

CANADA / JUDGMENT

Ruwenzori Enterprises Ltd. v. Walji

2006 BCCA 448

COURT

British Columbia Court of Appeal

DECIDED

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2006 BCCA 448 Ruwenzori Enterprises Ltd. v. Walji

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Ruwenzori Enterprises Ltd. v. Walji,

2006 BCCA 448

Date: 20061012

Docket: CA032076;

CA032065;

CA032077

Docket: CA032076

Between:

Ruwenzori Enterprises Ltd.,

Cale Holdings Limited and Norsham Inc.

Respondents

(Plaintiffs)

And

Zulfikar Walji

Appellant

(Defendant)

- and -

Docket: CA032065

Between:

Ruwenzori Enterprises Ltd.,

Cale Holdings Limited and Norsham Inc.

Respondents

(Plaintiffs)

And

Yasmin Walji, 1118174 Ontario Limited (dba Best Western

Roehampton Hotels & Suites), 1392275 Ontario Inc. (dba Markham

Hilton Gardens), 3465632 Canada Inc. (dba Days Inn Montreal

Airport), Humble Capital Group LLC (dba Humble Hampton Inn),

YZ Enterprises Inc. (dba Classic Cleaners and dba Designamatics)

Appellants

(Defendants)

And

Zulfikar Walji

Respondent

(Defendant)

- and -

Docket: CA032077

Between:

Zulfikar Walji

Appellant

(Plaintiff)

And

Farhana Charania, Personal Representative of Noordin Charania, Deceased,

Nor-Sham Hotels Inc., Nor-Sham Developments Inc.,

Nor-Sham (Markham) Hotels Inc., and Nor-Sham Management Inc.

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Mackenzie

The Honourable Madam Justice Levine

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Place and Date of Hearing:

Vancouver, British Columbia

13 - 16 June 2006

Place and Date of Judgment:

Vancouver, British Columbia

12 October 2006

Partially Dissenting Reasons by:

The Honourable Mr. Justice Hall

Reasons for the Majority by:

The Honourable Mr. Justice Mackenzie (Page 34, para. 58)

Concurred in by:

The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] This is an appeal from a decision of Pitfield J. dated 4 June 2004.
- [2] This case has its roots in the actions of a political leader in Uganda over a generation ago, which actions caused the exodus of a large number of business families from that jurisdiction. Four brothers of the now older generation of one of those families, whom I will for purposes of clarity simply describe by their given names, emigrated out of Uganda in 1972. Those brothers were Shamash, Noordin, Pili and Tajdin. Ultimately, two of the brothers, Pili and Tajdin, came to live in Canada. Tajdin had a son, Zulfikar Walji, usually referred to as "Zuli" by other family members. Zuli married Yasmin. The business activities, particularly of Zuli and to a lesser extent of Yasmin, are central to the issues arising on these appeals.
- [3] The brother, Noordin, seems to have been the primary directing mind and final arbiter of business decisions in the family. Prior to his death during the course of this litigation, he resided in Antwerp, Belgium. The fourth male sibling of this generation, Shamash, at the direction of Noordin, moved to Kenya and managed a transport business on a significant scale. This type of enterprise had, I gather, been of considerable financial consequence to the affairs of the family when the family members previously resided in Uganda. One other individual, Farhana, the daughter of Noordin, must also be mentioned, as she had a role to play in the factual matrix that underlies this case.
- [4] The extended family came to be involved in North America in the hotel business and also owned a large apartment complex in Toronto. The parent company in North America was the plaintiff, Ruwenzori Enterprises Ltd. The four brothers were essentially equal shareholders in this company which had been incorporated in British Columbia in 1973. The initial business venture of this company was the operation of an IGA store in Vancouver. Pili was the brother assigned to locally superintend North American operations for the family. Although Tajdin was not particularly involved in running the family business enterprises, two of his sons, Zuli and Nazmin, were involved in running the IGA store in Vancouver in the 1970s.

- [5] The trial judge, Pitfield J., shortly set out some background describing the acquisition of assets and certain corporate entities:
- [4] In 1979, the family extended Ruwenzori's operations to the United States. Nor Sham, Inc. ("Nor Sham US") was incorporated in Texas and organized as Ruwenzori's wholly-owned subsidiary. Nor Sham US acquired a hotel known as the Intercontinental Motor Inn situated near the Houston airport at a cost of approximately US \$3.4 million. The purchase was financed by Ruwenzori's subscription for Nor Sham US shares at a price of US \$300,000, a loan in the amount of approximately US \$2 million from a family source not clearly identified in the evidence, and vendor take-back financing of US \$1.1 million. Zuli terminated his involvement with the IGA franchise in Vancouver and moved to Houston to manage the hotel which was initially operated under a Best Western flag but later, under the Ramada and Days Inn flags.
- [5] Zuli managed the Best Western in Houston from 1979 to July 30, 1999, when he sold the hotel without consulting the brothers. The extent to which the Best Western prospered is disputed. Suffice to say presently, financial reporting by Zuli in respect of the business was scant and unsatisfactory. He did not account to Nor Sham US for the sale proceeds. He claims that the family abandoned its interest in the hotel in 1990, or gave the family's interest to him at some point thereafter, leaving him to conduct the hotel business as he saw fit and to apply the proceeds from the sale for his and his wife Yasmin's benefit. Zuli's conduct in relation to the operation and eventual sale of the Best Western is an issue in the Ruwenzori action.
- [6] After Ruwenzori sold its IGA franchise in 1981, Nazmin was without work. He moved to Houston to work with Zuli. Soon after the move, Classic Drycleaners of America Inc. ("CDCA") was incorporated in Texas as a subsidiary of Nor Sham US. CDCA acquired a dry-cleaning business to be managed by Nazmin with Zuli's assistance. Nazmin and Zuli found it impossible to work together. The assets comprising the CDCA business were sold in 1987 and Nazmin returned to Vancouver.
- [7] In 1984, while Nor Sham US was operating CDCA, Zuli and Yasmin incorporated YZ Enterprises Inc. in Texas. YZ acquired and operated its own dry-cleaning business in the Houston area until the business was sold in 1996. The activities of YZ and the operation of its own dry-cleaning business, the fact of which was known to family members, are issues in the Ruwenzori action.
- [8] In addition to its interests in Texas, Ruwenzori made an investment in Toronto, Ontario. In 1981, it acquired the Elm Park Apartments through a wholly-owned Ontario subsidiary named Cale Holdings Ltd. Pili was responsible for Cale's operations until 1995 when Zuli became involved in the management of the complex. Zuli arranged for the sale of the apartments in 1999. His actions in that regard and his accounting for, and disposition of, the sale proceeds are issues in the Ruwenzori action.

