IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Wang v. Guo,*
2024 BCSC 380

Date: 20240304
Docket: S175130
Registry: Vancouver

Between:

Weihe Wang, Guilian Tian and Weihe Investments Ltd.

Plaintiffs

And

Ying Ping Guo, Yue Chun Xie, Yunal Kumar Nath, Jozsef Horvath, Katalin Maria Horvath, Zsolti Horvath, Developro Construction Ltd., and Vantone Development Group Ltd., and

Defendants

And

Ying Ping Guo, Yue Chun Xie, Yunal Kumar Nath, Jozsef Horvath, Katalin Maria Horvath, Zsolti Horvath, Developro Construction Ltd., and Vantone Development Group Ltd.

Third Parties

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiffs:	J.A. Dawson R. LaPlante
Defendants and Third parties, appeared in person:	Y.P. Guo Y.C. Xie J. Horvath K.M. Horvath Z. Horvath Vantone Development Group Ltd.

No other appearances

Place and Dates of Trial:	Vancouver, B.C. January 3-6, 9-13, 16-20, 23-27, and 30, 2023 February 1-3, 6-10, 2023 June 19-23, 27, 28, 2023 October 10-13, 2023
Place and Date of Judgment:	Vancouver, B.C. March 4, 2024

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I. Introduction and Summary

[1] This is a case about a real estate development project gone terribly wrong. The plaintiffs have sued their partners in this failed project for just over $5 million, seeking to recover money they lost by investing in the land and the developments. They now have nothing to show for that investment except two empty parcels of land valued at a fraction of what they paid for them.

[2] In May 2016, the plaintiffs Guilian Tian and Weihe Wang were persuaded to invest in two properties for residential development: one near Prince George (the "Prince George Property") and the other on Sumas Mountain in Abbotsford (the "Sumas Mountain Property"). The plaintiffs' once good friend, the defendant Ying Ping Guo, brought the opportunity to them after learning of it from the defendant Jozsef Horvath.

[3] It was agreed that Ms. Tian and Mr. Wang, through their company, the plaintiff Weihe Investments Ltd. ("Weihe"), would buy the properties and put up the investment capital needed to develop them into residential subdivisions. Mr. Horvath and another development partner, the defendant Yunal Nath, would be responsible for obtaining subdivision approval and developing the two properties into residential lots for resale. They would do so through their company, Vantone Development Group Ltd. ("Vantone Developments"). Mr. Guo was to oversee the projects as manager with the "ultimate right" of decision-making. Messrs. Guo, Horvath and Nath were to collectively receive 15% of any net profits of the development (5% each) with the balance going to the plaintiffs through Weihe. However, by separate agreement, Mr. Guo was to receive an additional 10% if the project met certain profit goals and in exchange he personally guaranteed the plaintiffs' investment in the project.

[4] The project was a complete failure. Before it even started, Mr. Horvath and Mr. Nath obtained for themselves the right to purchase both properties without disclosing that to the plaintiffs. They earned a substantial undisclosed profit of $1,450,000 by flipping the properties to the plaintiffs at massively inflated prices.

[5] Still unaware of these secret profits, Ms. Tian and Mr. Wang, through Weihe, invested another $2,862,500 in project development costs (the "Project Development Funds") but only a fraction of this money was spent on the project itself. Most of it was misappropriated by Mr. Nath and Mr. Horvath for their personal use or to support their other projects. Only about $812,536 of the Project Development Funds was spent on the development itself, but even that went to waste because of the defendants' gross mismanagement of the project.

[6] The development itself was a disaster. Messrs. Nath, Horvath, and Guo failed to examine the feasibility of the development or seek necessary government approvals before breaking ground. They hired McElhanney Consulting Services Ltd., a construction engineering firm, as project engineers to design the road and subdivision plan and make the necessary applications for permits and other approvals, but they did not wait for McElhanney to complete its work before starting the project. They hired an on-site project manager and engaged a road contractor to begin clearing and road building but, because the final design had not been completed or approved (and had to be changed at least twice), money was wasted on unnecessary roadbuilding.

[7] Mr. Nath and Mr. Horvath insisted the project proceed as quickly as possible with road building throughout the fall of 2016 in the rain and cold. McElhanney warned that doing road construction in the fall when soils were wet would add considerably to the cost of the project and, through the on-site manager, urged Mr. Nath and Mr. Horvath to wait until the spring to build the roads. But his advice fell on deaf ears. In October 2016, McElhanney withdrew as engineers of record on the project and in November work came to a halt because contractors had not been paid and the site was too wet for more road work.

[8] Throughout this time, Mr. Guo, who was responsible for the overall management of the project, had not been informed and did not keep himself apprised of these events. He learned in January 2017 that contractors had not been paid and, by March, he learned that Mr. Nath and Mr. Horvath had misappropriated

most of the Project Development Funds for themselves or other projects. He finally told the plaintiffs of these problems in April 2017 and they started this action.

[9] The plaintiffs seek damages against Mr. Nath, Mr. Horvath, Mr. Guo, and Messrs.' Nath and Horvath's companies in excess of $5 million. Their claims are based on breach of fiduciary duty, fraudulent and negligent misrepresentation, conspiracy, breach of trust, and breach of contract. They also seek recovery against Mr. Guo based on his guarantee. They do not seek to rescind the contracts for the purchase of the two properties but they seek an accounting of the profits Mr. Nath and Mr. Horvath took by flipping the properties and damages for the amount they paid for the lands above their market value. They seek to recover the full amount of the Project Development Funds plus an additional amount they paid to settle a claim by one of the unpaid contractors.

[10] The plaintiffs also claim against two of Mr. Horvath's family members for their receipt of what the plaintiffs say is their misappropriated money. They claim against Katalin Horvath, Mr. Horvath's wife, in knowing receipt and knowing assistance of the misappropriated funds. They also allege that Mr. Horvath's son, Zsolt, was a participant in the alleged fraud. They also claim against Mr. Guo's spouse, Yue Chun Xie, alleging she also gave a verbal guarantee for the investment and that she received some of the misappropriated funds.

[11] The plaintiffs had also claimed against Aaron Salter and Equip Law, who are the lawyer and the law firm that prepared documents effecting the sale of the properties, and against Sinominico Investment Ltd. and its principal, Michael Gao, whom the plaintiffs alleged received a substantial benefit after misappropriated funds were used by Mr. Horvath to improve Sinominco's property in Pitt Meadows. However, the claims against these parties were settled before trial.

[12] Mr. Guo makes a third party claim against Mr. Horvath, Mr. Nath, and Vantone Developments. Mr. Horvath and Mr. Nath also have a third party claim against Mr. Guo but that was not pursued at trial.

[13] In a related action, Teare Creek Contractors, which is the road contractor hired by Mr. Nath and Mr. Horvath, sued the plaintiffs' holding company that now owns the Prince George Property for unpaid accounts for road construction. The Teare Creek action was tried together with this action with evidence in one being evidence in both. However, that claim settled during a four-month break in the trial. The plaintiffs now claim the settlement amount ($307,500) as part of their damages in this action.

