

CANADA / JUDGMENT

Pomozon v. Beausoleil

2020 BCSC 2084

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Supreme Court of British Columbia

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2020 BCSC 2084 Pomozon v. Beausoleil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pomozon v. Beausoleil,

2020 BCSC 2084

Date: 20201230

Docket: S29935

Registry: Chilliwack

Between:

Irene Merle Pomozon

Plaintiff

And

Joseph Jean Marcel Beausoleil, Sandra Mae Beausoleil, and Beausoleil Enterprises Ltd.

Defendants

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Plaintiff:

A.M. James

D. Rogers

Counsel for Defendants:

P.J. Thornton

Place and Date of Trial:

New Westminster, B.C.

July 27-31, 2020

August 4, 2020

Place and Date of Judgment:

Chilliwack, B.C.

December 30, 2020

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I. Overview

- [1] This is a claim for breach of trust. The action arises out of three trust agreements between a mother, her daughter, her daughter's husband, and a company owned by the daughter and son-in-law.[1]
- [2] The tragedy in this case lies in the fact that the parties, who were once very close, are embroiled in litigation at a time when they should all be trying to enjoy their sunset years.
- [3] The plaintiff, Irene Merle Pomezon ("Irene") is 98 years old. Her daughter, Sandra Mae Beausoleil ("Sandra"), and son-in-law, Joseph Jean Marcel Beausoleil ("Marcel"), are in their 70s (collectively referred to as the "Beausoleils"). The Beausoleils are the sole shareholders of the corporate defendant, Beausoleil Enterprises Ltd. (the "Company").
- [4] The plaintiff claims that the defendants breached their obligations under the trust agreements to properly account for, and pay her, a proportionate share of the rental profits and proceeds of sale of a mobile home park owned and operated by the Company. She seeks general and punitive damages, as well as court ordered interest.
- [5] The defendants resist all aspects of the claim. They admit to having held the mobile home park property in trust for the plaintiff, but argue that the plaintiff was paid what she was due under the trust agreements. They specifically deny any obligation to pay the plaintiff a share of the income earned from the mobile home park operations. They also deny any breach of their duty to account, but say that even if such a breach has been proven, the plaintiff has suffered no loss, and thus damages are not payable.

II. Issues

- [6] The Amended Notice of Civil Claim alleges numerous grounds of breach of trust. However, at trial, the plaintiff only sought relief for breach of trust in relation to the Englishman River Mobile Home Park ("ERMHP"), which was owned and operated by the personal defendants through the Company.
- [7] The defendants have discontinued their counterclaim against the plaintiff for unpaid contributions and expenses in relation to another portion of trust property that was located in Chilliwack.
- [8] The following issues remain to be determined in this proceeding:
 - a) What portion of the ERMHP constituted trust property?
 - b) Did the defendants breach their obligations to pay the plaintiff what she was owed in relation to the ERMHP?

- c) Did the defendants breach their obligations as trustees by failing to properly account to the plaintiff?
 - d) What loss has been suffered by the plaintiff?
 - e) Does the defendants' conduct as trustees merit an award of punitive damages to the plaintiff?
- [9] I turn now to discussing the background to the dispute before me.

III. Background

- [10] Irene was born in 1922. She and her now deceased husband ("Mr. Pomozon") had four children: Valerie, Sandra, Marguerite, and Richard. Up until the events leading to this dispute, Irene had a very good relationship with Sandra and Marcel.
- [11] Irene retired from employment in the 1980s. When Mr. Pomozon became ill around 1991, they decided to move to Chilliwack so they could be closer to the hospital for his medical treatment. At the time, the Pomozone were living in Vanderhoof, and the Beausoleils were living in Prince George.
- [12] As Sandra and Marcel were also planning to move to the Lower Mainland, the four of them decided to purchase a nine-acre property together. The property was located on Broadway Street in Chilliwack (the "Broadway Property"), and was purchased by the Pomozone and the Beausoleils as joint tenants.
- [13] For the vast majority of the time that the plaintiff resided at the Broadway Property, her relationship with the defendants, particularly Sandra, was excellent. They spoke on a daily basis and saw each other numerous times per week. Both Irene and Sandra described the other as her best friend. This relationship became even closer when Mr. Pomozon passed away in the 1990s.
- [14] At some point after the purchase of the Broadway Property, the plaintiff asked the defendants to manage her investments and property interests.
- [15] On July 8, 2002, the parties entered into their first trust agreement ("First Trust Agreement"). This agreement covered the plaintiff's beneficial interest in four trust assets: the Broadway Property; the ERMHP; an Equity Retirement Savings System fund in the name of Marcel and Sandra ("Equity Fund"); and \$404,909.26 held "in trust" in the name of Marcel and Sandra at the law firm of Patten Thornton (the "Trust Fund").
- [16] On August 22, 2002, the parties entered into the second trust agreement ("Second Trust Agreement"). This agreement noted that the lawyer's trust account had been closed, and that Irene's interest in the Trust Fund amounted to \$91,246.97. While confirming all other respects of the First Trust Agreement, the Second Trust Agreement specified what was to occur to the plaintiff's share of the Trust Fund.

- [17] In March 2006, Sandra, Marcel, and their son Kevin, acquired a property in Nanaimo (the "Nanaimo Property"). There is no dispute that Sandra and Marcel held their half-interest in the Nanaimo Property in trust for Irene. The Nanaimo Property was subsequently divided into two lots. One of the subdivided lots was sold in July 2007.
- [18] On September 22, 2007, the parties entered into their third trust agreement ("Third Trust Agreement"), which amended the first two agreements. The new trust agreement acknowledged the sale of the ERMHP and disposition of other trust assets. Amongst other things, it confirmed that a property located at Stewart Avenue in Courtenay with a PID of 006-029-817 (the "Courtenay Property") was being held in trust for Irene, who was the beneficial owner.
- [19] The Courtenay Property was acquired by Sandra and Marcel on September 28, 2007. It was purchased on behalf of Irene, using proceeds from the sale of the Nanaimo Property.
- [20] Until 2010, Marcel was the executor of the plaintiff's will. In 2010, Irene changed her will to make her son, Richard Pomozon, the executor. In August 2010, at the plaintiff's direction, Marcel and Sandra transferred their legal interest in the Courtenay Property to Richard, to be held in trust for Irene. Neither the plaintiff nor Richard paid any consideration to the defendants in exchange for this transfer.
- [21] It was sometime between 2010 and 2012 that the relationship between Irene and the Beausoleils fractured. Though a fair amount of trial time was spent on this issue, it is not necessary for me to determine how or why the previously loving and supportive relationship between a mother and her daughter and son-in-law took such a wrong turn. Each party blamed the other. As is so often the case when it comes to matters involving family, the explanations seem petty regardless of whose version of events I believe.
- [22] In any event, the parties turned to litigation to sort their disputes.