- [9] Independently of Ruwenzori and Cale, Noordin, Shamash, and a family friend and business associate, Amir Ishani, became involved in the ownership of Transroad Ltd., a Jersey (Channel Islands) company. In 1991, Transroad's Ontario subsidiary, Nor-Sham Holdings Ltd., through its subsidiary, Nor-Sham Hotels Ltd., acquired a Holiday Inn located in Mississauga, Ontario. In 1995, Nor-Sham (Markham) Hotels Inc., another subsidiary of Nor-Sham Hotels Ltd., acquired a second hotel known as the Radisson Markham. Zuli became involved in the management of the Ontario hotels in 1995.
- [10] In 1995, while he was managing the Holiday Inn and the Radisson for the Nor-Sham group and the Elm Park Apartments for Cale, Zuli and Yasmin incorporated 1118174 Ontario Ltd. to acquire the Roehampton Hotel situated in Toronto. The manner in which that purchase was funded is an issue in the Ruwenzori action. Nor Sham US claims its funds were appropriated by Zuli and Yasmin to facilitate the purchase of shares and debt of 1118174.
- [6] Two actions were tried before Pitfield J. In the first action, Ruwenzori Enterprises Ltd. ("Ruwenzori") and its subsidiary companies, Nor Sham Inc. ("Nor Sham U.S.") and Cale Holdings Limited ("Cale"), sued Zuli and Yasmin alleging various acts of misfeasance related to the management of Nor Sham U.S., the management and sale of the Toronto apartment complex owned by Cale, and the acquisition of certain hotel interests in Canada. In effect, the claims of the plaintiffs in this action were that the defendant husband and wife and corporate entities controlled by them had acted as faithless fiduciaries. Proprietary remedies sought by the plaintiffs at trial were granted by Pitfield J. The appellants contend that the judge erred in granting such relief.
- [7] In the second action, Zuli was plaintiff and the defendants were Farhana, personal representative of Noordin, Deceased, Nor-Sham Hotels Inc., Nor-Sham Developments Inc., Nor-Sham (Markham) Hotels Inc. and Nor-Sham Management Inc. Zuli claimed he was entitled to management fees and a share in hotel properties located in the Toronto area. These hotels were the Holiday Inn in Mississauga and The Radisson Markham. He claimed he had been instrumental in procuring the hotel properties. He had managed these hotels for a time. He asserted in this action that he had been promised a share in the properties by his uncle, Noordin. Although he was largely unsuccessful in these claims he advanced at trial, he was granted relief by way of quantum meruit concerning his management services. The quantification of the value of these services has not yet been the subject of a trial.
- [8] Zuli and Yasmin and certain corporate entities appeal against the trial judgment granted to Ruwenzori, Cale and Nor Sham U.S. Zuli also appeals against the dismissal of a number of his claims against the aforementioned defendants in the action in which he was plaintiff. I propose to deal first with the appeal in the proceedings in which Zuli and Yasmin and related corporate entities were defendants and subsequently with the appeal in the proceedings in which Zuli was plaintiff. There is also an appeal brought on behalf of what I shall term the Dhanani interests, parties who held a minority share interest in 1118174 Ontario Limited ("118174") and through that shareholding held a minority interest in the Roehampton Hotel located in Toronto and in two limited partnerships that held modest

interests in a hotel located in Markham and a hotel located in Montreal. The latter property has been sold and what remains at issue in that instance is the distribution of the sale proceeds. I propose to deal with the issues arising in that appeal in the final portion of these reasons.

- [9] The hotel property in Houston was purchased in 1979 for \$3.4 million USD. The purchase was financed by \$300,000 from Ruwenzori, \$2 million of family money from Noordin and Shamash and a vendor take-back mortgage of \$1.1 million. This mortgage was ultimately paid off by family funds provided through Noordin. The family debt standing against the hotel aggregated over \$3 million and nothing of this sum was ever paid back during the operation of the hotel or upon the sale of the property in 1999. The financial status and history of this enterprise was quite opaque at the trial before Pitfield J. A host of records relating to the hotel had disappeared from the Texas home of Zuli and Yasmin in mysterious circumstances. The trial judge found that he had no confidence that available financial records accurately portrayed the finances of Nor Sham U.S., the company that was the registered owner of this hotel.
- [10] The family enterprises in North America were run with a degree of informality and seem to have operated on the basis that family members trusted each other to do the right thing. Zuli was given a broad ambit of discretion in managing the properties owned by family corporate entities. The judge found that having regard to the broad authority and discretion granted to Zuli, he had a fiduciary duty to properly manage the family enterprises with which he was involved. Although the Houston hotel never appeared to make any profit sufficient to repay the substantial outstanding family debt, the older family members continued to let Zuli manage the property and to later take on additional management duties of the Toronto apartment complex, and the Holiday Inn and Radisson hotels located in the Toronto area.
- [11] The trust and confidence reposed by the family in Zuli began to erode in 1996-97. In 1996, Farhana, the daughter of Noordin, came to Toronto to receive training in the hotel business. She worked in association with her cousin, Zuli. The trial judge noted as follows:
- [11] As a result of her involvement in the Holiday Inn and Radisson businesses, Farhana became concerned about Zuli's involvement in the management of the hotels and his ownership of the Roehampton. Her inquiries eventually led to questions regarding Zuli's management of the Best Western in Houston and his conduct in relation to Cale's Elm Park Apartments.
- [12] While senior family members did not then appreciate that Zuli and his wife were acting in ways inimical to their financial interests, what Farhana had observed caused the family to become more vigilant concerning the North American business interests of the family. It took a very long time, in most cases until just before or at trial, that the family came to a full knowledge of the true state of affairs. As early as 1990, Noordin and Shamash in particular had been concerned about the profitability of the Houston hotel and there was some discussion in the family of closing the enterprise. A question was put to Zuli about possibly

raising a mortgage on the property, but his advice to his uncle Noordin was that the poor financial position of the hotel made this unlikely. Although the family had been willing to advance money to support this enterprise in the 1980s, by this time they were reluctant to commit further funds to what seemed a continually unprofitable operation.