[14] For the reasons that follow, I find that Mr. Nath and Mr. Horvath, along with their companies, are jointly and severally liable for the full amount of the plaintiffs' claim. I find Mr. Guo is liable in negligent misrepresentation for a relatively smaller amount of the purchase price for the properties ($87,500). However, he is jointly and severally liable with Messrs. Nath and Horvath and their companies for most of the Project Development Costs (excluding only payments Weihe made in November and December 2016), for the $307,500 settlement with Teare Creek, and for the interest the plaintiffs paid to borrow the investment funds.

[15] I find that the defendant Katalin Horvath is liable for $35,500 of the proceeds of the profits from the sale of the properties that was paid to her plus half the value of a down payment for a property purchased in her and Mr. Horvath's names jointly.

[16] I dismiss the claim against Zsolt Horvath and find the allegation that he participated in a fraud is without foundation.

[17] I dismiss the claims against Ms. Xie as I am not persuaded she offered a guarantee of the plaintiffs' investment. Nor am I persuaded she knowingly received a portion of the misappropriated funds.

[18] I note that the plaintiffs were represented by counsel at trial but all of the defendants represented themselves.

II. The Parties

1. The Plaintiffs

[19] The Plaintiffs Guilian Tian and Weihe Wang are spouses who immigrated to Canada from China in 2005. Mr. Wang soon returned to China where he operated a pharmaceutical business until his retirement. He spends one or two months a year in Canada. Ms. Tian remained in Canada with the parties' children, all of whom are now adults. She has been a Canadian citizen since 2010.

[20] The Plaintiff Weihe Investments Ltd. ("Weihe") is one of Ms. Tian's and Mr. Wang's family businesses. It is a British Columbia company that has invested in real estate primarily in B.C., including in the two properties at issue in this case. Ms. Tian and Mr. Wang were Weihe's shareholders during the events of this case but Mr. Wang has since transferred his shares to their children.

[21] Both Ms. Tian and Mr. Wang are experienced real estate investors but neither has experience in real estate development. Ms. Tian describes herself as a "housewife" but she has also been primarily responsible for Weihe's investment activities. Prior to the events giving rise to this action, Ms. Tian, through Weihe and other family companies, had invested in some 22 condominiums at the pre-sale stage as well as some commercial and stand-alone residential properties in British Columbia. She also invested in four condominiums in Alberta and some properties in Toronto. For larger investments exceeding $1 million, Ms. Tian typically had the property inspected and appraised before buying it because she was concerned about money. She also involved Mr. Wang in these more expensive investment decisions. She has never worked in real estate development.

[22] Mr. Wang's pharmaceutical business in China has been very successful. He has also invested in a number of real estate development projects in that country but, like Ms. Tian, only as an investor and not as an active developer.

[23] Both Ms. Tian and Mr. Wang speak Mandarin. Mr. Wang cannot read or understand English. Ms. Tian has limited capabilities in both spoken and written

English but, based on the evidence of those who have spoken to her in English, including Dennis Voss and Aaron Salter, I find she is capable of understanding very basic conversational English.

2. The Defendants Ying Ping Guo and Yue Chun Xie

[24] The defendants, Ying Ping Guo and Yue Chun Xi are spouses and had been close friends of Mr. Wang and Ms. Tian prior to this litigation.

[25] Mr. Guo met Mr. Wang in 1994 at an international Ginseng conference in Vancouver and the two became fast friends. They worked together on a number of business investments in China and Vietnam. When Ms. Tian and Mr. Wang immigrated to Canada in 2002, Mr. Guo and Ms. Xie helped them settle in Vancouver and navigate the city as newcomers. The two families frequently socialized, travelled, and celebrated holidays together.

[26] In May 2016, Mr. Guo introduced Mr. Wang to the opportunity to invest in the Prince George and Sumas Mountain Properties. This would ultimately prove fatal to their 20-year friendship.

3. The Defendants Jozsef Horvath and Katalin Horvath

[27] The defendant Jozsef Horvath is a building contractor who has built and renovated houses throughout the Fraser Valley. Katalin Horvath is his spouse. Both fled communist Hungary in the 1980s and, after some time in a refugee camp in Austria, immigrated to the United States as refugees. They came to Canada in 2001 and Mr. Horvath worked on projects for an established property development company before starting his own renovation and construction business. He has operated under various names, including M&J Renovations and Vantone Construction Ltd. (not to be confused with Vantone Developments).

[28] Mr. Horvath met Mr. Guo in 2013 when the Horvaths moved into a rental property in Pitt Meadows that Mr. Guo was managing. The Pitt Meadows property is a 33-acre farm owned by Mr. Guo’s friend, Michael Gao, through Mr. Gao’s company Sinominco Investments Ltd (“Sinominco”). Mr. Guo was a director of

Sinominco at one point but never a shareholder. Mr. Gao is based in China and Mr. Guo would often attend to Mr. Gao's affairs for him in Canada, including arranging the rental of the Pitt Meadows property to the Horvaths.

[29] In 2015 Mr. Gao hired Mr. Horvath to build a house and a mushroom processing facility on the Pitt Meadows property. Mr. Guo was managing that project on Mr. Gao's behalf. Mr. Horvath was working on that project in the spring of 2016 when he came to Mr. Guo with the investment proposal for the Prince George and Sumas Mountain Properties.

4. The Defendant Yunal Nath and Developro Construction Ltd.

[30] The defendant Yunal Nath was also a contractor. He is the owner of the defendant Developro Construction Ltd. ("Developro") which was involved in the sale of the Prince George Property to the plaintiffs and a recipient of a substantial amount of the plaintiffs' appropriated Project Development Funds. Developro was incorporated on March 29, 2016 shortly before the events giving rise to this claim.

[31] Despite his involvement in these events, Mr. Nath took no part in the trial. In affidavits filed by the plaintiffs, Mr. Nath and his caregiver confirm that Mr. Nath was aware of the trial and the dates on which it commenced but he chose not to participate. The affidavits explain that Mr. Nath had a stroke some years ago and he has no money and no ability to participate in the trial. I was satisfied that Mr. Nath had been served with the Notice of Trial, was aware that the trial was proceeding, and elected not to participate. The trial therefore proceeded in his absence.

5. The Defendant Zsolt Horvath

[32] The defendant Zsolt Horvath (pronounced "Zsolti") is Mr. and Ms. Horvath's son. He was employed by Vantone Developments between June and December 2016 to do administrative tasks and run errands for Mr. Nath and Mr. Horvath. One of his tasks was to communicate with Ms. Tian about Project Development Fund payments and collect cheques from her when they were due. The plaintiffs allege

that Zsolt Horvath improperly received some of the funds they paid for the Prince George and Sumas Mountain Properties.

[33] I will refer to Zsolt Horvath by his first name to distinguish him from Jozsef Horvath and I intend no disrespect in doing so.

III. Credibility and Reliability

[34] Much in this case turns on the credibility of the witnesses.

[35] There are significant problems with the credibility and reliability of both Mr. Guo's and Mr. Horvath's evidence, which frequently and materially conflicted with evidence they gave on examination for discovery. Both were impeached countless times during the trial. Mr. Guo often strained to explain inconsistencies between his trial and discovery evidence but these efforts were unconvincing and only further undermined his credibility.