IV. Litigation History

- [23] On September 4, 2012, under B.C. Supreme Court Action No. S025033, Chilliwack Registry, Marcel and Sandra filed a petition for the partition, sale and an accounting of interests with respect to the Broadway Property (the "Broadway Petition"). The petition sought to have the plaintiff's one-fourth interest sold to Marcel and Sandra.
- [24] On March 6, 2013, under B.C. Supreme Court Action No. S026096, Chilliwack Registry, Irene brought a petition for an accounting under the Trustee Act, R.S.B.C. 1996, c. 464, for the time period covered by the three trust agreements (the "Accounting Petition").
- [25] On April 22, 2014, Justice Grist ordered the defendants in the Accounting Petition, to produce their accounts for the period July 8, 2002 to September 22, 2012, by May 30, 2014. As a result, the defendants provided their first trust accounting.

- [26] On June 5, 2014, Irene, Sandra and Marcel resolved the Broadway Petition by way of a settlement agreement. On August 15, 2014, Irene's 25% interest in the Broadway Property was transferred to the Beausoleils.
- [27] On September 4, 2015, Registrar Nielson ordered the defendants in the Accounting Petition to provide all documents in relation to their initial accounting, and to verify their accounts by way of an affidavit.
- [28] On September 16, 2015, Irene began the within action by way of Notice of Civil Claim ("NOCC"). The NOCC was amended on June 16, 2016.
- [29] On October 15, 2015, Marcel swore his affidavit exhibiting a trust statement of accounts in the Accounting Petition.
- [30] On July 12, 2016, the defendants filed a Response to Civil Claim ("RTCC") to the within action. They also filed a Counterclaim seeking an accounting and relief with respect to the Broadway Property.
- [31] On August 2, 2016, Irene filed a Response to the Counterclaim.
- [32] On September 1, 2016, the Accounting Petition was adjourned pending resolution of the within claim.
- [33] On July 22, 2020, Marcel and Sandra discontinued their Counterclaim on a with costs basis.

V. Legal Framework

- [34] There is no dispute that the defendants acted as trustees of the plaintiff in connection with the three trust agreements, and thereby owed a duty to the plaintiff in keeping with their trust relationship.
- [35] In *Valard Construction Ltd. v. Bird Construction Co.*, 2018 SCC 8 at para. 17, the Court summarized the duties of a trustee as follows:

First, a trustee must act honestly and with that level of skill and prudence which would be expected of the reasonable person of business administering his or her own affairs. Secondly, a trustee cannot delegate the office to another. And thirdly, a trustee cannot profit personally from its dealings with the trust property or with the beneficiaries of the trust.

- [36] The standard to be met in respect of the trustee's duty "is not perfection, but rather that of honesty, and reasonable skill and prudence": *Valard* at para. 26.
- [37] These duties have been interpreted to impose an obligation on trustees to secure trust assets, safeguard, preserve and enhance their value, and to distribute the trust assets to the beneficiaries. They also include the duty to disclose and the duty to account: *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 at 316 and 318; see also *Taylor v. Banicevic*, 2017 BCSC 1538.

- [38] Professional and non-professional trustees have the same obligations and are held to the same standard of care. Lack of experience, training, or knowledge are insufficient to absolve a trustee of their obligations: Fales at 315-316.
- [39] Section 15.2 of the Trustee Act sets the standard of care for trustees as being that of a "prudent investor".
- [40] In *Pestano v. Wong*, 2019 BCCA 141 at paras. 81-82, citing Donovan W.M. Waters et al., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Thomson Reuters Canada Limited, 2012) at 1006-1009, the Court held that the guiding principles for investment of trust property are compliance with the trust instrument and reasonable prudence as viewed in the context of the particular trust.
- [41] The beneficiary of the trust has the right to hold the trustee to account for administering the trust property and to enforce the terms of the trust: Valard at para. 18.

VI. Credibility and Reliability

- [42] Credibility and reliability of the parties featured strongly in this trial. Owing to the lack of documentary evidence, the parties mostly depended on their memories of events that transpired more than 10 to 18 years ago. Oftentimes, the parties' versions of events were irreconcilable.
- [43] Credibility centers on the witness' honesty. It involves an assessment of the trustworthiness of a witness' testimony, based upon their veracity or sincerity: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392.
- [44] Reliability has to do with the accuracy of a witness' evidence, such as: whether they have a good memory; whether they are able to recount the details of the event; and whether they are an accurate historian: *R. v. Nyznik*, 2017 ONSC 4392 at para. 15; and *R. v. H.C.*, 2009 ONCA 56 at para. 41.
- [45] A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are relating, but nevertheless be mistaken in their recollection. Such witnesses will appear to be telling the truth and will be convinced they are right, but may still be shown to be wrong by other evidence: *H.C.* at para. 41.
- [46] Such was the case with the plaintiff's evidence. Though I generally found her to be an honest witness, I did not find her evidence to be reliable. The plaintiff's faculties were remarkably intact, particularly given her advanced age. Nevertheless, she was easily confused, and her memories of key events were significantly lacking. For example, she was unable to recall what the Trust Fund monies referred to, despite acknowledging that she had signed both trust agreements that referred to those funds, and had initialled some changes in relation to her interests in the Trust Fund.

- [47] I do not believe the plaintiff was actively trying to mislead the court. Yet it was clear that the plaintiff's fervent belief that she had been wronged by the defendants, coloured much of her evidence. Gaps in the plaintiff's ailing memory appeared to have been filled with events that had been reconstructed (even if subconsciously) to fit within the larger narrative.
- [48] I note also that the first time the plaintiff appears to have complained to the defendants of their conduct with handling her assets was in July 2012, after an altercation between Marcel and Richard. The incident was reported to the police, and Richard was charged with assault. The plaintiff sent Sandra and Marcel a letter in July 2012, to try to have Marcel drop the assault charges against Richard. In her letter, the plaintiff appears to suggest that she will not proceed with her allegations of financial misconduct by the Beausoleils, if the charges against Richard are dropped and if the parties can agree on a purchase price for her 25% interest in the Broadway Property. While this does not mean that the defendants' wrongdoing as alleged in this litigation did not occur, it creates a possible motive for the plaintiff to lie. As such, I approach the plaintiff's evidence with caution.
- [49] The plaintiff submits that the defendants, particularly Marcel, are not credible witnesses. Her counsel points to what she says are contradictions between the evidence given during his examination for discovery and his trial evidence, which appear to show an improvement in his memory. The plaintiff suggests that these improvements are due to Marcel's attempts to recast some of his evidence to fit the documents. Marcel explains the improvements as arising from his refreshed memory after seeing certain documents. It is not unusual for a witness' memory to be triggered after reviewing certain documents. That in and of itself does not give me cause for concern.
- [50] However, there are other aspects of the defendants' evidence that raise concerns about their forthrightness. As an example, on cross-examination, defence counsel put to the plaintiff that, in 2002, the sum of \$91,246.97 CAD represented approximately \$60,000 USD. After initially agreeing to this proposition, the plaintiff changed her answer and reiterated her evidence in chief, equating \$60,000 USD with approximately \$80,000 CAD. Despite this proposition being to the plaintiff, neither defendant provided any evidence as to what the converted amount of \$60,000 USD would be. Instead, in closing submissions, their counsel simply relied on the plaintiff's assertion of \$80,000 CAD, arguing "if that is true, then Mrs. Pomozon made a significant profit as a result of the Defendants allowing her to participate in the Cayman Islands investment" (Defendants' Written Brief of Argument, para. 22). In my view, the defendants' decision to not testify about the converted amount, was a calculated decision to use the plaintiff's mistake to their advantage. A review of the defendants' lawyers' trust ledger indicates that the multiplier used to convert the monies into US Funds, would have resulted in a figure that was closer to the \$91,000, rather than the \$80,000, which they relied on in their closing arguments.

