

CANADA / JUDGMENT

Taylor v. Banicevic

2017 BCSC 1538

COURT

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2017 BCSC 1538 Taylor v. Banicevic

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Taylor v. Banicevic,

2017 BCSC 1538

Date: 20170830

Docket: S124709

Registry: Vancouver

Between:

Graham Taylor

Plaintiff

And

Peter Mario Banicevic, Banicevic Developments Inc.,

Banicevic Holdings Ltd. and 679484 B.C. Ltd.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

June 12-16, 19-23, 26-28, 2017

Place and Date of Judgment:

Vancouver, B.C.

August 30, 2017

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INTRODUCTION

- [1] The plaintiff Graham Taylor and the defendant Peter Banicevic used to be good friends. Their relationship soured as a result of their joint participation in relation to the ownership and development of certain property in Surrey, B.C.
- [2] The parties had widely divergent views as to the agreement struck between them and whether that agreement remained in place over the time that the property was developed. Unlike most commercial transactions, there is little documentary support for the agreement.
- [3] Taylor contends that Banicevic held half of the property in trust for him and that Banicevic breached their agreement and fiduciary obligations owed to him by reason of Banicevic's later dealings with the property. He seeks substantial damages against Banicevic.
- [4] Banicevic denies that he was in breach of the agreement and he denies any trust relationship with Taylor; he asserts that the agreement was mutually terminated by them well before the actual development of the property. He denies that he breached any fiduciary duties owed to Taylor to that time. He in turn claims damages against Taylor by reason of the filing of certificates of pending litigation (CPLs) early in this litigation.
- [5] The corporate defendants, Banicevic Developments Inc. ("Developments"), Banicevic Holdings Ltd. ("Holdings") and 679484 B.C. Ltd. ("679"), are owned and controlled by Banicevic. Taylor only seeks judgment against 679 by reason of its involvement in the development of the subject property. It is agreed that the action be dismissed as against Developments and Holdings.

CREDIBILITY OF THE PARTIES

- [6] This case largely stands to be determined based on an assessment of Taylor's and Banicevic's credibility and the reliability of their evidence.
- [7] Both have gone back in time, at times to 2001, some 11 years before this litigation even began, in an attempt to obtain relevant documents about the course of their dealings. However, both largely rely on their memory of events going back to 1999/2000 when they began their mutual involvement in certain financial transactions.
- [8] The factors to be considered when assessing credibility were summarized by Justice Dillon in *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.

- [9] In my view, Taylor's evidence was largely reconstructed from the few independent facts he was able to obtain from certain and few documents, toward the narrative that he advanced at this trial. Often, he forgot about parts of the "story" and had to return to supplement his answers, showing a lack of spontaneity and true recollection. At times his evidence was vague and contradictory as he corrected his narrative. I do not accept his contention that he has a clear memory of most of the events he recounted. Where his assertions are not supported by the document, I have severe doubts about their veracity and reliability.
- [10] Banicevic was much more honest and forthcoming about his lack of memory about many of the events in question although he did, at times, assert some propositions that are at odds with other evidence. Taylor attempted to portray Banicevic as deceitful at this trial. For example, he points to discrepancies between income reported on Banicevic's income tax returns and income levels recorded on certain mortgage application forms. I do not accept this argument. Overall, I found Banicevic to be a fairly straightforward individual who attempted to give his evidence fairly and without embellishment, contrary to that of Taylor.
- [11] In summary, both parties face some credibility issues and concerns about the reliability of their evidence. I approach the evidence of both parties with caution and with a view to determining the course of events here based on the totality of the evidence and the known facts supported by independent evidence, such as other witnesses and the documentary evidence. I have accepted and rejected parts of both parties' testimony on the key issues.

BACKGROUND FACTS

- [12] The following background facts are my findings of fact. Other findings of fact will be addressed in the discussion of the individual issues.
- [13] Taylor met Banicevic in 1996/1997. They became close friends.
- [14] When they initially met, Taylor was working in investor relationships for various public companies, including a pharmaceutical company. Banicevic was a part owner of a hotel in White Rock and had also, since approximately 1990, been involved in real estate development.
- [15] In 1998, Banicevic sold his interest in the hotel and earned approximately \$380,000 as a result. Taylor introduced him to four stock brokers in Vancouver and Banicevic went on to open brokerage accounts with three of them.
- [16] Around 1999/2000, Taylor was involved in two companies that were public or going public: eVirus Software and HealthNet International. Taylor was assisting both companies with financing and investor awareness. As a result of Taylor's advice, Banicevic became aware of both companies and invested in them through the stock brokers Taylor identified.

- [17] When the technology stock bubble burst in the fall of 2000, both Taylor and Banicevic lost money in the stock market. In part, Taylor blames his, and Banicevic's, losses on what he described as unauthorized trading in their brokerage accounts by Peter Almerling at Cannacord Capital. Almerling was one of the brokers that Taylor had introduced to Banicevic earlier in 1998-2000.
- [18] In 2003, Banicevic was continuing his involvement in real estate development and had a project underway in developing a residential lot on Wales Street in Vancouver.
- [19] By 2003, Taylor seems to have recovered from his stock market losses. Taylor had a controlling interest in Magnus International Resources Inc., which did mineral exploration in China. He was still involved in various public companies, including Sinovac Biotech, a vaccine company.
- [20] Beginning in 2003, Taylor made some personal loans to Banicevic.
- [21] Taylor advanced \$50,000 in December 2003 on an interest free basis. Although there are no documents to support the advance of such a loan, Banicevic's own handwritten document from March 2005 refers to this loan. In addition, 679's cheque #0077 dated March 22, 2005 in the amount of \$25,000 refers to this as being in repayment of a loan from December 2003 to 679. This cheque was made payable to Hsien Loong Wong, a friend of Taylor's. I find that this was done at Taylor's direction.
- [22] In addition, Taylor advanced \$15,000 to Banicevic by cheque dated September 29, 2004. A copy of the cheque and Taylor's banking records confirm this advance. Again, Banicevic's own handwritten document from March 2005 refers to this loan being repaid in March 2005 which is supported by 679's cheque #0078 dated March 22, 2005 in the amount of \$15,000 payable to Taylor.
- [23] Taylor also contends that he advanced the further sum of US\$21,500 to Banicevic by wire transfer in July 2004. There is absolutely no documentary evidence of such a loan or transfer, save for a document in Taylor and Banicevic's handwriting from July 2004 which refers to Banicevic's banking details. Banicevic denies that any such loan was advanced. I reject Taylor's evidence that he advanced such a loan to Banicevic. In addition, in part, I rely on there being no written request or demand for repayment at any time, in particular from the fall of 2009 when Taylor, by his own admission, was in dire financial straits.
- [24] In February 2004, Banicevic entered into a contract of purchase and sale to acquire a two acre lot located at 19038 - 68th Avenue in Surrey ("Lot 17") for \$800,000. Lot 17 was a residential lot with a house located on it, but most of the property was undeveloped. The purchase agreement was subject to Banicevic obtaining a feasibility study by May 2004, at which time a deposit of \$80,000 had to be made. The sale was scheduled to complete on December 30, 2004.

- [25] Sometime after February 2004, Banicevic mentioned to Taylor that he had tied up Lot 17. Taylor advised him that he was interested in getting involved in the development, if such an opportunity presented itself. At that time, Taylor had no experience or knowledge relating to real estate development, beyond co-owning a condominium with his brother.
- [26] In June 2004, Banicevic put up the deposit of \$80,000 for the purchase, using in part \$50,000 borrowed from Raj Soni. Soni has been brought into the deal by another developer who was also originally involved in the purchase of Lot 17 and Soni was to provide some of the deposit monies. On June 2, 2004, Banicevic assigned his interest in the purchase and sale contract to Soni as security for the loan.
- [27] In December 2004, before the closing, Soni indicated to Banicevic that he wished to take over the Lot 17 deal himself, prompting Banicevic to conclude that he needed someone else to assist in coming up with sufficient monies to repay Soni and complete the purchase. Since Banicevic did not have the necessary funds at the time, Banicevic turned to Taylor.
- [28] Banicevic indicated that he thought Lot 17 had already gone up in value. I accept Banicevic's evidence that he considered that the value of Lot 17 had already risen by about \$200,000. Taylor confirmed that he was told by Banicevic about this same increase in value, being \$100-200,000. I also accept Banicevic's evidence that by December 2004, he had already notionally earned a profit on Lot 17 of \$200,000 given the increase in value and that, if he had been willing, he could have accepted an offer from a development company to take over the deal at the higher price.
- [29] Banicevic's plan was to develop Lot 17 into high density residential lots and a business park. He indicated that he wanted to bring Taylor in as a partner in the deal.
- [30] In the first week of December 2004, Taylor viewed Lot 17 with Banicevic. At that time, Lot 17 was overgrown with trees and bushes. The house located on the lot was rented out. However, the clearing of the property across the street had already begun. There was already a completed development close by. As with Banicevic, the development potential of Lot 17 was obvious to Taylor who, at trial, described it as a "no brainer".
- [31] Banicevic explained to Taylor that he said that he could obtain a \$500,000 residential mortgage from CIBC Mortgages Inc., but he needed the remainder of the monies urgently to close the deal, or he would lose the opportunity to acquire and develop Lot 17. Banicevic indicated that he needed Taylor to come up with \$330,000 in order to repay Soni, reacquire the contract of purchase and sale, and close the deal. Taylor agreed.
- [32] In summary, by December 2004, Banicevic owed Taylor the amount of \$65,000 from the prior loans. In addition, having a valuable asset - namely, the contract of purchase and sale - in hand, Banicevic's intention was to bring in Taylor as an equal partner. In broad terms, that partnership was premised on: Taylor putting in the necessary funds to repay Soni and close the deal; and, Banicevic contributing the "lift" in value that he had already obtained in Lot 17, his pre-approved residential CIBC mortgage in the amount of \$500,000 and his

expertise in proceeding with the development of Lot 17 when that was worthwhile to pursue.

THE ISSUES

[33] The issues raised by Taylor are as follows:

- a) what were the terms of the December 2004 agreements between Taylor and Banicevic?
- b) was there a valid termination of the agreement/trust?
- c) did Banicevic act in breach of the agreement/trust?
- d) what amount, if any, is owing to Taylor under an accounting?

[34] In addition, Banicevic advances a counterclaim against Taylor arising from the filing of the CPLs against property held by the defendants in 2012.

TAYLOR'S ISSUES

[35] I will now address the specific issues raised by Taylor in his claim.

(a) What are the terms of the Agreement/Trust?

[36] Despite Taylor agreeing to become involved in the Lot 17 project, he did not have \$330,000 for the required contribution. He turned to his friend Wong and Wong agreed to provide the funds. Taylor and Wong say that they had a side agreement that from Taylor's 50% share of the Lot 17 project, Wong would receive the first \$330,000 (his investment), plus one half of any further monies or profits from the project payable to Taylor.

[37] On December 9, 2004, the parties attended at the office of Banicevic's real estate lawyer, Alan Hultman, and provided him with instructions in relation to the deal. I find that Hultman acted jointly for Taylor and Banicevic with respect to their agreement and the acquisition of Lot 17. As with the parties, Hultman's recollection of matters had dimmed considerably, save what could be independently verified from his legal file.

[38] Hultman prepared notes of the December 9 meeting. Those notes reflect the parties' intention that Banicevic would take title to Lot 17 and grant a first mortgage in favour of CIBC. In addition, Taylor was to contribute \$320,000 to repay Soni and close the deal, with a second mortgage being granted against Lot 17 in favour of a company to secure the \$320,000 investment. At the time of this meeting, the shareholder of this company had not yet been identified.

[39] I find that the reason why the shareholder of this mortgagor company was not identified at this initial meeting was that Taylor advised Hultman and Banicevic that he did not want any documents in his name because he was looking into obtaining non-residency status in Canada for tax purposes. His intention was to avoid being linked to any property or business in Canada for that reason.