[36] Mr. Horvath's evidence at trial was frequently contradicted by his discovery evidence but, unlike Mr. Guo, he usually admitted the contradiction and confirmed his discovery evidence without trying to explain or rationalize it. His evidence given under cross-examination by Mr. Guo was not reliable because, while Mr. Guo and Mr. Horvath are adverse in interest as it relates to the third-party claims, their interests align in refuting the plaintiffs' claims, and much of Mr. Guo's cross-examination of Mr. Horvath was friendly. This is illustrated by the fact that Mr. Horvath acknowledged that he discussed his evidence with Mr. Guo before the cross-examination began.

[37] While much of Mr. Guo and Mr. Horvath's evidence was patently unreliable, the plaintiffs' evidence was not without problems. Mr. Wang had memory lapses for details of events and his testimony on some matters was clearly contradicted by more reliable evidence, particularly that of Dennis Voss, the on-site project manager whose evidence I found to be credible. Some of these memory lapses were innocuous, such as Mr. Wang contemplating building a house for himself on the Prince George Property. However, Mr. Wang's inability to recall certain matters and

his emphatic denial of some points that were clearly made out on other more reliable evidence leads me to question how he was able to have a very precise memory events when it helped the plaintiffs' case but a less reliable memory for matters that go against it.

[38] Much of Mr. Wang's evidence focused on assigning blame to Mr. Guo. In cross-examination this frequently took the form of highly repetitious statements that had the ring of a script. As will be seen, there is much for which Mr. Guo should legitimately be blamed, but Mr. Wang's determination to lay every problem at Mr. Guo's feet caused him to contradict even his own evidence on occasion. For example, while under cross-examination by Mr. Guo, Mr. Wang was emphatic that a project development meeting held June 2016 had two purposes: to discuss the project development budget and to discuss marketing of the properties after the development. He repeated these two purposes several times during the cross-examination by Mr. Guo. However, when Mr. Horvath was cross-examining Mr. Wang about the meeting, Mr. Wang claimed he not remember what the meeting was for.

[39] Mr. Wang also distanced himself from his own involvement in the project when he perceived it to be in his interest to do so. For example, Messrs. Wang, Guo, Horvath, and Nath chartered a plane on May 15, 2016 to fly to Prince George to view the Prince George Property before the plaintiffs bought it. This was done at Mr. Wang's suggestion and he paid for the flight. The group then took a taxi to the property from the Prince George Airport but Mr. Wang testified he does not recall if he even got out of the cab to look at the property. It is not credible that Mr. Wang would go to the trouble and expense of flying all the way to Prince George on a chartered flight that he paid for with the specific intent to see the investment property and not even get out of the taxi to look at it when he got there.

[40] Mr. Wang also denied looking at other investment opportunities in Prince George and going to Prince George City Hall to make inquires about land development in the area. Mr. Voss gave detailed evidence about this visit and

Mr. Wang's involvement in it. I accept Mr. Voss' evidence on the point and find Mr. Wang's adamant denials of this to be an effort to avoid any appearance of his own interest in investing in the Prince George area.

[41] I also find the plaintiffs' evidence about the involvement of their son Haitao Wang in the project significantly undermines their credibility as well as Haitao's. (I will refer to Haitao Wang by his first name to distinguish him from Weihe Wang and I intend no disrespect in doing so.) Mr. Guo maintained that Haitao replaced him as project manager in June 2016. As I discuss below, I do accept this but I do find that Haitao was to be involved in at least the marketing of the developed properties. Mr. Wang, Ms. Tian's, and Haitao's firm denials of this fact undermines their credibility.

[42] A clear illustration of this is when Haitao visited the Prince George Property in October 2016 with his friend Mr. Cui, who is a realtor, and another realtor known to Mr. Cui. Haitao testified that Mr. Cui went on the trip as a translator and it was a mere coincidence that he was also a realtor. He claimed he was unaware the other person was a realtor and said he was just a friend that Mr. Cui wanted to bring along for the trip. It is not credible that the plaintiffs would incur the cost of flying an unknown person to Prince George simply because a friend of Haitao's wanted this person to come along. I find that Mr. Cui and his colleague accompanied Haitao on this trip <u>because</u> they were realtors. Thus, the plaintiffs' denials that Haitao would have anything to do with even the marketing component of the project undermines their credibility generally.

[43] In summary, the evidence of Mr. Horvath and Mr. Guo is largely unreliable given the many conflicts with their discovery evidence. However, I am not able to simply prefer the evidence of the plaintiffs where it conflicts with Mr. Horvath or Mr. Guo's evidence because the plaintiffs' evidence was not wholly credible or reliable either. I found Mr. Voss to be a credible witness in part because he has no personal interest in the outcome of the case and it was clear that he was not attempting to favour any party in his testimony. His evidence is important because

he was on site at the Prince George Property every day during the development. His evidence provides a good backdrop against which the veracity of other evidence can be measured. For largely the same reason, I found the evidence of Brendon Masson, an engineer with McElhaney, to be credible and reliable.

[44] Thus, in making findings of fact, I view much of the non-expert evidence of the main participants with varying degrees of caution or skepticism. I exclude from this the evidence of Mr. Voss and Mr. Masson, both of whom I found to be credible. I will apply the principles discussed in cases like *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, *Gichuru. v. Smith*, 2013 BCSC 895 at para. 130, and *Deplanche v. Leggat Pontiac Buick Cadillac Ltd.*, 2008 CarswellOnt 2107, at paras. 46-47, 2008 CanLII 15897 (ONSC) in making my findings of fact.

IV. Facts

1. The Properties

[45] The Prince George Property is within the Fraser-Fort George Regional District. It is located at the south end of Sylvia Road in the unincorporated community of West Beaverley which is a rural area about 20 km southwest of downtown Prince George. It is 143-acre property that, prior to the events of this case, was densely treed. It was aptly described by land appraiser, Dennis Parkhill, as follows:

> The subject property is comprised of hilly, undulating topography with an elevation variance of 30 metres or 100 feet from north east to south west. Site conditions include low marshy areas, a wetland along the central west boundary and a seasonal stream within the south easterly quadrant. The clay soil conditions are prevalent throughout the neighbourhood.

[46] The Sumas Mountain Property is an uncleared 153-acre parcel at the top of Sumas Mountain in Abbotsford. It has no road access but could be accessed by extending Taggart Road to the property if permits were granted. A variance to the zoning bylaw and Official Community Plan would be needed to develop the property into a significant residential subdivision.

2. The Investment Proposal

(a) How the Proposal Arose

[47] Mr. Wang testified that Mr. Guo first contacted him about the opportunity to invest in the properties in a phone call on May 14, 2016. Mr. Guo claims it was Mr. Wang who first approached him seeking help to find real estate in British Columbia to invest in. Mr. Guo says he then made inquiries with Mr. Horvath which led to the identification of the two properties.

[48] Mr. Guo's evidence on this point is inconsistent with his discovery evidence where he said Mr. Horvath came to him with the opportunity. He did not qualify this on discovery with evidence that Mr. Wang came to him first with an inquiry about looking for investment properties. In fact, Mr. Guo testified on discovery that it was Mr. Horvath who was looking for an investor for the property and Mr. Guo became involved to help him find one. I find that it was Mr. Guo who first approached Mr. Wang about the opportunity.

