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Claims Against Fiduciaries

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CLAIMS AGAINST FIDUCIARIES

I. Introduction

One focus of this paper will be on substantive claims that personal representatives and trustees are not exercising their discretions properly, are in a conflict of interest, or both. Consider a beneficiary of a discretionary trust created by her father for her, who says that the trustee, chosen by her father, is refusing her requests for funds. Does she have a remedy? How does the court supervise the administration of a discretionary trust, when the beneficiaries include the trustee? When, if ever, may a trustee profit from her own decisions?

We will look at a recent decision challenging the trustees' exercise of discretion in a disability trust, then consider the "no profit" and "no conflict" rules, and consider the Court of Appeal decision earlier this year in the complex case, *Pirani v. Pirani,* 2022 BCCA 65.

The second focus of this paper is on remedies. There are various tools for dealing with claims against fiduciaries, such as the removal of the fiduciary, monetary and proprietary awards intended to compensate beneficiaries, disgorge profits after wrongful conduct, and, in one recent decision, punitive damages. We will look at operative principles, with an emphasis on recent cases dealing with remedies.

First, a word about terms. I will endeavour to use the terms executor, administrator and trustee in accordance with their technical meanings. An executor of a will is always appointed in a will, in contrast to an administrator who is appointed by the court. In this paper, "personal representative" will refer to an executor of a will, or administrator of an estate, and if the

personal representative is also a trustee of part or all of an estate, this will include the personal representative and trustee. This definition, while perhaps cumbersome, corresponds with the definition in section 29 of the *Interpretation Act*. "Trustee" will refer to a trustee of a trust, whether the trust is an *inter vivos* or testamentary trust. The functions are similar, but as discussed below, the differences between personal representatives and those trustees who do not fall within the definition of a personal representative have practical procedural implications.[1]

On the other hand, unless otherwise indicated, the use of the word "settlor" in this paper refers to the person who implemented the trust, who might not necessarily be the "settlor" in the sense of the person who contributes the initial property held in trust. Often, for example, a successful businessperson may establish a trust to hold shares of a company for their spouse and descendants, but the settlor who contributes the initial property of say $20 is another person without any further interest in the trust in order to avoid tax attribution problems. The businessperson might not technically be the settlor, but is nevertheless the person who is the driver of the creation of the trust. One reason I relax the technical definition here is that, as we shall see, the courts are often interested in looking at who really implemented the trust, irrespective of who is the nominal settlor.

II. Allegations of Improper Exercises of Discretion or of Conflicts of Interest

A. Exercise of Discretion

Discretionary trusts are often drafted broadly, permitting the trustees "absolute and uncontrolled discretion." This may be so, even when the will-maker or settlor had in mind creating a benefit for one beneficiary. Courts are reluctant to interfere with the trustee's discretion in such cases, as long as the trustee is acting reasonably and in good faith.

In a recent case, *Re Zaleschuk*, 2022 BCSC 943, Justice A. Ross declined to remove trustees who had refused various requests for funds made by a beneficiary's mother on behalf of the beneficiary. After Kenneth Zaleschuk ("Kenneth Sr.") was diagnosed with cancer in 2014, he settled a trust for his son, Kenneth Jr., a young adult who had a learning disability and was unable to live independently. Kenneth Sr. was the initial trustee, and named his sisters as his successor trustees. His sisters became the trustees following Kenneth Sr.'s death in 2015. The trust provided that the trustees had discretion to make payments to or for Kenneth Jr., and if any fund were left in the trust on Kenneth Jr.'s death, those funds would be paid to his sister, Kenneth Sr.'s daughter, Marie.

Kenneth Jr. lived with his mother Marina Zaleschuck. She and Kenneth Sr. had divorced and there was evidence from Kenneth Sr.'s lawyer and financial advisor that in settling the trust, Kenneth Sr. was concerned about protecting the funds from his former spouse, and making sure there were sufficient funds for his son for life.

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1 See Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Carswell, 2021) ("*Waters*") at pages 48 -56 for an in-depth discussion of the similarities and differences between executors or administrators and trustees

The trustees refused several requests from Marina for funds for Kenneth Jr. including funds for a motorized scooter, glasses, massage and acupuncture treatments, a new phone, a new laptop, travel expenses for a trip to Europe and a new headboard.

A petition was filed for Kenneth Jr. to remove his aunts as trustees and replace them with his mother. Although the petition was brought in his name, the trustees alleged that the litigation was being driven by his mother who had a power of attorney for him.

The trustees had provided funds totaling about $26,000 for Kenneth Jr. including travel expenses for trips with his sister Marie, glasses and a helmet. They provided reasons for denying Marina's requests including that she did not follow the procedure they put in place for requests, that they considered that some expenses were for items he did not need or, in the case of the scooter, potentially dangerous, and that some of the expenses were potentially covered under his disability benefits. They were willing to step aside as trustees provided that a professional trustee was appointed, but opposed Marina becoming the trustee.

In declining to remove the trustees, Justice Ross found that they were acting properly within the scope of their discretion. Justice Ross wrote:

> [80] Despite the criticisms leveled by the petitioner, I note that:
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> a) the Trustees have released Trust funds to the benefit of Kenneth Jr. for travel and other items;
>
> b) they have considered and rejected other expenditures on the basis that they were not in Kenneth Jr.'s best interests (*e.g.*, the motorized scooter) or they were unsure whether the Province may be reimbursing the expense;
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> c) their actions have resulted in the capital increasing by more than $200,000 since 2015.
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> [81] Although complaints have been leveled regarding the decisions of the current Trustees, I accept their submission that the Trust Deed imbues them with the full discretion to decide whether to pay amounts out of the Trust. On that point I accept this overarching submission of the Trustees:
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> > They are exercising their discretion (as provided in the provisions of the Trust Deed) to make sure that there are sufficient funds to care for Kenneth Jr. for the rest of his life. At present, Kenneth Jr. lives with his mother and his regular expenses are covered by his disability benefits paid by the Province. At some point in the future, he will not be able to rely on living with his mother. The Trustees are administering the Trust in a fashion that will best ensure that there are funds available for his care in his later years. The Trustees submit that the Trust Document provides them with the full discretion to make those decisions.

In *Zaleschuk,* the trustees were not beneficiaries of the trust, and there was no allegation that they were in a conflict of interest. The level of deference the courts give to the exercise of discretion may be reduced when the trustee is a beneficiary or in a conflict of interest.

B. Conflicts of Interest

The starting point is that a fiduciary must not act in a conflict of interest or profit from their position as a fiduciary, sometimes referred to as the "no conflict" rule and the "no profit" rule. As set out by the Court of Appeal in *Louie v. Louie*, 2015 BCCA 247, at para. 23:

> [23] I start with the two most fundamental and long-standing obligations of fiduciaries – the "no conflict" rule and the "no profit" rule. These have been stated on many occasions over several centuries, but this passage from the judgment of the High Court of Australia in *Chan v. Zacharia* (1984) 154 C.L.R. 178, summarizes the historic approach succinctly:
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> > The first is that which appropriates for the benefit of the person to whom the fiduciary is owed any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: the objective is to preclude the fiduciary from being swayed by considerations of personal interest. The second is that which requires the fiduciary to account for any benefit or gain obtained or received by reason of or by use of his fiduciary position or of opportunity or knowledge resulting from it: the objective is to preclude the fiduciary from actually misusing his position for his personal advantage. ... [T]he two themes, while overlapping, are distinct. Neither theme fully comprehends the other and a formulation of the principle by reference to one only of them will be incomplete. [At 198-9.]
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> (Quoted with approval by the majority in *Strother v. 3464920 Canada Inc.* 2007 SCC 24 at para. 75; see also the discussion in L.I. Rotman, *Fiduciary Law* (2005) at ch. 6.) An even more succinct statement may be found in the words of Lord Herschell in *Bray v. Ford* [1896] AC 44 (H.L.): "It is an inflexible rule of a Court of Equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." (At 51.) [emphasis in the CA decision].