- [13] In 1997 family members were together for a social occasion in London, England. At a meeting where Zuli, Noordin and Shamash were present, Zuli disclosed the surprising news that a mortgage of \$2 million USD had been placed on the hotel property. The uncles were distinctly shocked and unhappy about this because of Zuli's earlier indication that this would not be possible given the financial status of the hotel. By this stage Noordin and Shamash were becoming frustrated with their inability to get any sensible financial information detailing the operation of the Texas hotel. Although Shamash and Noordin attended in Houston to endeavour to garner information, their efforts were largely unsuccessful. Shamash and Noordin took steps to investigate whether a sale of the property could be arranged, but no purchaser willing to make a satisfactory offer could be found at this time.
- [14] Zuli claimed in his testimony that during the 1990s his uncles and his father had indicated he could have their shares in the hotel. He did not identify whether these were Nor Sham U.S. shares or Ruwenzori shares. There was a document signed by Pili and Tajdin in September 1997 indicating that Pili and Tajdin were intending to transfer a 50% interest in the hotel property to Zuli. Noordin and Shamash did not sign anything to this effect, although Zuli claimed that at least Noordin had orally indicated Zuli could have his shares in the unprofitable enterprise. No steps were ever taken to formally transfer any shares in the corporate entities to Zuli. The judge expressly found that neither Noordin nor Shamash ever intended to transfer any shares to Zuli. The judge found that there had been no transfer of shares by gift or otherwise to Zuli of the hotel. He stated, at paras. 57 - 60 of his reasons:
- [57] I find as a fact that Shamash had no intention of giving any shares to Zuli. I find as a fact that Noordin had no intention of giving shares to Zuli. I find Noordin's statement that Zuli could have his shares to mean that he would transfer for nominal consideration if the contemplated appraisals indicated little or no value in the hotel. In any event, I find that Noordin did nothing to effect delivery of any shares of Nor Sham US to Zuli.
- [58] I find that the transfer of interest document signed by Pili and Tajdin was insufficient to transfer any interest in shares of Nor Sham US to Zuli. The document, which appears to have been prepared by Zuli, is ambiguous and contradictory. It incorrectly recites the fact that Ruwenzori is the owner of the Best Western when the fact is that the hotel was owned by Nor Sham US. The document makes no reference to Ruwenzori's ownership of shares of Nor Sham US. It attributes to each of Pili and Tajdin a beneficial interest in the hotel when they each held, in fact, a 25% interest in Ruwenzori. The document purports to direct Ruwenzori to transfer to Zuli a 50% interest in the hotel in the form of a 25% interest from each of Pili and Tajdin.

- [59] Neither Pili nor Tajdin owned shares of Nor Sham US that they could give away. While Pili and Tajdin might have disposed of their shares of Ruwenzori by way of gift, they did not purport to do so. It is most improbable that they would have done so given that Ruwenzori was also the owner of the shares of Cale Holdings Ltd., a profitable operating company in the Province of Ontario.
- [60] Neither Pili nor Tajdin, alone or together, was able to compel Ruwenzori to dispose of any of its shares of Nor Sham US. Had they been able to do so, they would have caused Ruwenzori to divest itself of a 50% interest in Nor Sham US but each of Pili and Tajdin, as continuing shareholders of Ruwenzori, would have been entitled to continue to share in the residual 50% interest of Nor Sham US that Ruwenzori would still own.
- [15] Having rejected the suggestion made in evidence by Zuli that ownership of all or a substantial portion of the Texas hotel had been transferred to him by family members, the trial judge went on to consider whether the corporate plaintiffs had established the breaches of duty they alleged against Zuli and his spouse, Yasmin. These allegations included: taking for his personal benefit certain insurance proceeds and loan proceeds related to the Texas hotel; the utilization of Nor Sham U.S. funds by his wife, Yasmin, through 1118174, a corporate entity controlled by her, for the purchase in 1996 of the Roehampton Hotel in Toronto; the purchase through 1118174 of an interest in another limited partnership concerning a Toronto hotel; and the use of 118174 funds to purchase a limited partnership interest in a Montreal hotel through Houston YP, a corporate entity wholly owned by Yasmin. As well, the plaintiffs alleged that Zuli had breached his fiduciary duty by proceeding to sell without permission the Toronto apartment complex and appropriating to himself without authorization a sum of over \$1.5 million realized on the sale of the apartment complex.
- [16] Zuli proceeded to sell the Texas hotel in 1999 without the permission of family members and the net proceeds after payment of outstanding debt totalled just over \$1 million. These funds found their way to a bank account controlled by Zuli and referred to in evidence as the "Chase bank account". The judge found that Zuli had no valid reason to keep these funds of Nor Sham U.S. As well, the judge found that flood insurance claim proceeds of just over \$1 million received by Nor Sham U.S. had been deposited to Zuli's bank account and wrongfully appropriated by him from that company. The trial judge rejected the evidence of Zuli concerning the utilization of these corporate funds. The trial judge also found against Zuli concerning sums of money aggregating in total approximately \$2.3 million which Zuli appropriated from Cale, the owner of the Toronto apartment complex.
- [17] It was suggested in argument by counsel for Zuli that the evidence adduced concerning the appropriation of insurance monies was not sufficient for the judge to have reached an adverse finding against him for this sum. I accept the submission of the respondents that there was evidence before the judge permitting him to find that the sum in question relating to insurance proceeds was paid over to Zuli personally from Nor Sham U.S. and that the judge, having rejected Zuli's explanation for the appropriation, was entitled to find against

Zuli as he did concerning this sum of money.