[40] On December 10, 2004, Hultman prepared a draft letter, which purports to set out the terms of the agreement between Taylor and Banicevic (the "Letter Agreement"). Neither party particularly recall receiving this document but I find that it was received by both Taylor and Banicevic. Both Banicevic and Taylor agree that, with one exception, the Letter Agreement accurately reflects the terms of their agreement, as was told to Hultman.

[41] The Letter Agreement provides (corrected for some punctuation):

This letter agreement once signed below by all parties shall serve to record the agreement between the parties as follows:

1. Graham Taylor shall advance the necessary monies to complete the Purchase and Sale referenced above estimated at \$320,000;
- 2 Peter Banicevic shall grant a personal covenant and a first Mortgage to CIBC Mortgages Inc. to provide the balance of the Purchase monies set out in the Contract of Purchase and Sale between the Vendor and Banicevic Developments Ltd. dated February 12, 2004;
3. Graham Taylor shall advance \$80,000. (the "Initial Advance") of the Purchase monies to "Hultman & Company in trust" no later than December 12, 2004, which monies shall be applied towards the Purchase Price by settlement of a deposit money dispute between Rajinder Soni and Banicevic Developments Ltd.;
4. The security for the \$80,000 shall be by Promissory Note given by Peter Banicevic and Banicevic Developments Ltd. in the amount of \$80,000, due on demand bearing interest at ____% per annum calculated and compounded annually;
5. Concurrently with the completion of the Purchase the security for the \$300,000, inclusive of the \$80,000 Initial Advance, shall be given to Graham Taylor by granting of a second Mortgage to a company to be determined by Graham Taylor;
6. The Property shall be held by Peter Banicevic in trust for Graham Taylor as to an undivided 50% and for Peter Banicevic as to an undivided 50%, with all demands for further capital and all profits therefrom to be divided equally between Graham Taylor and Peter Banicevic;
7. Peter Banicevic shall repay \$40,000 of the Initial Advance to Graham Taylor at the earliest date and no later than ____, 200_.
8. All material decisions relating to the Property shall be made jointly.

[42] Hultman indicates that subsequently, he must have been instructed that there was to be no interest paid on the \$80,000 advance since he wrote "Ø" in the blank space in paragraph 4 of the Letter Agreement. Even so, Hultman received no further instructions regarding the Letter Agreement from either Taylor or Banicevic. Although, signature lines are located at the bottom of the Letter Agreement for Taylor, Banicevic and Developments, the Letter Agreement was never signed by anyone.

- [43] It is significant that the Letter Agreement stands as the only document which confirms the agreement of the parties and, more importantly, as the only contemporaneous document from December 2004 when the parties struck their deal.
- [44] There was contradictory evidence about when Wong's involvement in the Lot 17 acquisition became known to Banicevic and Hultman. Taylor initially said that he did not explain to Banicevic and Hultman at their meeting on December 9, 2004 that he would be arranging payment of the \$330,000 by a third party, being Wong. He later changed his evidence. I reject Taylor's testimony on this point. Hultman has no recollection or notes to indicate that he was told on December 9 of Wong's involvement. I find that Taylor made no mention of Wong's potential involvement in the transactions at the time of this initial meeting. I consider it more likely that, at that time, Taylor was still arranging for the funds to come from Wong and that he only later advised both Banicevic and Hultman of Wong's involvement.
- [45] Taylor caused \$330,000 to be paid to Hultman. In turn, Hultman used those funds to repay Soni, reacquire the contract of purchase and sale, and then complete the purchase of Lot 17 in Banicevic's name. The funds were received as follows:
- a) \$80,000 was received by Hultman on December 14, 2004 by way of a bank draft. On December 13, 2004, in conjunction with this advance, Banicevic and Developments executed a demand promissory note in favour of Taylor for \$80,000. Wong says that this was his bank draft which he dropped off at Hultman's office; and
 - b) \$250,000 was received on December 17, 2004 by way of a bank draft which on its face refers to Wong. Again, Wong says that this was his bank draft which he dropped off at Hultman's office.
- [46] After receipt of Taylor's first advance, Hultman proceeded to settle matters with Soni so as to reacquire the rights to the contract of purchase and sale. On December 16 and 20, Hultman forwarded \$83,000 to Soni's lawyer to do so.
- [47] I find that by no later than December 17, 2004, both Banicevic and Hultman knew of Wong's involvement. This arises from Hultman's receipt of Wong's bank draft of that date. In addition, on this date, Wong signed a mortgage approval for the CIBC mortgage, although it is unclear to me why Wong's signature was required since Banicevic was the only mortgagor. I accept Wong's evidence that he signed this form in Banicevic's presence on that date.
- [48] Wong's involvement in the deal was also highlighted to everyone by a later trust agreement.

- [49] Hultman prepared a Declaration of Bare Trust and Agency Agreement between Banicevic, as "Nominee", and Banicevic and Wong, collectively as "Owner" of Lot 17 (the "Trust Agreement"). Taylor instructed Hultman to put Wong's name in this document and not his, again further to his efforts to obtain non-residency tax status in Canada. The document was signed by Banicevic on December 30, 2004. It was never signed by Wong and he was not even aware of this document until this lawsuit began in 2012.
- [50] The Trust Agreement includes the following terms:
- a) Banicevic holds the beneficial interest in Lot 17 in trust;
 - b) Banicevic holds title to Lot 17 in trust for the Owner (defined as Banicevic and Wong in equal shares); and
 - c) Banicevic will not deal with Lot 17 in any way or execute any instrument, document or encumbrance in respect of Lot 17 without the prior written consent or direction of the Owner.
- [51] Taylor says that he explained to Hultman and Banicevic that Wong was his nominee and that it was understood that Taylor always remained the beneficial owner of the 50% interest in Lot 17 which Banicevic had agreed to hold in trust for him. Hultman confirms that Taylor would have directed that the Trust Agreement be in favour of Wong, confirming his understanding that Wong was Taylor's nominee or representative in the deal.
- [52] On December 30, 2004, the purchase of Lot 17 completed. The necessary funds to complete came from a first mortgage granted by Banicevic in favour of CIBC for \$500,000 and \$221,151 plus the property purchase tax amount. In accordance with the Letter Agreement, Banicevic became the registered owner of Lot 17.
- [53] Paragraph 5 of the Letter Agreement contemplated that Taylor would be granted a second mortgage against Lot 17 for \$300,000 of the advance (later increased to \$330,000). Hultman had recorded in his notes from December 9 that this mortgage was to be granted in favour of a company to be controlled by Taylor or as he later described at the trial, as security or "protection" for the investment.
- [54] In mid-January 2005, pursuant to instructions from Banicevic and Taylor, Hultman incorporated a numbered company, 0713810 B.C. Ltd. ("071"). However, given that Taylor had advised that he didn't want any documents in his name, Hultman prepared the documents to place the shares and control of 071 in Wong's name, not Taylor's. Despite this, Hultman never did "fully organize" 071 to record Wong as the sole shareholder, as Hultman later acknowledged years later in April 2007. It appears that Wong was oblivious to his involvement in 071 at the time.

- [55] In addition, there were also discussions about Banicevic transferring title to Lot 17 into the joint names of two companies, one being 071 controlled by Wong, and the other controlled by Banicevic. This never happened, although it appears that Hultman did prepare the necessary transfer documents by February 2005.
- [56] On January 26, 2005, a second demand mortgage was executed by Banicevic in favour of 071 in the amount of \$330,000 and it was registered on January 27, 2005 (the "Second Mortgage").
- (i) The Legal Effect of the Transactions
- [57] In my view, the above circumstances amply demonstrate that Banicevic and Taylor agreed that, if Taylor came up with the \$330,000 needed for the purchase, Banicevic would take title to Lot 17 and hold a 50% interest in Lot 17 for Taylor. The important circumstances include the initial discussions between Taylor and Banicevic to that effect, as confirmed by their later joint instructions to Hultman, and by the Letter Agreement.
- [58] Three certainties are needed to establish a trust, being certainty of subject; certainty of intention; and certainty of beneficiaries/objects: see *Quesnel & District Credit Union v. Smith* (1987), 19 B.C.L.R. (2d) 105 (C.A.) at 112.
- [59] The three certainties are more than satisfied here. The subject of the trust was a 50% interest in Lot 17. Certainty of intention was addressed in *Bradshaw* (BCSC):
- [201] Certainty of intention refers to the clear communication that the settlor intends that the recipient hold the subject matter in trust (*Waters* at 132). In *Sutherland Estate v. Nicoll Estate*, [1944] S.C.R. 253 at 263, Kerwin J. said that it is necessary to show that the communication was clear and that it was made in circumstances in which an obligation was imposed upon and accepted by the trustee. Newbury J. (as she then was) said in *Bank of Montreal v. British Columbia Milk Marketing Board* (1994), 94 B.C.L.R. (2d) 281 (B.C.S.C.), [1994] B.C.J. No. 1606 at para. 10: "there must be sufficient evidence of an intention on the payor's part that the funds or property received by the trustee are not to become part of his own property but are to be or remain the property of the beneficiary." If an alleged settlor clearly says that certain property is to be held on trust, then an express trust is created (*Gill v. Grant* (1988), 30 E.T.R. 255, [1988] B.C.J. No. 1705 (B.C.S.C.)).
- [60] Here, Banicevic orally agreed that he would hold a 50% interest in Lot 17 for Taylor. This intention to create a trust was expressly stated in the Letter Agreement.
- [61] Banicevic raises an issue with respect to the certainty of beneficiaries/objects. He argues that only Wong put up the money and only Wong is the beneficiary in accordance with the Trust Agreement. Banicevic then argues that since Taylor, not Wong, is the only litigant before the court, Taylor cannot claim that he is the "true beneficiary" of the trust in place of Wong.

- [62] In my view, this technical argument cannot succeed. The evidence supports the conclusion that there was a side deal between Taylor and Wong and that Wong was only put forward as Taylor's nominee, agent or representative to hold the express trust interest in place of Taylor. In addition, Wong paid the \$330,000 on behalf of Taylor to satisfy Taylor's obligation under his agreement with Banicevic.
- [63] Banicevic's argument is confusing and contradictory. This is apparent from his assertion that, despite only Wong being the beneficiary of a 50% interest in Lot 17, there was a corollary joint venture agreement between him and Taylor which was concluded in December 2004 in relation to Lot 17. Banicevic argues that, by this joint venture agreement, he was to hold an undivided 50% interest in Lot 17 for Taylor, as set out in paragraph 6 of the Letter Agreement.
- [64] In my view, these two agreements cannot be looked at in isolation. They are but parts of a whole. I agree that the parties entered into a joint venture agreement, but imbedded in that joint venture was the feature that Banicevic was to hold a 50% interest in Lot 17 and 50% of the fruits of any development activities in trust for the benefit of Taylor, not Wong, despite the wording of the Trust Agreement. I cannot see how Banicevic could hold a 50% interest in Lot 17 for Wong under the Trust Agreement and hold that same 50% interest for Taylor under the joint venture agreement. They are but one and the same.
- [65] Lastly, Banicevic's argument at trial concerning who is the true beneficiary of the trust flies in the face of his extensive concessions at his examination for discovery, confirmed by his evidence at this trial. That evidence confirms Banicevic own understanding and agreement that, after the closing of the purchase of Lot 17, he held a 50% interest in Lot 17 for Taylor:

On June 20, 2017:

Q That was the deal you made. He arranged the \$330,000 which you needed in December of 2004 (and) in return you would hold title to lot 17 in trust as to 50 percent interest for him and he would get 50 percent of the profits on the project; right?

A That is correct.

Q And as a result of using the money that Mr. Taylor had come up with so that you could do those things you understood that you were holding a 50 percent interest in lot 17 in trust for Mr. Taylor as of December 30th, 2004 which is when you completed the purchase of lot 17 right?

A Yeah.

Q Is that right?