[49] Sometime in late April or early May 2016, Messrs. Horvath, Nath and Guo met in Langley to discuss how they would manage the development of the properties and the possibility of having Mr. Wang invest. They agreed amongst themselves that if Mr. Wang invested, Mr. Guo would be the overall manager of the project and Mr. Horvath and Mr. Nath would do the development work. Mr. Guo denies this meeting but I find Mr. Horvath's evidence that it took place is more reliable.

(b) Mr. Guo's Alleged Representations

[50] On May 14, 2016, Mr. Guo called Mr. Wang who was visiting Vancouver. He said he had good news to share and proposed that they meet shortly at the Grand Villa Casino in Burnaby which Mr. Wang frequents when he is in Vancouver.

[51] Mr. Wang testified that during this brief meeting, Mr. Guo told him about the properties and that he had formed a team that was working on their development. He said the team had been following these properties for some five years and things had come to a point where the government would allow the land to be subdivided

and developed for housing projects. Thus, the investment opportunity had ripened. As I discuss in a moment, I am not persuaded Mr. Guo presented the opportunity in these precise terms.

[52] Mr. Guo told Mr. Wang they would be able to subdivide the Prince George property into one-acre lots and could build some 150 houses on that property. He said the Sumas Mountain Property could also be subdivided into one-acre lots or potentially half-acre lots with the possibility of building up to 300 houses. The purchase price was said to be $1.5 million for the Prince George Property and $3.25 million for the Sumas Mountain Property. Mr. Wang said Mr. Guo represented this as a great opportunity in which they could earn at least $50 million in profit or much more. He said Mr. Guo also told him that he could buy both pieces of land for under $5 million but he needed to act quickly because others would take up the opportunity if Mr. Wang did not.

[53] Mr. Wang said Mr. Guo described the management team as including Mr. Horvath and Mr. Nath. He said Mr. Horvath had “a few decades of experience” and is very capable of managing a building construction project. He said Mr. Nath had a family connection in government who could help facilitate the rezoning and subdivision approvals needed to develop the properties. Mr. Guo explained that if Mr. Wang provided the capital, Mr. Horvath and Mr. Nath would do the development and permitting work and Mr. Guo would supervise the project management.

[54] Mr. Wang testified that the opportunity as presented was that Mr. Guo, Mr. Horvath, and Mr. Nath would share 15% of the net profits of the development (5% each) for managing and doing the development. He said that Mr. Guo also offered to guarantee Mr. Wang’s investment so that if he put up the money, Mr. Guo would mortgage his own family’s property to guarantee the investment, providing a “100% guarantee” that Mr. Wang would not lose money. For this, Mr. Guo was to receive an additional 10% of the profits on top of the 5%.

[55] Mr. Guo denies making many of these representations. He says he simply advised Mr. Wang of the opportunity and introduced him to Mr. Horvath and

Mr. Nath the following day when they went to see the properties. He claimed his role was simply to translate for Mr. Wang who could not speak English, although he acknowledges that, at that stage, he was to become the overall project manager if Mr. Wang invested.

[56] I am not persuaded that Mr. Guo made all these representations. Mr. Wang's evidence of the representations was uncharacteristically precise and it is difficult to reconcile this precision with his inability to remember other details. Further, Haitao testified that Mr. Guo restated the very same representations to him when Mr. Guo came to visit the family at their house but neither Mr. Wang nor Ms. Tian testified about Mr. Guo visiting their house in 2016. The alignment between Mr. Wang's uncharacteristically detailed recollection of the alleged representations and Haitao's restatement of those very same representations appears to be the product of family discussions about the events rather than an accurate recounting of the precise representations.

[57] Nevertheless, Mr. Guo made at least some of the representations and, in fact, he admitted to doing so in his evidence at trial and on discovery. He confirmed in cross-examination that he advised Mr. Wang on May 14, 2016 that he had found two real estate opportunities which had the potential to be very profitable and that if Mr. Wang agreed to participate in their developments, he could earn significant profits. Mr. Guo also relayed to Mr. Wang that the Prince George opportunity was to develop the property into one-acre lots, that these lots could be sold for $800,000 fully developed, and after development expenses Mr. Wang could earn a profit in excess of $50 million. For these latter three statements, Mr. Guo said he was simply relaying what Mr. Nath and Mr. Horvath had said. He also relayed, through translation, that the Sumas Mountain Property could be subdivided into half-acre lots so that 300 houses could be built on it. He said in his evidence at trial that his statements about subdivision potential were qualified by the need for government approvals and that Mr. Wang understood this.

[58] I accept that Mr. Guo spoke in positive terms about the opportunity to Mr. Wang given that Mr. Guo's admission that his task was to find an investor and Mr. Guo himself stood to make a profit if the development was successful. I also find that Mr. Guo explained the opportunity as being that Messrs. Nath and Horvath would develop the property under Mr. Guo's management. Thus, Mr. Wang reasonably understood the circumstances as being that Mr. Guo had formed this project management team to develop the properties. I accept that Mr. Guo did not represent any certainty that the properties could be subdivided as suggested. Indeed, it was represented that one reason for Mr. Nath's involvement was to take advantage of his family connection to help achieve necessary government approvals for such subdivisions. This implies that the subdivision approvals were not a certainty. However, as I will discuss later in these reasons, I am satisfied that it was misrepresented to Mr. Wang that there were favourable circumstances to achieve these subdivisions when in fact there was no basis for that representation.

[59] I am not persuaded that Mr. Guo represented that he had been following the properties for several years and that the opportunity to invest was now ripe, but I find it likely that he relayed or suggested to Mr. Wang that Mr. Horvath or Mr. Nath had been following the properties for some time. Overall, I accept that Mr. Guo represented the opportunity to Mr. Wang as a good one. I also find that Mr. Nath and Mr. Horvath made that same representation to Mr. Guo and did so with the expectation that he would relay it to Mr. Wang in an effort to persuade Mr. Wang to invest.

(c) The Alleged Dim Sum Meeting and Viewing the Properties

[60] The following day, May 15, 2016, Mr. Guo took Mr. Wang to see the properties and some other potential investment properties. According to Mr. Wang and Ms. Tian, they met with Mr. Guo and Ms. Xie for a dim sum breakfast at a restaurant in the Grand Villa Casino in Burnaby where they discussed the opportunity. Mr. Guo denies this breakfast meeting and says Ms. Tian dropped Mr. Wang off in the casino parking lot where he got into Mr. Guo's car so they could drive to the Fraser Valley to see properties. Mr. Wang and Ms. Tian testified that

Ms. Xie offered her own personal guarantee to them during this breakfast meeting and therein lies the importance of whether or not the dim sum meeting took place.

[61] Ms. Tian testified that the four met for dim sum at 9:00 a.m. However, when Mr. Guo suggested to her in cross-examination that the restaurant does not open until 9:30 a.m., she said they went to the casino before the restaurant opened so Mr. Wang could play the slot machines. She could not recall how long the dim sum meeting lasted. When Mr. Guo suggested to Ms. Tian that she dropped Mr. Wang off in the casino parking lot at 8:00 a.m. she said she could not recall, but reiterated that Mr. Wang went early to play the slot machines before they had dim sum.

