles as a trustee of the MAP Trust, a beneficiary of the Madatali Trust, a director of 703, a director of PEL and PIL, and in the Family Business generally. For Meb, it would be between his roles as a beneficiary of the MAP Trust, a director of 702, a director of PEL and PIL, and in the Family Business generally.
- [39] The judge summarized her view of the conflict of interest inherent in overlapping roles as such:

[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.

No reference is made to interests in the Family Business and the prospect of being able to continue in them, although in other parts of the judgment this appears to be an element of her analysis.

[40] The judge concluded these overlapping roles gave rise to conflicts of the duty of loyalty to act solely in the best interests of all the MAP Trust beneficiaries. In reaching this conclusion, the judge rejected the defendants' arguments that, when viewed in light of the trust agreement, there were no disabling conflicts. She rejected an argument that the rule against self-dealing does not apply if the trustee is put into a position of conflict by the settlor of the trust:

[169] In the case at bar, Meb is a beneficiary of the MAP Trust; the settlor was his father's mother in law. Meb became a director of PEL and PIL because his father nominated Meb to take his place pursuant to the First Generation's shareholders agreement. Similarly, Mustaq's father chose him to overtake the directorships in the Family Business, but the settlor of the Madatali Trust was Mustaq's mother. Therefore, neither was placed in a position of conflict by the settlors of their respective family's trust. Unlike the siblings in *Sargeant*, the same person did not put the Defendants in a position of conflict.

The judge also concluded the case referred to in the paragraph above, *Sargeant v. National Westminster Bank PLC*, [1990] 61 P. & C.R. 518 (C.A.) [*Sargeant*], did not assist the defendants because, although in that case the conflicts were not disabling, the trustees were not relieved of their fiduciary duties.

[41] The judge returned to the issue of conflicts inhering in the structure of the trusts later in her reasons:

[286] The Defendants' answer to the plaintiffs' claims is the conflicts at issue were inherent to the structure of the four trusts. As a result, one cannot find they failed to meet a good faith standard, relying on, among others, *Clock Holdings Ltd. v. Braich*, 2008 BCSC 1697, and *Sargeant*. Their position was at most, their actions might amount to negligence.

[287] That position cannot succeed; the issue is how they acted, not whether they could act. The cases relied upon by the Defendants do not stand for the proposition that any aspect of a fiduciaries' duty of loyalty is diminished just because they were permitted to act while in *prima facie* conflict by virtue of the trust instrument or some other factor.

- [42] As such, the judge found the defendants were in a prima facie disabling conflict of interest. Accordingly, the burden of demonstrating they had fulfilled their fiduciary duties shifted to the defendants. To demonstrate this, it is important to understand the nature of the duties to which they were subject. Again, the judge concluded the defendants were under a duty not to allow self interest to sway their judgment, not to take a benefit or profit from their position as fiduciaries, and to act solely in the best interest of the beneficiaries. As she observed:
- [288] The Defendants' burden in this case was to adduce evidence to establish that in the face of those conflicts, they nevertheless carried out their duties honestly and in good faith, with regard only to the best interests of the beneficiaries. On the whole of the evidence, I am not satisfied they met that burden.
- [291] In my view, this behaviour is inconsistent with someone being guided only by the best interests of the beneficiaries. When viewed together with what I found was their unsuccessful attempts at trial to downplay how much they knew, the most plausible explanation for their behaviour is that their primary concern at all times was their self-interest. In my view, that is the crux of their breach.
- [43] The judge described the general obligation owed by the defendants, in relation to one of the issues in the case, as follows:
- [278] The critical issue is not whether Mustaq was legally required to obtain independent appraisals. Nor could it be determinative whether he consulted, obtained or relied upon professional advice. The issue is, in the face of his conflict, did he fulfill his duties as a fiduciary to act only in the best interest of the beneficiaries.
- [Emphasis by underline added.]
- [44] The judge engaged in a detailed analysis of the conduct of the defendants. The following factors and findings played a critical role in her conclusion the defendants had not discharged their burden to show they had acted only in accordance with the best interests of the beneficiaries. First, the defendants implemented a plan to restructure the numbered corporations so they and their families would take the benefit of future growth in the value of PEL and PIL. Second, they chose to act collectively. Third, the defendants did not advise or seek the view of the plaintiffs regarding their intention to distribute MAP Trust assets unequally, nor did they consider options other than taking the benefit of future growth for themselves or their families. Fourth, the judge rejected the defendants' explanations of why they chose an unequal distribution and the considerations they said influenced their decisions. Fifth, they knowingly relied on valuation reports that grossly underestimated the current value of PEL and PIL. Sixth, Meb took no steps to address the inherent conflict of interest when Mustaq proffered values for a valuation report. Seventh, the defendants did not disclose the valuation report when requested by the plaintiffs.

- [45] In short, the judge concluded the defendants acted to prefer their own self interest in how they structured the corporate reorganization and wind up of the trust. The judge's summary is worth setting out, even though I have referred to some paragraphs already:
- [290] (T)he evidence that was key to my conclusions on breach of fiduciary duty was what Meb and Mustaq did not do in light of their overlapping roles. On these points, the evidence was not disputed. The Defendants did not follow Mr. Fish's specific advice to engage, at some level, all adult beneficiaries in a discussion about how to address the 21 Year Rule before making final decisions. Upon their legal advisors expressing surprise and concern about the lack of underlying appraisals for the 2014 Report, they took no steps nor made any enquiries to redress that concern. Mustaq made no effort to contact Sheliza or Zaida. No one alerted Fareed and Arshad of their removal as directors of 702 until it had already been done. This is an illustrative, but not exhaustive, list.
- [291] In my view, this behaviour is inconsistent with someone being guided only by the best interests of the beneficiaries. When viewed together with what I found was their unsuccessful attempts at trial to downplay how much they knew, the most plausible explanation for their behaviour is that their primary concern at all times was their self-interest. In my view, that is the crux of their breach.
- [292] The Defendants settled on a plan to address the 21 Year Rule. They wanted to implement what is possibly not an uncommon model: an estate freeze, and distribution of trust assets, conferring only on some the future growth of a business. However, that plan created the substantial risk that their fiduciary duties may be pitted against duties arising from their roles and directors, and (for Meb and Mustaq only) their self-interest as beneficiaries. It is important to recall that the only assets each trust held was its family's Numbered Company.
- [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.
- ...
- [297] More troubling, on that very, issue both Meb and Mustaq mislead the Court (see above, paras. 77-88). I conclude, from that lack of evidence and that testimony, that it is more probable than not that both Meb and Mustaq believed the figures supplied by Mustaq were inaccurately low. Given their roles as directors they knew the impact of the corporate restructure. Therefore, they understood how an undervaluation would benefit them as compared to beneficiaries who were to receive only a portion of the trusts' frozen value. They did nothing about that. That conduct is dishonest, not in good faith and a blatant

breach of their fiduciary duties.