A Me and Graham were partners. Yeah, I was the property go in my name and me and him are partners 50/50.

Q And you were holding a 50 percent interest in that property in trust for Mr. Taylor effective on December 30th, 2004, when you completed the purchase of the property right?

A I don't -- I don't specifically remember. If you're using -- I know that he was -- the deal was puts up the 330, I put up the 500 half the cost for half the profits, I'm going to hold the property, you know, 50/50 go in my name but we're 50/50.

Q Right. And you understood that you were holding a 50 percent interest in trust for Mr. Taylor. Isn't that so?

A Yes.

Q So as of the spring of 2009 when you and Mr. Taylor were talking about selling lot 17 you were still partners and you still held a 50 percent interest in lot 17 in trust for Mr. Taylor right?

A Up to which date.

Q Spring of 2009?

A Until that final email yes -- text message sorry.

Q And it's also the case that up until the spring of 2009 you understood that Mr. Taylor was entitled to 50 percent of the increase in value of lot 17 during the preceding years from the time when it was purchased in your name, right?

A Mr. Taylor was still 50 percent until the buyout which was in the spring of 2009.

Q What you weren't telling him was that in your view at that time he was no longer your 50/50 partner?

A I think he still was. Are you talking March 2008.

Q Yes I am.

A I believe he was still a partner.

Q I beg your pardon?

A I think he was still a partner in 2008 he was still involved.

Q And in March 2008 you were still holding a 50 percent interest in lot 17 in trust for him; is that right?

A Until -- yes, I believe so.

On June 21, 2017:

Q And as of August 2008, as far as you were concerned, the joint development was still going ahead isn't that right?

A Correct.

Q And as of August of 2008 you were still holding a 50 percent interest in trust for Mr. Taylor right?

A Yes.

[66] As Taylor argues, Banicevic's declaration of trust in early December 2004 in advance of the completion of the sale was contingent on two things: firstly, Taylor putting up \$330,000 to repay Soni and provide monies on the closing; and secondly, the purchase actually completing such that Banicevic took title to Lot 17: see Chitty on Contracts, 31st ed (London: Sweet & Maxwell, 2012) at §2-153. No one disputes that these conditions were fulfilled by Taylor arranging for Wong to make these funds available to Hultman, as set out above, and Banicevic indeed taking title to Lot 17 on December 30, 2004.

[67] Banicevic agrees that by reason of the agreement in the Letter Agreement and by the trust arrangements, he owed a fiduciary duty to Taylor.

(ii) The Disputed Terms

[68] Each of Taylor and Banicevic argue that there were other terms of their agreement beyond what is indicated in the Letter Agreement, which is denied by the other:

- a) Taylor argues that Banicevic agreed to repay him \$165,000 (half of his \$330,000 contribution) within a short period of time (said to be within a year or so);
- b) Taylor argues that he and Banicevic agreed that they would either hold and resell Lot 17 or alternatively, only proceed to the subdivision stage. Taylor also contends that there was never any agreement to actually build houses on the subdivided lots; and
- c) Banicevic argues that Taylor agreed to repay him, from his share the profits on Lot 17, the amount of \$200,000 in pharmaceutical or other stock, said to be in repayment of previous stock losses in 1999/2000 and toward Banicevic's accrued "lift" in Lot 17's value by the time of the closing in December 2004.

[69] Firstly, Taylor contends that the Letter Agreement accurately reflects his agreement with Banicevic, save for one further term. He alleges that Banicevic agreed to repay 50% of the \$330,000 to Taylor (\$165,000) when funds were available from the Wales Street project, which he argues was to be "within a year or so". He contends that the purpose of this payment was to bring him and Banicevic into equal standing.

[70] The difficulty with this argument is that the Letter Agreement is entirely devoid of any such term. By paragraphs 4 and 5 of that document, Banicevic executed a promissory note in favour of Taylor for \$80,000, which was meant to be temporary, and to be replaced by the Second Mortgage.

[71] The evidence establishes that the promissory note and Second Mortgage were only meant to stand as security for Taylor's investment and not, as the face of the document might indicate, as evidence of a loan to Banicevic. Even by Taylor's evidence and argument, he could not have demanded repayment from Banicevic of \$330,000 under the Second Mortgage at any time he pleased or "on demand". Accordingly, just as Hultman intended, the Second Mortgage only provided some measure of security in favour of Taylor/Wong since

Banicevic was to be the only registered owner of Lot 17.

- [72] Both parties had good reason to put Lot 17 in Banicevic's name only. Taylor says that title was to be placed in Banicevic's name only because Banicevic told Taylor that he could not obtain sufficient financing unless Lot 17 was registered in his name. There were other possible tax benefits such as avoiding capital gains by claiming it as a personal residence. In addition, at the same time, Taylor was considering becoming an off-shore resident for Canadian income tax purposes and he did not want title to real property being registered in his name.
- [73] Paragraph 6 of the Letter Agreement then provides that the parties are to have an equal interest in Lot 17 with complete equal sharing of profits. In other words, the effect of this agreement was that \$165,000 was an immediate benefit to Banicevic through Taylor's cash contribution. However, as I have stated above, Banicevic brought other benefits to the transaction, including having sourced the deal, agreeing to be the mortgagor in favour of CIBC and also, contributing what he considered was the increased value in Lot 17 by the time of closing. Accordingly, both parties contributed in different ways. Based on the handshake nature of this deal, I conclude that was intended by the parties to more or less equalize their positions in Lot 17.
- [74] In my view, if Banicevic had truly agreed to repay \$165,000 to Taylor after the closing and by a certain time, this would have been explained to Hultman on December 9. Hultman indicates that if this was a term of the agreement, he would have recorded it in the Letter Agreement. In addition, Taylor's own evidence is equivocal, referring to payment within a certain time frame "or so". There is little certainty about Taylor's evidence and confirms my assessment that he has largely reconstructed his version of the agreement ex post facto. I find that Wong's testimony about the timing of the \$165,000 repayment is not helpful to Taylor.
- [75] I reject Taylor's contention that such a term existed in their agreement. I accept Banicevic's evidence that both parties were to obtain their capital back only upon the completion of the development of Lot 17.
- [76] Secondly, Taylor argues that he agreed with Banicevic that, after acquiring Lot 17, the idea was to hold it for a period of time and then sell it; or, after obtaining approval for a subdivision (which would increase the value of the property), then sell it. Taylor further argues that there was no discussion of proceeding with the subdivision themselves, or that they would actually build houses on Lot 17. Hultman's evidence was such that he understood that the general intention was that Lot 17 would be held for resale at a profit or developed for value.
- [77] In my view, Taylor has failed to establish that any such agreement was entered into with Banicevic and I again consider that he has largely reconstructed this scenario after the fact. I reject his evidence that any such term was agreed upon.

- [78] I accept Banicevic's evidence that the agreement was that Lot 17 could be held for resale, as is, or developed in a general sense. I consider that the parties intended that Banicevic would, if feasible, make efforts to develop Lot 17, just as the neighbouring properties were being developed. This included waiting for the services to be brought to Lot 17 and then proceeding with engineering work and obtaining City of Surrey approvals so that the development could proceed.
- [79] Banicevic's evidence, which I accept, was that his discussions with Taylor were to the effect that other development options might exist, such as the building of houses for resale. I acknowledge that the Letter Agreement provided that material decisions relating to Lot 17 were to be jointly made. However, I find that Taylor intended to and did defer to Banicevic in respect of the development efforts and decisions given Banicevic's clearly superior expertise in that matter. I also find that it was intended by both parties that Banicevic would keep Taylor informed of those development efforts from time to time.
- [80] Thirdly, Banicevic argues that, as part of their agreement in December 2004, Taylor agreed to give him pharmaceutical or other stock worth \$200,000, which he never received.
- [81] The difficulty with this contention is that there is no mention of any such agreement in any of the documents, including the documents prepared by Hultman. Hultman indicated that if Taylor was to, as part of the agreement, repay Banicevic \$200,000, he would have probably recorded it in his notes and if it was part of the agreement, he would have recorded it in the Letter Agreement.
- [82] Banicevic asserts that there was a further term of the agreement that arose in 2001 whereby Taylor would reimburse him for stock losses he suffered in 2000/2001. Banicevic's pleading alleged total losses of almost \$305,000 suffered by either him personally or Holdings. In addition, Banicevic argues that another basis for this additional term was to recognize the \$200,000 "lift" in Lot 17's value Banicevic could have realized by flipping the deal to another developer before closing.
- [83] I would not accede to this argument. I have concluded that the "lift" in value that Banicevic had accrued in Lot 17 to that time was already addressed in the capital contribution to be made by Taylor/Wong.
- [84] As for the remainder of the argument, I accept that Banicevic did suffer some losses in the stock market in 1999/2000, in some cases as result of Taylor's recommendations which were executed by the stock brokers Taylor recommended, and some irregularities with one of the brokerage accounts.
- [85] However, there is simply no evidence to support that Taylor at any time agreed with Banicevic to repay those losses. It would be an unusual result for Taylor to have assumed responsibility for those losses simply because he introduced Banicevic to certain stock brokers or recommended certain trades to him. There is also no evidence that Taylor had any direct involvement in Banicevic's opening of these brokerage accounts. Banicevic

confirmed at his examination for discovery that Taylor had no authority on these brokerage accounts to direct trades on his behalf; only Banicevic did. Banicevic's contention that Taylor told him to invest and that he would "make him a lot of money" does little to elevate these circumstances to Taylor taking on this responsibility. At that time, Taylor himself had suffered losses in the market to the point of insolvency and was hardly in a position to offer to backstop Banicevic's losses in any event, despite their friendship.

- [86] I accept Taylor's evidence that Banicevic never blamed him for his losses and he never said that he would take responsibility for Banicevic's losses.
- [87] Banicevic's own conduct also belies that any agreement was in place as of 2001. Why would Banicevic borrow \$65,000 from Taylor in 2003/2004 if he could just as easily demanded repayment of those amounts toward this obligation? This same reasoning applies with respect to Banicevic's need to raise monies to close the Lot 17 deal. Why ask Taylor to invest \$330,000 if Taylor owed him this significant amount?
- [88] I find that Taylor did not agree to provide \$200,000 in pharmaceutical or other stock from Taylor's share of his interest in Lot 17.
- [89] In conclusion, I reject the arguments of both Taylor and Banicevic that there were additional terms that were part of their 2004 agreement.
- (b) Was the Agreement/Trust terminated?
- [90] In September 2005, Taylor and Banicevic, with the assistance of Hultman and Wong, attempted to acquire two other properties which were located adjacent to or near Lot 17 (known as the Connie Chow and BRR Holdings properties). Again, funds were needed for deposits in these transactions.
- [91] On September 20, 2005, Wong advanced \$50,000 to Hultman's office which Hultman recorded as being received from Taylor. On September 23, these funds were returned to Wong almost immediately in U.S. funds. Similarly, on September 23, 2005, Wong advanced US\$90,000 to Hultman's office.
- [92] The Chow and BRR Holdings transactions ultimately fell through and monies were returned to Wong. On November 4, 2005, Hultman wrote a cheque to Wong for \$96,446.42, representing the return of the U.S. funds, less legal fees.
- [93] I find that Banicevic was aware of Wong's involvement in those proposed transactions as they were going on, just as he was aware of Wong's involvement in the acquisition of Lot 17.