- [18] The argument advanced on Zuli's behalf concerning the monies appropriated from the sale of the Texas hotel was predicated on the proposition that Zuli had substantial ownership of the hotel and was entitled to use the funds as he saw fit. The judge rejected this assertion, finding that no valid transfer of shares in the hotel had ever been made to Zuli. I do not consider that the trial judge erred in his finding that no valid transfer of shares was ever made to Zuli and, accordingly, Zuli was properly found to have had no valid defence to the claim for misappropriation of the sale proceeds of the Texas hotel.
- [19] With regard to the monies appropriated by Zuli from Cale, the owner of the Toronto apartment complex, the judge rejected the evidence given by Zuli concerning his entitlement to sums received by him personally from this corporate entity. Zuli admitted receiving the sums in question, including \$1.6 million from the proceeds of the sale of the Toronto apartment complex. He claimed he was lawfully entitled to ownership of this portion of the sale proceeds on the basis of an alleged commission agreement.
- [20] There was evidence that Pili had signed a special resolution authorizing the sale, but he testified that he was not aware until after the agreement for sale was signed that Zuli was in the process of selling the complex. It was suggested in argument that Pili, for reasons of his own, desired to see the complex sold so that he could receive a financial benefit. While there was evidence from Pili that he was not unhappy to see the complex sold in the hope that he might receive some funds, that does not in any way obviate the circumstance that Noordin and Shamash, who had originally provided the bulk of the funds for the purchase of the complex in 1981, never acceded to the sale and only learned of it after it was a fait accompli.
- [21] Zuli was clearly in a position to effect the financial interests of the shareholders of Ruwenzori who controlled the subsidiary, Cale. There was evidence that shortly after the sale occurred, the property had considerably escalated in value. Thus, there was evidence that the sale of the complex in 1999 was not necessarily to the financial advantage of the Ruwenzori shareholders. It was, however, of immediate financial advantage to Zuli because he was able to realize what he claimed was a "commission" immediately upon the sale of the property. The judge found against him on this commission claim and I consider there was a proper foundation in the evidence for this factual finding of Pitfield J. It was certainly open to the learned trial judge to make a finding that Zuli breached his fiduciary duty in selling the Toronto apartment complex without the consent of his uncles Noordin and Shamash. There was a clear conflict between the duty of Zuli to act in the best financial interests of the Ruwenzori shareholders and his own interest in immediately obtaining a significant sum of money from the sale proceeds of the apartment complex. Having concluded that Zuli breached his fiduciary duty, the judge was, in my view, correct to deny any compensation to Zuli for his role in selling the apartment complex owned by Cale. He also did not err in finding Zuli was not entitled to other funds wrongfully appropriated from Cale.

- [22] A considerable portion of the argument in this case was devoted to issues related to the proprietary relief granted by Pitfield J. concerning the Roehampton Hotel (the "Roehampton") located in Toronto. Pitfield J. granted a proprietary interest to Nor Sham U.S. in the interest of 1118174 in the Roehampton and as well an interest in the assets comprising the Montreal Days Inn and the Markham Hilton Gardens to the extent such assets were acquired with funds originating from Nor Sham U.S. These latter two assets, held through Houston YP (a corporation wholly owned by Yasmin) and through 1118174 (a corporation 85% owned by her), were limited partnership interests of a minority nature. While immediately after judgment was pronounced in 2004 it appeared that the orders made with respect to these interests may have been overly broad, these issues have been since adjusted in the trial court and I am satisfied that no intervention with respect to the dimensions of these orders is presently required by this Court. There is an appeal brought by the Dhanani interests relating to these matters, but I shall deal with this when I come to discuss the Dhanani appeal proceedings.
- [23] The appellants, Zuli and Yasmin Walji, submit that the trial judge erred in granting a proprietary remedy against the assets owned by 1118174 or purchased with funds flowing through 1118174. It is also submitted that the judge erred in his findings relating to certain promissory notes granted by Nor Sham U.S. to Yasmin in 1995, in failing to take proper account of certain alleged income of Yasmin and in rejecting a limitation defence advanced by her. It was also argued that the judge erred in rulings he made related to the admissibility and use of statements of the deceased party, Noordin.
- [24] The company 1118174 was incorporated in Ontario in February 1995. By 1996 Yasmin held 85% of the shares and the Dhanani interests held 15% of the shares of this corporation. As narrated in the reasons for judgment of the trial judge, Zuli had, between 1990 and 1995 at the behest of his uncle Noordin, been involved in seeking out and purchasing for the family, hotel properties in the Toronto area. A Holiday Inn was purchased in 1990 and another property, ultimately operated as the Radisson Markham, was acquired in 1995. It was Zuli who became aware that the Roehampton was for sale and he agreed to buy the hotel in early 1996. The purchaser of the Roehampton was ultimately 1118174, the company controlled by Yasmin Walji.
- [25] At about the same time as 1118174 was incorporated in Ontario, Yasmin, with the assistance of a Texas attorney, Mr. Harmeyer, took steps to document loans allegedly made by her to Nor Sham U.S. going back to 1987. These loans were alleged to have been made to pay company debts for operating expenses and taxes. Two promissory notes, both dated March 29, 1995, in the amount of \$379,702.90 USD and \$132,032.38 USD were drawn by Mr. Harmeyer and signed on behalf of Nor Sham U.S. Mr. Harmeyer testified that he never saw source documents confirming the payment of the sums Yasmin alleged she had made on behalf of Nor Sham U.S.

- [26] Aside from an initial payment of \$50,000 that Yasmin testified was derived from a Dominion Securities account in her name, all of the monies used (aside from monies put up by the Dhanani interest to purchase a 15% interest) to purchase the equity interest in the Roehampton were Nor Sham U.S. monies. The \$50,000 aforesaid came from a Royal Bank of Canada account in the names of Zuli and Yasmin Walji.
- [27] The ultimate source of these Nor Sham U.S. funds used to purchase the Canadian hotel interests derived from the \$2 million mortgage on the Houston hotel earlier referred to in these Reasons. That loan had been obtained by Nor Sham U.S. from MetroBank in 1995. This liability was cleared upon the sale of the Texas hotel property in 1999. As I read the reasons of Pitfield J., he concluded that aside from funds of the Dhananis and a sum of about \$96,000 borrowed from another party, which sum was repaid in the summer of 1996, virtually all of the required funds to obtain the equity in the Roehampton originated from Nor Sham U.S. funds. The Roehampton purchase price was \$4.5 million. The vendor took back a debenture for just over \$4 million and the cash required to close, aside from adjustments, was about \$475,000. This transaction was concluded in the first half of 1996. It was only long afterwards in the course of the litigation that the source of the funding for the purchase of the hotel property became apparent to the Ruwenzori shareholders.
- [28] Of course, if the bulk of the funds required to close that transaction had been advanced by Nor Sham U.S., then Nor Sham U.S. would have under trust principles an equitable claim to proportional ownership of the resulting assets, the Roehampton and the limited partnership interests. As noted by the trial judge, the balance sheet of Nor Sham U.S. included in a U.S. tax return around this time did treat the Roehampton as an asset of Nor Sham U.S. However, the registered owner of the hotel interest was 1118174.
- [29] On the other hand, if Yasmin had advanced her own monies to 1118174 to fund her share of the equity purchase of the Roehampton, then Nor Sham U.S. would have no claim to or interest in this property. Counsel for the appellant, Yasmin, submitted that this was in fact what occurred and that therefore the judge erred in fact in granting a proprietary remedy to Nor Sham U.S. concerning the interests. Counsel submitted that a company incorporated by Yasmin in 1984, YZ Enterprises Inc., a company providing dry-cleaning services, was in the final analysis the source of these funds. It was said this company had grossed over \$7 million in sales and \$800,000 in profits over the approximate 11 years it was owned by Yasmin. This company was becoming unprofitable in the mid-1990s and it was sold at that time. This enterprise, it was submitted, had over the years provided funds to Yasmin sufficient to generate monies that were advanced by her in the amount of the notes granted by Nor Sham U.S. and also served as a source of money to fund the \$50,000 down payment for the Roehampton purchase. Counsel relied on the presumption of validity concerning the promissory notes granted by Yasmin by Nor Sham U.S.
- [30] The judge found these submissions unpersuasive, having regard to the totality of the evidence. One difficulty with what I shall term the "loan explanation" as to the advance from Nor Sham U.S. to fund the Canadian hotel purchases in 1996 is that no Nor Sham U.S.