- [46] It is helpful to provide some detail to explain the judge's reasoning more fully.
- [47] The judge found the defendants acted collectively and consistently to deal with all of the trusts; the reorganization of 702 and the wind up of the MAP Trust was part of a coordinated strategy devised and implemented principally by Meb and Mustaq, with Haider's cooperation. It was not possible, therefore, to view each trust in isolation: Pirani at para. 164.
- [48] Given the respective roles of the parties in the Family Businesses, at least in terms of the genesis and orchestration of the reorganization, it is not surprising the principal actors were Mustaq, Meb, and Haider. That said, this comment does not address who was entitled to make decisions on behalf of the trusts, numbered companies, or PEL and PIL, or the duties and obligations incurred by those charged with decision making.
- [49] The plaintiffs contended, and it appears the judge accepted, the defendants usurped the decision-making authority of the trustees of each trust. At the same time, it should be recognized that separate meetings were held between the lawyers and the trustees of each trust for the purpose of giving instructions to the lawyers to implement the reorganization. And, it is not clear to what degree the defendants could be viewed as implementing the decisions made by the trustees, or exercising delegated authority, to achieve a coordinated restructuring.
- [50] The judge criticized the defendants for not following initial advice from their solicitor about how to proceed, for deciding early on that the continuation of the Family Business would only be for the benefit of those most actively involved at that time, rather than to advance the best interests of all beneficiaries. The defendants identified those people to be Mustaq, Meb, Haider's son Nadeem, and Pyarali's son Zahir. In the context of the MAP Trust, this was accomplished by removing Fareed and Arshad as directors of 702. Similarly, Mustaq's brother was removed as a director of 703.
- [51] The judge noted the following evidence of Meb:
- [191] The plaintiffs assert the real reason the Defendants did not explore any other plan was that would not allow them to accomplish the goal of having the identified people control the Family Business, and exclude the plaintiffs from 702's future growth. Meb's testimony was revealing on this issue. In answering why continuing the Family Business was essential he said, "there were four of us that were at least fully occupied in this business" and if they sold the assets, they would all have to look for something else to do. Meb also confirmed during his testimony that Fareed and Arshad were removed as directors of 702 to eliminate the need for them to approve of the corporate restructuring of 702. That restructuring paved the way for him to receive complete control of 702.

- [52] In proceeding in this way, the defendants ignored advice from their lawyers to seek the views of all beneficiaries so they could make decisions in the best interests of all beneficiaries. Given their overlapping roles in the Family Business and the family trusts, the judge explained the defendants needed to do something to address their conflicts and ensure their judgment was not swayed by self interest, or indeed anything inconsistent with the best interests of all beneficiaries. The judge found it "difficult to conclude" the defendants had discharged their fiduciary obligations when they declined to follow "sound legal advice": Pirani at para. 195.
- [53] It was an essential part of the plaintiffs' analysis, and subsequently that of the judge, that the unequal or inequitable distribution of benefits resulting from the reorganization inherently reflected the trustees of the MAP Trust acting in the face of conflicts of interest and duty, as well as decisions swayed by and promoting their self interest. To put it another way, the defendants' decisions to implement a reorganization that conferred benefits on themselves and their families necessarily involved a breach of fiduciary duty, both because they acted while in a conflict and profited from their actions. As I read the judgment, the judge concluded it was inherent in the plan and the corporate structure adopted that the trustees had not discharged their fiduciary duty to act solely in the best interests of all of the beneficiaries.
- [54] This aspect of the case needs to be contrasted with a second element of the reorganization, although from the plaintiffs' perspective they are interwoven. This second element is how the current value of the underlying businesses was established in order to identify the frozen value to be distributed among the beneficiaries. The plaintiffs argued, and the judge accepted, the defendants' approach to valuation was flawed and the current value was knowingly underestimated. I will return to the significance of this issue in my analysis.
- [55] Regarding this valuation issue, the judge made a number of findings about the manner in which the underlying value of the businesses was assessed for the purpose of implementing an estate freeze. In general terms, she concluded the defendants knew they had not provided adequate information of the fair market value of underlying assets, so that the existing equity would be undervalued, benefitting those with an interest in future growth. In reaching these conclusions, the judge rejected the explanations offered by Meb and Mustaq of how underlying properties were valued. These comments are illustrative of her analysis:
- [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.

- [226] I find that evidence combined with the preceding discussion about the 2014 Report, demonstrates that Mustaq's estimates were most probably inaccurate, possibly by a very large margin.
- [227] The Defendants needed to demonstrate, via evidence at trial, that Mustaq's quantification of trust assets was honestly done, in good faith, and in a manner fair to all beneficiaries. Given the causal methodology he employed, and the evidence suggesting his estimates were gross underestimates, that conclusion is difficult to draw.
- [255] I find Meb was aware that the calculations in the 2014 Report depended upon figures provided by Mustaq. He took no steps to redress what he admitted was an inherent conflict of interest.
- [256] I find Meb's and Mustaq's testimony about the quality of the 2014 Report, Mustaq's role in it and their knowledge about both, was not credible. I am satisfied that both Meb and Mustaq understood the 2014 Report was not an objective valuation of trust assets because it lacked independent verification of his estimates. I do not believe Meb's assertion that he was unaware the extent to which Mustaq influenced the final valuation. I do not believe the excuse that Mustaq thought there was insufficient time to obtain appraisals.
- [270] Based on the foregoing, I infer that the refusal to disclose the 2014 Report to Fareed and Arshad was largely motivated by both Meb's and Mustaq's self-interest not to expose the report's frailties. That conduct is contrary to the MAP Trustees' fiduciary duties.
- [278] The critical issue is not whether Mustaq was legally required to obtain independent appraisals. Nor could it be determinative whether he consulted, obtained or relied upon professional advice. The issue is, in the face of his conflict, did he fulfill his duties as a fiduciary to act only in the best interest of the beneficiaries.
- [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.
- [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.
- [56] On the basis of her findings, the judge found both Haider and Mustaq liable to the plaintiffs for breach of fiduciary duty. She found Meb liable to them for knowingly assisting in that breach through his conduct in executing the plan, including, as I read the judgment, using his position as trustee of the Madatali Trust to further the plan. In the result, and as a result of an election by the plaintiffs, she concluded the plaintiffs were entitled to the disgorgement of benefits received as a result of the defendants' breaches of duty.
- [57] In her conclusion, the judge wrote:
- [346] Based on my review of all the evidence, and these reasons for judgment, I conclude:
- a) I am satisfied that the plaintiffs established Haider and Mustaq were in a prima facie conflict as the MAP Trustees because of their overlapping roles. They failed to persuade me that they conducted themselves in good faith and with honesty in the face of that conflict. I conclude that Mustaq's duty of loyalty was impaired by his self-interest. I conclude Haider and Mustaq breached their fiduciary duties to the plaintiffs.
 - b) I am persuaded that the evidence establishes that Meb knowingly assisted Mustaq and Haider in their breach of their fiduciary duties. I also conclude his conduct was not in good faith because he was guided by his self-interest.
 - c) With regard to the process of winding up of the family trusts and the steps taken to restructure the Numbered Companies, the Defendants acted collectively. I conclude they all were in a prima facie conflict from the outset of the process. Mustaq and Meb failed to persuade me that in light of that, they adhered to their duty of loyalty to all beneficiaries. I conclude their actions and decisions were influenced by their self-interest and their conduct was not in good faith throughout that process.
 - f) Given these conclusions, it is unnecessary for me to address the claims of breach of trust, conspiracy and negligence.
- [58] It would seem evident from subparagraph (f), the judge viewed the case as turning on breach of fiduciary duty, but not breach of trust. I confess to not fully understanding what the judge intended to communicate when she commented it was unnecessary to address the claims of breach of trust. It would seem to me the liability of Haider and Mustaq had to turn on breach of their fiduciary duties as trustees of the MAP Trust. It is apparent, however, that the foundation of the judge's analysis is that the prima facie conflict between duty and interest arose because the defendants were in overlapping roles.

- [59] Subsequent to the release of the reasons on liability, further proceedings occurred. It is not necessary to refer to them in detail, except to say other parties potentially affected by the disgorgement remedy (principally individuals interested in the other family trusts, including especially those interested in the Madatali Trust) were given notice and made submissions on proper remedy. The reasons dealing with these matters are indexed at 2020 BCSC 1711 and 2021 BCSC 1530.
- [60] The upshot of the final orders was that the class C (future growth) shares of 703, now held by Mustaq's newly created family trust, were to be disgorged to the plaintiffs of the wound-up MAP Trust by way of a constructive trust. The same was true of the class C (future growth) shares of 702, now held by Meb's new family trust. Finally, the judge ordered 50% of Meb's class A (voting shares) in 702 be disgorged to the plaintiffs by way of a constructive trust.