- [94] In the fall of 2006, Banicevic had ongoing discussions regarding Lot 17 with his accountant, Don Marsh. Unfortunately, Marsh died in 2009 and his evidence was not available at this trial. Banicevic told Marsh that he had a partner relating to Lot 17. Banicevic asked Marsh to review his and Hultman's records concerning the financial transactions relating to Lot 17, Chow and BRR Holdings. The materials also included Banicevic's handwritten notes regarding the 679 cheques given to Taylor in March 2005 (#0077 and #0078).
- [95] By September 8, 2006, Marsh had prepared a Summary of Surrey Projects which tracked the cash out, monies received from either Taylor or Wong and other rental revenue and expenses relating to Lot 17. A package of documents, including the Summary of the Surrey projects, was provided to Taylor in advance of that date.
- [96] The parties agree that a meeting was held at Banicevic's Wales Street property in September 2006 to discuss this accounting. They agree about little else regarding that meeting, including the actual date of that meeting. Taylor's evidence about this meeting was vague and I do not consider that he truly recalls the details. Banicevic's brother, Karlo Banicevic ("Karlo") was also present at that meeting. Both Banicevic and Karlo's evidence was clear about what happened at that meeting.
- [97] I accept both Banicevic's and Karlo's evidence about the events of that meeting on September 8, 2006. I find that the principal reason for the meeting arose from Marsh's request for an explanation as to why the monies for the various transactions appeared to be coming interchangeably from Taylor and Wong. I find that Taylor advised the others at that meeting that he was using Wong as a front for these transactions in aid of his efforts to appear to be a non-resident in Canada for tax purposes. I also find that there was some discussion of tax issues that Taylor was facing at that time, including the fact that his returns had not been filed in earlier years.
- [98] I find that, at no time during this meeting, did Taylor enquire or request payment of the \$165,000 which he would later assert was owed at that time.
- [99] At some point, Taylor left the meeting and discussions continued between Banicevic, Karlo and Marsh. Marsh advised them that what Taylor was doing was probably money laundering or tax evasion. Marsh recommended to Banicevic that he could be exposed as aiding and abetting Taylor's activities and he recommended that Banicevic give Taylor his money back.
- [100] Marsh's assessment at this time was later supported by the expert opinion of Slav Kanjer introduced by Banicevic at this trial. Kanjer was qualified to give evidence relating to the investigation of tax evasion under the Income Tax Act. He considered that Taylor's activities in relation to Lot 17 warranted investigation by the authorities. Kanjer stated that, if Taylor had been guilty of tax evasion, Banicevic was potentially exposed under s. 239(1) of the Income Tax Act, R.S.C. 1985, c.1 (5th supp.).

- [101] As a result of the meeting with Marsh, Banicevic provided Taylor with certain cheques. I find that Banicevic specifically told Taylor that he was returning money to him because of Marsh's concerns and recommendation to Banicevic.
- [102] Firstly, Taylor was provided with a cheque dated September 8, 2006 made payable to Wong at his direction for \$50,000, in partial repayment of the initial investment in Lot 17. Secondly, Taylor was provided with a cheque that same date payable to Taylor's company, Technique Capital, for \$25,000. This cheque was in repayment of Taylor's earlier loan of \$50,000, half of which had already been repaid in March 2005.
- [103] In addition, on January 11, 2007, Banicevic caused 679 to issue a cheque for \$75,000 re "repayment [Lot 17]" toward Taylor's investment in Lot 17. The cheque's payee was blank when given to Taylor who subsequently directed that it be made payable to his friend, Michael Tan.
- [104] Banicevic argues that these payments to Taylor, totalling \$125,000, are significant because it represents, together with the alleged stock debt of \$200,000, the approximate amount of Taylor's investment in Lot 17. I have already rejected that any such obligation existed on Taylor's part to pay \$200,000 to Banicevic. I do not accept that this is a proper characterization of the reason for these payments.
- [105] If Banicevic's argument is accepted, he could argue that these arrangements resulted in a complete repayment to Taylor of his interest. However, Banicevic's own evidence at the trial was that Taylor's 50% interest remained intact until the spring of 2009, years after the Marsh meeting and the \$125,000 payments. Banicevic contends that it was only at this later date when their relationship as regards Lot 17 ended.
- [106] I accept and find that Banicevic made these payments to Taylor totalling \$125,000 in an effort to reduce Taylor's investment in Lot 17 and hence, what he considered to be his own exposure as a result of Taylor's potentially illegal activities.
- [107] Banicevic alleges that he and Taylor mutually agreed to end Taylor's interest in Lot 17, and consequently terminate Banicevic's obligations to Taylor under the Letter Agreement and Trust Agreement. This assertion is based on interactions in the spring of 2009.
- [108] There is no disagreement as to the law relating to the termination of trusts.
- [109] A trustee may not terminate a trust, unless given an express or implied power to do so in the trust document. The authors of *Widdifield on Executors and Trustees*, 6th ed (Toronto: Thomson Reuters Canada, 2017) at 16-2 commented:

The broad powers contained in a trust deed to amend a trust do not permit a trustee to revoke a trust: *Rose v. Rose* (2006), 2006 CarswellOnt 3776 (Ont. S.C.J.). "Without an express power of revocation in a trust deed, bringing a trust to an end is not an option. Where there is no express amending power in a trust document, amending or altering a trust can be achieved only by application to the court: *Van den Hoef v. Van den Hoef* (2006), 2006 CarswellOnt 7928 (Ont. C.A.).

- [110] There is no evidence here that the trust arrangements between Taylor and Banicevic gave Banicevic the right to unilaterally terminate the trust.
- [111] The rule in *Saunders v. Vautier* permits the beneficiaries to terminate a trust. In *Buschau v. Rogers Communications Inc.*, 2004 BCCA 80, the court stated:
- [2] Every student of trust law is familiar with the rule in *Saunders v. Vautier* (1841) 4 Beav. 115, 49 E.R. 282, aff'd (1841), Cr. & Ph. 240041 E.R. 482, a decision of the Court of Chancery. It affirmed an already existing "implicit understanding of Chancery judges" that the sole beneficiary of a gift in trust made payable at a future event, with a direction to accumulate income until that event, may require that the trust be terminated. The rule has since been extended to trusts involving two or more beneficiaries, but the principle is the same: beneficiaries who together are entitled to all the rights of beneficial ownership, actual and possible, in the trust property may, if they are of full capacity, call for the extinguishment of the trust, notwithstanding the settlor's expressed wishes.
- [112] The burden of proof that there was consent on the part of both Taylor and Banicevic, as beneficiaries of the trust, to terminate the trust rests with Banicevic as trustee: *Langley, Bevans and Julson v. Brownjohn*, 2007 BCSC 156 at para. 71.
- [113] Banicevic argues that Taylor expressly consented to a termination of the trust. Similarly, looking at the joint venture more generally, Banicevic argues that Taylor agreed to a termination of the Letter Agreement in relation to the development of Lot 17.
- [114] By the fall of 2008, Taylor's financial situation was significantly and negatively impacted by the worldwide financial collapse. At that time, Taylor began a series of communications with Banicevic. He was not able to produce any record of these communications. Banicevic was able to retrieve some communications between them and the following description of those communications must be considered as incomplete.
- [115] Taylor began sending text messages and emails to Banicevic regarding the real estate market. In his text message of September 18, 2008, he said that he "needs us to sell the Langley Project [it is agreed that this is a reference to Lot 17]". He followed this up with some emails regarding the financial collapse extending to real estate. On October 12, 2008, he texted Banicevic and asked "any more interest in the project?"
- [116] In February 2009, Taylor sent another text message to Banicevic regarding an offer of \$1.2 million for Lot 17 from Taylor's realtor friend which is described as "not good". At the time this offer was made, there were \$900,000 in mortgages on Lot 17 and a further \$114,814 had been advanced by Banicevic in relation to Lot 17. Neither Taylor nor Banicevic were interested in a sale at \$1.2 million.
- [117] Taylor followed up with his text message of February 21, 2009. In his message, Taylor stated: We need to get rid of that property or find a partner to buy me out for \$450,000 or higher.

[118] I accept that Banicevic responded to Taylor's calculation of the value of his interest in Lot 17 to the effect of asking "how do you figure that? There are costs" and that Taylor responded that he had forgotten there were costs.

[119] On March 8, 2009, Taylor sent another text message asking if Banicevic could find a buyer for Lot 17 at \$1.4 million. It appears that at this time, Taylor was still in Brazil staying with a friend. He indicated in this text message that he would not be back until the end of March.

[120] Banicevic says that following the text message on March 8, 2009, there was a meeting at his house with Taylor. Banicevic contends that during that meeting, he told Taylor something to the effect of:

"You want out at \$1.4 million. Ok, I am buying you out at \$1.4 million. The costs on the project are over \$950,000. That leaves \$450,000 in equity. I have already given you \$125,000, you still have not given me the \$200,000 of stock, so the way I see it, we are even. This is my statement of adjustments. If you have a different statement of adjustments, please let me know."

Banicevic says he never heard further from Taylor as to a different version of the accounting.

[121] Even accepting that this discussion took place, Taylor denies that he ever agreed to a termination of his interest in Lot 17, whether under the joint venture agreement or the Trust Agreement.

[122] Taylor points out, correctly, that there is nothing in writing whereby Taylor disclaimed his beneficial 50% interest in Lot 17 or otherwise acknowledged that Banicevic was released from his trust obligations.

[123] There is conflicting evidence about whether Taylor continued to communicate with Banicevic after March 2009 regarding Lot 17 and if so, what they discussed. Banicevic argues that he received no communications from Taylor regarding Lot 17 from 2009 to the start of this lawsuit in 2012. He says that the lack of any communications supports that the joint venture agreement came to an end by agreement in the spring of 2009.

[124] Taylor alleges that he continued to try to contact Banicevic after March 2009 and in later years, without success. I do not accept Taylor's evidence that he was continually requesting an accounting and update regarding Lot 17 from Banicevic from this time, as he asserts. This again seems like an ex post facto reconstruction from phone records. Even Taylor acknowledged that he has no clear recollection of any discussions with Banicevic over this time. I accept Banicevic's evidence that he did not speak to Taylor about Lot 17 after March 2009.

- [125] I do acknowledge, however, that in June 2010, Taylor began making efforts to obtain documentation from Hultman regarding the Lot 17 transactions, although this was stated to be in aid of dealing with his taxes. Later, on August 26, 2011, Taylor began seeking documentation relating to the property that he and Banicevic "co-own[ed]". In his September 13, 2011 email to Hultman, Taylor refers to Lot 17 and states that he and Banicevic are to "split the profits equally".
- [126] After a consideration of the entirety of the circumstances, I find that Banicevic has failed to prove on a balance of probabilities that Taylor agreed to a termination of the joint venture and trust arrangements. As Taylor's counsel argues, there was absolutely no benefit to be gained by Taylor agreeing to such a termination given the "statement of adjustments" proposed by Banicevic. I think the more likely scenario is that Taylor was not pleased with Banicevic's proposed resolution based on a notional value for Lot 17 of \$1.4 million. He simply decided not to press the matter with Banicevic from that time forward.
- [127] Accordingly, I conclude that Banicevic's trust and contractual obligations to Taylor remained in effect as of the spring of 2009 and continued to the end of the development of Lot 17.
- [128] Having said that, what remains relevant is Banicevic's state of mind at the time of their March 2009 meeting when Banicevic's "statement of adjustments" was discussed. He had already repaid Taylor \$125,000 of his initial investment when there was absolutely no obligation to do so prior to the completion of the development. This was only in aid of distancing himself from Taylor's activities. In addition, Banicevic had been paying all the costs associated with Lot 17 and had never asked Taylor to contribute, despite their agreement to equally share these costs. Banicevic had also expended all of the time and effort that had been necessary to deal with Lot 17 to that time, without any contribution by Taylor.
- [129] I conclude that Banicevic honestly mistook Taylor's silence after the spring of 2009 as confirming Taylor's agreement to the termination of his interest in Lot 17. Thereafter, I conclude that Banicevic proceeded in relation to the Lot 17 development on the premise that he was the only remaining beneficiary of the project, and that he did not consult with or advise Taylor from that time forward by reason of that erroneous but honest premise. In summary, when Banicevic thought that his joint venture with Taylor had come to an end, he thought that his obligations to confer with Taylor as a trustee also came to an end.
- (c) Did Banicevic Act in Breach of the Agreement/Trust?
- [130] Taylor alleges that, in breach of his fiduciary obligations as trustee, Banicevic:
- a) Banicevic borrowed against Lot 17 and used funds for other projects;
 - b) Banicevic claimed that he was entitled to the entire equity in Lot 17 for the purpose of borrowing against other properties, thereby obtaining a personal benefit;

- c) Banicevic breached his duty to disclose and his duty to account to Taylor, including:
 - i) failing to disclose that he registered a new second mortgage of \$400,000 against Lot 17 and that he had used the proceeds for other projects;
 - ii) delivering only one accounting to Taylor in September 2006 showing costs to Lot 17, despite numerous demands;
 - iii) failing to consult with Taylor on material decisions, or even notify him of material decisions, including the decisions to take out large construction loans and the decision to build houses on some of the subdivided lots; and
 - iv) executing a trust agreement stating that 679 is the beneficial owner of Lot 17, and back date the document to April 30, 2008, at a time when he admits he still held a 50% interest in trust for Taylor.
- d) Banicevic charged expenses to the trust that were inconsistent with the agreement with the parties.
- (i) Borrowing against the Trust

[131] Taylor refers to various authorities in support of the proposition that borrowing against a trust by a trustee is prohibited: *Waters* at p. 952; *Re Lerner*, [1952] 4 D.L.R. 605 (Q.B.); *Brooks Estate v. Brooks Estate*, 2013 NSSC 319 at para. 22. Taylor argues that Banicevic did this.