financial statement referred to these alleged loans or to any repayment to Yasmin of any such loan. No contemporary documentation relating to the movement of funds to Canada from Nor Sham U.S. makes reference to these funds as being the repayment of a loan to Yasmin Walji or her company. If this was such a payment, one would expect to see it recorded as such. The judge said this in his reasons about the evidence of Yasmin:

- [92] Given that Yasmin was not paid a salary by Nor Sham US until 1993 or 1994, and then in a relatively small amount, her only other possible source of income was YZ. In the course of cross-examination, Yasmin agreed that there was no longer a general ledger for YZ; she did not have, and had been unable to obtain, the company's tax returns; her total equity investment was in the range of US \$15,000; the company made substantial purchases of equipment financed from cash flow and depreciation but she did not know of the details; the company declared no dividends; the management fee payable to her was 10% of gross sales; no tax return contained any reference to management fees or compensation being paid to officers of the corporation, she being one of them; and any amount paid to her would be included in gross wages to employees. She did not know whether YZ filed tax returns for 1995, 1996 and 1997, saying that she was not sure when the business was sold. She testified to the fact that an amount recorded on the YZ financial statements as a long-term liability in the form of a note to "YZ Inc." was in fact a loan from her to the company. She could not explain how it arose or why it was characterized as it was on the statement. She produced no personal income tax information, whether in the form of tax returns or other documentation from any revenue service, tending to substantiate her claim that she received income from YZ, let alone income in the amount of US \$379,000.
- [95] Yasmin was examined for discovery in relation to the Roehampton Hotel purchase on April 23, 2003. On that occasion, Yasmin did not know, or alternatively remember, that the funds used to complete the Roehampton transaction came from the repayment of a promissory note. At the same examination for discovery, she said she had actually transferred the sum of US \$18,500 to Nor Sham US in 1992. The promissory note and statement of collateral contradict that evidence. She testified at the examination for discovery that she actually transferred the sums of US \$105,000 and US \$225,000 to Nor Sham US in April 1993, but she testified, at that time, to having no memory of where the funds came from, how the amounts had been advanced, or to whom the amounts were paid. She also testified at the discovery that whatever funds she had lent to Nor Sham US were derived from YZ.
- [96] I do not find Yasmin's evidence with respect to the fact of the loans to be credible. The objective evidence which is available and to which I have referred undermines her claim that she had the capacity to lend, and the likelihood that she lent, any amounts to Nor Sham US. I find as a fact that Yasmin did not derive funds from YZ Enterprises Inc. that would have permitted her to make a loan of US \$379,702.90, or any lesser amount, to Nor Sham US. An abundance of evidence rebuts any presumption that might operate in Yasmin's favour in respect of the promissory note and the existence of a debt. I find that Yasmin did not lend any of the funds described in the promissory note in the principal amount of US \$379,702.90

to Nor Sham US at any point in time.

[Emphasis added.]

- [31] In this Court, counsel submitted that the substantial gross revenues reflected in certain tax records of YZ Enterprises filed at trial should found the conclusion that Yasmin did have access to monies sufficient to advance loans to Nor Sham U.S., the repayment of which supplied funds for the hotel purchase. In my opinion, the records put forward by Yasmin in an effort to underpin the loan assertions were sparse indeed. I do not lose sight of the circumstance that she may have had some difficulty in getting access to some historic records. It is also in my view significant that in discovery proceedings before trial she did not assert that any loans to Nor Sham U.S. were the source of the funds transferred to Canada. While the promissory notes or copies thereof were in evidence, the validity of those notes are highly suspect because of the dearth of financial records documenting the transactions said to support the issuance of the notes. A relevant fact properly considered by the judge is that at a time contemporaneous with the movement of Nor Sham U.S. funds to Canada in 1996, there is no suggestion in the available records that these funds were being advanced in repayment of earlier loans made by Yasmin.
- [32] The bulk of the funds used (aside from the Dhanani contribution) to purchase the Canadian hotel interests via 1118174 appear to have been funds of Nor Sham U.S. channelled through Canadian bank accounts of Zuli and Yasmin. The judge in my view articulated cogent reasons as to why he did not find credible the explanation of the appellants that the Nor Sham U.S. funds used in the purchase were simply repayment of a loan of Yasmin to Nor Sham U.S. I do not consider that any basis has been demonstrated for interference with this factual conclusion of Pitfield J., a finding that I believe was soundly based on the evidence at trial.
- [33] The appellants submit that regardless of this factual finding, the proprietary remedy award was not supportable in principle, having regard to the authorities. A number of legal arguments were advanced on this issue. It was firstly submitted that the judge erred in his conclusion that Yasmin was in breach of a fiduciary duty. It was submitted that at best, the role of Yasmin in the transactions could only be characterized as being in knowing receipt of improperly obtained funds and that being so, a restitutionary and not a proprietary remedy was the appropriate relief: *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, 152 D.L.R. (4th) 411, *Alers-Hankey v. Solomon*, [2002] B.C.J. No. 693 (QL), 2002 BCCA 227, *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592.
- [34] The appellants also submit that the trial judge fell into error because he did not clearly determine whether Yasmin gave knowing assistance to a breach of fiduciary duty by Zuli in utilizing Nor Sham U.S. funds or whether she was in knowing receipt of the funds derived from such a breach. The appellants submit the judge could not properly grant a proprietary remedy absent a proper characterization of the nature of the activities of Yasmin Walji.