Appeal

- [61] The defendants, now the appellants, appeal the liability conclusions, and contest the appropriateness of the remedy. They are joined by parties interested in the other original family trusts, who also contest the remedy. The plaintiffs, now the respondents, support the liability findings and the disgorgement remedy, but cross appeal, arguing the judge erred in limiting the scope of what she ordered to be disgorged. They say the judge erred in principle by not ordering the disgorgement of all of the shares: namely, all of the frozen shares, the class E shares, and all of the voting shares in both 702 and 703.
- [62] Given the view I take of this appeal, it is not necessary to provide further detail about the scope of the remedy at this stage, although I will comment later on some of the issues raised by the remedy.

Position of the Appellants

- [63] The appellants contend the judge committed an extricable legal error in the analytical framework she applied to assess the evidence. Specifically, the judge erred in applying only general principles of fiduciary duty to the exercise of discretion by the trustees of the MAP Trust, rather than assessing whether there were lawful grounds to interfere with the trustees' exercise of discretion conferred on them by the MAP Trust instrument. Alternatively, they submit the judge erred in concluding, based on the facts as she found them, given the scope of their discretion, the defendants breached their fiduciary duties.
- [64] The appellants assert the judge should have begun, but did not begin, her analysis with the MAP Trust instrument to determine the scope of the trustees' discretion and the extent to which the instrument, in the context in which it was created, modified the application of abstract fiduciary duties. This, they claim, could have helped resolve issues such as whether the trustees were acting in the face of a disabling conflict, whether the "no profit" rule was displaced, and whether the trustees were obliged to act solely in the best interests of all of the beneficiaries. Had the judge approached her task properly, she should have concluded

the trustees acted within the scope of the discretion conferred by the MAP Trust instrument.

- [65] The foundation for this argument, the appellants assert, is that the first duty of a trustee is to act in accordance with the terms of the trust instrument. Where an issue arises, the obligation of the court in interpreting the trust instrument is to determine the settlor's intention in establishing the trust, considering the scope and purpose of the trust as a whole, and the foundations and principles on which it was intended to operate.
- [66] The appellants submit that had the judge properly performed her analysis, she would have found the content of the trustees' duties was modified by the trust instrument. The analysis would then have focused on the scope of the trustees' discretion, guided by the principles governing legitimate judicial intervention with a trustee's decision. As summarized in *Waters*, 4th ed., a court may intervene in the following circumstances:
- (1) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.

As a result of the judge entering into a flawed analysis, she did not address the questions properly before the court.

- [67] The appellants also argue that while fiduciaries generally must avoid conflicting interests, that is not a non-derogable rule. Rather, in the context of private discretionary trusts, particularly family trusts, the court must first examine the trust instrument and the circumstances in which the trust was established. They point out there is no inherent prohibition against trustees being directors of companies owned by a trust, or beneficiaries of related trusts, or even beneficiaries of the same trust. These overlapping roles do not necessarily create disabling conflicts. In light of this, the scope and nature of the duty to avoid conflicts must be examined by reference to the particular trust instrument. Here, the appellants say, the MAP Trust contemplated the trustees being directors of PEL and PIL, thus simultaneously owing duties both to the trust and PEL and PIL.
- [68] The appellants assert the judge simply did not grapple with how the trust instrument authorized trustees to act in their overlapping roles. Nor did she consider how these permitted roles might affect the nature and scope of the trustees' duties as fiduciaries. They say she incorrectly considered she was bound to resolve the case on the basis of general principles of fiduciary duty, without regard to the terms of the MAP Trust. Consequently, she ignored the First Generation's intentions and concluded the trustees were in a disabling conflict of duty that gave rise to what she found were breaches of their duties of loyalty.

[69] Under the trust instrument, the trustees had a broad and unfettered discretion to pay out the capital to one or more of the beneficiaries, even to the exclusion of others. The trustees were not, as the judge concluded, impressed with a duty to act solely in the best interests of all of the beneficiaries. They had no duty to make decisions that produced any particular result for the beneficiaries. The trustees simply had an obligation to consider the interests of all of the beneficiaries.

[70] In summary, the appellants say the MAP Trust instrument reflected the personal objectives and wishes of Mohamed Aly:

... He and his brothers well-understood the structure of the Family Business: they built that structure. They knew the scope of the discretion they wanted to assign to their trustees: the trustees would be their kin in whom they had confidence. Respect is owed to their choices, including the discretion they sought to repose in their trustees. Particular respect is owed to the distribution judgements of Haider and Pyarali, who were the First Generation brothers alive at the time those decisions were made in 2014.

[71] Accordingly, the judge's conclusions on breach of fiduciary duty, and the findings of fact associated with them, rest on a flawed legal analysis. As a result, a new trial is necessary.

[72] The appellants also advance an alternative argument, which assumes the judge was right to approach the issues through an abstract breach of fiduciary duty lens. They say none of the factors the judge considered established a breach of fiduciary duty. In their submission, at most these amount to objections to the administration of the trust.

[73] The appellants submit the judge elevated a practical recommendation to consult beneficiaries to a legal obligation. They argue the trustees had no duty to consult the beneficiaries before making their decision, or to provide reasons for it. Further, a conflicting interest on the part of Mustaq could not amount to a breach of fiduciary duty held by Haider and Mustaq, collectively. Haider was not a beneficiary of any trust. Nor, they say, did he have any interest that conflicted with his duty as a trustee of the MAP Trust.

Position of the Respondents

[74] The respondents contend the judge did not fall into any of the errors alleged. They say the judge had proper regard for the terms of the trust agreement, and was entitled to conclude it did not vitiate, replace, or modify the fiduciary duties to which the trustees were subject. They say the judge did not apply only abstract principles of fiduciary duty without regard to the trust instrument. In their view, the appellants mischaracterise what the judge did. They say the judge applied the proper analytical framework, as follows:

- (a) The trial judge first had to determine whether the fiduciary duty of loyalty and the no-conflict and no-profit rules were obviated by the terms of the MAP Trust. She found that they were not. This finding was consistent with the advice the trustees received at their first meeting with the solicitors about the freeze in 2012.

- (b) The trial judge then had to determine whether the plaintiffs had established a prima facie case that the MAP Trustees had breached that duty. She found that the appellants placed themselves in "blatant" conflicts of interest by addressing the winding up collectively, by implementing the "foregone conclusion" which preferred their personal interests over those of the other beneficiaries, and by producing a valuation they knew grossly undervalued the trust assets to their personal benefit.
- (c) Having found that the plaintiffs had established a prima facie breach of fiduciary duty, the onus then shifted to the defendants who were required to demonstrate that their actions were in accordance with their duties. As we have seen, the trial judge concluded they had failed to prove that they had acted properly and found that Mustaq intentionally and dishonestly breached his duty with the knowing assistance of Meb.
- [75] The respondents agree a trustee's duties and obligations are dictated by both the express terms of the trust and the general law. They agree the express terms of the trust deed, or the settlor placing the trustee in a position of conflict, may modify general fiduciary obligations, but maintain that broad discretion in a trust instrument does not, without more, obviate a trustee's duty of loyalty. In this case, the respondents say the trust instrument displaced neither the "no conflict" rule, nor the "no profit" rule.
- [76] The respondents submit the trial judge understood the terms of a trust could modify the duty of loyalty, either by way of an exclusion clause or a grant of power that effectively acts as an exclusion clause. They agree, quoting Waters, 4th ed., "it is fundamental that no trustee may permit his interest to conflict with his duty, but it is open to the settlor to permit the trustee to occupy such a position". However, they contend the judge was correct in finding neither was the case here, nor that the trust instrument excluded the duty of loyalty.
- [77] In their submission, the terms of the trust instrument reinforce the duty of loyalty. They note clause 5.2 prohibits a Primary Beneficiary or his or her spouse from being a trustee. Therefore, Meb and Mustaq (as Primary Beneficiaries of the MAP Trust and the Madatali Trust, respectively) were each precluded from any involvement in the decision making of the respective trust of which each was a beneficiary.
- [78] Moreover, the trial judge acknowledged the defendants' submission that the rule against self-dealing does not apply if the trustee is put into a position of conflict by the settlor of the trust. They say she was right to find the cases relied on by the appellants did not apply in the circumstances. As the judge noted, Mustaq was not put in a position of conflict by the settlor when it was created; he only became a trustee of the MAP Trust after Mohamed Aly passed away.