[132] Banicevic determined that it was necessary to refinance Lot 17 in the fall of 2007. Accordingly, it became necessary for Taylor to remove the Second Mortgage so funds could be borrowed on the security of Lot 17.

[133] In late fall 2007, Banicevic asked Taylor to discharge the Second Mortgage. I find as a fact that Banicevic explained to Taylor that costs were going to be incurred for the Lot 17 project, such as further holding costs and costs for the subdivision approval, primarily engineering and City of Surrey fees. Banicevic explained that in order to pay those costs, it was necessary to obtain further financing. In addition, I also find that Banicevic explained to Taylor that he had personally funded substantial costs relating to Lot 17 which would be, at least to some extent, repaid through the financing.

[134] I reject Taylor's evidence about his discussions with Banicevic in advance of obtaining the discharge of the Second Mortgage. I reject Taylor's evidence that he discussed with Banicevic that the purpose of the refinancing was to obtain a larger first mortgage or second mortgage so as to pay Taylor/Wong the rest of the monies owed on the \$165,000 (namely \$40,000) and to pull out monies for Taylor's personal use. I also reject Taylor's evidence that Banicevic advised that the subdivision costs needed were only going to be a maximum of \$100,000.

- [135] I find that Taylor was expressly told the reasons for the refinancing which were, in part, to repay Banicevic amounts he had already expended on the project. This obvious benefitted Taylor to avoid having Banicevic ask for reimbursement of 50% of the costs which he had personally paid to that time, as he was entitled to do in accordance with the Letter Agreement.
- [136] On December 14, 2007, Wong met with Hultman and executed a release on behalf of 071 in relation to the Second Mortgage.
- [137] In conjunction with that refinancing, in March 2008, Banicevic had obtained an appraisal of Lot 17 showing a value of \$1.75 million, a substantial increase in value from the purchase price of \$800,000.
- [138] On March 7, 2008, the release of the Second Mortgage was registered. Hultman confirmed to Taylor later on March 17, 2008 that this was:
- in order and that your development plans with Peter Banicevic include a re-finance of the current first Mortgage, hence the release of the second Mortgage.
- [139] In addition, by March 17, 2008, Taylor had become the only shareholder and director of 071 effective as of December 2007 although Wong seems to have been unaware of this development also.
- [140] Immediately after the discharge of the Second Mortgage in March 2008, Banicevic obtained a \$400,000 loan from the North Shore Credit Union ("NSCU"). On March 19, 2008, a \$400,000 second mortgage was registered against title to Lot 17 (the "NSCU Mortgage"). While I agree that Banicevic did not specifically later tell Taylor about the NSCU Mortgage or tell him about the actual use of the monies borrowed, the entire transaction with NSCU and the use of the funds by Banicevic was entirely consistent with Banicevic's previous advice to Taylor when he asked for the discharge. I reject Taylor's contradictory evidence that he followed up with Banicevic and continued to be "stonewalled" about what had happened with the refinancing. Taylor's other evidence, which I accept, consistent with Banicevic's own evidence, is that Banicevic generally kept Taylor up to date on the course of the development efforts with respect of Lot 17 from time to time until March 2009.
- [141] Banicevic confirmed that he received \$381,472.54 of the \$400,000 in mortgage proceeds under the NSCU Mortgage.
- [142] Taylor alleges that after Banicevic obtained the \$400,000 NSCU mortgage without his knowledge, Banicevic used a significant portion of the proceeds to pay expenses relating to his other real estate development projects. He points to a fax dated March 3, 2008 from Banicevic's mortgage broker, Randy Barrington-Foote, to the NSCU stating:

Peter is looking for \$400,000, approx \$100,000 to get the sub division application of the subject property approved (4-8 months) and \$300,000 for his Port Moody deal which NSCU is financing. He has apparently been offered \$2,300,000 for this property.

- [143] Taylor also relies on the expert opinion of Gary Mynett ("Mynett"). Mynett was accepted as an expert in the area of chartered accounting and chartered business valuation at the trial. Mynett's report is dated November 5, 2016.
- [144] Mynett was asked to trace the use of the NSCU mortgage proceeds. He determined the following (para. 8.02):
- a) \$360,000 of the \$400,000 NSCU mortgage proceeds were deposited into the defendants' HSBC bank account between March 1, 2008 and September 30, 2008 (Taylor also showed that the remaining \$40,000 was applied to loan commitment and mortgage broker fees); and
 - b) the HSBC account had a balance as at March 1, 2008 of \$6,696. The account received the \$360,000 referred to above, plus \$188,968 from other sources, for a total of \$555,664.
- [145] Mynett's further analysis related to the uses to which the \$555,664 was applied. As a result, Mynett was only able to attribute, from HSBC bank statements as well as cancelled cheques and any notations provided on those cheques, that \$11,116 could be "assigned" to Lot 17. Other amounts were attributed to other uses, such as \$302,917 to Banicevic personally. Mynett further analyzed whether any of these personal amounts could be categorized, and they were attributed to: ATM withdrawals; transfers to other accounts; NSCU payments; HSBC loan payments; bank charges; miscellaneous; unknown; Peter Banicevic; Developments; and credit card payments.
- [146] Banicevic did not provide any reply report.
- [147] There is no doubt that Banicevic can be criticized for not keeping separate and contemporaneous records of all revenue and expenses incurred in relation to Lot 17. Nevertheless, this argument is met by Banicevic's evidence, which I accept, to the effect that all monies raised from Lot 17 were used for Lot 17.
- [148] In response to this lawsuit, Banicevic engaged in a detailed analysis of all revenue and expenses relating to Lot 17. He was assisted in that regard from two people; firstly, his wife, Cindy Banicevic; and secondly, his accountant, Anthony Danielov. Between them, they sought out and/or gathered up substantial documentation and provided a detailed analysis for the accounting in relation to Lot 17. This detailed accounting comprises some 40 binders. Spreadsheets summarizing the detailed entries supported by documentation were in evidence, detailed by both month/year and also, by category.
- [149] These spreadsheets included the running costs summary which indicates that as of the date when the NSCU Mortgage was funded (namely, from February 2004 to March 2008), Banicevic had advanced, from his personal funds, just over \$401,000. I find as a fact that these were costs had been personally incurred by Banicevic in relation to Lot 17 at that time. This entirely supports Banicevic's evidence that the proceeds from the NSCU Mortgage were to be, at least in part, used to repay him for these expenses. In addition, to the extent that he then redeployed these monies into other of his projects, that freed up the equity in those projects which increased his ability to further solely fund the future

expenses that would be required to proceed with the Lot 17 development.

[150] Mynett understood that Banicevic was involved in a number of projects which were funded from commingled accounts, and so he was not able to see where other monies came from. As observed by Mynett, the defendants did not maintain separate bank accounts for the various projects that they were working on. As a result, Taylor did not conduct any further tracing.

[151] Taylor did not prove that any other monies raised from Lot 17 were used to fund Banicevic's other projects.

[152] The evidence does, however, support that in fact, some of the funding for the Lot 17 development came from Banicevic's other projects, including 182nd Street and his home on Sierra Drive in Burnaby, particularly when Taylor registered a CPL on Lot 17 in July 2012.

[153] In summary, I reject that Banicevic's actions with the NSCU mortgage were in breach of his trust obligations. It follows that I dismiss Taylor's claim for \$194,442, being one-half of the mortgage alleged to have been used for Banicevic's own use.

(ii) Claiming Entire Interest in Lot 17 re Others

[154] Taylor alleges that Banicevic claimed that he was entitled to the entire equity in Lot 17 for the purpose of borrowing against other properties, thereby obtaining a personal benefit.

[155] Taylor cites Waters:

Private advantage gained through direct dealing with the trust property, while the most familiar misuse of the trustee's office, is not only the only conduct resulting in personal benefit which Equity regards as a breach of the duty of loyalty. There are many and various ways in which trustees and other fiduciaries can derive personal benefit, as the authorities demonstrate. They range from the acceptance of secret commissions and bribes, to the use of confidential information for personal gain, to profits that may seem quite innocent. In a sense, these various activities cannot be distinguished. The acceptance of a bribe or a secret commission, which are examples of obvious profiteering, is a manifestation of the same wrongful act as the exploitation of office in more sophisticated ways. (at p. 957)

Issues regarding the outer limits of the liability to disgorge profits do not, however, arise with trustees. A trustee occupies the most intense of fiduciary roles, and any profit which he makes out of his office without prior permission he must surrender. He may decide to invest the trust funds in his own business enterprise, which is a dealing with trust property such as we have already discussed, or he may accept payments as an inducement to certain conduct. (at p. 959)

- [156] Barrington-Foote was taken to various mortgage application documents, and he confirmed that Banicevic had, at times, claimed that the entire equity in Lot 17 was his own. Those representations are found in: mortgage application for Sierra Drive dated December 15, 2006; mortgage application dated February 27, 2008; and mortgage application for Lot 17 dated March 13, 2008.
- [157] All of these documents were signed by Banicevic, and all of the documents are dated prior to the spring of 2009, when Banicevic alleged that the joint venture and trust had been terminated. Both Banicevic and Barrington-Foote agree that Barrington-Foote was told at some point that Banicevic had a partner; however, neither had any clear recollection as to when that was communicated.
- [158] There is no evidence that Banicevic "profited" as a result of these representations to the point of having received a personal benefit. Taylor does not say what any profit was, or in what amount, or what should be repaid as a result. It is clear enough that the representation in March 2008 was for the benefit of Lot 17, in terms of obtaining funds under the NSCU Mortgage.
- [159] In the alternative, if the execution of the other mortgage applications was a breach of trust on Banicevic's part, I find that it was minor and that there are circumstances which justify him being excused since he acted reasonably and honestly in doing so: see Trustee Act, R.S.B.C. 1996, c. 464, s. 96.

(iii) Breach of duty to disclose / duty to account

[160] It is not disputed that a trustee has a duty to disclose and a duty to account.