- [51] I also have concerns about the defendants' conduct during this litigation, which suggests that their motives were not always bona fide. The defendants filed a counterclaim against the plaintiff on an issue they knew had been settled. There is also evidence that they filed a defamation action against the plaintiff's daughter, Valerie Deacon ("Defamation Action"), in retaliation for her anticipated testimony in favour of the plaintiff.
- [52] While I did have some concerns about the reliability of some aspects of the defendants' evidence, their version of events was often consistent with the documentary evidence. Nevertheless, I do note that discrepancies between Marcel's affidavit sworn October 15, 2015 (in the Accounting Petition) and his evidence at trial suggest a carelessness with his evidence.
- [53] In summary, all parties faced some credibility and reliability issues with respect to their evidence. This has lead me to approach all of their evidence with caution, and to accept and reject parts of each party's testimony on key issues. In arriving at my findings of fact, I have considered all of the evidence as a whole, including the known facts that are supported by independent evidence, such as other witnesses and the documentary evidence.

VII. Analysis

- [54] The central dispute in this case relates to whether the plaintiff received the monies owed to her by the defendants in relation to the ERMHP. It is the position of the plaintiff that the agreement between the parties was that she was entitled to a 1/16 interest in the profits of the ERMHP, as well as the sale proceeds on disposition of that property. The plaintiff says that the defendants breached the trust agreements by not paying her these monies. She seeks \$48,166.68 from the net sale proceeds. The plaintiff argues that calculating her share of profits is made difficult by the lack of accounting and lack of separation of the Company's business operations with that of other corporate entities owned by the personal defendants. However, she is prepared to accept \$9,661.49 as her share of the profits from the ERMHP. In total, the plaintiff seeks to recover \$57,828.17.
- [55] The defendants agree that the plaintiff's share of the net sale proceeds amounted to \$48,166.68. However, they deny that she was entitled to any share of the profits of the ERMHP. Nevertheless, the defendants say that in consideration of the plaintiff agreeing to a quick sale of the remaining 44 lots in the ERMHP, the defendants had agreed to credit the plaintiff \$10,000 over and above her share of the net sale proceeds. By their calculation, the plaintiff was owed \$58,166.69 after the final 44 lots of the ERMHP were sold.
- [56] The defendants say that the \$58,166.69 was either paid directly to the plaintiff, or held by the defendants at her request and on her behalf. Defence counsel submits that "[a]lthough due to the passage of time the Defendants cannot say for sure whether this sum was paid directly to the Plaintiff or held by the Defendants on her behalf, it is submitted that it is more likely than not that the latter occurred." This money was later invested, in accordance with the plaintiff's instructions, into the Nanaimo Property, and eventually, to purchase the plaintiff's

100% interest in the Courtenay Property.

- [57] Before I turn to addressing each of the issues raised, it is helpful to have a clearer understanding of the plaintiff's financial situation when she entered into the First Trust Agreement.

A. Plaintiff's Financial Holdings

- [58] The issues before this Court all relate to a chain of events that began with the repatriation of money from the Cayman Islands in the early 2000s, continuing on with the purchase of the Nanaimo Property, and ending with the transfer of the Courtenay Property to the plaintiff's son in 2010.

- [59] The plaintiff says that the funds for the Courtenay Property came from the sale of her interest in the Nanaimo Property, which in turn originated from her Cayman Islands investment. The defendants do not disagree that the plaintiff's investment in the Cayman Islands went towards the purchase of the Nanaimo Property. However, they say that the plaintiff did not have enough money from her Cayman Islands investment to afford her one-half interest in the Nanaimo property, and was thus required to also use her entire interest in the ERMHP for the purchase.

1. Broadway Property

- [60] Irene testified that when she and her husband moved to Chilliwack, they liquidated all of their real estate holdings. These amounted to two properties in Vanderhoof which sold for approximately \$179,000, of which \$150,000 was used to purchase their one-quarter interest in the Broadway Property.

- [61] The Broadway Property was purchased in cash, with the plaintiff and her husband contributing 25% (\$150,000) towards the purchase price, and Sandra and Marcel contributing 75%. After moving into the Broadway Property, Irene and her husband began the construction of a new home which was attached to the one they were living in. Mr. Pomozon passed away around 1993, not long after they had moved into this new house.

- [62] There are no issues in this litigation arising from the plaintiff's one-quarter beneficial interest in the Broadway Property.

- [63] In addition to the Broadway Property, Irene was in possession of money from her father's inheritance, which amounted to \$60,000 USD held in an account in the U.S. (the "inheritance money"). There was some evidence from Irene that, at one point, she took about \$20,000 of her father's inheritance to purchase some gold. There is no evidence about what happened to this gold investment, and it does not factor into any of the evidence provided by the parties regarding the purchase of any of the trust assets.

- [64] Aside from a few thousand dollars in various bank accounts, the above represented the total amount of cash and assets that the plaintiff had around the time of her husband's death.

2. Equity Fund

- [65] It is unclear when the plaintiff made the Equity Fund investment. However, it was the uncontroverted evidence from the defendants that the plaintiff had invested approximately \$6,250 into the Equity Fund in order to purchase one-fourth of a full share. The defendants themselves had invested \$100,000. A full share was equivalent to \$25,000. The company that held the investment fund was dissolved for failure to file in August 2006.
- [66] The plaintiff does not challenge the defendants' evidence that they lost money in this investment, and no issues are raised in this litigation regarding the same.

3. Cayman Islands Investment

- [67] Towards the end of the 1990s, the Beausoleils began making plans to move to the Cayman Islands. They retained the services of a law firm in Calgary, and paid them \$25,000 to set up a mechanism by which their money could be received in the Cayman Islands. In addition to their own money, the Beausoleils invested some money of the plaintiff's.
- [68] Eventually, the Beausoleils changed their minds and decided not to move to the Cayman Islands. The money in the Cayman Islands was repatriated back to Canada, and a portion of it was returned to Irene. There is no dispute that later, Irene used her Cayman Island's money to invest in the Nanaimo Property.
- [69] The parties disagree on how much money Irene invested in the Cayman Islands. Sandra and Marcel testified that the plaintiff used her inheritance money and invested \$60,000 USD into the Cayman Islands.
- [70] It was the plaintiff's evidence that she invested \$125,000 to \$129,000 into the Cayman Islands. She said that the money was invested for a few years, before the defendants gave her back the exact amount of her investment, with no interest. She says that she later used this money to invest in the Nanaimo Property. Under cross-examination, she testified that the money for her Cayman Islands investment came from the sale of her two properties in Vanderhoof (totalling \$179,000).
- [71] I did not find the plaintiff's evidence reliable on the issue of how much money she had invested in the Cayman Islands.
- [72] First, the plaintiff was unable to explain where the approximately \$127,000 came from for her to invest in the Cayman Islands. The plaintiff admitted she had already used \$150,000 from the sale of her two farms in Vanderhoof to purchase the Broadway Property. While there was no direct evidence of what happened to the remaining \$29,000 from the funds left over after purchasing the Broadway Property, it can be inferred from the evidence that at least some of this money was spent on renovations to the Broadway Property and to finance the plaintiff's investment in the Equity Fund. The plaintiff was adamant that her inheritance money was not used for the Cayman Islands investment. Thus, even if the plaintiff had saved all of the \$29,000 and used it towards the Cayman Islands, she still needed to come up with

another \$100,000. There is simply no evidence that her financial position after her husband's passing had improved sufficiently to allow for that to occur.