[79] The respondents argue that having found the trustees of the MAP Trust owed a duty of loyalty, the judge then had to consider whether the duty had been breached. First, the plaintiffs had the onus of establishing a prima facie fiduciary duty and its breach. It was sufficient to demonstrate a substantial risk the trustees' duties and interests could conflict. Once this was established, the onus shifted to the trustees to demonstrate they were acting solely in the best interests of the beneficiaries.

[80] In their submission, the judge was entitled to find, as she did, the plaintiffs' interests were compromised, the conflicts were blatant, and the defendants did not conduct themselves honestly and in good faith: Pirani at para. 339. These findings, they say, are mixed fact and law, and subject to a standard of review of palpable and overriding error.

[81] The respondents contend the duty of loyalty was breached both by the collective decision making, and the fact that the decision to carry out a freeze was a "foregone conclusion":

clause 5.2 of the trusts was aligned with the common law no conflict rule by expressly prohibiting beneficiaries of a trust from being involved in the decision-making relating to that trust. As such, Meb was prohibited from being involved in the decision-making relating to the MAP Trust and Mustaq was prohibited from being involved in the decision-making relating to the Madatali Trust. The settlors' intentions, as expressly set out in the trusts, are consistent with the need to avoid conflicts, contrary to the appellants' submissions.

[82] The judge found:

[164] Moreover, Mustaq was instructing [his lawyers] about the trusts' termination and corporate restructuring 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.

[83] She also found:

[281] 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.

[84] Furthermore, as the respondents point out, the trial judge found the defendants never wavered from the basic design of the plan they collectively devised while in a conflict of interest: Pirani at paras. 186-92.

[85] The respondents dispute the suggestion the appellants were not facing disqualifying conflicts. It is inaccurate, they contend, to say this was precisely how the First Generation intended to govern the Family Business, and to say the conflicts were permitted by the MAP Trust. In oral submission, their counsel acknowledged the context of the establishment of the trust or the factual matrix may affect the interpretation of trustee duties, but submitted there is nothing in that context to cast doubt on the judge's approach.

- [86] They contend clause 5.2 of the trusts prohibited Meb and Mustaq from any involvement in decision making that affected them as beneficiaries of the MAP Trust and Madatali Trust, respectively. As a result, the conflicting pressures on Mustaq's and Meb's judgment were obvious and manifest in their "foregone conclusion".
- [87] The respondents argue the "foregone conclusion" was the result of a conflict between the trustees' duties to act solely in the interests of the beneficiaries, and Mustaq's and Meb's self interest in being able to continue to run the Family Business solely for themselves. This, they say, is not simply the result of them being both trustees and directors of PEL and PIL or the numbered companies. Rather, the conflict arose because Mustaq and Meb (as well as Zahir and Nadeem) were the only second-generation members involved in the Family Business. They had no interest in looking for other work. The conflict, then, was between their obligations as trustees (to have regard to all the available options and all the beneficiaries), and their self interest in not considering any alternatives. This conflict manifested itself not only in the decision to continue the Family Business (as opposed to liquidation), but also in relation to how the defendants structured this continuation.
- [88] The respondents contend the conflict both contaminated the decision making about how to structure the continuation of the Family Business, and precluded consideration of other options for addressing the winding up. As they point out, the 21-year rule did not require the continuation of the Family Business or a corporate reorganization. There were alternatives available.
- [89] In their submission, the conflict became clear through the defendants' conduct; it manifested itself in the way they undertook the valuation of the existing assets, and in the refusal to provide the valuation report to the plaintiffs. In short, Mustaq led the reorganization plan that benefitted himself and Meb, and if Mustaq was in a conflict and in breach, the fact that Haider went along with it did not dissipate the breach.
- [90] Accordingly, the respondents argue, there is no basis upon which to interfere with the judge's conclusions on liability.
- [91] As noted, the respondents also have a cross appeal directed at expanding the class and number of shares subject to disgorgement.

Analysis

- [92] Before commenting on the substantive issues in the appeal, I begin by noting the appellants raised an issue about whether the plaintiffs had properly claimed an entitlement to disgorgement in their pleadings. I see no merit in that suggestion because the plaintiffs wrote to the defendants before trial and explicitly gave notice of their intention to seek an order for disgorgement.
- [93] I turn now to the issues on appeal. While at first blush, the parties may appear to be ships passing in the night, there is, I discern, more analytical common ground than first appears.

- [94] The parties agree on a number of incontrovertible general principles. First, trustees are fiduciaries and owe duties to the beneficiaries of the trust. Second, as a general matter, trustees should not act in the face of a disabling conflict of interest or duty. Third, conflicts may exist between duties owed as trustees, and duties owed in other capacities; or conflicts may exist between duty and interest. Fourth, where a trustee acts in the face of a disabling conflict, the trustee will bear the onus of demonstrating that decisions were taken in good faith within the scope of the trustee's powers. Depending on the circumstances, the trustee may also have to demonstrate they did not profit from acting as a trustee. Fifth, a prima facie conflict may arise where there is a substantial risk the conflict could sway the decision making.
- [95] The parties also agree these general propositions are context specific, and not necessarily of universal application. Their applicability turns, at least in part, on the extent to which the trust instrument, interpreted in its appropriate factual matrix, informs, alters, modifies, or displaces the scope and content of fiduciary duties. The parties agree the trust instrument may authorize a trustee to act in the face of what may otherwise be a disabling conflict; displace the operation of the "no profit" rule; and in other ways modify the content of the fiduciary duty, for example, displacing an obligation to act only in the best interests of all beneficiaries with a more limited duty.
- [96] It is also common ground that in order to establish the degree to which the trust instrument has modified a trustee's duties, it is necessary to seek to determine the actual intentions of the settlor. This inquiry involves interpreting the trust agreement in light of the context in which the trust was established, its purposes and the principles governing its administration.
- [97] In my view, none of these propositions are controversial. Indeed, the principles in the two preceding paragraphs, both of which are key to this appeal, are reflected, for example, in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Carswell, 2021) [Waters, 5th ed.] at 1003:

It is important to remember, however, that the rules do not involve a total prohibition upon activities which present a conflict of interest and duty, nor upon any possibility of inquiring some profit from the fiduciary role. The person who asks the fiduciary to undertake that task, or who condones the assumption of the task, is perfectly free to permit such activity on the part of the fiduciary. A contract of agency may spell out circumstances in which the fiduciary may derive a personal profit, and a will or trust deed may expressly or impliedly give such a permission.

Where it is alleged the activity was authorized at the time of appointment, this will involve the construction of the instrument appointing the fiduciary

- [98] This proposition is well supported by case authority. In "The Reception of Equity in the Supreme Court (1875-2000)" (2001) 80 Can Bar Rev 620 at 651, Donovan W.M. Waters says "the creator of a fiduciary relationship can always provide that the relationship shall not apply or apply only to a limited degree", giving the example of *Crocker and Croquip Ltd. v.*

Tornroos and Tornroos, [1957] S.C.R. 151, 7 D.L.R. (2d) 104. One may also refer to *Munden Acres Ltd. v. Lincoln Trust and Savings Co.* (1975), 63 D.L.R. (3d) 604 at 616, 10 O.R. (2d) 492 (H. Ct. J.):

... This rule is sometimes expressed that he must not place himself in a position where he has or may have a conflict of interest with his cestui que trust.