- [35] While the distinction between knowing assistance and knowing receipt may often be a subtle one and may have differing legal consequences as pointed out in the relevant authorities, in my opinion, the instant case does not call for any extended consideration of such issues. What happened here and what I consider the trial judge clearly found was that Yasmin Walji was a co-participant with her husband, the appellant Zuli, in a breach of a fiduciary duty owed by Zuli Walji to Nor Sham U.S. She participated with him in moving the funds from Nor Sham U.S. to Canada and indeed participated in the entire transaction of using the funds to purchase the hotel interests through corporations. She was therefore, in my opinion, properly found to have been a co-participant along with her husband in a breach of fiduciary duty to Nor Sham U.S. Her liability arises through her own participatory activity in wrongfully using the Nor Sham U.S. funds to purchase the interests. These interests, to the extent they were purchased using Nor Sham U.S. funds are properly treated as assets of Nor Sham U.S.
- [36] The issue then arises, was it appropriate for the judge to grant a proprietary remedy against assets acquired through the use of the Nor Sham U.S. funds? The appellants suggest, relying inter alia on *Peter v. Beblow*, [1993] 1 S.C.R. 980, 101 D.L.R. (4th) 621, *B.C. Teachers' Credit Union v. Betterly* (1975), 61 D.L.R. (3d) 755 (B.C.S.C.) and certain comments in *Soulas v. Korkontzilas*, [1997] 2 S.C.R. 217, 146 D.L.R. (4th) 214, that a proprietary remedy ought not to have been awarded to the respondents. The point primarily taken here seems to be that since the assets were purchased from a mixed fund and not solely by employing Nor Sham U.S. funds, a proprietary remedy would not be appropriate. It was also submitted the judge should have considered whether a monetary remedy would be more appropriate than a proprietary remedy.
- [37] The respondents submit that this is a clear case for the imposition of a proprietary remedy and place considerable reliance upon the majority judgments in the English case of *Foskett v. McKeown*, [2001] 1 A.C. 102. The respondents also referred to a recent judgment of this Court, *Alers-Hankey v. Teixeira*, [2006] B.C.J. No. 996 (QL), 2006 BCCA 224.
- [38] Counsel for Yasmin on appeal appeared to assert that his client had only obtained a modest interest in the Roehampton, having regard to the Dhanani interest and extant debt obligations. With respect, I do not consider this a tenable factual proposition. Through her company 1118174, Yasmin gained 85% of the equity interest in this hotel property. The debt position is factually and legally irrelevant for the purposes of ownership analysis. Any owner of an equity interest, be it 1118174 or Nor Sham U.S. or Parviz Dhanani through an ownership interest in 1118174, is required to deal with the debt of the Roehampton either by servicing it or by paying it out when and if the hotel asset is sold.
- [39] What is of relevance is that an equity interest in the Roehampton (and the limited partnerships) was obtained through the utilization of funds wrongfully appropriated from a third party, the respondent Nor Sham U.S., the subsidiary of the respondent Ruwenzori. While a court dealing with a claim for an appropriate remedy in a family law situation such as *Peter v. Beblow* must carefully consider whether it would be preferable to grant a

monetary as opposed to a proprietary remedy where the basis of the claim originates in services and assistance, that rationale has in my view limited applicability in a factual situation of the sort presented in the case at bar.

- [40] I would describe this case as bearing a considerable factual similarity to the case of *Foskett*, supra. There, trust monies that came from various investors were supposed to be earmarked for the purchase of lands. Some of the funds had been wrongfully used by a deceased insured to pay premiums for a policy of insurance on his life. The contest at trial was between the parties whose funds had been misappropriated by the deceased and children of the deceased, who were the beneficiaries of the insurance policy. The majority of the House of Lords concluded that the investors whose funds had been wrongfully utilized by the deceased insured could successfully assert a proprietary claim against the life insurance proceeds. Lord Hoffmann said at p. 115:

I agree with [his] conclusion that Mr. Murphy's children, claiming through him, and the trust beneficiaries whose money he used, are entitled to share in the proceeds of the insurance policy in proportion to the value which they respectively contributed to the policy.

Lord Millett said at p. 131:

Accordingly, I would state the basic rule as follows. Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money.

[Emphasis in original.]

- [41] In the case at bar as in that case, the respondents elected to advance a proprietary claim to the hotel assets. The present case, in my opinion, is a very clear instance of a situation where a proprietary remedy seems just and appropriate. It is to some extent a stronger case for such an equitable remedy than was the situation in *Foskett* because here, the contestants (the appellants) are not the innocent beneficiaries of life insurance proceeds, but rather the very parties who participated in the breach of fiduciary duty. It would be a reproach to justice if in these circumstances the wronged respondents could not obtain such a remedy as was ordered by the trial judge. To allow the appellants to profit from their own wrongdoing by receiving any increase in the asset value of the Canadian hotel property purchased with the funds of Nor Sham U.S. would seem a strange result to say the least.
- [42] The appellants take the further point that because the assets were purchased out of a mixed fund, a proprietary remedy ought not to be available in law to the respondents. Particular reliance was placed on the trial decision in this jurisdiction of *Betterly*. There, the defendant employee had been guilty of a substantial defalcation from the plaintiff. Some of the stolen money was used, along with legitimate funds, to buy a piece of property. Based on the authority of *In re Hallett's Estate* (1880) 13 Ch.D. 696, Bouck J. held that since the property was purchased from a mixed fund "the plaintiff cannot take the land itself but must be

satisfied with a charge on the house". The appellants rely on this statement to submit that the trial judge erred in granting the respondents a proprietary remedy concerning the Roehampton and the limited partnership interests. Interestingly, the result of the order in *Betterly* seems to have been equivalent to a proprietary remedy since the plaintiff was found entitled to a share proportional to the stolen money contribution in any profit upon sale, which sale was ordered by the judge.