- [73] Second, there are serious gaps in the plaintiff's evidence that make her memory of how much she invested, unreliable. The plaintiff acknowledged that she signed both the First Trust Agreement and the Second Trust Agreement, and that she initialled a hand-written change adjusting her interest in the Trust Fund asset from 22.5% to 22.55%. However, she was unable to recall at trial what those portions of the First Trust Agreement and the Second Trust Agreements referred to.
- [74] According to Sandra and Marcel, the \$404,909.26 Trust Fund money referenced in the First Trust Agreement related to money brought back from the Cayman Islands, of which the plaintiff held a 22.55% share. It was also their evidence that the \$91,246.97 referenced in the Second Trust Agreement represented the plaintiff's share of these funds. The documentary evidence supports this contention.
- [75] Entries in the trust ledger of Patten Thornton indicate that a file in the name of "NOZMOP Trust" was opened in December 2000. It was Marcel's evidence that NOZMOP Trust was the name for the Cayman Islands investment. In February 2001, \$332,807.12 USD was deposited into that account. Aside from some minor interest adjustments, there were two withdrawals from this account. The first occurred on March 28, 2001, when the sum of \$31,500 USD (\$49,044 CAD) was withdrawn, with the name "Kevin Beausoleil" next to the entry. On October 26, 2001, \$800 USD (\$1,249 CAD) was withdrawn with a notation indicating that this was a "partial termination" and a transfer from 1301 Fiduciary Trust (Cayman) Limited. It is unclear where any of these funds went. Marcel denied knowledge of the transactions, and Kevin was not asked.
- [76] Aside from daily interest, no further funds were deposited into the NOZMOP Trust account before the money was repatriated on May 8, 2002. At that time, the trust ledger indicates the account stood at \$308,305.42 USD. A 30-day US term deposit was opened on the same day in the amount of \$50,000 (the "term deposit"), and the balance of the money (\$258,305.42 USD) was converted into Canadian funds of \$404,377.14 (the "converted funds"). The notation indicates that the converted funds were then held in trust for Sandra and Marcel Beausoleil. Interest accrued on the converted funds and the term deposit, until August 21, 2002. On that date, the converted funds stood at \$405,542.07. The term deposit with interest of \$80.05 USD was converted into Canadian dollars of \$77,574. As such, the total amount in the trust account stood at \$483,116.07 CAD.
- [77] The trust ledger indicates that three separate payments were made to Marcel and Sandra before the trust account was closed, as follows:

08/21/02 \$314,295.10

08/21/02 \$77,574.00

08/22/02 \$91,246.97

- [78] Below the entry showing the \$91,246.97 payment to Marcel and Sandra Beausoleil, is the final ledger entry that reads "22.55% from Irene Pomozon". The corresponding amount next to this line item is "0.00".
- [79] There are a number of questions that arise from review of the trust ledger:
- a) why the parties chose to stipulate the value of the Trust Fund in the trust agreements as \$404,909.26 instead of \$405,542.07, which was the value of the converted funds on August 21, 2002;
 - b) why the \$77,574 was excluded from the ultimate figure that comprised the Trust Fund; or
 - c) why the Second Trust Agreement puts the plaintiff's share at \$91,246.97, since taking 22.55% of \$404,909.26 yields \$91,307.04.
- [80] There was no evidence from the parties regarding the above, and the documentation is silent. However, the trust ledger statement from Patten Thornton nevertheless helps explain how Irene's share was calculated. It is evident that the \$91,246.97 referenced in the trust ledger and the Second Trust Agreement was arrived at simply by taking 22.5% from \$405,542.07. As I have noted, \$405,542.07 was the value of the converted funds on August 21, 2002, and 22.5% was Irene's interest until the parties amended it to 22.55%.
- [81] Thus, despite the discrepancies noted above, there exists compelling evidence in the trust ledger statements supporting the defendants' contention that the \$91,246.97 represented the plaintiff's share of the Cayman Islands investment.
- [82] Finally, I note that any suggestion of recent fabrication of the defendants' assertion of how much money was given by Irene is rebutted by a handwritten document prepared by Sandra on March 7, 2002. The document was contained in the Patten Thornton files, and referred to in re-direct examination. Sandra testified that in order to instruct her counsel concerning the creation of the First Trust Agreement, she created a handwritten summary of assets in which the plaintiff held a beneficial interest. The document states in part, "TRUST MONEY \$60,500 U.S. FUNDS". Sandra explained that by writing these words, she was intending to reference the money that the plaintiff had invested in the Cayman Islands.
- [83] There is no dispute that the March 7, 2002 document is a prior consistent statement and cannot be taken for the truth of its contents. However, it can be used to rebut an allegation of recent fabrication: *Gibbs v. Carpenter*, 2013 BCSC 763 at para. 67. To that end, while the figure noted in the document is \$500 higher than what the defendants testified to at trial, it is sufficient to satisfy me that since at least March 2002, Sandra has maintained the position that Irene invested money in the range of \$60,000 USD in the Cayman Islands.

- [84] Thus, having regard to the whole of the evidence, I conclude that the plaintiff invested her inheritance funds of approximately \$60,000 USD in the Cayman Islands, and not the \$125,000 - \$129,000 asserted. I also find that the Cayman Islands investment of \$60,000 was the subject of her interest in the Trust Fund referenced in the First Trust Agreement and Second Trust Agreement.
- [85] While the plaintiff may have been wrong about how much money she initially invested in the Cayman Islands, I accept the plaintiff's evidence that she received back all of her investment in the Cayman Islands, with no interest. This evidence was unshaken in cross-examination, and indeed, is supported by a careful examination of the trust ledgers.
- [86] Though the NOZMOP Trust account trust ledgers do not indicate the conversion rate used to convert from US to Canadian funds, one can extrapolate the numbers contained in the trust ledger to come to a close approximation. Considering the amounts that were converted on March 28, 2001 and October 26, 2001, and the numbers arrived at after conversion, one arrives at multipliers of approximately 1.557 and 1.561 respectively. On May 8, 2002, it appears that the \$258,305.42 USD was converted into Canadian funds using a multiplier of approximately 1.565. However, a multiplier of 1.549 seems to have been used to convert the \$50,080 on August 21, 2002.
- [87] If the plaintiff's \$60,000 was converted using the same multiplier when the Cayman Islands funds were repatriated on May 8, 2002, one arrives at \$93,900. If the multiplier from August 21, 2002 is used, the resulting figure is \$92,940. This is remarkably close to the \$91,260 figure referred to in the Second Trust Agreement, and lends credence to the plaintiff's evidence that the money she received back from the Cayman Islands did not include any interest or return on her investment.