The [above] rule is a stern and inflexible rule and in no way dependent upon good faith or harm to the cestui que trust: *Regal (Hastings), Ltd. v. Culliver et al.*, [1942] 1 All E.R. 378; *Aberdeen R. Co. v. Blaikie Brothers* (1854), 1 Macq. 461, but it is not applicable here. The terms of the voting trust agreement clearly exclude it. Not only that, but to deny the trustees the right to deal with shares of the company would go against the whole concept of the company. These trustees as directors and officers were recruited to serve without recompense in the hope of success to the company which would be reflected in profit to them. There was nothing to prevent their buying the shares on the open market, subscribing when rights were offered and underwriting the issue. If in so doing they made a profit it was theirs. That the parties can exclude the strict rule is apparent from consideration of *Boulting et al. v. Ass'n of Cinematograph Television & Allied Technicians*, [1963] 1 All E.R. 716, and the cases therein referred to.

[Emphasis added.]

[99] Other illustrative cases beyond *Boulting v. Association of Cinematograph, Television and Allied Technicians*, [1963] 1 All E.R. 716, [1963] 2 W.L.R. 529, include *Edell v. Sitzer* (2001), 55 O.R. (3d) 198, 106 A.C.W.S. (3d) 1136 (Sup. Ct.) [Edell cited to O.R.], *aff'd* (2004), 187 O.A.C. 189, 131 A.C.W.S. (3d) 563, in which Cullity J. observed:

[158] It is evident from the terms of clause 8 that it was not intended to be merely a power to advance capital to the primary capital beneficiaries. Like the power to distribute income, it was exercisable at any time prior to the Distribution Date in favour of all, or any, of the issue of Paul and Geraldine and, therefore, was exercisable in favour of Michael or any one, or more, of Paul's descendants to the exclusion of any others notwithstanding the priority given to the interests of Jodi and her issue in clause 9. In these circumstances the words of the trust instrument by themselves are sufficient to indicate that the power was created in order to provide sufficient flexibility to permit the dispositions of capital in clause 9 to be overridden if the trustees considered this to be for the benefit of any one or more of the objects of the power. To that extent this not uncommon form of a power of encroachment has some of the important attributes of a power of appointment as well as those of a power of advancement. It is, however, exercisable by the trustees and for that reason is subject to fiduciary standards, and the supervision of the court, to an extent that would not be applicable to powers vested in individuals in their personal capacities: *Maclean, Trusts and Powers* (London: Sweet & Maxwell, 1989), at p. 88. The application and extent of fiduciary standards--such as the duties to avoid conflicts of interest, to act with reasonable prudence and to observe impartiality or, in other words, to maintain an even hand--may, of course, be limited by the provisions of the trust instrument that indicate both the scope of a power

and the purposes for which it may be exercised: *Ballard Estate v. Ballard Estate* (1991), 1991 CanLII 7287 (ON CA), 3 O.R. (3d) 65, 41 E.T.R. 113 (C.A.); *Armitage v. Nurse*, [1997] 2 All E.R. 705 (C.A.); *Edge v. Pensions Ombudsman*, [2000] Ch. 602 (C.A.), at pp. 621 and 627-30.

[100] It would, I think, be redundant to cite further authority. What is useful to note, however, is how important it is to the proper interpretation and articulation of the scope and content of a trustee's obligations to understand the circumstances in which powers and duties are created and conferred, and the principles upon which parties base an arrangement (here, an exercise in estate planning). Again, Cullity J. makes the point:

[180] In addition to the above reasons for my finding that the encroachment should not be interfered with, I believe it is legitimate to construe the provisions of the Jodi Trust in the light of the general principles accepted by Paul and Sidney and reflected in the estate planning of which the establishment of the trust was an integral element. The planning was premised on a conviction that its success--like that already achieved in the growth of the family businesses--would depend on co-operation and an avoidance of disharmony and discord among members of the family. The power of encroachment was inserted to provide Paul with a measure of control over the ultimate distribution of the trust property and he was, in my judgment, entitled to exercise it in accordance with, and to protect and implement, the principles on which the planning was based.

[187] Paul was, of course, wearing several different hats: he was a trustee of the two inter vivos trusts and of the testamentary trust created in Geraldine's will and he was the controlling shareholder, and the owner of preference shares that represented a substantial part of the value, of Paulco. To the extent that these different capacities could involve him in conflicts of interest, they were authorized by the circumstances in which such capacities were conferred upon him: namely, as part of the estate planning implemented by him and his spouse. As Professor Waters has stated (*Law of Trusts in Canada* (2nd ed., 1984), at p. 715):

It is important to remember that the rule does not involve a total prohibition upon activities which present a conflict of interest and duty. The person who asks the fiduciary to undertake the task, or who condones the assumption of the task, is perfectly free to permit such activity on the part of the fiduciary.

[101] Broadly speaking, the judge accepted these propositions. Respectfully, I think the appellants press too hard the argument that the judge referred exclusively to general fiduciary obligations without regard to the trust instrument. It is apparent, on a fair reading of the judgment, the judge turned her mind to whether the trust instrument displaced the "no conflict" and "no profit" rules, although there is almost no analysis of the implications of the broad grant of absolute discretion to the trustees in clause 4.12.

- [102] Hence, while the proposition that a trustee is a fiduciary is incontrovertible, it is also clear that when a trust is created, trustees may be authorized not only to act in the face of a conflict, but may also be relieved of other aspects of their fiduciary duty, including the "no profit" prohibition.
- [103] It is necessary now to focus directly on why I have concluded the judge fell or was led into extricable legal error. In respect of contractual interpretation (the context of many leading cases on extricable legal error) the standard of review to be applied on appeal is one of mixed fact and law, unless an extricable legal error is present. Extricable legal errors "include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 53.
- [104] In my view, this articulation of extricable legal error applies similarly to the interpretation of a trust instrument. Here, respectfully, in my view, the judge made extricable legal errors in her analysis of the scope and content of the duties owed to the plaintiffs by the defendants. The judge did not have proper regard to the context in which the MAP Trust was established, and accordingly did not consider a number of factors relevant to its interpretation. As a result, the judge applied incorrect principles to the interpretative analysis, and failed to consider required elements of the legal test.
- [105] I accept that the judge recognized the interpretation of the trust instrument might affect the nature and scope of fiduciary obligations. She also understood the circumstances in which the trust was created may influence the interpretation of those obligations. But having identified these points, the judge did not ask herself the legally relevant questions to give them full effect. Rather than examine the context of the establishment of the trust, she limited her analysis to the putative intentions of a nominal settlor, and considered only when and at whose decision Mustaq became a trustee. In doing so, she failed to integrate into her analysis other essential elements of the factual matrix relevant to the scope and content of the trustees' duties. Similarly, by placing the issue of general fiduciary duties at the heart of her analysis, she relegated the trust instrument to a peripheral role. In my view, this led the judge to assume the general fiduciary duties were governing the entire transaction and thus were breached unless the trustees could justify their decisions. Had she approached the question properly, she would have asked first what the relevant duties were in light of the trust instrument, interpreted given the relevant context. To that extent, I agree with the appellants' submissions on appeal.
- [106] It may well be the trial judge was led into this error. The primary focus of the defendants' submissions was on clause 4.12 of the trust instrument. That clause, they argued, conferred on the trustees a broad, absolute, and unfettered discretion to distribute the capital of the MAP Trust to the beneficiaries in such proportions as they determined, as well as authorizing the exclusion of beneficiaries from the distribution. The defendants argued the nature of their obligations should be gleaned from within the four corners of the trust document without resort to the so-called "armchair" rule. The gravamen of the defence was

that the trustees had acted in good faith in accordance with their duties and powers.