There is a distinction between those cases in which the personal representative or trustee has by their conduct, or alleged conduct, placed themselves in a conflict of interest, and those cases in which the settlor of a trust or will-maker has placed them in a position in which they are permitted to prefer their own interest as beneficiaries to those of other beneficiaries.

An example of the former is *Weisstock v. Weisstock*, 2019 BCSC 517, in which the will-maker appointed two of her sons as co-executors in her will and left the residue of her estate to be shared equally among her four children. The brothers did not see eye-to-eye. One of them, Tony Weisstock, accused his brother Albert Weisstock of misusing their mother's power of attorney during her lifetime, failing to cooperate in instituting a pipeline tax plan for a family-owned company, some of the shares of which were in the estate, and failing to cooperate in the company's needed refinancing. Albert Weisstock, in turn, accused Tony Weisstock of having acted in a conflict of interest as a director of the family company, paying large director fees and salaries to family, and having failed to pay shareholder loans owing to their mother for her care. He also alleged that Tony Weisstock had not provided her with funds through a trust of which he was trustee. Mr. Justice Milman found them both to be in a conflict of interest and passed them over, appointing a retired lawyer as administrator.

On the other hand, as will be discussed further below, a will-maker or settlor may permit trustees to act in a conflict of interest or profit from their positions.[2] The general rule may be relaxed. For example, in lieu of providing an outright gift to her daughter, the will maker might create a discretionary trust for her daughter, her daughter's spouse and descendants, appointing the daughter as trustee, intending that the daughter may allocate all of the income and capital to herself, but also permitting her to distribute to her spouse and descendants if there are tax or other advantages in doing so.

C. Intersection of Discretion and Conflicts of Interest

There are limits to the deference shown to a trustee with wide powers of discretion, especially when the trustees prefer their own interest. In *Ghag v. Ghag*, 2021 BCCA 106, Madam Justice Griffin set out the principles as follows:

> [47] A trustee's exercise of wide discretion under the express terms of a trust will rarely be interfered with by a court. Nevertheless, there are grounds that may justify the court's interference in the exercise of a trustee's discretion. As summarized by Professor Waters, the court may interfere in the exercise of discretion by a trustee where:
>
> > a) the decision is so unreasonable that no honest or fair-dealing trustee could have come to that decision;
> >
> > b) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or
> >
> > c) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion.
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> (Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012))

Sukie Ghag settled a family trust for the benefit of his wife, Charmaine, and his four children, after he was diagnosed with brain cancer. 100 Class A common shares of Abby Pharmacy Ltd. were held in the trust. He appointed his son Brendan as trustee and Charmaine as the alternate trustee. The terms of the trust included the provision:

> ... The Trustee shall exercise the powers and discretions given to him <u>in what he deems to be the best interests, whether monetary or otherwise, of the Beneficiaries</u>, whether or not such exercise may have the effect of conferring an advantage on any one or more of the Beneficiaries at the expense of the other Beneficiaries ....
>
> [emphasis in decision.]

Brendan Ghag took $100,000 out of the trust bank account, and he distributed 55 Class A common voting shares to himself, 15 Class A shares to each of the other children, and none to Charmaine. He also caused the company to allot 150 Class B common voting shares, ranking equally with the Class A shares, to himself.

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[2] See *Waters* at 1003

Charmaine Ghag and the other three children brought a petition to remove him as trustee and appoint Charmaine, for an accounting, and for an order voiding the transfer and allotment of shares.

While consenting at the hearing of the petition to his removal as trustee, and to an accounting, Brendan alleged that the share transactions were in furtherance to a secret agreement he had with his father. He claimed that his father intended for him to receive control of the company in a tax-efficient way, and for his mother to receive no interest in the shares or voting rights.

Mr. Justice Tammen heard the petition and granted the relief sought including declaring the transfer and issuance of shares void. He found that by acting in accordance with the alleged secret agreement, Brendan

> took into consideration irrelevant and inappropriate considerations in exercising his discretion as trustee. In addition, his decision to apportion the majority of the trust assets to himself and to exclude entirely one of the named beneficiaries is one that no even-handed, fair minded trustee could have made in the exercise of his discretion.[3]

The Court of Appeal upheld Mr. Justice Tammen's decision.

The interplay between allegations of conflict of interest and exercise of discretion is highlighted in *Pirani v. Pirani*, 2022 BCCA 65 reversing 2020 BCSC 974, further reasons 2020 BCSC 1711 and 2021 BCSC 1530. One of the key issues in this case, which has yet to be finally determined, is the extent to which the fiduciaries were permitted to exercise their discretion in the manner they did by the structure of companies and trusts created by the founders of the family businesses, a structure which embedded overlapping trustee and director roles. That case illustrates that it is sometimes necessary to consider both conflicts of interest and the exercise of a trustee's discretion in an even broader context than the wording of the trust, and consider the whole structure in which a trust is created and operates.

The original structure was established by four brothers: Mohammed Aly Pirani, Madatali Pirani, Pyarali Pirani and Haider Pirani. Only Haider Pirani is still alive. The Pirani brothers established a successful business through family-owned companies owning and operating hotels in Canada and in the United States. The two main companies were Pirani Enterprises Ltd. ("PEL") and Piramco Investments Ltd. ("PIL").

In 1993, they arranged an estate freeze of their companies. An estate freeze involves exchanging shares that increase in value with the company for other shares that have a fixed value. New shares are then issued for a nominal amount of money. These new shares are initially worth only the nominal value, but if the company grows, the new shares will become worth more. In this case, each brother created a holding company to hold the growth shares in the operating companies. A family trust was settled in each case to hold the shares in the holding company. Accordingly, as a result, there were four trusts. In each case, the trustees held shares in one of the four holding companies. The beneficiaries of each trust consisted of the children and grandchildren of one of the brothers.

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[3] 2020 BCSC 2136 at paragraph 11.

One of the trusts was created for Mohammed Aly Pirani's descendants. This trust is referred to as the "MAP Trust." Mr. Mohammed Pirani was one of the initial trustees of this trust, together with his wife, and his brother Haider Pirani. After Mohammed Pirani's death, his nephew (Madatali's son) Mustaq Pirani became a trustee. Mohammed Pirani's wife also died, but no other trustee was appointed. This trust held shares in a holding company 438702 B.C. Ltd. ("702") The beneficiaries of the trust were Mohammed Pirani's children Mehboob Pirani (referred to in the decision as "Meb"), Fareed Pirani, and Arshad Pirani, as well as his grandchildren, Meb's son Imran Pirani, and Fareed's daughters Sheliza Pirani and Zaida Pirani. The provisions of each trust did not permit a beneficiary of that trust to also be a trustee.