4. Term Deposit and GIC

- [88] I turn now to what happened to the \$91,246.97. Clause D of the Second Trust Agreement stipulates that "Irene wishes to pay those funds to Marcel and Sandra for them to invest for her." The manner in which this was to be done is set out at Clause 1, such that the defendants agreed that they will place those funds in a term deposit at Envision Credit Union in Chilliwack (the "term deposit"). Although the term deposit was to be in Sandra and Marcel's name, the parties agreed that it was beneficially owned by Irene.
- [89] Bank records show that on August 23, 2002, the sum of \$88,246.97 was placed in an RBC GIC in Sandra and Marcel's name. The defendants acknowledge that by doing this, they did not follow the requirements of Clause 1 with respect to the amount and location of the term deposit. It is their evidence that the plaintiff consented to this amendment to their agreement.

- [90] Sandra testified that the plaintiff volunteered to reimburse them \$3,000 as her share of the costs of setting up the Cayman Islands investment trust, which is why \$88,246.97 was invested and not \$91,246.97. The plaintiff denied such agreement, and denied knowing that there were any costs related to the Cayman Islands investment.
- [91] It was also Sandra and Marcel's evidence that the plaintiff agreed to the money being placed in an RBC GIC rather than with Envision Credit Union. They recommended this course of action to the plaintiff after the defendants had made some inquiries and found out the money would yield a higher return at RBC. Irene had no recollection of this conversation. Nor did she have any independent recollection of signing the three trust agreements.
- [92] The trust agreements were prepared by the defendants' lawyer, Donald Patten. Irene's signature on the First Trust Agreement was witnessed by Brad Waal, a notary public. Her signature to the Second Trust Agreement was witnessed by Mr. Patten. Her signature to the Third Trust Agreement was witnessed again by Mr. Waal, who at that time also provided the plaintiff with legal advice. There is no dispute that the plaintiff did not obtain independent legal advice prior to signing the first two trust agreements. However, the plaintiff does not challenge their validity, but rather seeks to rely on them to support her contention that the defendants were in breach of trust.
- [93] The plaintiff's lack of recall of even the most basic details surrounding the signing of the trust agreements, causes me to find her evidence on this issue unreliable.
- [94] While there are some inconsistencies in Sandra and Marcel's evidence about whether Irene's share of the repatriated money could have been paid to the plaintiff, or held in their names and re-invested, these inconsistencies do not undermine my conclusion that the plaintiff consented to a deduction of the \$3,000 as well as placing the money in a GIC at RBC. I conclude that the defendants' version of events on this issue is most consistent with the preponderance of probabilities. Though she was around 80-years-old at the time, all of the evidence indicates that the plaintiff was a savvy investor who had a keen interest in what was happening to her investments. I find it implausible that the day after the Second Trust Agreement was signed, the defendants would place the money at RBC rather than with Envision Credit Union or put in a lower amount into the GIC than had been agreed to in the Second Trust Agreement, without getting the plaintiff's consent.
- [95] The GIC matured on August 23, 2003. It is unclear how much interest was earned during the year that the money remained in the GIC, as the only bank statement provided in evidence was for the period ending September 30, 2002, at which point the funds had already earned \$179.15 in interest. How much more interest was earned after that is unknown. Marcel testified that the RBC GIC money went into his savings account once it had matured. He did not know how much interest the money earned through his savings account, though he agreed that it would have been less than the GIC rate of return.

- [96] It is uncertain how long the GIC money stayed in Marcel's savings account. It was the defendants' evidence that the plaintiff asked them to hold onto the money rather than putting it into another GIC, while the three looked for another investment for her. Sandra testified that in 2004, after her son's death, she and Marcel did not look for any further investments for the plaintiff, and just focussed on what they had.
- [97] At some point, the money was either returned to the plaintiff, who later gave it to the defendants for the Nanaimo Property investment, or kept by the defendants until the Nanaimo Property investment was made in March 2006.
- [98] It is important to note that the plaintiff is not seeking damages in relation to the \$3,000 reduction, nor has she sought any compensation for any interest that might have been lost in this investment when it was held by the defendants.

5. Mobile Home Park

- [99] The ERMHP was located at 2130 Errington Road in Parksville, and had a PID of 000-906-549. It was acquired in 1994 by the Company. The Company operated the property as a mobile home park, and collected a monthly pad rent from the tenants.
- [100] On July 18, 2002, the Company acquired a property adjacent to the ERMHP. The property was called Parkstone Place, and located at 2100 Errington Road, with a PID of 025-670-701 ("Parkstone").
- [101] Around June 2003, the Company caused the subdivision of the two parcels of land located at 2130 Errington Road and 2100 Errington Road. Consequently, the ERMHP was subdivided into 47 individual parcels, and Parkstone was subdivided into 20 individual parcels.
- [102] Two of the lots in the ERMHP were sold in the fall of 2003 for \$42,500 each. One lot was sold in April 2004 for \$41,121.50.
- [103] One of the defendants' sons died in 2004. The defendants found it too stressful to handle their investments, and decided to sell the remaining lots together. The defendants testified that the plaintiff was disappointed because she wanted to wait and sell them individually for a higher price. They offered her an additional \$10,000 over and above her interest in the net sale proceeds of the ERMHP if she agreed to them selling the lots together. They testified that she agreed.
- [104] The remaining 44 lots in the ERMHP were sold in December 2004 for \$1,237,066.81. The Company received \$770,667.01 as net proceeds of sale of the ERMHP.
- [105] Sometime prior to July 8, 2002, the plaintiff acquired a 1/16 beneficial interest in the ERMHP. How the investment came about, and the actual amount provided for the investment, are in dispute.

- [106] The plaintiff testified that Sandra told her she wanted to purchase the land adjacent to 2130 Errington. She asked her mother to invest in the ERMHP to help facilitate the purchase. The plaintiff agreed, and she and Sandra went to the U.S. to retrieve the inheritance money. It was the plaintiff's evidence that she gave all of the inheritance money to the defendants for the ERMHP investment.
- [107] It was the defendants' evidence that it was Irene that approached them in order to make the investment. Sandra denied that she and her mother went to the U.S. to retrieve her inheritance money. They also say that the plaintiff had only put in \$26,700 into the ERMHP, and not the inheritance funds of \$60,000 USD.
- [108] The evidence leads me to conclude on a preponderance of probabilities that the plaintiff invested \$26,700 into the ERMHP, and not \$60,000 USD as asserted. I say this for a number of reasons.
- [109] First, I find that the inheritance money was not available for use when Irene invested in the ERMHP, as she had already invested this money into the Cayman Islands investment. The \$332,807.12 USD was deposited into the NOZMOP Trust account in February 2001. Aside from daily interest, no further funds were deposited into the NOZMOP Trust account before the account was closed on August 22, 2002.
- [110] Second, the defendants' version of events is consistent with other documentary evidence. Marcel testified that the investment amount of \$26,700 was arrived at using the net book value of the ERMHP. The unaudited financial statements for the Company, for the period ending May 2002, place the net book value of the land at about \$417,000. One-sixteenth of this figure is just over \$26,000.
- [111] Third, the \$26,700 figure is also consistent with the Trial Balances for the Company for the year ending May 31, 2004. These show a loan payable to Irene Pomozon in the amount of \$26,700 ("Loan Payable"). While it is unclear why it is shown as a loan and not an investment, or why the loan is subsequently adjusted in the Company's adjusting journal entries ("AJE") to show a \$26,700 credit to Sandra's shareholder account, I am satisfied that the \$26,700 noted in the Trial Balances and the AJE represents the amount of Irene's investment in the ERMHP.
- [112] Finally, I note that the remedy sought by the plaintiff is inconsistent with her evidence that she invested \$60,000 USD into the ERMHP. I find it implausible that the plaintiff would be seeking to recover only \$48,166.68 CAD from the net sale proceeds of the ERMHP if she believed that she had invested the inheritance funds in the ERMHP. Using her figure of \$80,000 CAD, would result in a shortfall to her of about \$32,000 CAD.