- [107] The defendants accepted as a general rule trustees must act in the best interests of the beneficiaries as a whole, and in compliance with the trust instrument. They argued, correctly in my view, the court's primary task in interpreting a trust instrument is to determine the actual intention of the settlor in establishing the trust. They focused their submission on the MAP Trust instrument as the starting point of the analysis, contending it was not necessary to rely on the armchair rule to interpret it, and it was only necessary to examine the MAP Trust instrument alone. They submitted that if the intention of the settlor can be discovered in the context of the document as a whole, it is not necessary to look any further. As a result of the "clear and unambiguous" language of clause 4.12, they said, the trustees had the authority, consistent with their fiduciary duties as modified under the instrument, to distribute the trust property unequally and to exclude some beneficiaries altogether.
- [108] The defendants' primary focus was on the breadth of discretion conferred by clause 4.12. Insofar as the defendants addressed the conflict issue, they did so in the following way. On the basis of *Clock Holdings Ltd. v. Braich*, 2008 BCSC 1697 [Clock Holdings], they contended there was no disabling conflict arising from the same person filling the roles of trustee and director of a company in which the same trust owns shares. Haider and Mustaq were not beneficiaries of the MAP Trust, meaning no conflict arose. Similarly, no conflict arose from the fact that Mustaq was a beneficiary of the Madatali Trust, nor from the fact that Haider had an interest in how the Haider Trust would be distributed. Moreover, as the judge acknowledged, the rule against self-dealing does not apply if the trustee is put into that position by the settlor. They placed, *inter alia*, Edell and Sargeant before the judge.
- [109] As we have seen, the judge rejected the argument that it was sufficient to analyse the issues by focusing on the MAP Trust in isolation. She concluded, rightly in my view, it was necessary to take a broader view, recognizing the relevance of the other trusts. In her analysis, she thought it essential to look beyond the MAP Trust to the relationships amongst the trusts; to how all four trusts were administered; and to the fact that, despite the existence of separate trusts and numbered companies, the defendants created and implemented a plan that dealt with four trusts together. This approach underlay her conclusion that Mustaq was in a conflict because, although he was a trustee of the MAP Trust, he was also a beneficiary of the Madatali Trust. Similarly, Haider's conflict related to his overlapping role as a trustee of other trusts, his directorships, and his role in the Family Business.
- [110] Respectfully, however, I do not think the judge explored fully the implications of this analytical approach, and she took far too narrow a view both of the relevant context in which the MAP Trust was established, and its effect on the broad discretion conferred by clause 4.12. In my view, the judge fell into error by not properly exploring the structure of the arrangements established at the outset by the First Generation. She also paid insufficient attention to the principles underlying the estate freeze. Undertaking the proper

analysis would have led the judge to examine whether the structure of the trusts should be interpreted as influencing the content of the fiduciary duty. In answering this question, she would have had to grapple with the issue of whether, inherent in the structure of trustees occupying different roles, they were authorized to exercise the discretion conferred by clause 4.12 as they saw fit, even in the face of what otherwise might be regarded as a disabling conflict.

- [111] As noted, the failure to embark on the correct inquiry is an extricable legal error. The judge failed to ask the right questions, that is, she failed to apply a proper interpretative approach to the legal questions she had to answer. The approach was legally flawed, reflecting errors in principle.
- [112] These errors have the capacity to undermine the judge's findings supporting her conclusion that the defendants breached their fiduciary duties. One needs to ask whether, if overlapping roles are contemplated, conflicts are, in this context, disabling. If the result is that the appellants were not in a disabling conflict, then, necessarily, further questions about whether the content of the duties were modified would need to be examined, including whether the no profit rule is displaced. The potential effect on the judge's ultimate conclusions is profound because, in her reasoning, the fact of overlapping roles creating disabling conflicts led her directly to conclusions that the structure of the reorganization (reserving future growth to appellants' family and unequal distribution of current value) necessarily evidenced a breach of fiduciary duty by preferring self interest. Equally, her conclusion that the defendants had breached duties to act solely in the interests of all beneficiaries is also undermined, since that is an incorrect articulation of the content of the trustees' duties.
- [113] Above, at para. 35, I set out what I identified as the dominant themes of the trial judgment. I view the consequences of the legal errors I am examining to be potentially profound because of the importance of those dominant themes in the judgment. To reiterate, those themes include: the fiduciary duty was to act solely in the best interests of all the beneficiaries, and the failure to do so was a breach of the duty of loyalty; it was wrong for the trustees to act in a coordinated fashion on behalf of all of the trusts; the fact of overlapping roles leading to disabling conflicts; and the "foregone conclusion" to implement a plan that preferred currently involved individuals and families to others.
- [114] If a proper analysis is undertaken of these themes, several critical conclusions (particularly those rooted in the inherent structure of the reorganization) fall away. Other findings, such as those regarding knowingly underestimating the value of PEL and PIL, would likely need to be analysed in a different legal framework, with potential consequences for the appropriate remedy.
- [115] I will now explain these considerations more completely. It is helpful to begin by acknowledging the importance of a correct interpretation of the trust instrument in understanding whether and how a trustee's fiduciary obligations may be affected. In this

sense, I agree with the appellants the starting point should be the trust instrument and not fiduciary duties at large. This insight has been explained by Cromwell J. in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6. Despite the case involving the administration of a pension plan under a statute, his comments are instructive and of general application:

- [185] However, the conclusion that Indalex as plan administrator had fiduciary duties to the plan beneficiaries is the beginning, not the end of the inquiry. This is because fiduciary duties do not exist at large, but arise from and relate to the specific legal interests at stake: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261, at para. 31. As La Forest J. put it in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574:

The obligation imposed [on a fiduciary] may vary in its specific substance depending on the relationship [N]ot every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty.

It is only in relation to breaches of the specific obligations imposed because the relationship is one characterized as fiduciary that a claim for breach of fiduciary duty can be founded.

[Emphasis added; pp. 646-47.]

- [186] The nature and scope of the fiduciary duty must, therefore, be assessed in the legal framework governing the relationship out of which the fiduciary duty arises: see, e.g., *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 S.C.R. 175, at para. 141; *Galambos v. Perez*, 2009 SCC 48, [2009] 3 S.C.R. 247, at paras. 36-37; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 41. So, for example, as a general rule, a fiduciary has a duty of loyalty including the duty to avoid conflicts of interest: see, e.g., *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 35; *Lac Minerals*, at pp. 646-47. However, this general rule may have to be modified in light of the legal framework within which a particular fiduciary duty must be exercised. In my respectful view, this is such a case.

- [187] In order to define the nature and scope of Indalex's role and fiduciary obligations as a plan administrator, we must examine the legal framework within which the administrator functions. This framework is established primarily by the plan documents and the relevant provisions of the PBA. It is to these sources, first and foremost, that we look in order to shape the specific fiduciary duties owed in this context.

[*Italic emphasis in original; underline emphasis added.*]

- [116] Thus, a proper interpretation of the trust instrument must consider the context in which it was created. In my opinion, the following facts constitute an important and pertinent part of the factual matrix. Although these facts were acknowledged by the judge, she did not analyse their significance for the issues she had to decide.