One of the other trusts is referred to as the Madatali Trust, which held shares in another holding company, 438703 B.C. Ltd. ("703"). The trustees were initially Madatali Pirani, Haider Pirani and Meb Pirani. When Madatali died, no new trustee was appointed. The beneficiaries of this trust were Madatali Pirani's three children, Mustaq Pirani, Bashir Pirani and Najma Pirani. Again, none of the trustees were beneficiaries. You will notice that Meb Pirani is a beneficiary of MAP Trust, and a trustee of the Madatali Trust, while Mustaq Pirani is a trustee of the MAP Trust and a beneficiary of the Madatali Trust.

The four brothers created a shareholder agreement among the companies pursuant to which the brothers were the first directors of PEL and PIL, and each could appoint a successor director. Mohammed appointed his son Meb, and Mustaq appointed his son Madatali.

The effect was that there were overlapping trustees and directors.

Although the terms of the trusts provided for a termination after 80 years, in each case the trust deed allowed the trustees to terminate the trusts earlier if they considered it advisable to preserve the capital of the trusts because of taxation. Under the *Income Tax Act,* RSC 1985, c.1 (5th Supp.), the trusts would be subject to a deemed disposition of the trust assets 21 years after the trust was settled, which would have resulted in significant taxes on the shares of the holding companies. But if the shares were rolled out of the trusts to the beneficiaries before the 21st anniversary, the tax would be avoided (or really deferred until the beneficiaries sold the shares or died).

The trustees of each of the four trusts, including the MAP Trust and the Madatali Trust, decided to wind-up the trusts by distributing the shares before the 21st anniversary. In winding-up the MAP Trust, the trustees, Haider and Mustaq, decided to give Meb voting control over the holding company 702, and 45% of the equity, while giving Fareed and Arshad 20% of the equity each, and Meb's son, Imran, 15% of the equity.

There was a twist in the plan. The trustees decided to do another estate freeze, essentially freezing the value of the shares distributed to the beneficiaries, and creating new growth shares, all of which were distributed to Meb. The effect was that Meb would have voting control over 702 and all of the future growth in value. Before implementing the plan, the trustees removed Fareed and Arshad as directors of 702. Directors' resolutions would be required to create new shares and implement the estate freeze.

The trustees of the other trusts followed a similar plan in respect of the shares of the holding companies held in each trust. In the case of the Madatali Trust, the trustees gave Mustaq the voting control and growth shares. In each case, growth shares were given to those beneficiaries most active in the businesses.

Although the trustees received legal advice that it would be best to consult with all of the beneficiaries before distributing the trust assets, they did not do so.

To implement an estate freeze it was necessary to value the company shares. The value of the new freeze shares issued in exchange for the old growth shares needed to be determined. An appraisal firm, Duff & Phelps were hired to appraise the shares. However, the valuation was based on the values of various real estate holdings owned by Pirani Enterprises and Piramco Investments Ltd. These valuations of real estate were not based on professional appraisals, but were estimates made by Mustaq Pirani, which the trial judge found were unreliable, and likely too low. The effect of a low valuation would be to undervalue the freeze shares, and overvalue the new growth shares.

Fareed Pirani, Arshad Pirani, Sheliza Pirani and Zaida Pirani, all of whom were beneficiaries of the MAP Trust, sued Haider Pirani and Mustaq Pirani, who were the trustees, Meb Pirani and Imran Pirani, who were beneficiaries, and the holding company 702. Their allegations included that the trustees were in breach of trust and breach of their fiduciary duties. They alleged that the trustees were in a conflict of interest, and that Meb colluded with the trustees of the MAP Trust to deprive the plaintiffs of their entitlement to share in the family business.

The defendants denied the allegations. The claims were advanced by beneficiaries of the MAP Trust, and the defendants focused their defence on the wording of the trust, which did give the trustees the discretion to wind-up the trust, and gave them a broad discretion on how to distribute the shares. The trustees of the MAP Trust, Haider and Mustaq were not beneficiaries of that trust, and they argued that they had no conflict of interest.

The trial judge found that there was a *prima facie* case that the defendant trustees were in breach of their fiduciary duties by acting in a disabling conflict of interest. The plaintiffs established that the defendants "were in a position where there was a substantial risk their duties and interests could conflict." The conflict of interest resulted from the overlapping roles of Meb, Mustaq and Haider as trustees, directors and in the business. The burden then shifted to the defendant trustees to show that they acted in the best interest of the beneficiaries. She found that the defendants failed to meet that burden.

With respect to the argument that the trust instrument gave the trustees an unfettered discretion to allocate the trust property on winding up the trust, she held that this was not a complete answer. She wrote at paragraph 155,

> The Defendants' fiduciary obligations crystallized the moment they were appointed as trustees, in addition to the duties or powers spelled out in the deed. It is in that sense that the nature of the discretion and the wording of the deed cannot be the full answer. More to the point, there is no power under the deed that could purport to authorize trustees to breach their duty of loyalty.

As summarized by Mr. Justice Harris in the Court of Appeal:

> [44] The judge engaged in a detailed analysis of the conduct of the defendants. The following factors and findings played a critical role in her conclusion the defendants had not discharged their burden to show they had acted only in accordance with the best interests of the beneficiaries. First, the defendants implemented a plan to restructure the numbered corporations so they and their families would take the benefit of future growth in the value of PEL and PIL. Second, they chose to act collectively. Third, the defendants did not

> advise or seek the view of the plaintiffs regarding their intention to distribute MAP Trust assets unequally, nor did they consider options other than taking the benefit of future growth for themselves or their families. Fourth, the judge rejected the defendants' explanations of why they chose an unequal distribution and the considerations they said influenced their decisions. Fifth, they knowingly relied on valuation reports that grossly underestimated the current value of PEL and PIL. Sixth, Meb took no steps to address the inherent conflict of interest when Mustaq proffered values for a valuation report. Seventh, the defendants did not disclose the valuation report when requested by the plaintiffs.

The trial judge held that Haider and Mustaq were in breach of their fiduciary duties to the beneficiaries of the MAP Trust, and Meb knowingly assisted them in breaching their fiduciary duties.

She ordered that Meb and Mustaq give up what they gained by breaching their duties, by ordering the disgorgement of some of the shares that they received, as well as disgorgement of some of the shares Imran received from his father. If is notable that the order would have given the beneficiaries of the MAP Trust shares of 703, even though the Map Trust never held shares in 703, which had been held in the Madatali Trust, of which none of the plaintiffs ever held a beneficial interest.

In her additional reasons at 2020 BCSC 1711 and 2021 BCSC 1530, the trial judge awarded the plaintiffs special costs of the trial as against the defendants, and ordered Meb to disgorge all of his Class E shares in 702, and Mustaq all of his Class E shares in 703 by way of a constructive trust imposed on those shares in favour of the plaintiffs (these were the growth shares). She also ordered Meb to disgorge 50% of his voting shares in 702. She declined to order a disgorgement of Mustaq's voting shares in 703, and also declined to order a disgorgement of all of the other shares issued to Meb or Mustaq, which represented freeze shares.

The British Columbia Court of Appeal set aside trial judge's orders, and ordered a new trial.