- [43] The judgment in that case, while not binding on this Court, would of course be of persuasive authority. However, in my view, the case on the particular point argued by the appellants should no longer be considered authoritative. The House of Lords refused to follow *Hallett's Estate* in the *Foskett* case. Lord Millett said at p. 131:

In *In re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696, 709 Sir George Jessel MR acknowledged that where an asset was acquired exclusively with trust money, the beneficiary could either assert equitable ownership of the asset or enforce a lien or charge over it to recover the trust money. But he appeared to suggest that in the case of a mixed substitution the beneficiary is confined to a lien. Any authority that this dictum might otherwise have is weakened by the fact that Sir George Jessel MR gave no reason for the existence of any such rule, and none is readily apparent. The dictum was plainly obiter, for the fund was deficient and the plaintiff was only claiming a lien. It has usually been cited only to be explained away: see for example *In re Tilley's Will Trusts* [1967] Ch 1179, 1186, per Ungood-Thomas J; Burrows, *The Law of Restitution* (1993), p. 368. It was rejected by the High Court of Australia in *Scott v Scott* (1963) 109 CLR 649: see the passage at pp 661-662 cited by Morritt LJ below [1998] Ch 265, 300-301. It has not been adopted in the United States: see the American Law Institute, *Restatement of the Law, Trusts*, 2d (1959) at section 202(h). In *Primeau v Granfield* (1911) 184 F 480, 482 Learned Hand J expressed himself in forthright terms: "On principle there can be no excuse for such a rule."

In my view the time has come to state unequivocally that English law has no such rule. It conflicts with the rule that a trustee must not benefit from his trust. I agree with Burrows that the beneficiary's right to elect to have a proportionate share of a mixed substitution necessarily follows once one accepts, as English law does, (i) that a claimant can trace in equity into a mixed fund and (ii) that he can trace unmixed money into its proceeds and assert ownership of the proceeds.

- [44] Thus, the circumstance that it may not have been exclusively funds of Nor Sham U.S. that funded the purchase of the Canadian hotel property is no bar to awarding a proprietary remedy to the respondents. I see no principled reason why a person whose monies were in part used to buy an asset cannot obtain a proportional proprietary interest in the asset. In my opinion, Pitfield J. was entitled to make the award he did. I would go further and say that indeed he was almost obligated to make such an order on the facts of this case, for to refuse such an order would amount to allowing wrongdoers to profit from their wrongful conduct, a result a court of equity could not countenance.

- [45] It is submitted on behalf of the appellants that the judge made no finding as to whether a sum of \$50,000 that came from the Royal Bank account was the property of Yasmin Walji or had its origin in funds wrongfully appropriated from Nor Sham U.S. I think there is force in this submission. While there is some suggestion in the reasons that perhaps the trial judge viewed these funds as having originated from Nor Sham U.S., I cannot discern any clear finding by him on this issue. In my opinion, it will therefore be necessary to remit this one issue to the trial judge for decision and I would so order. That issue has no great bearing on the bulk of the issues decided in this case adversely to Yasmin Walji and 1118174. Those appeals are otherwise dismissed.
- [46] That leaves for consideration the other grounds of appeal urged concerning limitations, laches and the judge's treatment of the evidence of statements of the deceased Noordin. I am content to adopt the reasons of the trial judge concerning limitations and laches. I do not consider the appellants have demonstrated any errors on the part of the trial judge concerning these time bar issues. As to the submission that the judge ought to have held a separate voir dire each time an issue arose about the admissibility and treatment of the evidence of the deceased Noordin, I consider this submission cannot succeed. It is a matter of discretion for a judge to decide how to approach such an evidentiary issue. This was not a trial by jury and it would make no sense and be a dreadful waste of judicial time to proceed as suggested by the appellants. The judge, in my opinion, fairly and properly considered the evidence of what I might term the verbal acts of Noordin as testified to by others or as tendered by affidavit or transcript. This was part of the narrative of events relied upon by all parties to the litigation. The evidence of what was said or done by Noordin was but one facet of the multi-faceted evidence in this litigation and I do not consider the judge fell into any error in his admission or treatment or the evidence sought to be impugned by the appellants.
- [47] While I have found that one issue raised by these appellants must be remitted for decision to the trial court, I do not consider that the appellants have had any considerable success on the various grounds of appeal advanced. In the circumstances, I consider the respondents ought to be entitled to 80% of their costs on this appeal and I would not order any costs in favour of Yasmin Walji, 1118174 or YZ Enterprises. Aside from the single issue remitted, these appeals are otherwise dismissed.
- [48] The appellant, Zuli Walji, in a separate appeal, appeals from the refusal of the trial judge to grant him ownership or trust remedies concerning the Holiday Inn Mississauga and the Markham Radisson. As earlier noted, he had been instrumental for obtaining these properties for corporate vehicles of the family. The judge outlined the claim in his reasons:
- [289] In this action against Noordin's Estate and the four Ontario Nor-Sham companies, Zuli seeks a declaration that he is entitled to a 15% interest in the Nor-Sham group of companies under an oral agreement or on the basis of constructive trust principles, an order for an accounting of the profits made by the group, and damages.