- [117] The First Generation established, worked in, and owned the Family Business. They decided collectively to reorganize the corporate structure and ownership of PEL and PIL. They did so by creating the four family trusts, of which the MAP Trust is but one. The initial corporate reorganization and the creation of the family trusts was itself a coordinated and collaborative exercise. The structure of each of the family trusts was substantially identical.
- [118] It seems clear that, in reality, the First Generation brothers were the creators of the trust, since they established and implemented the trusts, and the trusts reflected their intentions and purposes. Although each trust had a settlor other than one of the brothers, the settlors were clearly nominal. The settlors were fulfilling the intentions of the creators of the trust and, at a minimum, condoning the implications of the relationships created and the operative principles underlying the trusts in relation to the Family Business. Thus, the relevant intention for the purpose of examining the scope and content of trustees' duties is that of the First Generation brother who established a particular trust. In my opinion, it is too narrow and technical a view to restrict the relevant intention to the "settlor" where the settlor is clearly nominal. This is, however, what the judge did by concluding the trustees were in a disabling conflict in part because the settlor did not authorize the conflict. Approached properly she could or should have concluded that the settlor in fact approved or at a minimum condoned the arrangements. She said:
- [169] In the case at bar, Meb is a beneficiary of the MAP Trust; the settlor was his father's mother in law. Meb became a director of PEL and PIL because his father nominated Meb to take his place pursuant to the First Generation's shareholders agreement. Similarly, Mustaq's father chose him to overtake the directorships in the Family Business, but the settlor of the Madatali Trust was Mustaq's mother. Therefore, neither was placed in a position of conflict by the settlors of their respective family's trust. Unlike the siblings in Sargeant, the same person did not put the Defendants in a position of conflict.
- [119] The analysis rests on the proposition that neither Meb nor Mustaq was put in a position of conflict by the settlor of his respective family's trust, because it was their respective fathers who chose them to take over directorship of PEL and PIL. Here, I consider the judge erred. The relevant question was whether the person who implemented the trust sanctioned the conflict. (Alternatively, it might be analysed as whether the settlor must also be taken therefore as sanctioning or condoning it.) In both cases, the person who implemented the trust was the person who nominated the sons to assume the role in numbered companies or the Family Business. The role each son assumed was his father's. Both fathers were trustees and directors from the outset. Overlapping roles were inherent in the structure of the trust, and corporate structure, from the beginning. This context is pertinent to the analysis of whether disabling conflicts existed. It misses the point to say neither Meb nor Mustaq was put in a position of conflict by a nominal settlor. The obligations and duties attaching to each role inhere in the office, not the specific identity of the person occupying them.

- [120] With respect to these overlapping roles, the judge treated the overlapping roles of trustee and company director as inherently disabling. As I have just alluded to, in my view, this is incorrect. Where a family trust owns a family business, it is commonplace to have the same individual acting both as director and trustee. There is no conflict inherent in that arrangement. Indeed, to the contrary, the interests of the trust and the company are typically aligned. What is good for the company is good for the trust. The first duty of someone occupying both these roles is to the company: *Clock Holdings* at para. 155.
- [121] The respondents argue Mustaq cannot escape his conflict because he was not a trustee at the time the trust was established. He was appointed only later and not by the settlor. This misses the point. Again, the crux is what duties attached to the office of the trustee, how overlapping roles may have affected those duties, and whether the conflict was inherent in or contemplated by the structure of the trusts. It is not about the individual. Mustaq assumed the obligations attaching to the office when he became a trustee. Whether he then faced a disabling conflict depended on the structure of the trust arrangements, and if they contemplated that a trustee could occupy those roles.
- [122] The respondents also argue the real conflict is not between the appellants' obligations as trustees and duties as directors, but between their fiduciary duties and their underlying interest in the Family Business. This created the conflict that underlay the "foregone conclusion" the appellants would implement a plan ensuring their continuing involvement in the Family Business, and avoid the need to "look for other work". Apart from the fact that PEL and PIL are their businesses, this argument is not responsive to the question of whether this kind of conflict was embedded in the structure of family arrangements, which created overlapping roles. The judge did not analyse whether this context impacted the conflicts she found to be disabling, or somehow modified or displaced the "no profit" rule. Indeed, it seems the judge concluded the arrangements created by the First Generation brothers embedded prohibited disabling conflicts in the trust arrangements from the very beginning, as opposed to acknowledging and thus sanctioning these conflicts. In my respectful view, that conclusion cannot be correct.
- [123] Moreover, the fact that the First Generation initially deliberately acted together must inform the interpretation of their intentions. Each established a trust, and each transferred a portion of his interest in PEL and PIL to that trust, as part of a coordinated scheme to plan for the future.
- [124] It is also important to note that each of the First Generation brothers was a trustee of his respective family trust. Haider was a trustee of each of the family trusts. The trustees of each trust are required to act unanimously. The inference from this arrangement might well be that the founders' expectation was indeed that the trustees for each trust would act in a coordinated fashion, share information, and consider each other's perspectives and interests in formulating plans of action.

- [125] While the trust instruments prohibit a trustee of a given trust from being a beneficiary of that same trust, they do not prohibit a trustee from being a director of PEL and PIL, or otherwise being involved in and taking benefits from the Family Business. That was the situation from the outset. Each brother was directly involved in the Family Business and contributed to its success. The brothers collectively maintained voting control over PEL and PIL. Each maintained a financial interest in the Family Business. Each was a trustee. Decisions taken by a brother as trustee had the potential to benefit or harm that brother's interest in the Family Business. At the very least, this suggests a trustee who has an interest in PEL and PIL is not thereby in a disabling conflict of interest. It may carry the further implication that the "no profit" rule is vitiated or modified. Again, the judge did not address this question.
- [126] Furthermore, nothing in the trust instruments prohibited a trustee from being a beneficiary of another trust. From the outset, both Meb and Mustaq, beneficiaries of the MAP and Madatali Trusts, respectively, were also trustees of certain other family trusts. Again, this suggests that acting as a trustee and being a beneficiary of another trust was not itself to be seen as a disabling conflict. It may also lend further support to the potential displacement of the "no profit" rule.
- [127] To reiterate, acknowledging this background opens the door to considering whether, embedded in the structure of the trusts, was an expectation the trustees could act collectively without breaching their duties. While each First Generation brother no doubt had to make this decision in respect of his trust, he may well have contemplated that, in doing so, he (along with his co-trustees) would consider and implement a coordinated plan on behalf of all the trusts. If that is so, the judge's conclusion that the trustees breached their duty by acting in a coordinated fashion is arguably undermined.
- [128] I am not going so far as to say that, when a conflict is not disabling because it is contemplated by the trust arrangements, this necessarily vitiates the no profit rule or displaces other fiduciary duties. It may well be, as in *Sargeant*, a trustee facing a potential conflict of interest or duty may be entitled to act, but nevertheless may be required to demonstrate they had discharged their fiduciary duty to the beneficiaries. Before one can conclude a rule such as the no profit rule has been displaced or fiduciary duties have been modified in some way, one must engage in further analysis. The issue here is that the judge did not undertake this analysis.
- [129] At this point, some of the language of the trust instrument becomes directly relevant. Many of the terms are conventional for a trust of this kind. The instrument conferred broad discretion in clauses 4.1 to 4.4 with respect to interim distributions. Clause 4.12 is, of course critical. It is convenient to set it out again:

Notwithstanding any other provision of this Deed, the Trustees may at any time, if they deem it advisable for the preservation of the capital of the Trust Fund by reason of the incidence of taxation payable during the administration of the Trust or to be paid on the devolution or

distribution of the Trust Fund or the termination of any interest therein, or which the Trustees may in their sole discretion deem likely to be payable under any such circumstance, declare that the trusts hereof will terminate as to the whole or such part of the capital of the Trust Fund as they consider advisable, whereupon the whole of the capital of the Trust Fund or the part thereof as to which any such declaration is made, will vest in such one or more of the beneficiaries to the exclusion of the other or others in such proportions and in such manner as the Trustees in their absolute and unfettered discretion determine.

[Emphasis added.]

[130] Pursuant to clause 5.2, no person could be a trustee of that trust if they were at the same time a Primary Beneficiary or the spouse of a Primary Beneficiary. Under clause 6.1, the trustees had absolute and unfettered discretion to administer the trust fund, to the same extent as if they were the absolute owners beneficially entitled thereto. Subclause 6.2(p) specifically authorized a trustee to serve as an officer or director of any corporation, any of whose shares form part of the trust fund. Subclause 6.2(s) provided that trustees may make any distribution or other allocation for the purpose of a tax act as they in their absolute discretion deem to be in the best interests of the trust fund or the beneficiaries even if doing so could or would "confer[] an advantage on any one or more of the beneficiaries or could otherwise be considered as not being an impartial exercise by the Trustees of their duties under this Deed". Subclauses 6.2(m)-(o), (r) empower trustees to engage in and carry on any businesses on behalf of the trust; incorporate or acquire a corporation or corporations to hold any part of the trust fund; exercise voting and other rights incidental to the ownership of shares; and engage in transactions with any trustee if such transactions are, in the opinion of the trustees, on the same basis as might reasonably be negotiated in a non-arms length transaction.