[62] Mr. Wang testified that he and Ms. Tian arrived at the casino between 8:30 a.m. and 9:00 a.m. He initially suggested the restaurant opened at 9:00 a.m. but then said it might have been 10:00 a.m. but he could not remember specifically. He said they discussed the investment opportunity while standing outside the entrance to the restaurant waiting for it to open and then again while having dim sum in the restaurant. He did not say he played the slot machines before breakfast. He said that during those discussions, Mr. Guo repeated what he had said about the investment opportunity the day before. He said Mr. Guo and Ms. Xie were trying to convince Mr. Wang and Ms. Tian that they should make the investment because it was a good opportunity they should not miss. He said both Mr. Guo and Ms. Xie promised to guarantee the investment. He could not recall what time they finished dim sum but suggested it was “probably after 10:30, before 11:00”. Then he and Mr. Guo went off to meet Mr. Horvath and Mr. Nath and view the properties.

[63] Mr. Guo said he picked Mr. Wang up in the casino parking lot at around 8:00 a.m. when Ms. Tian dropped him off. He says they did not have dim sum at the casino. Rather, he said the two of them drove straight to the Pitt Meadows farm where they met Mr. Horvath and viewed the work he was doing on the two buildings there. Around 8:30 a.m. the three of them drove to Harrison Hot Springs, arriving there around 9:30 a.m., to view a potential investment in a lakeside resort and casino project. Mr. Wang was not interested in that project because it was too big.

They then drove through Chilliwack to see some housing developments and then to Abbotsford where they had lunch. Mr. Guo and Mr. Horvath testified they looked at the Sumas Mountain Property before lunch but Mr. Wang denies that. That afternoon, they took a charter flight to Prince George to view the Prince George Property.

[64] I am not persuaded that there was a breakfast meeting on May 15, 2016. Mr. Wang and Ms. Tian gave inconsistent evidence on this point as it relates to when the restaurant opened and what they were doing before it opened. Further, Messrs. Wang, Guo, and Horvath had a full day of viewing properties and I find it improbable that there was time for a dim sum breakfast that lasted until close to 11:00 before they ventured out to Pitt Meadows.

[65] As I will discuss in more detail later in these reasons, I am also not persuaded that Ms. Xie offered to personally guarantee Ms. Tian and Mr. Wang's investment on May 15, 2016. I say this in part because I am not persuaded that the dim sum meeting occurred and also because Ms. Xie was not challenged in cross-examination about her denial of giving the guarantee. Principally, however, I base this on the fact that, unlike Mr. Guo, Ms. Xie never gave a personal guarantee in writing. I find that if Mr. Wang and Ms. Tian had relied on a personal guarantee from Ms. Xie, they would have asked that she give that guarantee in writing as Mr. Guo did.

(d) Flight to Prince George

[66] Mr. Nath joined Messrs. Wang, Guo, and Horvath while they were having lunch in Abbotsford and the four of them discussed the investment opportunity. Mr. Wang was anxious to see the Prince George property and, not wanting to wait until the following day for a commercial flight, he said he wished to charter a plane to see it that afternoon. I do not accept his evidence that Mr. Guo represented to him that the urgency to secure the investment opportunity indicated a need to see the Prince George Property that very day.

[67] Mr. Nath arranged the charter flight from the Abbotsford Airport and, around 3:00 in the afternoon, the four of them took-off from Abbotsford to Prince George. Mr. Wang paid for the charter.

[68] The flight to Prince George was approximately one hour and they took a cab from the airport to the Prince George Property which was around a 30-minute drive. As the property was covered with trees, there was little ability to access it so after viewing it from the perimeter for 15 or 20 minutes the group returned to the airport and flew back to Abbotsford. After seeing the property, Mr. Wang told Mr. Guo that he was quite interested in buying it.

[69] The following day, May 16, 2016, Messrs. Wang, Guo, Horvath and Nath went to see the Sumas Mountain Property. They also viewed an active residential development on Sumas Mountain, apparently to get a sense of what might be possible for the Sumas Mountain Property.

(e) The May 16, 2016 Dinner

[70] That night, Mr. Wang and Ms. Tian hosted Messrs. Guo, Horvath, and Nath for dinner at the casino restaurant. Ms. Tian and Mr. Wang testified that Ms. Xie was also there but Mr. Guo and Ms. Xie deny this. The only significance of Ms. Xie's potential attendance relates to the plaintiff's assertion of her guarantee. They testified Mr. Guo and Ms. Xie again committed over dinner to personally guarantee the investment but, since I have found that Ms. Xie did not give a guarantee and the plaintiffs did not rely on a guarantee from her when deciding to invest, nothing ultimately turns on whether Ms. Xie attended the dinner.

[71] Over the course of the dinner, if not before, Mr. Wang and Ms. Tian decided they would buy the properties and invest in the development. The parties toasted the investment and their new business relationship.

[72] While there is considerable disagreement about many of the details up to this point, I find that by the time the dinner had concluded, the parties had discussed a proposal whereby Mr. Wang and Ms. Tian would purchase the Prince George

Property for $1.5 million and the Sumas Mountain Property for $3.25 million. They would also put up the capital for the development costs for both properties. Mr. Horvath and Mr. Nath would be responsible for developing the two properties while Mr. Guo would be the overall manager with ultimate decision-making authority. I also find that Mr. Guo had offered to guarantee Mr. Wang and Ms. Tian's investment in the development but I am not persuaded that Ms. Xie offered a separate guarantee of her own.

[73] While the parties had not made a binding agreement by the evening of May 16, 2006, these were the general terms they had discussed and that formed the basis for Mr. Wang and Mr. Tian's decision to buy the properties and develop them in partnership with Messrs. Guo, Horvath, and Nath. It was the arrangement they toasted that night. In the days that followed, these terms were reduced to written agreements signed by all parties.

3. Undisclosed Interests in the Properties

[74] Unbeknownst to the plaintiffs, in the weeks leading up to the May 16, 2016 dinner, Mr. Horvath and Mr. Nath secured for themselves the right to buy the Prince George and Sumas Mountain Properties for substantially less than the purchase price given to Mr. Wang and Mr. Tian. Thus, by May 16, 2016 when the parties toasted their new investment relationship, Mr. Horvath and Mr. Nath stood to share (and soon after did share) a secret profit of $1,450,000 by flipping two properties to the plaintiffs.

(a) Undisclosed Interest in the Prince George Property

[75] On May 12, 2016, Mr. Nath and Mr. Horvath travelled to Prince George to see the Prince George Property. They met the owner and a real estate agent and were shown some preliminary development plans. Mr. Nath then decided he wanted to buy the property.

[76] On May 16, 2016 – the same day as the dinner – Mr. Nath, through his company Developro Construction Ltd., entered into a contract of purchase and sale

to buy the Prince George Property from John and Annette Greentree for $550,000. That sale was set to complete on May 26, 2016.

[77] An appraisal of the Prince George Property done by Dennis Parkhill of Kent MacPherson assesses its market value as of May 16, 2016 at $375,000. This appraisal, and in fact all four appraisals that were put in evidence, were tendered by the plaintiffs without objection or cross-examination by any defendant.