- [290] Zuli says that when the Holiday Inn was purchased in October 1990, he and Noordin agreed he would receive a 15% interest in the hotel and the adjoining vacant land. Zuli also says he arranged for the purchase of the Radisson Hotel in 1995 and, as a result of discussions with Noordin, understood he would receive a 15% interest in that hotel. Finally, Zuli says he managed both the Holiday Inn and the Radisson until April 1997 without compensation for the services he provided.
- [291] Zuli pleads that the Nor-Sham group has had the benefit of his services in finding, purchasing and managing the hotels, and there is no "justiciable" reason for the enrichment that results from the failure to provide the 15% interest or appropriate compensation. Zuli claims that Noordin, and latterly his estate, have refused to provide either an ownership position in the hotels or compensation for his services.
- [49] The respondents took the position at trial and on appeal that Zuli had not adduced sufficient evidence to permit the trial judge to make the orders sought by this appellant. The respondents successfully advanced at trial a counterclaim for \$163,600 on the basis that Zuli had taken these funds without authority during the time he managed those hotels. The judge carefully reviewed the evidence that Zuli asserted as the basis for a claim to some type of equity ownership in the hotels. He concluded that Zuli had failed to prove any agreement entitling him to shares in any company involved in the direct or indirect ownership of the two hotels and he dismissed the claim. He did however, as noted earlier in these Reasons, order that Zuli ought to be entitled to advance a claim in quantum meruit. He held:
- [336] I am satisfied that Zuli did provide services from which the Ontario hotels and their owners benefited. Those services cannot reasonably be regarded as part of the range of services to be expected from a manager or a person charged with the responsibility of overseeing management. I accept that the claim was not defined as a quantum meruit claim in the pleadings. At the same time, Zuli pleaded that the defendants were enriched by his services and have not paid for them. Whether one describes the claim as quantum meruit or unjust enrichment, the substance of the claim is apparent on the face of the pleading: the corporate defendants benefited from services for which they did not pay.
- This claim has not yet been quantified and if the parties cannot agree, a trial will be required to fix the sum due the appellant under this head of relief awarded by the trial judge.
- [50] The decision of Pitfield J. that the appellant was not entitled to any ownership interest in the hotels was largely a factual one. As such it is entitled to a considerable measure of appellate deference - *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 211 D.L.R. (4th) 577. I do not consider that this Court can or should interfere with this factual conclusion of Pitfield J. and I would, therefore, dismiss the appeal of Zuli Walji from this decision of Pitfield J.
- [51] The appellant further argues that the judge erred in granting judgment to the respondents, the owners of the hotels, for the sum counterclaimed that he found to have been misappropriated by the appellant. The appellant argues the evidence at trial did not suffice to support this award. As I interpret the evidence, the respondents adduced evidence of

payment of funds to the appellant or entities under his dominion, mainly being Nor Sham U.S. The appellant asserted he was entitled to these sums, but he could not produce records supportive of such assertions. What must not be lost sight of in considering this matter is the truly remarkable history of what happened to a great volume of Nor Sham U.S. records. It was established in evidence that microfiche records had been made of these records by the appellant and the records were then stored at the Houston home of Zuli and Yasmin. Through unexplained circumstances, a great bulk of the records went "missing". The remarkable circumstance of the disappearance of these records with no sensible explanation, coupled with the conduct of Zuli during the course of the litigation in dissipating funds he had agreed to hold in safekeeping, afforded ample grounds to the learned judge to be sceptical of the bona fides of this appellant. The judge did not err in his cautious approach to the evidence of Zuli. When these funds that formed the substance of the counterclaim were demonstrated to have flowed to the appellant or entities under his dominion and the appellant could produce no records to demonstrate reasons for the payments, I do not consider the judge erred when he declined to accept the unsupported evidence of the appellant claiming entitlement to the funds.

- [52] Credibility issues are particularly within the province of the trier of fact. Given the host of dishonest actions brought home to this appellant, it is difficult to quarrel with the adverse findings of the judge concerning the testimonial credibility of this appellant. The judge was entitled to reject his unsupported assertions of entitlement to the funds in question and find in favour of the respondents on the counterclaim. I would not give effect to the arguments of the appellant attacking this conclusion of the trial judge. The appeal from this aspect of the judgment should be dismissed.
- [53] The remaining matter outstanding is the appeal brought by Parviz Dhanani and the corporate entities concerning the orders made by the judge relative to the Roehampton and the partnership interests in 1392275 Ontario Inc. (dba Markham Hilton Gardens) and 3465632 Canada Inc. (dba Days Inn Montreal Airport). As noted above, the latter hotel property has been sold and what remains to be resolved in the distribution of sale proceeds to those properly entitled to the proceeds.
- [54] To some extent certain of the submissions advanced on behalf of Parviz Dhanani and the corporate entities tracked some submissions advanced on behalf of Yasmin Walji and 1118174. Essentially, these appellants seek to assert that the remedies granted by the trial judge concerning the Canadian hotel properties were overly broad and have worked a hardship on these appellants. It is also submitted that the proprietary remedies granted were not appropriate. These latter submissions are similar to those advanced on the other appeal, which submissions I concluded were not able to succeed.
- [55] As I noted earlier, it appears to me that the scope of the orders initially made in this regard by Pitfield J. were subsequently narrowed to ameliorate the asserted hardships on the appellants arising from these orders. It is not apparent to me that any additional intervention is called for at this time by this Court and any additional alterations in any

orders, if required, should be able to be worked out in the trial court. This concerns issues relating to the minority interests in the limited partnerships. I do not consider that the appellants have made out any case for relief in this Court concerning the orders made by Pitfield J. concerning these interests.

[56] As to the minority 15% interest held by the appellant, Parviz Dhanani, through 1118174 in the Roehampton assets, I note that in February 2006 this appellant entered into a consent order. By that consent order it was provided that 1118174 holds a 15% in the Roehampton assets by way of a constructive trust for this appellant. While the appellant would perhaps wish to be in a better position than the minority holder of a share in these assets, it appears that consent was given to be the holder of such an interest. In my opinion, it is not open to this appellant to appeal from such a consent order. Therefore, the appeal on this aspect of matters cannot succeed and should be dismissed.

[57] In the result, I would dismiss the appeals brought by Parviz Dhanani and the corporate entities. In sum, subject only to the direction previously made concerning the sum of \$50,000 used in the purchase of the Roehampton, I would dismiss all of the appeals of the appellants.

"The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

[58] I have had the opportunity to read the draft reasons for judgment of Mr. Justice Hall. At para. 45 of his reasons he addresses the issue of the beneficial ownership of the \$50,000 deposit made for the purchase of the Roehampton hotel and concludes that the trial judge did not clearly determine the beneficial ownership of the deposit funds and the issue should be remitted back to him for decision. On my reading of the trial judge's reasons, he did find that the deposit was derived from funds improperly diverted from Norsham, Inc. (referred to as Norsham US) by Zulfikar and Yasmin Walji, through a Dominion Securities investment account and Royal Bank account no. 500-272-00. These were the same accounts that provided the funds required to close the purchase of the Roehampton hotel, also found by the trial judge to have been improperly diverted from Norsham US. In my respectful view, the trial judge has made the necessary finding of fact as to the source of the deposit funds and it is not necessary to remit the matter back to him for further consideration.

[59] In all other respects, I agree with the reasons of Mr. Justice Hall and his disposition of the appeal.

"The Honourable Mr. Justice Mackenzie"

I Agree:

"The Honourable Madam Justice Levine"

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