[161] Taylor again cites Waters:

A trustee is essentially one who is managing the affairs of others. He may have a personal beneficial interest, indeed, he may be the only immediate beneficiary, but as a trustee he still remains subject to the obligation to account for his administration to those who may have an interest in the trust fund, whether as another beneficiary or a creditor. This obligation has been called the duty to disclose. (p. 1119)

It was clearly established in the early nineteenth century that a trustee, like an executor and other accounting persons, must be ready at all times with his accounts. MacLennan J.A. in the leading Canadian case of *Sanford v. Porter* [(1889), 16 O.A.R. 565 (Ont. C.A.) at 571] summed up the situation when he said, "The duty of a trustee or other accounting party is to have his accounts always ready, to afford all reasonable facilities for inspection and examination, and to give full information whenever required." This burden of being ready at all times means that the trustee does not have the advantage, as a company may, of merely having to put the accounts into a state of readiness once a year or at some other periodic interval. The question is therefore crucial as to what it is that the trustee is expected to have ready. (p. 1120)

Finally, it is important to observe that the courts will not permit the testator or settlor to deprive the beneficiaries or any beneficiary of the right to require accounting. (pp. 1122-1123)

- [162] Taylor has referred to a number of authorities on the duty to disclose: *Rochwerg v. Truster*, [2002] 212 D.L.R. (4th) 498 (C.A.) at para. 98; *Boreta Estate v. McRory*, 2014 ABQB 498 at para. 66; *Capannelli v. Muroff*, [2003] O.J. No. 975 (S.C.J.). Taylor also refers to certain authorities to the effect that a trustee has the burden of proving that he has accounted for the trust property and that if there is any failure to account for trust property, the trustee will bear that loss: *Schwarzkopf v. McLaughlin*, 2008 BCSC 730 at paras. 14-20.
- [163] Another case authority is *Siemens v. Bawolin*, [1999] 184 Sask. R. 161 (Q.B.) at paras. 99-110, (var'd as to one remedy at 2002 SKCA 84). The plaintiff, an unsophisticated party, put the defendant in control of all of her real and personal property. The plaintiff eventually became uncomfortable with the way the defendant was handling her affairs. After the plaintiff brought proceedings, the defendant refused to comply with orders for disclosure.
- [164] The action was allowed, and the plaintiff was awarded damages. The defendant maintained inadequate records of his dealings with the plaintiff's property, and was unable to provide a proper accounting either of what funds were received, or of their use or management or even their location over the approximately 4.5 years they were in his control. The Saskatchewan Queen's Bench referred to the defendant's absolute obligation to account (paras. 99, 107-111). It was the defendant's position that it was impossible for him to provide a proper accounting, but the court rejected the excuses which the defendant offered for the lack of accounting (para. 111).
- [165] The court observed that as a consequence of this breach, it was necessary for the plaintiff to incur a very large cost in collecting evidence of the financial transactions engaged in, and employing a forensic accountant, to try to determine what became of her funds and to determine the extent of her loss. The expert continually revised his account as new information came to light, from his review of numerous institutional account records and thousands of financial records unearthed and examined. The costs of producing these reports were held to be a direct consequence of the defendant's breach of this duty to account to the plaintiff (para. 112). The court accepted the plaintiff's approach to calculation of damages: to determine a cumulative balance of the plaintiff's funds in the defendant's control from month to month and to consider expert evidence, on that basis, of what those funds would have earned had they been properly invested (para. 166). The appeal on this issue was dismissed.
- [166] If a trustee is unable to provide an accounting, the parties may rely upon expert evidence to try to reconstruct what happened: *Pirani v. Esmail*, 2014 ONCA 145.
- [167] I would also note that paragraph 2(c) of the Trust Agreement specifically requires such an accounting:

any benefit, interest, profit or advantage out of or accruing from the Property is a benefit, interest, profit or advantage of the Owner and if received by the Nominee will be received and held by the Nominee for the sole use, benefit and advantage of the Owner and the Nominee will account to the Owner for any money or other consideration paid to or to the order of the Nominee in connection with the Property as directed in writing by the Owner;

[168] In addition to the fiduciary duties of disclosure and accounting at law, discussed above, it was a term of the joint venture agreement that material decisions relating to Lot 17 be made jointly.

[169] As with many other issues, Taylor and Banicevic's evidence are completely at odds as to whether Banicevic kept Taylor updated from time to time on the status of matters. Again, there is little documentation to assist.

[170] Overall, I accept Banicevic's evidence that he did keep Taylor updated from time to time about the course of the development activities from early 2005 to March 2009. Taylor himself confirmed that he was aware of such things as the servicing of the lots, such as sewer services, collection ponds and dealings with the neighbours regarding services. In addition, I reject Taylor's evidence that he asked for an accounting regularly, or every couple of months, to September 2006 and that Banicevic refused to provide it.

[171] Taylor also refers to the accounting which he received in September 2006 at the meeting with Marsh. However, I find that that meeting was in fact called by Banicevic in order to respond to questions that Marsh had been asking about the role of Wong in the Lot 17 development.

[172] I agree that no other accounting was prepared by Banicevic and provided to Taylor after September 2006 and until this lawsuit was commenced. However, there is absolutely no document which supports that Taylor asked for any accounting and I do not accept his evidence that he did this and was "stonewalled" by Banicevic who refused to do so.

[173] I acknowledge the numerous phone calls that Taylor says he placed to Banicevic from June 2009 to December 2009. But most of those were only approximately one minute long. These phone records prove nothing. They do not support Taylor's evidence about the contents of any actual phone discussions between Banicevic and Taylor over this time and I do not rely on them as supporting Taylor's suspect evidence and recollection on this point.

[174] I conclude that Banicevic was not in breach of his obligation to account or disclose up to the time when Taylor commenced this litigation.

[175] In addition, the issue of the accounting is, in my view, fully met by the extensive accounting that was later provided after this lawsuit was commenced. I fully accept that accounting as an accurate portrayal and full disclosure of all financial transactions relating to Lot 17. As Danielov's evidence makes clear, he reviewed all of the detailed transactions to make sure that they were properly supported by the documentation. If they were not, they were excluded from the accounting. The accounting was revised and adjusted following receipt

of the Mynett report to ensure accuracy.

[176] Taylor also argues that Banicevic failed to disclose other matters material to Lot 17, including:

- a) the registration of the NSCU mortgage and the use of those proceeds;
- b) the decision to proceed with the subdivision;
- c) the decision to service the lots, and take out a \$2.3M construction loan in May 2010 in advance of the subdivision approval which was obtained in August 2010; and
- d) the decision to build houses on some of the lots, and in June 2011, the taking out of a \$1.75M construction loan to do so.

[177] I have already rejected this argument concerning the NSCU Mortgage which I have found was fully disclosed by Banicevic to Taylor.

[178] As to the other matters, I also reject that Taylor was not told by Banicevic about the course of the subdivision to the spring of 2009. I agree that he was not told about the decision to proceed with the building of the four houses; however, by that time, Banicevic thought that Taylor's interest had been abandoned by him. Thereafter, I find that Taylor made no further enquiries of Banicevic regarding the course of the subdivision.

[179] Finally, Taylor alleges that Banicevic failed to disclose that he executed a trust agreement in 2010, stating that 679 is the beneficial owner of Lot 17, after purporting to sell the property to 679 for \$1.6 million. In cross-examination, Banicevic testified that the documents were signed in 2010, but backdated to April 30, 2008 (before the alleged agreement to terminate the trust). This was confirmed by Danielov.

[180] There is little other evidence concerning the reason for these transactions. However, I would note that by 2010, Banicevic honestly and mistakenly believed that he had full authority over Lot 17 and could do with it as he wished. In any event, there is no evidence that this was done to thwart Taylor's claim. Banicevic did not assert this agreement was in any way relevant to his dispute with Taylor. He does not purport to rely on it as a defence to this action.

[181] Taylor does not suggest what consequences arise from this trust agreement in favour of 679 in any event. I do not accept that this was a breach of Banicevic's trust obligations; alternatively, if this was a breach of trust on Banicevic's part, I find that it was minor and that there are circumstances which justify him being excused since he acted reasonably and honestly in doing so, pursuant to s. 96 of the Trustee Act.

[182] Taylor also advances various other general allegations concerning how Banicevic, as trustee, conducted himself regarding the course of the development and in respect of the accounting provided by Banicevic in these proceedings. In that respect, Taylor alleges that Banicevic breached various fiduciary duties which he owed to him, as beneficiary.

- [183] I have concluded that Banicevic acted reasonably and honestly in respect of his development of Lot 17 and that his efforts resulted in substantial monies, which are to be shared equally by him and Taylor. It should be noted that Banicevic was equally intent on dealing with Lot 17 in a commercially reasonable manner so as to maximize the benefits of the development. Banicevic certainly benefitted from his efforts, but he was also a beneficiary along with Taylor. Their commercial interests were aligned.
- [184] I will address the specific issues raised by Taylor in respect of the development and the ensuing accounting below.
- (d) What Amount is Owing to Taylor? (ie. the Accounting Issues)
- [185] The task at hand is to determine just how much money was obtained through the development of Lot 17 and what net profits remain to be divided between the parties. Any misdeeds or actions by Banicevic in breach of his obligations under the trust agreement may result in damages that will put the beneficiary in the same position as if the breach had not occurred: *M.A. Concrete Ltd. v. Truter*, 2015 BCSC 229.
- [186] The loss must be assessed on the basis that prudent trustees would seek to maximize the advantages to be derived. Equity will grant a trust beneficiary, or a person who is deprived by breach of fiduciary duty, damages equal to the highest price at which the property, of which they were deprived, could have been sold in the period before the breach was discovered: *Valencia v. Yaghdjian*, (1996) B.C.J. No. 135 (S.C.) at paras. 35-36.
- [187] I will also consider whether any damages arise from Banicevic's actions under the joint venture.
- (i) The Development of Lot 17
- [188] Despite having purchased Lot 17 in late 2004, Banicevic did not develop or subdivide Lot 17 for several years. I accept his evidence that he was waiting for services to be provided to Lot 17's boundaries, which was the most economical way to proceed.
- [189] In early 2008, development efforts began with an application to the City of Surrey. Sometime earlier in late 2007, an engineer had been retained to assist in the development process and further services were provided into 2008 and later years.
- [190] In March 2008, the Second Mortgage was placed on Lot 17 for \$400,000. Accordingly, by that time, the overall borrowings against Lot 17 was approximately \$900,000.
- [191] As discussed above, in late 2008 and into 2009, Taylor was asking that Banicevic sell or refinance Lot 17. There was no agreement on this point and Taylor did not press the point.
- [192] From March 2008, expenses continued to be incurred by Banicevic in relation to Lot 17, including engineering fees, fees payable to the City of Surrey, construction costs and of course, mortgage payments. The 2008 out of pocket expenses would total \$116,645.

- [193] In the spring of 2009, Banicevic placed further mortgages against Lot 17:
- a) in March 2009, a third mortgage in favour of Canadian Western Trust Company in the amount of \$50,000;
 - b) in April 2009, a fourth mortgage in favour of Reginald Stanley Wozniak in the amount of \$150,000; and
 - c) in December 2009, a third mortgage in favour of Canadian Western Trust Company (ie. Barrington-Foote and his wife) in the amount of \$179,000 (which appears to have refinanced earlier mortgages after the CIBC and NSCU mortgages which remained on Lot 17).
- [194] Development efforts continued in 2009. Banicevic made efforts to pre-sell the future lots which would be subdivided from Lot 17, a requirement of the financing to finish the project. In December 2009, he began taking deposits on some of the lots.
- [195] In May 2010, Banicevic refinanced Lot 17 in order to obtain construction financing to proceed with the development to create serviced lots. That mortgage was granted by North Shore Capital Corporation in the amount of \$2.3 million. These funds were, in part, used to pay and discharge the existing mortgages in favour of CIBC and NSCU.
- [196] In August 2010, Banicevic caused Lot 17 to be subdivided, resulting in the creation of a number of residential building lots. Taylor refers to there being 18 residential lots; however, I accept Banicevic's evidence that there were actually only 16 residential lots and three partial lots. All of the money used to develop or subdivide Lot 17 and sell the lots was borrowed or generated from the sale of Lot 17 lots. This includes monies advanced from one or more of Banicevic's other projects that have since been repaid.
- [197] In February 2011, Banicevic granted a further third mortgage in favour of Donald and Sharon Shaw in the amount of \$365,000, which was registered against all 18 development lots. This replaced the Wozniak mortgage.
- [198] Sales of the lots began and 13 lots were sold by May 2011.
- [199] In June 2011, Banicevic obtained further financing of \$1.75 million from the NSCU in order to finance the construction of houses on four of the lots, which he thought would be more profitable than selling the bare lots. Another mortgage financing was obtained and the four lots with houses were sold in the summer of 2012 and in 2013. The final sale of the lots took place in February 2015. Final activities relating to the development took place later in 2015/2016 arising from the release of certain security and a letter of credit.
- [200] There are two main issues that arise in relation to Banicevic's actions and the accounting:
- a) the parties disagree as to whether certain costs claimed by Banicevic are properly chargeable to the Lot 17 project;
 - b) Taylor alleges that all of the lots should have been sold by April 2011.