The Court of Appeal held that the trial judge made an extricable legal error, failing to give sufficient regard to the structure of the MAP Trust, including the discretions conferred upon the trustees by the trust instrument, as well as the context in which the four trusts were implemented, including overlapping roles of trustees and directors. The terms of the trust in the factual matrix may modify the scope of a trustee's fiduciary duties. She erred in failing to give proper regard to the context of the creation of the trusts in her interpretative analysis. She "failed to integrate into her analysis other essential elements of the factual matrix relevant to the scope and content of the trustees' duties. Similarly, by placing the issue of general fiduciary duties at the heart of her analysis, she relegated the trust instrument to a peripheral role."[4]

The question of whether the trustees were in a disabling conflict should have been considered in the context of the intentions of the four brothers, who had implemented the trusts. Justice Harris wrote at paragraph 112:

> [112] These errors have the capacity to undermine the judge's findings supporting her conclusion that the defendants breached their fiduciary duties. One needs to ask whether, if overlapping roles are contemplated, conflicts are,

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[4] Para. 105.

> in this context, disabling. If the result is that the appellants were not in a disabling conflict, then, necessarily, further questions about whether the content of the duties were modified would need to be examined, including whether the no profit rule is displaced. The potential effect on the judge's ultimate conclusions is profound because, in her reasoning, the fact of overlapping roles creating disabling conflicts led her directly to conclusions that the structure of the reorganization (reserving future growth to appellants' family and unequal distribution of current value) necessarily evidenced a breach of fiduciary duty by preferring self interest. Equally, her conclusion that the defendants had breached duties to act solely in the interests of all beneficiaries is also undermined, since that is an incorrect articulation of the content of the trustees' duties.

The trial judge erred in taking too narrow an approach in deciding whether Meb and Mustaq were placed in a conflict of interest by the settlor. Although there were other nominal settlors, the persons who implemented the trusts were the four brothers.

Nor are overlapping roles of trustee and director inherently disabling. It is common when shares of a family business are held in a family trust to have overlapping roles of directors and trustees. The interests of the company and trust are often aligned.

Similarly, it was not inherently wrong for the trustees of the four trusts to act in concert in their sharing of information and formulating a plan in winding up the trusts and doing estate freezes.

Justice Harris summarized the errors at paragraph 137 as follows:

> [137] A number of potential conclusions follow from my analysis to this point, particularly as they relate to the dominant themes in the judgment. First, it is not apparent the trustees were in a disabling conflict. This is contrary to the finding of the judge. Second, it is not obvious the trustees breached any trust or fiduciary obligation in acting in a coordinated fashion to implement a plan for the corporate restructuring of PEL and PIL, and wind up of the family trusts. Third, it is possible that, on a proper analysis, one might conclude not only are the apparent conflicts not disabling, but also the family arrangements reflect the First Generation's intention to displace the "no profit" rule. Fourth, it follows, then, that acting in a manner that advanced personal interests was not necessarily a breach of the trustees' duties, as found by the trial judge. Fifth, the wording of the trust agreement, including especially clause 4.12, may lead to the conclusion the trustees did not owe a duty to act in the best interests of all of the beneficiaries. Sixth, it is not apparent the framework of the restructuring, which reserved future growth and voting control for certain family members, is inherently evidence of improperly preferring personal interests, being improperly swayed by a conflict, or breaching a fiduciary duty. Rather, it would be a decision open to trustees under the instrument, one that reasonable and honest trustees might make.

III. Remedies

A. Passing Over and Removal of Personal Representatives and Trustees

1. Introduction

Although the principles are likely to be similar in each case, there are four distinct applications:

(1) Passing over a named executor or before the court issues an estate grant;

(2) Passing over a person who has priority in applying for letters of administration;

(3) Removing a personal representative after the court has issued an estate grant;

(4) Removing a trustee of a trust.

One of the reasons the distinctions are important is that there are distinct legislative provisions between a personal representative of an estate and a trustee.

The *Wills, Estates and Succession Act,* ("the *WESA*") very clearly sets out both the jurisdiction of the court to pass over or remove a personal representative and sets out non-exhaustive grounds on which he or she may be passed over or removed. The grounds may be somewhat broader than those applied by the courts prior to the *WESA*, but the principles articulated in the previous authorities remain relevant, and will likely be applied to applications under the *WESA*.

Although the relevant sections of the *Trustee Act*, such as s. 31, which gives the power to the court to appoint a new trustee, and s. 97, which allows the court to appoint a judicial trustee, apply to trustees of estates, WESA does not apply to *inter vivos* trusts.

It should be noted that in some cases it may be necessary to apply under both the provisions of the *WESA* cited below and the *Trustee Act*, where the personal representative is also appointed as a trustee of a testamentary trust.

2. Legislation

Sections 158 and 159 of the *WESA* govern passing over and removing a personal representative and appointing a substitute.

> Application to remove or pass over personal representative
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> 158 (1) In this section, "pass over" means to grant probate or administration to a person who has less priority than another person to become a personal representative.
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> (2) A person having an interest in an estate may apply to the court to remove or pass over a person otherwise entitled to be or to become a personal representative.
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> (3) Subject to the terms of a will, if any, and to subsection (3.1), the court, by order, may remove or pass over a person otherwise entitled to be or to become a personal representative if the court considers that the personal representative or person entitled to become the personal representative should not continue in office or be granted probate or administration, including, without limitation, if the personal representative or person entitled to become the personal representative, as the case may be,
>
> (a) refuses to accept the office of or to act as personal representative without renouncing the office,
>
> (b) is incapable of managing his or her own affairs,
>
> (c) purports to resign from the office of personal representative,

(d) being a corporation, is dissolved or is in liquidation other than a voluntary dissolution or liquidation for the purpose of amalgamation or reorganization,

(e) has been convicted of an offence involving dishonesty,

(e.1) is an undischarged bankrupt,

(f) is

(i) unable to make the decisions necessary to discharge the office of personal representative,

(ii) not responsive, or

(iii) otherwise unwilling or unable to or unreasonably refuses to carry out the duties of a personal representative, to an extent that the conduct of the personal representative hampers the efficient administration of the estate, or

(g) a person granted power over financial affairs under the Patients Property Act.

(3.1) A creditor may make an application for an order under subsection (3) (e) or (e.1) only if the creditor has a claim for more than a prescribed amount.

(4) An order of the court removing a personal representative does not remove that person as a trustee.

Appointment of substitute personal representative

159 (1) If the court discharges or removes a personal representative, the court

(a) must appoint another person who consents to act as the substitute personal representative, unless

(i) the administration of the estate is complete, or

(ii) the court does not consider a new appointment necessary, and

(b) may, if the personal representative has resigned or is removed as a trustee, concurrently appoint the person referred to in paragraph (a) as trustee under the Trustee Act in place of the trustee being discharged or removed.

(2) The court may require a substitute personal representative under subsection

(1) to provide security if security is required by the Supreme Court Civil Rules.

(3) A substitute personal representative appointed under subsection (1)

(a) has the same authority that the former personal representative had in respect of the estate,

(b) must perform the same duties and is subject to the same obligations as were imposed by law on the former personal representative, and

(c) on application without notice, is entitled to receive a grant of probate or administration, as the case may be, without the return of the previous grant if the court is satisfied that the return of the previous grant would be impossible or impractical.