[113] In noting the inconsistency in the plaintiff's position on this point, it is not my finding that the plaintiff was trying to actively mislead this Court. Rather, I conclude that she is simply mistaken in her recollection. In my view, the lengthy passage of time, coupled with the lack of paperwork kept by the defendants and the plaintiff's firm belief that her daughter and son-in-law took advantage of her, has clouded the plaintiff's recall of events such as to make her memory unreliable.

6. Nanaimo Property

[114] Though the parties disagree on the amount of her return from the Cayman Islands investment, they all agree that these monies were used towards the purchase of her interest in the Nanaimo Property. What they disagree on is whether the plaintiff also used her ERMHP investment money towards the Nanaimo Property purchase.

[115] The plaintiff argues that this Court should not infer that the money from the GIC and the ERMHP was used to purchase the Nanaimo Property, on the grounds that "this court is not and should not be in a position to provide the requisite accounting where the defendants as trustee have failed to do so" (Plaintiff's Closing Argument, para. 61).

[116] There is no doubt that the poor recordkeeping of the defendants has made the task of determining what transpired between the parties a more difficult one. However, the task is not impossible. There is sufficient evidence to support my finding that the plaintiff's interest in the ERMHP was used towards her purchase of the Nanaimo Property.

[117] The uncontroverted evidence is the defendants paid roughly \$165,000 on behalf of the plaintiff for her half-interest in the Nanaimo Property.

[118] The defendants say that the Nanaimo Property was purchased using: approximately \$88,000 from the RBC GIC; approximately \$58,000 from the plaintiff's interest in the ERMHP; and an interest-free loan from Marcel and Sandra for approximately \$18,500.

[119] The plaintiff says that she invested roughly \$127,000, which she had received from the Cayman Islands investment, to acquire her half-interest in the Nanaimo Property.

[120] I have already found that the plaintiff only received about \$91,000 from the Cayman Islands investment, which was later reduced to \$88,000 after the deduction of some costs. Thus, while the plaintiff claims to never have received any portion of the ERMHP sale proceeds, it would have been impossible for her to invest her money into the Nanaimo Property if that were true. Even on her own version of events, she could not have afforded the money required to invest in the Nanaimo Property without also making use of the ERMHP funds. After adding the \$18,500 loan to her claimed investment of approximately \$127,000, the plaintiff still would have fallen short by about \$20,000.

[121] There were other aspects of the plaintiff's evidence regarding the purchase of the Nanaimo Property that caused me to consider it unreliable. For example, it was the plaintiff's evidence that her investment in the Nanaimo Property consisted of her loaning

approximately \$130,000 to Kevin Beausoleil's co-worker, Stuart Hopewell. However, this evidence is contradicted by Kevin, who stated that his co-worker did not participate in the venture until after the plaintiff's half-interest in the property had been listed for sale at the plaintiff's request. I found Kevin to be a reliable and credible witness. His evidence was consistent with the documentary evidence and was delivered in an unbiased manner.

[122] I conclude that the plaintiff's interest in the Nanaimo Property was purchased using approximately \$88,246.97 from her Cayman Islands investment, \$58,166.69 from her interest in the ERMHP, and an interest-free loan of approximately \$18,500 from the Beausoleils.

[123] In July 2007, the plaintiff sold her interest to Stuart Hopewell. She received approximately \$198,000 as a result of that transaction. After returning the loan to the Beausoleils, she invested approximately \$168,000 to purchase her full-interest in the Courtenay Property, and spent the remaining funds on improvements to the property.

[124] I turn now to answering the specific questions posed.

B. What portion of the mobile home park constituted trust property?

[125] At issue is whether the parties agreed to the plaintiff sharing in the profits from the ERMHP, in addition to getting a 1/16 interest in the ERMHP.

[126] Clause 7 of the First Trust Agreement provides for the plaintiff's interest in the sale proceeds of the ERMHP:

The parties agree that in the event of the sale or other disposition of any of the Broadway Property, the Englishman River Mobile Home Park, the Trust Fund or the Equity Fund, the proceeds of such sale are [sic] disposition will be apportioned among the parties in accordance with their beneficial interest therein.

[127] However, the trust agreements are silent on whether the plaintiff was also entitled to a share in the rental income from the ERMHP. Further, the defendants deny such an agreement, and the plaintiff's evidence is at best equivocal, stating simply that she was "not sure" if the parties had come to such an agreement.

[128] The plaintiff asserts that it is an implied term based on the First Trust Agreement and the defendants' representations in the Accounting Petition that she would be entitled to share in profits from the operation of the ERMHP. She further submits that her 1/16 beneficial interest in the ERMHP entitles her to a proportionate share of the rental income earned from that property because of the equitable prohibition against personally profiting from trust property. Counsel for the plaintiff argues that a violation of the prohibition against personal profit would occur if it can be shown that the trustees got something for nothing.

[129] The defendants say that there is no evidence that the parties agreed to the plaintiff sharing in the rental profits for the ERMHP, and as such, she has not proven her entitlement.