(ii) The Expense Issue

- [201] Taylor says that Banicevic agreed to make up the cash flow shortfall arising from the difference between the CIBC mortgage and the rental of the house on Lot 17. Otherwise, he says that they agreed to equally contribute to the other expenses, such as taxes and insurance on the house. This amounted to approximately \$20,000 per year. In addition, Taylor says that other more major development costs, such as engineering and City of Surrey fees, were to be financed.
- [202] In Banicevic's accounting, he has claimed for various expenses, including those listed above. However, many of his claimed expenses are disputed by Taylor. They include bank interest and service charges, credit card fees, gas, meals, office expenses, office employees of Banicevic's, office supplies and miscellaneous, professional training and website costs. These disputed costs total \$476,205.
- [203] It appears that Taylor did not ask Mynett to review the source documents for Banicevic's detailed accounting, which comprises some 40 binders of documents. Mynett states that he found the accounting "deficient"; however, there is no indication that he took steps to consider the accounting in detail, including the source documents or even asking for further information and documentation from the Banicevics. As such, Mynett's review was limited in respect of verifying the appropriateness of the various expenses. Mynett was simply instructed by Taylor to ignore what Taylor considered were inappropriate expenses.
- [204] Again, I accept the Banicevics accounting as an accurate portrayal of all costs attributable to the project.
- [205] The evidence is clear that the parties did not have any discussion in December 2004 about what specific expenses could be charged to the project. Nevertheless, there can be no doubt that the parties did recognize that expenses would be incurred. This is evident from the Letter Agreement in paragraph 6 which refers to "profits", indicating in the usual sense that expenses will be deducted from revenue.
- [206] Taylor argues that his interpretation of the agreement is consistent with the accounting materials provided to him in September 2006 by Banicevic, which do not refer to these "indirect" costs. I reject this argument and accept Banicevic's evidence that the expenses listed in the September 2006 summary were not comprehensive and was not intended to include all expenses relating to the project. It was intended as a general summary only.
- [207] The court must strive to give some business efficacy to the Letter Agreement, which the parties intended to have legal effect: *Mac-G Canada Inc. v. Element Construction Ltd.*, 2015 ABQB 632 at para. 32. In these circumstances, I consider that the parties agreed that reasonable expenses relating to the Lot 17 project would be deductible. In my view, these would include the type of indirect expenses claimed by Banicevic.
- [208] The terms of the Trust Agreement are also consistent with this approach:

3. Reimbursement of Expense - Any payment or disbursements made by the Nominee in respect of the Property in accordance with this Agreement will be made as the agent of and for the account of the Owner, as principal, and the Owner will reimburse the Nominee for any amount reasonably and properly expended by the Nominee in connection with the Property with the written consent or direction of the Owner. All liabilities incurred or outstanding with the Property, including under any mortgage, debenture or security agreement in respect thereof, are the liabilities of the Owner as principal and the Nominee in incurring or granting the same is acting only as agent for the Owner. The Nominee will not be entitled to any remuneration or any revenue or profit in respect of the Property for acting as nominee, agent and bare trustee under this Agreement.

[Emphasis added]

- [209] Here, Taylor had agreed that Banicevic would be the one to proceed with the development. In fact, it was Banicevic who had the expertise in that regard. Taylor had virtually no experience in real estate development and thereby relied on Banicevic's expertise. In my view, it cannot be said that Taylor intended to micro manage each and every expense incurred by Banicevic.
- [210] Further, these indirect costs are real and actual costs. They are part of the detailed accounting provided by the Banicevics and confirmed as appropriately attributed to the Lot 17 project by the accountant, Danielov. Danielov confirmed that these types of "indirect" expenses are not unusual in this type of development. As such, they are actually out of pocket expenses incurred by Banicevic. I see no basis upon which Taylor could have expected that Banicevic would fund these indirect costs out of his own pocket, and thereby benefit Taylor to that extent.
- [211] This is not a case where Banicevic was personally profiting by reason of the development. He did not charge any salary or management fees for his time and effort and, by doing so, he contributed his personal efforts without charge. This was consistent with the original intention of the parties that these efforts would be considered as part of his "capital" contribution.
- [212] Taylor argues that this was to be a short-term project and that little money was required to hold it, being the shortfall in paying the CIBC mortgage, insurance and taxes from rental revenue. He then argues that it was never contemplated that there would be large expenses to be shared between them. I reject this evidence, as noted above. Taylor was kept informed by Banicevic from time to time regarding his development efforts, which began in earnest in early 2008.
- [213] In addition, Taylor's suggestion that the property was to be sold before the subdivision, is contrary to evidence found in Taylor's affidavit filed in these proceedings and sworn February 18, 2013. At that time, he indicated in paragraph 6 that:

Lot 17 was to be developed by way of subdivision into building lots which would be sold or developed and sold for profit.

[Emphasis added]

- [214] Mynett, in his report, prepared three scenarios. In Scenario 1, Mynett assumed that Lot 17 was sold in March 2008 based on some indications of value around that time. That analysis resulted in Taylor being entitled to net profits of between \$364,000 and \$626,000. This scenario was specifically withdrawn at the outset of this trial and not advanced.
- [215] Not surprisingly, Taylor's approach to damages at this trial contemplates him benefitting from the subdivision itself, which of course he is entitled to. But, he can't have it both ways - if he is to benefit from Banicevic's efforts to achieve the subdivision, then that comes at a cost, which he must reasonably share.
- [216] Taylor further argues that no interest should be charged since no interest was to be charged by him on his initial investment. This misses the point entirely. The interest charged by Banicevic is on his own cash outlays toward funding the project. There is no doubt a cost of expending money. Again, I see no reason why Banicevic's advances to the project should be received by Taylor on an interest free basis.
- [217] The other difficulty with Mynett's analysis is that he was instructed by Taylor to only account for the mortgage expenses relating to CIBC, the NSCU Mortgage and the \$2.3 million mortgage that was obtained to begin and continue with the subdivision. He ignored all of the other financings that Banicevic obtained in order to complete the subdivision.
- [218] I accept Banicevic's evidence that it was necessary to obtain these other financings in order to proceed. Again, he can't have it both ways - there is absolutely no reason why Banicevic should personally bear these extra costs.
- [219] A trustee has the burden of proving that his accounts are reasonable: *Schwarzkopf* at para. 18. I find that Banicevic has met his burden in showing that these indirect costs were reasonable and connected to Lot 17. In addition, I find that Banicevic reasonably incurred further financing costs that were disregarded by Taylor and Mynett. All of these expenses are equally shareable by the parties.

(iii) The Timing Issue

- [220] Taylor alleges that Banicevic delayed the start of the Lot 17 development. He further alleges that this delay was caused by Banicevic being involved in other projects, including his Sierra Drive home. There is no evidence to support that Banicevic did that. Banicevic's evidence, which I accept, was that he proceeded with the development as soon as the services had come to Lot 17 so that he could proceed as economically as possible.
- [221] Taylor seeks his share of profits from the Lot 17 project, based on two alternative scenarios, both addressed in Mynett's report:

- a) Scenario 2 - a hypothetical scenario that assumes that all of the lots from Lot 17 could have been sold by April 2011, the date by which Lot 17 had been subdivided into separate residential lots. This would include a notional sale of Lots #15-20 which were only later sold; and
 - b) Scenario 3 - the actual scenario in which the lots that arose as a result of the subdivision of Lot 17 were actually sold.
- [222] Scenario 2 substantially relies on Taylor's evidence about the short-term nature of the development. He also says that he never agreed to building houses on some of the lots. Mynett's analysis uses extrapolated sale prices from the earlier lot sales in relation to the lots which were later sold. Mynett concludes that if such sales had occurred in that fashion, Taylor would have reaped a profit of \$910,000.
- [223] There are difficulties with Mynett's analysis. I accept Banicevic's evidence that Lots #18-20 were in fact partial lots which required further subdivision and combination with other neighbouring lots in order to be ready for resale. This took place after April 2011. Mynett ignored this, presumably at Taylor's direction. In fact, Mynett's analysis doesn't even refer to Lot #20. As with Scenario 1, Mynett's analysis under Scenarios 2 inappropriately ignored the costs of the further financings.
- [224] In addition, Banicevic states that as of May 2011, there were still outstanding project costs of \$320,642. As such, he made the decision to take steps to maximize value by further developing Lots #15-20. In fact, these development efforts on the remaining Lot 17 lots were underway when Taylor filed his CPL in July 2012.
- [225] In Scenario 2, Mynett estimated sale proceeds of only 18 lots at \$4.47 million. In fact, total sale proceeds for all of the 19 lots totalled \$5.7 million.
- [226] I have accepted Banicevic's evidence that his discussions with Taylor were to the effect that, while subdivision was definitely the plan, other development options might exist, such as the building of houses for resale. This evidence is consistent with Taylor's earlier evidence in his affidavit, as quoted above.
- [227] The question is whether Banicevic acted reasonably in proceeding with the building of the houses and taking these further development steps past May 2011?
- [228] I accept Banicevic's evidence and conclude it was. It was the joint intention of Banicevic and Taylor to maximize the revenue from Lot 17. I conclude that Banicevic proceeded reasonably in that respect toward benefitting all of the beneficiaries, which included not only Taylor but himself.

- [229] There was no added benefit to Banicevic to proceed further after May 2011 save for his reasonable commercial assessment that these further steps would generate further profits beyond simply selling the lots. I see no basis upon which Taylor can now second guess that reasonable business judgment after the fact, particularly since he was expressly deferring to Banicevic's judgment given his expertise in real estate development.
- [230] I therefore reject Mynett's Scenario 2 as a basis upon which to assess the accounting issues.
- [231] Mynett's Scenario 3 estimates Taylor's share of profits based on the actual development, subdivision and sale of Lot 17, as subdivided. Mynett was again instructed to exclude the disputed expenses. In addition, Mynett was again instructed to disregard certain mortgages and the costs of those further financings. Mynett did not consider the 2009 mortgages and the NSCU \$1.75 million mortgage obtained in 2011. Mynett concluded that under the Scenario 3 assumptions, Taylor would have been entitled to profits of \$730,000, being 50% of the total profits from the Lot 17 project.
- [232] Mynett also performed cash flow calculations to see whether the considered mortgages were sufficient to finance his Scenarios. Mynett explained in cross-examination that the purpose of the cash flow calculations was to make sure that the mortgages he included in his analysis provided sufficient funding to complete the project under his scenarios. However, this analysis fails to consider the disputed expenses and it also fails to consider the construction, labour and material costs post 2014. Mynett did not analyze the complete costs outlined in Banicevic's running costs summary, including the supporting documentation which was available to Taylor. Mynett did not analyze the cash flow needs throughout the entire course of the development; in particular, he ignored certain financing costs.
- [233] I conclude that Mynett's analysis under Scenario 3 and his cash flow calculations are sufficiently unreliable and I do not rely on them. This arises because: the instructions from Taylor were not appropriate (such as the direction to ignore certain expenses); his disregard of certain expenses which I have found were proper (such as the mortgage expenses and further construction costs); and, his incomplete review of the Banicevic's accounting and supporting documentation. In short, Mynett's analysis, based on instructions from Taylor, did not include a complete analysis of what was actually required to go forward and complete this development.
- [234] I accept Banicevic's analysis of the revenue and expenses from the Lot 17 project that is based on the extensive accounting prepared by the Banicevics and reviewed by Danielov. The summary document prepared by the defence indicates that the Lot 17 project generated total income of \$5,725,936. Again, as a result of this extensive accounting process and revisions to account for expenses that could not be supported, the total expenses from the project were revised downward to \$4,960,457.25, netting the amount of \$765,478.80. After deduction for taxes payable, the net profit is \$571,072. If each partner is entitled to 50% of the proceeds, then the amount due each partner is \$285,536. As Taylor has already

been repaid \$125,000 of his initial investment, his entitlement amounts to \$160,536.48.