[78] On May 18, 2016, Developro assigned its rights to purchase the Prince George Property to 1076121 B.C. Ltd. (“121 Ltd”) which was a recently-incorporated shell company, then wholly owned by Mr. Nath. This company would later be sold to Weihe as part of the property flip.

(b) Undisclosed Interest in the Sumas Mountain Property

[79] On May 4, 2016, a man named Troy Theodore entered into a contract of purchase and sale to buy the Sumas Mountain Property from 638070 Alberta Ltd. for $2,650,000. That contract was subject to financing (to be secured by June 4, 2016) and the completion of a feasibility study (by June 19, 2016) for the property’s development. The completion date for the sale was June 29, 2016. The evidence discloses nothing further about Mr. Theodore.

[80] On May 10, 2016, Mr. Horvath, through a newly-incorporated holding company, 1075191 B.C. Ltd. (“191 Ltd.”), took an assignment of Mr. Theodore’s rights under the contact of purchase and sale. The assignment document states that the assignment fee is $3.15 million but Mr. Horvath agreed in his evidence that he was only required to pay $2.65 million for the assignment – the same price for which Mr. Theodore had agreed to buy the property from the Alberta company. No one explained why the assignment fee of $3.15 million was stated in the assignment document but I infer this was done in case Mr. Horvath had to disclose the assignment to the plaintiffs, who had agreed to buy the property for that price. This would help conceal the fact that Mr. Horvath and Mr. Nath would be earning a $450,000 profit by flipping the assignment to the plaintiffs.

[81] An appraisal of the Sumas Mountain Property done by Jason Upton of EDIS Appraisals Ltd. assesses its market value as of June 29, 2016 at $2.69 million.

[82] On June 3, 2016, Mr. Theodore waived the financing condition precedent in his agreement with the Alberta company and on June 17, 2016, he waived the feasibility study condition precedent. The latter waiver states expressly that there was “now a firm and binding Contract” between Mr. Theodore and the Alberta numbered company. By then, the contract had been assigned to 191 Ltd. which had been transferred to Weihe under agreements I will discuss in a moment.

[83] Mr. Horvath admitted that he did not disclose the subject clauses in the original contract of purchase and sale to the plaintiffs because he wanted the sale to go ahead so he could earn his undisclosed profit. He agreed in cross-examination that it would have been a good idea for the plaintiffs to obtain a feasibility study for developing the Sumas Mountain Property before the condition precedent was waived.

4. First Meeting at Equip Law – May 18, 2016

[84] On May 18, 2016, two days after the May 16, 2016 dinner, Ms. Tian, Mr. Wang, Mr. Guo, Mr. Horvath, and Mr. Nath met at Equip Law in Abbotsford to execute documents for Weihe’s purchase of the two properties.

[85] Prior to that meeting, Mr. Guo told Mr. Wang and Ms. Tian that Aaron Salter of Equip Law would prepare all the legal documents to transfer the properties to Weihe. He also told them that they would need to pay approximately $4.8 million to Mr. Salter in trust and this money would be used to buy the properties, although not all of this was required for the May 18 meeting.

(a) May 18, 2016 Payments

[86] The day before the meeting, Mr. Guo told Ms. Tian and Mr. Wang that they would need to bring four bank drafts to Equip Law the following day. He gave Ms. Tian the names of the payees and the amounts required for each bank draft. Mr. Guo says he was simply relaying to Ms. Tian what Mr. Nath had told him was

needed. I accept that is what happened but this does not detract from Ms. Tian's reliance on Mr. Guo to advise her what was needed to conclude the agreements.

[87] For the Prince George Property, Mr. Guo told Ms. Tian she needed the following bank drafts:

a) One for $50,000 made payable to Developro Construction Ltd. for a "down payment"; and

b) One for $1,483,000 made payable to Equip Law in trust for the balance of the purchase price, $28,000 for property transfer tax, and $5,000 for some "potential small fees" but this would be refunded if there were no other fees.

[88] Mr. Guo told Mr. Wang and Ms. Tian that the $50,000 cheque for Developro was to reimburse Mr. Horvath and Mr. Nath for a deposit they had already put down on the Prince George Property. In fact, Mr. Nath's contract with the Greentrees only called for a $3,000 deposit that was due on May 19, 2016. There is no provision in that agreement for any payment of $50,000 and nothing about payment of the full purchase price before the May 26, 2016 completion date. I am satisfied that Mr. Guo was unaware of this when he relayed to Ms. Tian what payments were needed for the May 18, 2016 meeting at Equip Law.

[89] Ms. Tian knew nothing about Developro when she arranged for the bank draft although she must have inferred that it had some connection to Mr. Nath and Mr. Horvath because Mr. Guo told her the $50,000 payment was to reimburse them.

[90] For the Sumas Mountain Property, Mr. Guo told Ms. Tian she would need the following bank drafts:

a) One for $100,000 made payable to Develpro for a "down payment". Again, Mr. Guo told Mr. Wang and Ms. Tian that this payment was to reimburse Mr. Horvath and Mr. Nath for a deposit they had already paid to secure the Sumas Mountain Property; and

b) One for $500,000 made payable to Equip Law in trust.

[91] This payment represented only a partial payment towards the $3,150,000 purchase price. There is no explanation for why the plaintiffs were called upon to pay $600,000 towards the Sumas Mountain Property on May 18, 2016. The completion date under the assigned contract between Mr. Theodore and the Alberta company was not until June 29, 2016 and the most that had to be paid before that date was a $100,000 deposit, $20,000 of which was due upon acceptance and the remaining $80,000 upon the waiving of subjects which had a deadline of June 19, 2016. The assignment agreement between 191 Ltd (then controlled by Mr. Horvath) and Mr. Theodore refers to this deposit of $100,000 but does not state when 191 Ltd was required to pay that to Mr. Theodore. Regardless, none of this explains the $500,000 payment that Mr. Nath and Mr. Horvath apparently required for May 18, 2016 and no one seems to have questioned this.

(b) Explanation and Signing of the Documents

[92] The meeting itself was attended by Mr. Guo, Ms. Tian, Mr. Wang, Mr. Horvath, Mr. Nath, and Mr. Salter. Mr. Salter testified that when he learned at the meeting that Mr. Wang and Ms. Tian were attending without a lawyer, he recommended that they retain their own lawyer. That evidence was not challenged in cross-examination and I accept it. Mr. Guo testified that Mr. Salter told Mr. Wang and Ms. Tian when he greeted them that he was not their lawyer and he would not represent them. He testified that Ms. Tian said she understood this.

[93] Mr. Wang and Ms. Tian both testified that they understood Mr. Salter was the lawyer for the project and was representing them. Mr. Wang testified that he had suggested to Mr. Guo that they should get a lawyer who speaks Mandarin but Mr. Guo insisted that Mr. Salter was good and highly reputed lawyer with a large firm and it would be best to have him do the legal work on the transaction. Mr. Guo denies saying this.

[94] I find that Ms. Tian’s English, though limited, was sufficient to understand Mr. Salter’s recommendation that she and Mr. Wang speak to their own lawyer. I

base this on Mr. Voss' evidence that he found Ms. Tian was capable of carrying on a basic conversation with him in English. Mr. Salter also recalls that Ms. Tian spoke some English but he could not recall what she said.