(4) A grant of probate or administration to a former personal representative is revoked on the appointment of a substitute personal representative.

Section 132 is also relevant to passing over a person who would otherwise have priority to be appointed an administrator under section 130 or 131 (such as a spouse or child or beneficiary with a majority interest in the deceased's estate. It says:

Special circumstances

132 (1)Despite sections 130 and 131, the court may appoint as administrator of an estate any person the court considers appropriate if, because of special circumstances, the court considers it appropriate to do so.

(2) The appointment of an administrator under subsection (1) may be

(a)conditional or unconditional, and

(b)made for general, special or limited purposes.

Although it does not explicitly refer to the removal of a trustee, the courts have usually cited section 31 of the *Trustee Act* for authority to remove a trustee. It says:

> 31 If it is expedient to appoint a new trustee and it is found inexpedient, difficult or impracticable to do so without the assistance of the court, it is lawful for the court to make an order appointing a new trustee or trustees, whether there is an existing trustee or not at the time of making the order, and either in substitution for or in addition to any existing trustees.

Section 30 provides that the court may remove a court-appointed trustee or receiver, while, as noted above, section 97 of the *Trustee Act* provides authority for the appointment of a judicial trustee and section 97 expressly applies to an administrator or executor.

3. Inherent Jurisdiction

Apart from legislation, a Supreme Court of British Columbia judge also has the inherent jurisdiction to remove a trustee (*Mardesic v. Vukovich Estate*, 1988 CarswellBC 320 at paragraph 17 citing Donovan Waters, *Law of Trusts in Canada*, 2nd ed. (1984)).

4. Principles

The overriding consideration is these cases is the welfare of the beneficiaries. Has the fiduciary's conduct "endangered the trust property, or show a want of honesty or of proper capacity to execute the duties, or want of reasonable fidelity"[5]?

Although the broad principles are similar in each case, the courts will show deference to a fiduciary such as an executor or trustee appointed by the will-maker or settlor.

The decision in *Gawdun v. Lord*, 2020 BCSC 266, provides of good summary of the principles on an application to pass over or remove an executor appointed by a will maker, and these same principles will apply to removal of a trustee appointed by the settlor of a trust. Madam Justice E. McDonald wrote at paragraphs 12 and 13:

> [12] The principles that I should consider in guiding my decision on whether to pass over Ms. Lord as an executor include:
>
> a) Recognizing that the testator's choice of estate trustee should not be lightly entertained;
>
> b) Requiring clear evidence of necessity;
>
> c) Focussing on the main consideration of the welfare of the beneficiaries; and
>
> d) Requiring proof that the executor's acts or omissions are of such a nature as to endanger the administration of the estate: *Parker v. Thompson (Trustee)*, 2014 BCSC 1916 at para. 37.
>
> [13] Actual dishonesty, lack of proper capacity to execute duties, or lack of reasonable fidelity may form a basis to remove a trustee, although lesser grounds such as the trustee's inability to act impartially may suffice: *Parker* at para. 39.

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5 *Conroy v. Stokes*, 1952 CarswellBC 51 (CA) para. 10. See also *Letterstedt v. Broers*, (1884), 8 App. Cas. 371, 53 LJPC 44.

She then quoted with approval the principles as set out in an Ontario decision, *Radford v. Wilkins*, (2008), 43 E.T.R. (3d) 74 (Ont. S.C.J.), which for brevity I will summarize:

> Removal requires "the clearest of evidence that there is no other course to follow."
>
> The "main guide should be the welfare of the beneficiaries."
>
> Not "every mistake or neglect of duty" will lead to a trustee's removal. "It must be shown ... that the non-removal of the trustee will likely prevent the trust from being properly executed."
>
> The purpose of removal is not to punish past misconduct, but to protect the assets and interests of the beneficiaries. The court considers whether the past misconduct is likely to continue.[6]

Madam Justice E. McDonald then concluded her summary citing *Dirnberger Estate*:

> [15] In *Dirnberger Estate*, 2016 BCSC 439, Kelleher J. considered an application for removal and replacement of an executor. In *Dirnberger*, the named executor had retained numerous professionals to assist but eventually dismissed each one due to his inability to maintain a professional relationship. Some four years after probate, the estate remained undistributed.
>
> [16] In *Dirnberger* at para. 11, Kelleher J., citing *Conroy v. Stokes*, [1952] 4 D.L.R. 124 (B.C.C.A.), set out the four categories of conduct on the part of an executor that warrant removal:
>
> 1) endangerment of the trust property;
>
> 2) want of honesty;
>
> 3) want of property capacity to execute duties; and
>
> 4) want of reasonable fidelity.
>
> [17] Kelleher J. concluded that the trustee lacked the necessary capacity to act as trustee due to: (1) the trustee's inability to discharge his duties after four years and to maintain relationships with professionals; and (2) the trustee's unaccountable hostility towards his sister, who was a beneficiary and an alternate executor under the will. The trustee in *Dirnberger* was therefore removed and replaced.

In *Gawdun*, the court found that the evidence did not support the allegations of the will-maker's children that his spouse, their step-mother, whom he had named as a co-executor was hostile to them, that she would not maintain an even hand among beneficiaries, that she had previously preferred her own interest when exercising a power of attorney, and that she had interfered with the will-maker's estate planning. Accordingly, their application to pass her over was dismissed.

5. Recent Cases

There are quite a few recent reported cases, and I will not attempt to include all of them. A few of the other cases in the last three years include:

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6 See *Gawdun*, para. 14 for the quotation of *Radford*, paras 102-106.

a. In *Liu Estate*, 2019 BCSC 597, Mr. Justice Grauer dismissed the application of the deceased's daughter to remove her father as administrator of her mother's intestate estate, and appoint a lawyer as a judicial trustee. The applicant was claiming in a notice of civil claim that she beneficially owned two properties that had been registered in her parents' name, as against both her father and her mother's estate. Her father was claiming she had defrauded him. The court found that despite the hostility between them, the applicant had not shown that her welfare as a beneficiary of the estate was threatened by her father continuing as administrator.

b. In *Nieweler Estate*, 2019 BCSC 401, two of three executors successfully applied to remove their sister as co-executor of their father's will. Her conduct in dealing with her co-executors and in respect of the estate assets provided sufficient grounds for her removal.

c. In *Andreychuk Estate*, 2020 BCSC 1945, Mr. Justice Edelmann dismissed the application of two of the three beneficiaries of their mother's will to pass over their mother's sister as executor. Although the applicants alleged that their aunt had omitted assets from the Affidavit of Assets, and was hostile toward them, the Court found that she was fulfilling her functions as executor and did not meet the criteria in *Conroy v. Stokes*.

d. In *Derco v. Derco*, 2020 BCSC 2199, the will-maker had appointed her three surviving children as co-executors. One of them, Miles Derco sought to pass over his siblings, Barry Derco and Holly Derco, and they sought to pass over their brother. Justice Winteringham found the evidence of allegations that Holly had mismanaged her mother's finances during her lifetime, and allegations that Miles had been convicted of tax offenses was insufficient to pass either of them order. The court passed over Barry, who disputed that he owed his mother $50,000, on the grounds that he had a conflict of interest. This left two disputant siblings as co-executors. Mr. Justice Winteringham noted that a neutral administrator would be appropriate, but because none of the parties wanted to incur the costs of one, and the fact that the will-maker chose to appoint her children together, he did not appoint an independent administrator.