[131] These clauses must be analysed in the context I described above. The respondents argue clause 5.2 demonstrates the trustees were obliged to act independently, and no beneficiary of another trust could be involved in any decisions about winding up the trusts and restructuring PEL and PIL. It is not obvious to me this is an implication of clause 5.2, when viewed in context. Rather, multiple interpretations are possible. It could be an indication to avoid conflicts, but, in context, it could also be a measure intended to establish a degree of independence in decision making by the trustees as regards a particular trust. It does not clearly prohibit a degree of coordination by trustees, nor eliminate participation by those in overlapping roles in implementing a proposed transaction. The fact that trustees had to achieve unanimity in decisions, coupled with the fact that Haider was a trustee of all of four trusts seems to sanction coordination and consensus building. The judge did not turn her mind to these issues.

- [132] Similarly, the effect of clause 6.2 is key. The powers conferred upon trustees therein are extensive and include, inter alia, contemplating overlapping roles (a trustee may be a director), and providing for unequal distribution even where doing so might not be an impartial exercise of a trustee's duties. The judge does not consider the potential implications of these arrangements.
- [133] I do not wish to be taken as offering any definitive view of what the proper resolution of these issues might be. But, in my opinion, this analysis was necessary to determine the degree to which alleged conflicts were disabling, and whether generally applicable fiduciary duties were modified or displaced.
- [134] Only if the judge had undertaken this analysis would she have been properly placed to examine the implications arising from clause 4.12 for the scope and content of fiduciary duty. I do not think the judge's articulation of the scope of the fiduciary duty--to act solely in the best interests of all of the beneficiaries--can stand when compared to the language of clause 4.12. It expressly authorizes the trustees to "vest in such one or more of the beneficiaries to the exclusion of the other or others in such proportions and in such manner as the Trustees in their absolute and unfettered discretion determine". The judge did not address whether this clause displaced or modified the general fiduciary duty.
- [135] In the event of a decision to wind up the trust and invoke clause 4.12, the trustees may, assuming they are acting properly, exclude some beneficiaries and prefer others. Necessarily, this means the trustees are not required to act solely in the best interests of all of the beneficiaries, let alone any particular beneficiaries. With respect to decisions made pursuant to clause 4.12, the most any beneficiary has is a hope that they will receive some part of the trust property. There is no entitlement to a particular outcome or result. It is far from clear what the scope of a fiduciary duty, if any, to any particular beneficiary might be in a case where a trust instrument grants, and the trustees exercise, absolute discretion to distribute the capital of the trust.
- [136] The reasoning of the trial judge appears to be tantamount to a conclusion that the inherent structure of the impugned transaction necessarily demonstrates a breach of duty, because it preferred the interests of some beneficiaries to others. In particular, many of those involved in implementing the transaction arguably disproportionately benefitted from the transaction. This fact appears to have led the judge to the conclusion the defendants inevitably did not act honestly or in good faith to discharge their fiduciary duty to consider only the best interests of all beneficiaries. But as I have indicated, it is not clear the duty imposed on the trustees prohibits the ultimate, unequal result. The transaction structure itself only becomes problematic if one can clearly identify the content of the duty imposed on the trustees, and how it was breached. Doing so was not possible under the analytical framework the judge employed.

- [137] A number of potential conclusions follow from my analysis to this point, particularly as they relate to the dominant themes in the judgment. First, it is not apparent the trustees were in a disabling conflict. This is contrary to the finding of the judge. Second, it is not obvious the trustees breached any trust or fiduciary obligation in acting in a coordinated fashion to implement a plan for the corporate restructuring of PEL and PIL, and wind up of the family trusts. Third, it is possible that, on a proper analysis, one might conclude not only are the apparent conflicts not disabling, but also the family arrangements reflect the First Generation's intention to displace the "no profit" rule. Fourth, it follows, then, that acting in a manner that advanced personal interests was not necessarily a breach of the trustees' duties, as found by the trial judge. Fifth, the wording of the trust agreement, including especially clause 4.12, may lead to the conclusion the trustees did not owe a duty to act in the best interests of all of the beneficiaries. Sixth, it is not apparent the framework of the restructuring, which reserved future growth and voting control for certain family members, is inherently evidence of improperly preferring personal interests, being improperly swayed by a conflict, or breaching a fiduciary duty. Rather, it would be a decision open to trustees under the instrument, one that reasonable and honest trustees might make.
- [138] I do not think we are in a position to substitute our view of what the right answers to these questions might be. What is clear, however, is that the judge did not root her analysis of the scope and content of the defendants' duties in a framework that would have led her to ask and answer the necessary questions. Consequently, many of the conclusions she reached rest on a flawed foundation, as they are the result of the application of a legally erroneous analysis to the evidence, and a failure to consider a number of relevant issues. That is, she made an extricable legal error.
- [139] If the judge's conclusion that the structure of the reorganization inherently evidenced breaches of duty no longer holds, then the assessment of the findings about dishonestly undervaluing PEL and PIL may need to be revisited. It is possible this conduct would nonetheless be a breach of trust. It may also follow, however, that the proper remedy would be different. Or, if disgorgement is the proper remedy, it may only be disgorgement of what resulted from the breach measured by the difference between the suppressed value and fair market value.
- [140] As I have stressed, I am not suggesting the result of the matter on liability would necessarily have been different if the judge had undertaken the proper analysis. I am not addressing whether the judge's findings of fact are subject to palpable and overriding error, except to the extent they rest on a flawed legal foundation. Nor am I attempting to reinterpret the evidence on an assumption that it is permissible to interfere with those findings of fact. My concern is that the findings depend on an extricable legal error, and the flawed approach to the legal issues guiding the analysis of the evidence may well have influenced or contaminated these findings.

- [141] In my view, given the above, it is unavoidable that the order be set aside and a new trial ordered, so both the legal issues in play, and the analysis of the evidence, can take place against a proper framework of analysis.
- [142] In light of my proposed disposition of this appeal, it is unnecessary to comment on either the remedy ordered or the fact that persons affected by the remedy were not parties to the litigation before the remedy was ordered. This is, however, purely a consequence of my proposed order. It is not an endorsement of ordering disgorgement in the absence of parties who, in my opinion, were clearly affected by it. Moreover, on the facts of the case, I have reservations about whether the orders made rest on a sound application of the relevant remedial principles.
- [143] The remedy aspect of the appeal raises a number of difficult issues best left to an appeal where they may be determinative of the outcome. These issues include, for example, whether the judge should have decided on the plaintiffs' entitlement to disgorgement in the absence of individuals affected by the order; whether assets derived from the trust that was not party to or the subject of the lawsuit were capable of being subject to a disgorgement order; if so, whether the judge could order disgorgement of these assets to individuals who were not beneficiaries of the trust from which the assets were derived; whether the judge could make such an order if it was to the detriment of others who were beneficiaries of that trust; the legal status of the assets held by a trustee in breach if they were derived from the Madatali Trust and not the MAP Trust; the nature of the causation required between breaches of duty and receipt of benefits; and whether disgorgement was an appropriate remedy for knowing assistance in breach of trust. Again, this list is simply illustrative of matters arising in these proceedings.

Disposition

- [144] I would allow the appeal, set aside the orders arising from the underlying proceedings, and order a new trial.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

I agree:

"The Honourable Mr. Justice Voith"

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