[95] That said, I accept that Ms. Tian and Mr. Wang were unsure of who Mr. Salter acted for and what his role was in the transaction, other than preparing the documents. Mr. Guo contributed to his lack of clarity by advising Ms. Tian and Mr. Wang that Mr. Salter would prepare all the legal documents for the transfer of the properties. In fact, he told Mr. Wang that Mr. Salter was the lawyer who was going to handle the conveyance and the development projects. He did not suggest to Ms. Tian and Mr. Wang that they hire their own lawyer in advance of the May 18, 2016 meeting. I find that the plaintiffs likely believed that Mr. Salter was retained to prepare the documents for the conveyance and that they did not know he was representing Mr. Nath and Mr. Horvath. However, I also find they knew he was not specifically representing them or Weihe and they understood Mr. Salter's caution that they should retain their own lawyer but they chose not to.

[96] Mr. Salter had prepared a number of documents for the meeting to effect Weihe's purchase of the two properties. They were in English with no Chinese translation. Mr. Salter testified that he read through at least one of the documents paragraph-by-paragraph while Mr. Guo verbally translated it for Ms. Tian and Mr. Wang. He said they did not go through the same detail on all the documents because some were very similar to others.

[97] Mr. Guo did not explain the documents to Ms. Tian and Mr. Wang word for word. Rather, he translated what he considered to be the "core part[s]" or "key business terms" of the agreements such as the price and the property descriptions. Ms. Tian and Mr. Wang testified that Mr. Guo told them the documents were "standard legal documents" and he pointed them to the figures in the documents including the purchase price and the total price and assured her that she could sign them. I accept their evidence on this point.

[98] At trial, Mr. Guo downplayed his role in all the events surrounding the review and execution of the purchase documents and the payment of the purchase price through Mr. Salter's trust account. He maintained he was just translating or relaying in Mandarin what Mr. Nath had told him to communicate. I do not accept Mr. Guo's explanation. He knew that Ms. Tian and Mr. Wang trusted him completely and were relying on what he told them about the transaction. Mr. Guo wanted the deal to go through because he stood to earn what he believed would be a substantial profit from the plaintiffs' investment. I accept Ms. Tian's evidence that Mr. Guo told her and Mr. Wang at the meeting that these were standard legal documents.

[99] Mr. Guo maintains that no one – including him – pressured Ms. Tian and Mr. Wang to sign the documents on May 18, 2016. He says they could have taken them away to give them more consideration. Mr. Wang did not deny this when Mr. Guo put it to him in cross-examination. He repeatedly avoided answering Mr. Guo's question on this point and restated his evidence that Mr. Guo assured them they were standard legal documents that he should sign. I find that Mr. Wang and Ms. Tian were not pressured by Mr. Guo to sign the documents at the first Equip Law meeting but that they took comfort in Mr. Guo's assurance that they were standard legal documents.

[100] I do not propose to review the documents in detail. Briefly, for each property there is a "Transfer Agreement" and a "Share Purchase Agreement". The Transfer agreements provide for the transfer of the beneficial interest in each of the properties to Weihe from companies controlled by Mr. Horvath and Mr. Nath. The Share Purchase Agreements provide for the transfer of shares in the two numbered holding companies that were to acquire the properties.

(c) Ms. Tian's and Mr. Wang's Understanding of the Transaction

[101] I accept Ms. Tian and Mr. Wang's evidence that they did not understand the intricacies of these legal documents. I find they understood from the discussion at the first Equip Law meeting that they were buying the properties through the use of numbered companies but they did not understand why numbered companies were

being used. In this respect, they relied on the advice relayed by or through Mr. Guo that numbered companies are often used in commercial real estate transactions in British Columbia. They were never told that one reason for using numbered companies was to facilitate the flip of the properties without disclosing the original contracts of purchase and sale or the assignments.

[102] Ms. Tian and Mr. Wang were not aware that Mr. Nath and Mr. Horvath had acquired any rights or interest in the properties. They thought they were buying the properties from a third party. To the extent they understood Mr. Nath and Mr. Horvath were involved in the transactions, either directly or through their companies, I find Ms. Tian and Mr. Wang believed this was related to Mr. Nath and Mr. Horvath having paid the deposit on the properties to secure Weihe's ability to buy them. At most, Ms. Tian and Mr. Wang believed that Weihe was reimbursing Mr. Nath and Mr. Horvath for those deposits. I find Mr. Nath and Mr. Horvath structured the transaction in a way that allowed them to conceal this fact from Ms. Tian and Mr. Wang.

[103] Mr. Guo learned at the May 18, 2016 meeting that Mr. Nath and Mr. Horvath, through the holding companies they controlled, had acquired the rights to buy the two properties and they effectively controlled them. This came about through his reviewing of the purchase documents in the course of his translation to the plaintiffs. Despite coming into this knowledge, Mr. Guo did not question the transaction or disclose Mr. Nath's and Mr. Horvath's interest to Ms. Tian and Mr. Wang. However, I accept that Mr. Guo did not know that Mr. Nath and Mr. Horvath were making a secret profit by flipping the properties. Rather, I accept Mr. Guo's evidence that he believed Mr. Nath and Mr. Horvath's involvement related to their efforts to secure the properties for Weihe to buy. I find this largely because Mr. Guo received no benefit from the property flips. If he knew Mr. Nath and Mr. Horvath were making a profit from the flips, he likely would have inquired into this.

5. The Project Management Agreements – May 21-22, 2016

(a) The First Project Management Agreement

[104] On May 21, 2016, three days after signing the purchase and transfer agreements for the two properties, Ms. Tian, Mr. Wang, Mr. Guo, Mr. Horvath, and Mr. Nath met at the Burnaby casino to sign an agreement for the development of the properties. Mr. Guo drafted the agreement himself and prepared two copies of it: one in English and one in Chinese. The document is entitled “Agreement on Realty Development Cooperation”. I will refer to this as the “First Project Management Agreement”.

[105] The First Project Management Agreement identifies Weihe as “Party A” and Messrs. Nath, Horvath, and Guo as “Party B”. It purports to create a “cooperation partnership” for the development of the properties. The fact this was described as a “partnership” has significant legal consequences that I will discuss later.

[106] The agreement provides that Weihe will use the properties for “realty development purposes” and will provide the funding needed to support that development, budgeted at a total of $5 million.

[107] The agreement gives Messrs. Nath, Horvath, and Guo the “sole right” to plan and manage the development and the marketing and sales of the homes. It was agreed that they would appoint Vantone Developments as the project management company. Mr. Horvath agreed that his responsibilities under the First Project Management Agreement included planning the project and identifying how the properties could be developed in feasible and profitable manner. I find Mr. Nath had these same responsibilities.

[108] Vantone Developments was incorporated on May 30, 2016 for the purpose of receiving Project Development Funds from Weihe and developing the properties. Mr. Horvath and Mr. Nath were its only shareholders. Neither the plaintiffs nor Mr. Guo had any involvement with Vantone Developments.