- [130] There is no basis to conclude that it was an implied term of the First Trust Agreement that the plaintiff's investment in the ERMHP would entitle her to a share in the rental income. There is a material difference between sharing net sale proceeds versus the profits of a business. Absent a specific provision in the First Trust Agreement, or evidence from the plaintiff that such a term had been agreed to, I am not able to make such a finding.
- [131] I also do not find that the defendants' representations in the Accounting Petition should be taken to mean that they believed that the parties had agreed that the plaintiff was entitled to a share in the rental income. That is but one interpretation of the evidence, but not the only one.
- [132] The equitable prohibition against the trustee personally profiting from trust property is also not engaged in this situation. The trustees were owners of land on which they were also running a business. It was open to them to come to an agreement with the plaintiff as to what portion of the ERMHP her investment would entitle her to. An interest in the share of profits generated by a business, is very different than an interest in the proceeds of sale when that business is sold. Plaintiff's counsel provided me with no authority to support the contention that the court should infer that a trust agreement, which only specifies that a party is to receive a share of the sale proceeds, should be interpreted to include operating profits. The plaintiff's argument is founded on an assumption that is not grounded in the evidence nor supported by any case-law presented to me. As such, I am unable to conclude that the trust agreement covered rental income of the ERMHP, based on the equitable prohibition.
- [133] In any event, not much turns on my above finding. Given the defendants' acknowledgement that the plaintiff was entitled to an additional \$10,000 over and above the net sale proceeds, the outcome to the plaintiff remains unchanged even with my finding that she is not entitled to a share of the rental income. The parties both agree the plaintiff should have received \$48,166.68 from the net sale proceeds of the ERMHP. The plaintiff's claim for a 1/16 share in the rental income is \$9,661.49. While the defendants deny entitlement to a share in the rental income of the ERMHP, they say that they had agreed to give the plaintiff a \$10,000 credit over and above the \$48,166.68. The plaintiff never testified to such an agreement, likely because she had forgotten it existed. The defendants' \$10,000 figure is \$338 more than what the plaintiff is seeking by asking for a 1/16 share in the rental profits.
- [134] The defendants' acknowledgement at trial that they had agreed to pay the plaintiff an extra \$10,000 was a significant admission against self-interest, and enhances their credibility on this issue.
- [135] I conclude that only the net sale proceeds of the ERMHP constituted trust property. Pursuant to the First Trust Agreement, and the subsequent agreement by the parties to give the plaintiff a credit for \$10,000, the defendants were obliged to pay the plaintiff \$58,166.68 for her interest in the ERMHP.

C. Did the defendants breach their duty to pay the net sale proceeds of the ERMHP?

[136] The plaintiff's position is that the terms of the trust at issue required the defendants to apportion the sale proceeds of the ERMHP to the plaintiff in accordance with her beneficial interest therein.

[137] I have already determined that the defendants paid the plaintiff \$58,166.68 from the ERMHP monies by investing this money at her request into the purchase of the Nanaimo Property. Consequently, the defendants did not breach their duty to pay the plaintiff the net sale proceeds.

D. Did the defendants breach their duty to account for her interest in the ERMHP?

[138] The plaintiff's position is that the duties imposed upon the defendants as trustees required them to account to the plaintiff for her share of the profits earned by their operation and the use of the plaintiff's 1/16 beneficial interest in the ERMHP. Since I am unable to conclude that the trust agreement covered rental income of the ERMHP, there was no duty on the defendants to provide an accounting of the same.

[139] However, the plaintiff's concerns about a failure to account for the sale proceeds of the ERMHP are valid. The defendants held \$58,166.68 of the plaintiff's money for a period of 15 months. The defendants have provided scant documentation showing where the money was placed after it became due and owing to the plaintiff. They have provided no record of what interest accrued on this money, when it was paid out, or to whom.

[140] Furthermore, the defendants held onto this money from the end of December 2004, when the final 44 lots in the ERMHP were sold, until March 2006, when the Nanaimo Property was purchased. The evidence does not satisfy me that they continued to hold this money with the consent of the plaintiff.

[141] There is no doubt that there were times when the plaintiff asked others to hold onto investments or money in their name. For example, when the Courtenay Property was transferred from the defendants' names, the plaintiff directed that it be put into her son's name, rather than her own. However, this is not sufficient for me to conclude that the plaintiff asked the defendants to hold onto her monies from the ERMHP investment. The onus is on the defendants to establish this, and in my view, their evidence falls far short of doing so.

[142] Trustees have the burden of proving that they have accounted for the trust property. If there is any failure to account for trust property, the trustee will bear that loss: Taylor at para. 162, citing *Schwarzkopf v. McLaughlin*, 2008 BCSC 730 at paras. 14-20.

[143] The duty to account requires that the trustee, like other accounting parties, have their accounts always ready, to afford all reasonable facilities for inspection and examination, and to give the full information to the beneficiaries whenever required: Taylor at para. 161, citing *Waters*, *Law of Trusts in Canada* at 1120.

- [144] The accounts must contain a true inventory of the whole property in question, including the status of the original estate, an account of all monies received, and an account of all monies remaining: *Richards v. Air India Ltd.*, 2011 BCSC 1171 at para. 32, citing *Waters*, *Law of Trusts in Canada* at 1120.
- [145] The burden is on the trustee to establish that they have accounted for and discharged their duty prudently: *Schwarzkopf* at para. 18.
- [146] While the plaintiff is not seeking compensation for any breaches in relation to the GIC investment or the Cayman Islands investment, it is clear that the defendants fell far short of what was expected of them on that front as well. Starting from the money that flowed to the Cayman Islands and returned to Canada, the defendants' recordkeeping has been grossly inadequate.
- [147] The defendants submit that, even if the court finds that the plaintiff did not acquiesce to the defendants continuing to hold the plaintiff's 1/16 share of the ERMHP net sale proceeds on her behalf, the defendants acted honestly and reasonably in doing so and should be wholly relieved from any personal liability arising as a result of such breach, by operation of s. 96 of the Trustee Act.
- [148] Section 96 of the Trustee Act provides as follows:
- 96 If it appears to the court that a trustee, however appointed, is or may be personally liable for a breach of trust, whenever the transaction alleged to be a breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, then the court may relieve the trustee either wholly or partly from that personal liability.
- [149] The standard is not perfection, but that of honesty, and reasonable skill and prudence: *Valard* at para. 26. While I do not find the defendants to have been dishonest in their conduct, I do find them to have acted unreasonably, and in a manner that was lacking in reasonable skill and prudence, such that they should not be excused for the breach of trust.
- [150] Even if the plaintiff had agreed to allow Marcel and Sandra to hold her money for her, this did not absolve the defendants of their duty to account. In fact, it heightened their responsibilities to ensure that no intermingling of the plaintiff's funds would occur with non-trust property. In my view, the defendants failed to meet the standard of reasonable skill and prudence in their accounting. Their record keeping was woefully inadequate, and they frequently comingled the trust monies with other non-trust assets. While the defendants may have acted honestly, they did not act reasonably.

[151] I also find that the defendants' conduct after the plaintiff filed a petition seeking an accounting, fell far short of what is expected of a trustee. The first accounting was incomplete and required a court order for further documentation to be produced. Even then, as of the date of trial, there still has not been a satisfactory accounting that would meet the standard expected of a trustee.

[152] Thus, I conclude that the defendants Marcel and Sandra should not be relieved of personal liability for any damages award made against them.

E. Damages

[153] I turn now to what would be the appropriate measure of damages for the breach of duty to account for the plaintiff's interest in the ERMHP.

[154] Damages for breach of fiduciary duty are intended to be restitutionary. Where a breach of trust is found, the plaintiff is entitled to be restored to the position they would have been in had the breach not occurred. Just because damages are difficult to assess or measure accurately does not mean that the damage award will not be made. The court must do the best it can to make a reasonable estimate of the loss: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at para. 73; *Kohler v. Thorold Natural Gas Co.*, (1916) 52 S.C.R. 514 at 330-331.

[155] The defendants say that if there have been breaches, no loss has been proven. The defendants also state that any concerns regarding the lack of accounting should be addressed in the Accounting Petition action, or through a costs order.