e. In *Haynes Estate*, 2021 BCSC 669, the will-maker appointed his brother, Larry Haynes, as executor and left personal property to Ms. Vanden Blink, but did not dispose of the residue of his estate in his will. Ms. Vanden Blink claimed to be in a marriage-like relationship with the will-maker, a claim the brother disputed. Mr. Justice Riley ordered the removal of Ms. Vanden Blink's notice of dispute and permitted Larry Haynes to apply for probate, subject to a restriction of distribution of the contested portion of the estate, pending resolution of Ms. Vanden Blink's claim that she was the will-maker's common law spouse. The fact that Larry Haynes disputed Ms. Vanden Blink's assertion that she was the will-maker's common law spouse, and that he will benefit as the intestate heir if she is not, does not put him in an untenable conflict of interest, nor was he shown to be unable to act impartially or "untrustworthy in his obligation to act in good faith as the executor of the estate."

f. In *The Matter of the Estate of Jean Maureen Dahle*, 2021 BCSC 718, Justice Andrew Majawa dismissed the applications of each of two executors and trustees of a trust for their disabled brother to remove each other. The two executors had agreed to continue

acting as trustees of the trust for their brother with the addition of Heritage Trust as a third trustee with majority decision provision, but continued to seek the removal of each other as executor and trustee of the estate. Instead, the court appointed the professional trustee as a co-trustee of the estate along with the two brothers.

g. In *Pangalia Estate*, 2021 BCSC 1070, Madam Justice Matthews removed both administrators of their mother's estate and appointed a lawyer as administrator. Each brother had sought the removal of the other. One had refused to sign an authorization for their mother's bank to release information about joint accounts that were potentially estate assets, and the other was alleged to owe his mother a $50,000 debt, which he denied.

h. In *Jury v. Rogodzinski*, 2021 BCSC 2441, Justice Kirchner granted the petitioner Tammy Jury's application to prove her step-father's will in solemn form, but dismissed her application to be appointed as personal representative. She was one of two named executors. The other three beneficiaries of the will were her brothers, one of whom, Brian Rogodzinski, was named as co-executor. The will-maker had transferred his residence into a joint tenancy with the petitioner, and her brothers asserted that the will-maker had transferred the residence into a joint tenancy under the mistaken belief that it would be taken into account as part of Ms. Jury's share of his estate under his will, that she held it on a resulting trust for the estate, or alternatively that she exercised undue influence to obtain the transfer. In the circumstances the court found that she was in a conflict of interest. Justice Kirchner provided that she could reapply if the "cloud of conflict is resolved," or if her brothers delayed in proceeding with a petition to appoint Brian Rogodzinski as personal representative and proceed with a challenge to the transfer of the residence.

i. In *Parsons v. Zaranski*, 2021 BCSC 2092, the beneficiary of a trust created in his father's will sought the removal of his sister as trustee, alleging that she had failed to provide adequate information to him, had not provided adequate funds to him out of the trust, and had made an improper investment. Mr. Justice Wilson rejected the first two allegations, having reported regularly to the beneficiary and the payments she made to him were within her discretion. The court found that the trustee should not have made the $25,000 investment, but that she thought it was in the trust's best interest, and she had acted in good faith. The application to remove her was dismissed.

j. In *Koglin Estate*, 2021 BCSC 2525, three of the beneficiaries of their father's will applied to remove their sister as executor, alleging that she had not disclosed significant estate assets and had mismanaged the real property in the estate. The parties agreed to a consent order that she provide an accounting of her activities in the administration of the estate, and that she be cross-examined. Mr. Justice Veenstra dismissed the application to remove her, with liberty to reapply after the cross-examinations.

k. In *Kara Estate*, 2022 BCSC 923, the executor was removed on the basis of unreasonable delay in applying for probate and administering the estate. The deceased died in November 2018. There was also an allegation of conflict of interest.

l. In *Fitzgerald v. Hill*, 2022 BCSC 968, Mr. Justice Coval dismissed an application of most of the beneficiaries of Eveyln Howe's will to pass over her accountant, Mr. Kenneth

Fitzgerald as executor. The beneficiaries were nieces, nephews and grand nieces and nephews of the will-maker and those of her late husband. Their concerns included his handling of her finances under a power of attorney, his delay in disclosing her will, and his production of a letter he claimed she asked him to draft before she went into a care facility that, if given effect, would significantly change the distribution of the shares of a company she owned. The court found that although Mr. Fitzpatrick should have been more open and cooperative with the beneficiaries, there was an insufficient basis for passing him over, and the will-maker's appointment of him should be respected.

m. In *Nand Estate*, 2022 BCSC 1718, Madam Justice Ahmad dismissed the application of two co-executors to remove the third co-executor, Reginald Nand. She found that the applicants had not established on the evidence that the will-maker had a bank account in the United States, which he had hidden from them and taken funds for himself, that he had received rent for which he failed to account from a warehouse that was held in the estate, or wrongfully dealt with assets in the warehouse. Nor was he responsible for the delay in the administration of the estate.

B. Compensation and Disgorgement

Remedies for breach of fiduciary duties aim to compensate beneficiaries for their losses and take away a fiduciary's gain arising out of the breach. One principle is that beneficiaries should be restored to the position they would if the breach had not occurred. Another is that a fiduciary ought not profit by wrongful conduct. Disgorgement is measured by the fiduciary's gain, and is intended to discourage breaches of fiduciary duties. The result is that in some cases a beneficiary of a trust or estate may be placed in a better position after disgorgement than if the breach had not occurred.

We will look at three cases, two recent and one from a few years ago, below: *Sarzynick v. Skwarchuk*, 2021 BCSC 443; *Chung v. Chung*, 2022 BCSC 1592; and *Kyle Estate v. Kyle,* 2016 BCSC 855, appeal allowed in part, 2017 BCCA 329

In *Sarzynick*, Madam Justice Morellato imposed a constructive trust on proceeds of sale of real properties and on a residence to both compensate the deceased's estate for the loss of funds misappropriated by a fiduciary and to disgorge the fiduciary's gains.

Caroline Sarzynick brought a claim on behalf of her mother's estate[7] against her brother, Leonard Skwarchuk, for funds he wrongfully received from their parents. He had a power of attorney and several joint accounts with his parents, Mary Skwarchuk and William Skwarchuk (who predeceased Mary). Leonard Skwarchuk was the executor of their mother's will, which divided her estate equally between her two children.

Madam Justice Morellato found that Leonard Skwarchuk had misappropriated $23,400 which he used to purchase real property at 1035 Fir Street, another $70,000 which he used to purchase property 1045 Fir Street, both in Campbell River, and she found further withdrawals of $186,996.29, for which he had not accounted, and out of which he used $94,334.98 to purchase a condominium at 840 Braidwood Road in Courtenay. The two Fir Street properties were sold

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[7] The Plaintiff obtained an order under s. 151 of the *WESA*.

and by agreement one-half of the net sale proceeds were paid to Leonard Skwarchuk's partner, with the balance held in trust. Because of the defendant's repeated failures to comply with orders for production of documents, and his poor credibility, many of the findings were based on adverse inferences, and the decision contains a useful discussion of the inferences that can be drawn.