- [235] Banicevic also argues that there should be a further deduction from Taylor's share to reflect the interest benefit that Taylor received from the early repayment of \$125,000. I would not accede to this argument. At the time of this voluntary repayment, there was no discussion that such interest would be paid. In keeping with overall intention that the capital would not bear interest, this charge to Taylor is not appropriate.

BANICEVIC'S COUNTERCLAIM

- [236] Banicevic claims against Taylor for what he says are losses suffered by the defendants as a result of wrongfully maintaining CPLs against the defendant's properties.

(a) Factual Background

- [237] This action was commenced on July 4, 2012. In his pleading, Taylor referred to the "Trust Monies" as arising from the borrowings on Lot 17 in 2009 and 2010 and the sale of the Lot 17 subdivided lots. In addition to claiming a trust interest in the remaining Lot 17 lots, he alleged in paragraphs 42 and 43 of the Further Amended Notice of Civil Claim (filed on March 27, 2013) that some of the "Trust Monies" had been used by Banicevic to purchase his properties at 136th Street and 182nd Street in Surrey. Taylor sought a declaratory order that the defendants held all or a portion of these properties in trust for him.
- [238] On July 16, 2012, CPLs were registered against 136th Street and 182nd Street.
- [239] The CPL remained registered against 136th Street until September 14, 2012 when the parties entered into a consent order on terms. By that order, the CPL was removed, a sale of that property was allowed but Taylor was allowed to re-register the CPL after the earlier of 14 days or when a mortgage had been registered by Banicevic. Despite the latter provision, the CPL was not re-registered until some months later, on February 15, 2013. Following further discussions between counsel, Taylor then finally removed the CPL on March 14, 2013.
- [240] In the meantime, Banicevic provided certain documentation to Taylor in the litigation which Banicevic's counsel contended on February 15, 2013 made "apparent that all funds borrowed in relation to the [Lot 17] project went into the financing of that project".
- [241] In March 2013, Taylor amended his pleading. By those amendments, Taylor alleged in paragraph 45 that some of the Trust Monies had been used to pay for, maintain and improve Banicevic's residence on Sierra Drive. Again, Taylor sought a declaratory order that the defendants held all or a portion of Sierra Drive in trust for him. On April 2, 2013, a CPL was registered against Sierra Drive.

[242] On January 8, 2015, Banicevic applied for an order cancelling the CPLs against Sierra Drive and 182nd Street. Master Muir granted that order, conditional upon the posting of security of \$150,000: see *Taylor v. Banicevic*, 2015 BCSC 15. The Master found that hardship and inconvenience had been established, after observing:

[30] Although some of the hardship asserted is advanced in generalizations, taken as a whole, I am satisfied that this evidence provides the particularity required. It is clear to me that the effect of these CPLs over the properties in question has been to hobble Mr. Banicevic's ability to develop property, which is his livelihood. The CPLs have resulted in increased costs to his developments due to the requirement to use more costly financing and has limited the funds available for development purposes and to him personally.

[243] On January 28, 2015, the CPLs against Sierra Drive and 182nd Street were removed.

(b) The Law

[244] The parties have referred to two case authorities on this issue.

[245] The registration and maintenance of certificates of pending litigation against lands may be actionable as an abuse of process where it was done maliciously or for an improper purpose collateral to the ostensible purpose of the proceeding: *Marshall v. Heidi* (1984), 56 B.C.L.R. 107 (C.A.).

[246] To similar effect is *Palmer v. Palmer*, 2014 BCSC 1364, var'd on other grounds at 2015 BCCA 438. In this court, Justice Kloegman found no such abuse in that case. She observed:

[45] The tort of abuse of process is made out when a party shows a misuse or perversion of the Court's process for an exterior or ulterior purpose. In other words, using a certificate of pending litigation to tie up a property and prevent it being sold to anyone else as a negotiation tactic regarding an unrelated agreement would be an abuse of process: *D.K. Investments Ltd. v. S.W.S. Investments Ltd.*, [1984] 59 B.C.L.R. 333 (S.C.), aff'd [1986] 6 B.C.L.R. (2d) 291 (C.A.).

[247] The Court of Appeal in *Palmer* adopted this statement of the law. In addition, the court stated:

[51] In the cases to which we have been referred, the judges made clear findings that the purpose for filing a lien or CPL or similar instrument was completely collateral to the litigation. It served no purpose other than extraneous to the litigation and realistically was substantively unsupportable. In *Hundal*, Fenlon J., as she then was, stated:

[104] In considering whether Mr. Hundal had an unlawful or malicious purpose in filing the CPL, I set aside the question of whether the constructive trust pleaded by Mr. Hundal is Border Carrier's claim rather than his personally, and further set aside the question of whether there was any real prospect of recovery of an interest in property rather than an award of damages if unjust enrichment could be established. The question I am left with is not whether the plaintiff properly framed and pleaded his cause of action in unjust

enrichment, but whether he framed his case in this way knowing that there was no basis for a claim against Mr. Bains' home and for the improper purpose of filing a CPL to inconvenience Mr. Bains and obtain an advantage in the litigation: *Seville Properties Ltd. v. Coutre, et al*, 2005 BCSC 1105.

[Emphasis in original.]

[248] What I take from the above authorities is that it must be proven that the plaintiff knew and intended that the filing of the CPL was inappropriate (for example, knowing no such claim existed or it was done for an improper purpose). This requirement of showing the plaintiff's intent remains throughout the maintenance of the CPL's registration. To simply show that the plaintiff was ultimately proven wrong in registering the CPL through the litigation process is not sufficient to prove malice or improper purpose.

(c) Discussion

[249] There can be no doubt that the framing of Taylor's cause of action did potentially give rise to tracing remedies in respect of what he described as the "Trust Monies". The trust aspects of his claim were well documented from late 2004, as described above.

[250] As for Taylor's state of knowledge of the accounts, I find that he was understandably in the dark when he filed the claim as to what had happened to the receipts and revenues associated with Lot 17. Banicevic was involved in various projects over the course of the development of Lot 17. Importantly, Banicevic did not keep separate records of each project so as to segregate and easily identify transactions relating to each one. In addition, it was clear that funds coming and going in respect of all of these projects had been co-mingled in the various bank accounts. Accordingly, the accounting exercise was by no means an easy one. In fact, the Banicevics would only produce their detailed accounting in the years after this litigation began.

[251] After the claim was filed, documents were exchanged. In large part, Banicevic relies on his production of documents in the spring of 2013 as supporting, without question, his defence as to appropriateness of the use of funds from Lot 17 and that no monies were improperly redirected to other properties. Nevertheless, I find that it was still questionable in Taylor's mind what the state of accounts truly showed. There would have been a need for examinations for discovery of both parties and those only took place in mid-October 2013.

[252] Given the complexity of the accounts, Taylor required the assistance of Mynett to untangle some of the transactions. Mynett's report is dated November 5, 2016 and his analysis was that most of the proceeds from the NSCU Mortgage had not been paid directly for Lot 17 and that a significant portion had been paid to Banicevic, and presumably used on other of Banicevic's projects.

- [253] I have rejected in these reasons Taylor's contentions that funds from Lot 17 went into these other projects; however, that does not change the fact that it was live issue, particularly from Taylor's point of view, until the trial. It was only upon a consideration of the all of the evidence before this Court at the trial that it was determined that the Sierra Drive property was used to fund the development of Lot 17 and not the reverse.
- [254] In all of the circumstances, I see no basis upon which to conclude that Taylor filed the CPLs maliciously or for an improper collateral purpose.
- [255] Banicevic claims substantial damages arising from the registration of the CPLs in relation to the properties against which they were filed (136th Street, 182nd Street and Sierra Drive) and also consequential damage arising from financing issues on other projects. The total damages claimed are \$757,257, as follows:
- a) 136th Street: loss of potential sale prices as the defendants had to sell properties at reduced prices in order to reduce their financing obligations (\$104,000), extra financing charges (\$89,826) and legal fees (\$6,686);
 - b) 182nd Street: additional financial costs on the first and second mortgages (\$29,484 and \$24,738 respectively);
 - c) Sierra Drive: additional financial costs of \$29,512 on the first mortgage and \$73,580 on the 2nd and 3rd mortgages; and
 - d) 70th and 196th Street in Langley: no CPL was registered against this property, however, Banicevic alleges that he suffered the loss of financing his mortgage broker Barrington-Foote had arranged for this project. Once certificates of pending litigation were filed against the defendants' other properties, Banicevic says that the NSCU removed its offer to finance that project. Banicevic says that he had to assign the project to a numbered company owned by his wife in order to be able to proceed. In addition, he says that they had to deal with "B" lenders and pay extra fees (\$74,000) and interest costs (\$105,716) beyond what they would have otherwise incurred. In addition, Banicevic says that he had to borrow the down payment as he could not access the equity they had in any other property. He says that he ended up having to pay a further \$88,500 to Herman Fishing, \$3,779.64 to Signature Holding and \$127,433.71 to Barrington-Foote's mortgage lending vehicle.
- [256] I have no doubt that the filing of CPLs against a developer's development properties would have a very negative impact in terms of obtaining future financing.
- [257] However, it is also worth noting that Taylor was, from the outset, well aware of this potential impact. Based on a review of the correspondence between counsel, there was clearly considerable co-operation on Taylor's part to remove the CPLs so as to allow sales or registrations of mortgages. This was expressly referred to in the consent order from September 2012 which resulted in the CPL against the 136th Street property being removed after only two months. At that time, Banicevic did not similarly request that the CPL be removed against the 182nd Street property, for unknown reasons.

- [258] Otherwise, the CPL against the 136th Street property was only temporarily put in place for approximately one month (February-March 2013). It was removed by Taylor upon request based on advice that financing was being arranged. There is no reliable evidence to establish that the CPL affected sales that might have been achieved but for its registration. In addition, as Taylor points out, it is inconsistent to claim reduced value for quick sales, yet also claim for mortgage payments that would not have been incurred but for the CPL.
- [259] The evidence in relation to 182nd Street property is even more tenuous. Banicevic's counsel did, in his February 15, 2013 letter, request a consent to removal of this CPL. Nothing further happened in that regard. No application to remove this CPL was made until January 2015, some two years later. As with the other CPL, there is a very scant evidence to support any actual loss, even assuming some delay in completing this project.
- [260] With respect to Sierra Drive, there was never any demand to remove this CPL, nor any court application to compel its removal until January 2015, some 21 months after it was first registered in April 2013.
- [261] Finally, with respect to the development at 70th and 196th Street, Taylor was not even aware of this development and any impact of the CPLs upon it. He was never asked to remove the CPLs by reason of any negative impact on this project.
- [262] Accordingly, even if I had found malice or an improper collateral purpose, I am not satisfied that the evidence proves, on a balance of probabilities, the negative impact or damages asserted by Banicevic: Palmer (BCCA) at paras. 55-56.

CONCLUSION

- [263] Taylor is awarded judgment against Banicevic and 679 in the amount of \$160,536.48. By consent, the action is dismissed as against Developments and Holdings. Banicevic's counterclaim is dismissed.
- [264] Both parties sought Scale B costs in the event that they were successful Overall, I consider that there was divided success here as between the parties. Accordingly, there will be no costs award in favour of any party, such that they will bear their own costs.

"Fitzpatrick J."

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