[156] With respect to the Accounting Petition, the relief sought there is different than what is sought in this proceeding. In the Accounting Petition, Ms. Pomozon demands that the defendants provide a copy of the accounts and show cause as to why the accounts have not been passed. In this proceeding, she uniquely seeks the amounts due upon taking the accounting as well as damages. Although this proceeding has similarly involved an assessment of whether there has been a breach of accounting duties, establishing this breach is required before the plaintiff can claim any corresponding damages, and thus the two actions are naturally analogous to that extent. Insofar as there is an overlap, it is open to the defendant to raise the principle of *res judicata* should the plaintiff decide to continue with the Accounting Petition and seek the same remedy as has been granted in this proceeding.

[157] I also conclude that a costs order would be inadequate to address the harm to the plaintiff flowing from the defendants' breach of trust. Costs awards involve different considerations than restitution. Their purpose is to compensate the successful party for the expense incurred in commencing litigation. While it is clear that the plaintiff did make a profit from her investments in the ERMHP and the Nanaimo Property, this does not mean that she could not have made more money. As held by Justice Fitzpatrick in *Taylor* at para. 186, the loss of the beneficiary must be assessed "on the basis that prudent trustees would seek to maximize the advantages to be derived": see also *Pestano* at para. 81.

- [158] The Courts in *Hodgkinson and Osborne v. Harper*, 2005 BCSC 1683, at paras. 2-8, assessed restitutionary damages at the amount equal to the return on capital that the principal investment would have returned "had it been invested in accordance with [the plaintiff's] accepted risk". This assessment shall be based on the best evidence available to make a reasonable estimate of the loss: Kohler.
- [159] The ERMHP investment crystallized in December 2004 when the final 44 lots were sold. At that time, the plaintiff's \$58,166.68 for her interest in the ERMHP became owing. That money was held from December 2004 until March 2006, when it was invested in the Nanaimo Property. During this period of approximately 15 months, these funds should have accrued interest.
- [160] This is a case where the assessment of damages is difficult given the lack of records and the co-mingling of trust property that has occurred. I use the singular RBC GIC as a reference for a short-term investment that accorded with the plaintiff's risk level. I acknowledge that there is no certainty that a GIC would provide the same returns in 2005 as it did in 2002. Regardless, I must do the best that I can with the evidence that I have. The bank statement in evidence shows that the RBC GIC of \$88,426 accrued interest in the amount of \$179 over a period of five weeks in September 2002. If the plaintiff had received the same rate of return for her ERMHP investment, she stood to earn about \$100 per month in interest (66% of the \$179). This amounts to about \$1,500 of potential lost return on her investment. This figure is a reasonable and fair measure of the plaintiff's loss incurred for the defendants' failure to account to the plaintiff for the ERMHP trust property.
- [161] I conclude that the plaintiff is entitled to \$1,500 in damages for the breach of this trust, plus interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79. I arrive at this figure as an assessment, and not an accounting, of the loss that the plaintiff incurred for the defendants' failure to account to the plaintiff for the ERMHP trust property.

VIII. Punitive Damages

- [162] I turn now to consider whether the plaintiff is entitled to an award for punitive damages on account of the defendants' failure to provide the proper disclosure and accounting, and their conduct during litigation.
- [163] The parties agree to the proposition that punitive damages should only be awarded in exceptional circumstances. The law was summarized by Justice Goepel (as he then was) in the case of *Bronson v. Hewitt*, 2011 BCSC 102, *aff'd* 2013 BCCA 367, at paras. 31-37. Justice Goepel noted at para. 31 that:

An award of punitive damages is rational only when compensatory damages do not adequately achieve the objectives of retribution, deterrence and denunciation

- [164] The Court in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 94 sets out various factors to consider for punitive damage awards:

... (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[165] It is alleged that the defendants knowingly breached a trust, failed to disclose relevant documents, swore misleading affidavits, filed a counterclaim over a settled issue, and filed a defamation suit against one of the witnesses for her involvement. The plaintiff submits that this conduct merits an award of punitive damages of \$10,000.

[166] The evidence does not support a finding that the defendants knowingly breached a trust, or that they swore misleading affidavits. While the defendants did fail to disclose relevant documents, based on the facts of this case, such failure is not one that would attract an award of punitive damages.

[167] However, the defendants' actions of filing a counterclaim over a settled issue are very concerning. The counterclaim was filed after the plaintiff commenced this claim. It was maintained for four years until it was discontinued about a week before this trial commenced. There is no rational explanation for the defendants commencing the counterclaim over what they knew to be a settled issue, except that it was done to put pressure on an already vulnerable plaintiff. This conduct is even more egregious in light of the plaintiff's age at the time, her relationship with the parties, and limited finances, all of which made her particularly vulnerable to pressure.

[168] Marcel and Sandra also acknowledged in cross-examination that they had filed the Defamation Action against the plaintiff's witness, Valerie. Though they denied that this was done to intimidate the witness or as retaliation, the evidence suggests otherwise. The Defamation Action was commenced in 2018, over events that had occurred in 2012. The defendants had no explanation for why they waited six years after they had presumably

been defamed, to commence their action. Indeed, it was filed only after the defendants came to learn that Valerie had signed a declaration in support of the plaintiff, and would be testifying at trial. The uncontroverted evidence from Valerie was that she has spent around \$8,000 defending the Defamation Action in which no steps have been taken since 2019. Though it is unclear whether the claim has been abandoned, the preponderance of probability leads me to conclude that the defendants are aware that the Defamation Action has no reasonable prospect of success. The timing of the listing of the declaration on the plaintiff's list of documents, the subsequent filing of the lawsuit, and the lack of steps taken since 2019 to move it forward, lead to the reasonable inference that the Defamation Action was filed by the defendants to either intimidate a witness or as retaliation for the witness' anticipated testimony against them.

[169] The above conduct of the defendants is worthy of denunciation and retribution. It departs to a marked degree from ordinary standards of decent behaviour. Such litigation tactics cannot be justified, even if they were done on the advice of counsel. The conduct is reprehensible and must be discouraged.

[170] In contrast to Bronson, I find that the consequences flowing from the defendants' breach of trust, do not achieve the goals of retribution, deterrence and denunciation. As the damage award made in this case is nominal, the fact that the defendants have been refused protection of s. 96 of the Trustee Act will have little consequence.

[171] I also find that even if the defendants are found liable for an award of special costs in this action or in the defamation action, this would not be sufficient to address their egregious conduct. This is also the case with respect to any costs award that the parties may have already agreed to in relation to the counterclaim.

[172] Having regard to all of the evidence in this case, as well as the authorities, I conclude that a punitive damages award of \$2,500 is warranted. This award is proportionate to the defendants' misconduct, and will act as a sufficient deterrent.

IX. Costs

[173] Costs follow the event. The plaintiff is therefore entitled to her costs of this proceeding, at Scale B.

[174] However, if a party wishes to make submissions on the issue of costs, they may send written submissions up to a maximum of five (5) pages in length, for my consideration. These should be submitted through Supreme Court Scheduling within 21 days of the release of this Order. The responding party has 10 days from the receipt of the applying party's submissions to file a response.

"Shergill J."

- [1] Owing to the number of witnesses who share the same last name, to avoid confusion, I have referred to the parties and their witnesses by their first names. In so doing, I intend no disrespect.
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