The two Fir Street properties were sold at a profit. In addition to liability for the total funds he misappropriated, the court held him liable for one-half of the net gains on the two Fir Street properties, the other one-half having been paid to his partner. With respect to the property in Courtenay, she did not accept the B.C. Assessment authority as assessed value as admissible evidence, but granted leave for further submissions on the increase in value, which the defendant is required to account for.

With respect to the remedy, she applied the principles articulated in *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217:

> [220] A remedial constructive trust can be imposed when there has been a breach of fiduciary obligations if the following four conditions are met:
>
> (i) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
>
> (ii) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> (iii) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties; and
>
> (iv) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected. (*Soulos* at para. 45)

She imposed a constructive trust over the proceeds of sale of the two Fir Street properties and the property in Courtenay. The total recovery was $442,943,85 plus the increase in value of the property in Courtenay.

Similarly, in *Chung*, Mr. Justice Taylor imposed a constructive trust over the fiduciary's residence and ordered him to pay occupational rent to the plaintiff in order to disgorge the benefit the fiduciary received through his breach of trust.

The plaintiff, Jae Chung, and the defendant Won Chung were brothers. They invested in two apartment buildings in the west end of Vancouver. The titles were held in two nominee companies, which were subject to bare trust agreements proportionate to the brothers' respective interests. Won Chung managed the properties, while the plaintiff was a more passive investor. Won Chung refinanced the apartment buildings, with Jae Chung also signing the necessary documents, but Won Chung deposited $1,664,966 in his personal account, without his brother's knowledge. He later put the proceeds into GICs.

Subsequently, Won Chung cashed in $1,581,860 of the GICs and applied the funds to the purchase of a residence on South West Marine Drive (the "Marine Drive Property") in 2014. The

total purchase price including GST was a little more, $1,682,306, the difference made up in cash. Jae Wong was not aware of the use of funds until later.

After Jae Chung sued, the brothers entered into a partial settlement agreement which required certain accountings, but left open Jae Chung's disgorgement, tracing and constructive trust claims in respect of the Marine Drive Property.

Jae Chung sought a 45% interest over the Marine Drive Property through a remedial constructive trust, representing his 45% equitable interest in the mortgage proceeds. Won Chung argued that Jae Chung's remedy was limited to a return of his share of the funds improperly taken plus interest. He argued on the basis of *Hallett's Estate*, (1880) 13 Ch D 696 (Eng. C.A.), that because he mixed his own funds with the trust funds the remedy is limited to a lien for the amount of funds taken in breach of trust.[8]

Given the increase in value of Vancouver real estate, the difference is significant. The Marine Drive Property was appraised at $3,600.000 in 2021.

Mr. Justice Taylor rejected the argument that Jae Chung was limited to the amount of funds wrongfully appropriated, noting that courts in both England and British Columbia had declined to follow *Hallett's Estate*. An award limited to the amount of funds plus interest would not further the goal of discouraging breaches of fiduciary duties. He wrote:

> [77] Further, it is my view that an award of interest only, as asserted by the defendants, would not serve the necessary prophylactic purpose in this context. If I were to grant the remedy sought by the defendants, it would have the effect of allowing Won to benefit from his breach of trust, since the more than doubling in market value of the Marine Drive Property (of just under $2 million) clearly substantially exceeds the value of any notional interest payments over that same period, with the result that Won would benefit from his breach of trust. Such a result is inconsistent with the policy objective of the disgorgement remedy, which is to deter faithless fiduciaries.

The Court applied the reasoning in *Soulos*, and finding that the criteria for a remedial constructive trust had been met, imposed a constructive trust to the extent of a 45% interest in the Marine Drive Property.

Wong Chung argued that funds he used for renovations should be taken into consideration, but Mr. Justice Taylor did not find sufficient evidence that the renovations enhanced the value of the Marine Drive Property.

Mr. Justice Taylor also found that Jae Chung was entitled to occupational rent equal to 45% of the rental value of the house less 45% of Wong Chung's expenditures on utilities, insurance and property, for a total award of $128,314.

Kyle Estate illustrates the complexity of the disgorgement remedy. There must be a sufficient proximity of the wrongful conduct and gain.[9]

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[8] There was also an argument based on the terms of the partial settlement.

[9] The discussion of *Kyle* below was previously published in my paper, *Bad Fiduciaries,* for the CLE *Estate Litigation Update 2020.*

John Henderson Kyle, who was known as Jack, died on June 20, 2012, leaving his wife and four children surviving him. He named his son Christopher Kyle as the executor of his home-made will and codicil. Jack Kyle deposited $400,000 into a joint account with Chris Kyle at Coast Capital Savings Credit Union, Richmond Branch. Chris Kyle took $25,000 out of the joint account for himself during Jack's lifetime, made a couple of payments to his father's caregivers, and retained the balance on his father's death in the amount of $372,637. He used the remaining funds in the Coast Capital account, with other funds that he contributed, to pay off a commercial mortgage in the amount of $526,473 on four properties owed by 1537 Holdings Ltd, a company in which Chris Kyle owned all of the shares.

Chris Kyle's brother Robert William Kyle, who was named as the alternate executor of their father's will, brought a claim against both Chris Kyle and 1537 Holdings Ltd. At trial, Mr. Justice Burnyeat found that Jack Kyle had not intended to make a gift of the funds to Chris, but intended for all four of his children to share the funds.

Mr. Justice Burnyeat found that Chris Kyle was was not entitled to retain the funds in the joint account, and provided in his orders for the following remedies:

1. Chris Kyle was removed as executor and trustee of his father's will and estate;
2. Chris Kyle was required to divide the amount of $377,637 equally with his brothers, bringing the $25,000 he received from the Coast Capital account before his father died into account;
3. Chris Kyle was ordered to pay compound interest on the funds from the joint account from July 1, 2012 to the date of trial, at the rate which would have been available at Coast Capital in the "high-interest no-fee savings" account, and 5% interest thereafter as set out in the *Canada Interest Act* until paid;
4. Chris Kyle was ordered to pay an amount reflecting the interest that 1537 Holdings Ltd. saved as a result of paying out the mortgage, which was calculated at $1,178.00 per month, from July 1, 2012 when it was paid out to the date of trial. This amount reflected the proportionate share of the savings from the funds in the joint account to the full amount of the loan paid out; and
5. Chris Kyle was also ordered to pay a portion of the increase in value of the four properties owned by 1537 Holdings Ltd. from July 1, 2012 to the date of trial. The portion was to be calculated on the basis of the $377,637 used from the Coast Capital account to pay off the mortgage divided by the assessed value of the properties in 2012 of $1,580,000. Either Chris Kyle or 1537 Holdings Ltd. was required to pay that portion of the increase of value as determined by appraisals.

Chris Kyle was also ordered to pay special costs.

The result of the trial decision was that Chris Kyle was required to both compensate the beneficiaries for the value of the funds in the joint account, plus the loss of the interest they would otherwise have received if the funds were kept in the joint account, and the disgorgement of the benefit 1537 Holdings Ltd., and indirectly Chris Kyle as the shareholder, received by virtue of the interest saved on the mortgage, as well as the proportionate share of the increase in value of the properties that had been subject to the mortgage. This appears to the writer to be (to use technical language) a triple whammy. In addition to repaying the principal, Chris Kyle was

required to compensate the beneficiaries for their loss by paying the interest that would have accrued had the funds been retained in the joint account, plus disgorging the mortgage savings, plus disgorging a portion of the increase in the value of the properties, without allowing Chris to offset the compensatory interest from the disgorged savings of the mortgage interest, nor was he allowed to offset either the compensatory interest or mortgage interest from the appreciation of property values.

The Court of Appeal allowed Chris Kyle's appeal in part. The Court of Appeal agreed with Mr. Justice Burnyeat that Chris Kyle was not entitled to retain the funds in the joint account, but held that the funds resulted to Jack Kyle's estate, rather than held in trust for all four of the children. The Court of Appeal also allowed the appeal to the extent of substituting party and party costs (and double costs after the date of an offer) for full-indemnity special costs.

The most significant variation of the trial judge's decision from our perspective was in respect of the disgorgement of a proportionate share of the increase in value of the properties owned by 1537 Holdings Ltd. Madam Justice Saunders held that there was an insufficient connection between the use of the funds to pay off the mortgage and the increase in the values of the properties to warrant a disgorgement of a proportionate share of the increase in the property values. She wrote at paragraphs 37 through 39 as follows:

> [37] In Waters' *Law of Trusts in Canada,* D. Waters et al., 4th ed. (Toronto: Carswell, 2012), Professor Waters states at 527:
>
> > Profits that result from the breach of a fiduciary duty can be disgorged in two ways: (i) imposing a personal debt on the fiduciary, requiring her or him to repay the gain; or (ii) by the imposition of a constructive trust requiring the fiduciary to transfer the gain.
>
> [38] To same effect the Supreme Court of Canada in *Soulos v. Korkontzilas,* [1997] 2 S.C.R. 217 at para. 45, discussing the availability of a constructive trust to remedy a wrongful act absent unjust enrichment, set as a condition:
>
> > (2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;
>
> [39] Here there is no relationship between the payment on the mortgage and acquisition of the property. The amount ordered to be disgorged did not result from the breach of the fiduciary duty through payment of the mortgage. There is, in my respectful view, no basis to require payment of any portion of the appreciation of the real property in the circumstances of this case.

The Court of Appeal thereby reduced the amount Chris Kyle was required to pay. The result was no longer a triple whammy, but a double: he still had to pay compensation for the interest foregone on the joint account, plus disgorgement of the interest his company saved by paying down the mortgage.

In all three of these cases, *Sarzynick, Chung* and *Kyle*, the beneficiaries were placed in a better position as result of the disgorgement remedy than if a breach had not occurred.

C. Punitive Damages

Punitive damages are not common in estate litigation cases but are available to punish "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour." [10]

In *Kolic v. Kolic*, 2019 BCSC 1463, Mr. Justice Punnett ordered Mary Kolic to pay punitive damages in the amount of $10,000. Her mother, Violet Kolic had appointed Mary Kolic as her executor, and in her will left $10,000 to one child, Charles Kolic, and the residue to be divided among Mary, and Violet's two other children, Joseph Kolic and Angela Kolic. Violet died on February 10, 2013. Charles brought a wills variation claim and Joseph and Angela brought a counterclaim against Mary, claiming that she held funds she received from her mother through various bank accounts on a resulting trust for the estate. The counterclaim was heard separately from the wills variation claim.

Violet Kolic had limited education and her English was not good. She had lived simply and frugally, with a single bank account and some Canada Savings Bonds, as well as real property. She did not drive a car or travel. Despite a limited income, she saved about $10,000 per year.

In 2004, Mary moved in with Violet and five new accounts were set up. In the end, one was in Violet's name and the others either joint with Mary or in Mary's sole name. Substantial funds were moved into joint accounts or accounts in Mary's sole name. Apart from under $14,000 in an account in Violet's sole name, Mary claimed the rest of the funds. Mr. Justice Punnett found that funds Mary received were subject to a resulting trust for Violet's estate, and granted judgement against her in the amount of $235,794 plus interest in respect of the funds she received.

Mary had probated Violet's will, but was removed as executor in 2016[11].

In finding her misconduct sufficiently egregious to warrant punitive damages, Mr. Justice Punnett wrote:

> [123] Mary benefited from taking funds from Violet and did so without the knowledge of her siblings. She sought to hide what she had done from her siblings for years after Violet died, and court orders were necessary to disclosure of relevant records. She acted contrary to the estate's interests for her own financial gain, a pattern seen throughout the various financial transfers and in her failure to act properly as Violet's attorney. Indeed, Mary's continued intransigence in the litigation process and her attempts to avoid trial, along with her taking exception to counsel having documents in his possession during trial, continue a pattern of secrecy in an effort to avoid review of her conduct, and reinforce my findings regarding her conduct

In a subsequent decision, Mr. Justice Punnett also ordered her to pay special costs.[12]

In contrast, Madam Justice Morellato declined to order punitive damages in *Sarzynick*. Although the defendant's conduct was sufficiently egregious to warrant punitive damages, she took into

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10 *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 94.

11 *Re Kolic Estate*, 2016 BCSC 1312.

12 *Kolic v. Kolic*. 2022 BCSC 1448.

consideration his circumstances and the award of special costs against him. He had diabetes, amputations, poor eyesight approaching his 70s and retired.

In *Chung,* Mr. Justice Taylor also declined to order punitive damages, finding that the Won Chung's conduct did not rise (or perhaps fall) to the level of "high-handed, malicious, arbitrary, or highly reprehensible misconduct." He noted that as a result of the awards, Jae Chung had not suffered a loss and Won Chung incurred significant financial cost.

IV. Final Thoughts

What will be the denouement of *Pirani*? The principle that a trust instrument may permit conflicts and displace the no profit rule is well established. What is interesting about the case is that both the trial judge and the Court of Appeal took steps back and considered the operation of the trust in the context of overlapping directors and trustees, with multiple trusts. For the trial judge, it was the overlapping corporate and trustee roles that placed the trustees in a disabling conflict, despite the broad discretion conferred on trustees by the trust instrument. The Court of Appeal appears to be saying that the trial judge ought to have taken yet a further step back and looked at the extent to which the founding brothers had permitted conflicts through the very structure of the overlapping roles.

The principles underlying awards for breaches of fiduciary duties in both compensating beneficiaries for losses to a trust or an estate, and disgorging the fiduciary profits seem just. But do some of the cases go too far? It does not appear that the defendant in *Sarzynic*k received any credit for any portion of the profits on the sale of two properties attributable to his own contributions, although in view of his own failure to provide proper financial information, this is likely his own fault. In *Kyle*, the defendant had to both compensate for interest that would have accrued to the funds if he had not appropriated them and to account for the saving of interest on his own mortgage when he applied the funds to the mortgage does appear to contain an element of double counting. Arguably, he ought to have been charged with the higher of the two, but not both. In cases of blatant misappropriation, one might have little sympathy for the wrongdoing fiduciary if the award appears harsh, but it should be borne in mind that not all breaches of trust involve the same level of moral turpitude, and the principles should be applied in a consistent manner, leaving it to punitive damages to punish egregious behaviour.