[109] Clause 5 of the First Project Management Agreement appoints Mr. Guo as General Manager for the project with "ultimate right of decision-making" in respect of the fundamental aspects of the development:

> 5. Party A agrees to appoint Mr. Yingping Guo as the General Manager for the above mentioned projects. He has the ultimate right of decision making, preparation for development plan, preparation for budget, execution of the projects, and reporting to Party B regularly for the progresses of the development projects.
>
> [Emphasis added]

[110] I agree with the plaintiffs that this "right" of decision making also creates an obligation on the part of Mr. Guo to manage the project and oversee the plaintiffs' investment. Thus, while it was not expected that Mr. Guo would have the same hands-on responsibilities for the development expected of Mr. Nath and Mr. Horvath, he was the ultimate supervisor of the project with the responsibility to oversee what Mr. Nath and Mr. Horvath were doing, including how they spent the plaintiffs' Project Development Funds.

[111] The agreement provides that development of both properties was to be completed within 3.5 years after work commences. Messrs. Guo, Horvath, and Nath were obligated to prepare a budget for the plaintiffs' approval and a development plan for the two properties. After approval of the budget, the plaintiffs, through Weihe, were to cover all of the expenses incurred by Messrs. Nath, Horvath and Guo in developing the properties out of the budgeted amount.

[112] Finally, Messrs. Nath, Horvath, and Guo were to be compensated by Weihe paying them 15% of the total net income of the projects, with each receiving 5% as a "compensation dividend".

[113] At the May 21, 2016 meeting where the First Project Management Agreement was signed, Mr. Horvath told Ms. Tian and Mr. Wang that a minimum of four lots in the Prince George Property would be ready for a pre-sale marketing campaign by the end of 2016. Mr. Horvath agreed that neither Ms. Tian nor Mr. Wang made this request of them and neither was pushing at this meeting to have pre-sale lots ready

by then. Despite making this commitment, Mr. Horvath had not conducted any investigations to satisfy himself that this could be achieved and admitted the promise was “plucked out of thin air.”

(b) The Second Project Management Agreement

[114] The next day, May 22, 2016, Mr. Guo met with Ms. Tian and Mr. Wang to sign a second project management agreement also entitled “Agreement on Realty Development Cooperation” (the “Second Project Management Agreement”). Like the First Project Management Agreement, Mr. Guo drafted this second agreement himself in both English and Chinese. However, unlike the first agreement, Mr. Nath and Mr. Horvath were not parties to the second agreement and were not aware of it.

[115] The Second Project Management Agreement provides that Mr. Guo will receive a greater share of the net profits of the development if certain revenue targets are met. It also provides that Mr. Guo will personally guarantee Weihe’s losses if the projects fail by reason of Mr. Guo’s “misconducts”.

[116] The recital and clauses 1 through 3 of the Second Project Management Agreement are identical to the first agreement. Clause 4 establishes the indemnity given by Mr. Guo. It reads (as it appears):

> 4. Party B [Mr. Guo] is responsible for planning, design, monitoring, execution, marketing and sales, project management for the development, and has a high right of decision makings. At the mean time, Party B will take relevant risks. If the development projects fail and cause losses to Party A [Weihe] due to the reasons of Party B misconducts, Party B shall be fully responsible, compensate Party A for the losses, and guarantee it by using all assets of Party B.

[117] The Chinese version of the Second Project Management Agreement was independently translated for this litigation by a certified translator. That translation does not contain the qualification that the guarantee is contingent on Mr. Guo’s “misconducts” but simply states he will indemnify the plaintiffs for any losses that he causes to the development. The translation reads:

> 4. Party B is in charge of planning, designing, monitoring, implementing, marketing and managing the project development with high level of decision-

> making power. Meanwhile, Party B shall bear the corresponding risks. If, due to Party B, losses were caused to the development of the project and to Party A, Party B shall be fully responsible, compensate Party A for its loss, and pledge its entire assets.

[118] Clause 5 of the Second Project Management Agreement is substantially the same as clause 5 of the First Project Management Agreement except it describes Mr. Guo as having a "*high* right on decision making" rather than the "*ultimate* right of decision making". I find that nothing turns on the difference in wording but the language – be it "high right" or "ultimate right" – emphasizes that Mr. Guo, who drafted these agreements, assumed full and discretionary control over Weihe's interests in the project and particularly the Project Development Funds.

[119] Clause 6 creates the unique compensation scheme for Mr. Guo that is more generous to him than the First Project Management Agreement. It provides that if the projects earn a before-tax profit of $50 million or an after-tax profit of $30 million, Weihe will reward Mr. Guo with an additional 10% of the net income from the project on top of the 5% provided for him in the First Project Management Agreement.

[120] Mr. Guo claims that before signing the Second Project Management Agreement on May 22, 2016, he and Mr. Wang discussed Mr. Guo's right of decision making on the project. Mr. Guo said he sought Mr. Wang's assurances that he would be in control of the project investment funds. He says Mr. Wang insisted that if Mr. Guo was to have that authority he must personally guarantee Weihe's investment. Mr. Guo says this is how the guarantee first came up. He said:

> After we signed the first agreement, I talked to Mr. Wang about giving me authority and to make the ultimate decision – how to manage the funds and ultimate decision on the project. He told me if I wanted the authority to manage the funds and make ultimate decisions, "you need to give a personal assurance for that." That is when the second agreement came in.

[121] This was not put to Mr. Wang in cross-examination even though it contradicts his evidence that Mr. Guo offered a personal guarantee as early as May 14. I accept that Mr. Guo's guarantee was related to him having the "high" or "ultimate" right of decision-making and to his potentially increased remuneration under the second

agreement. However, I find that the plaintiffs and Mr. Guo had agreed in principle on these terms, including the indemnity, before the plaintiffs decided to invest.

[122] I find that the purpose of the Second Project Agreement was to confirm that Mr. Guo would receive a greater share of any profits and, in exchange, he agreed to guarantee the investment. Having a “high right” or “ultimate right” of decision making gave Mr. Guo discretionary control over the project to protect against his own risk arising from the personal guarantee. However, it also gave him a level of responsibility over the project management that would be commensurate with the reward he expected to receive at the end of the day. If the project generated a net profit of $30 million or more as the Second Project Management Agreement contemplated, Mr. Guo stood to receive at least $4,500,000 without investing a penny. Clearly, for this potential reward, it was expected that Mr. Guo would make a substantial contribution through his discretionary management and oversight of the project.

6. Second Meeting at Equip Law – May 26, 2016

[123] On May 26, 2016, Mr. Guo, Ms. Tian, and Mr. Wang attended again at Equip Law to sign more documents to complete the acquisition of 121 Ltd and the Prince George Property. This was also the day the sale of the Prince George Property from the Greentrees to Developro was set to complete.

[124] At the meeting, Ms. Tian signed a consent to act as director for 121 Ltd, a Transfer Agreement with Mr. Nath on behalf of Developro transferring the beneficial interest in the Prince George Property from Developro to Weihe, and a statement of adjustments for the Prince George Property. As with the documents signed on May 18, 2016, none of the documents signed on May 26 were translated to Chinese. Ms. Tian and Mr. Wang relied on Mr. Guo’s explanation of them and his assurances that they were standard legal documents effecting the purchase of the land through the numbered company.

[125] Also at this meeting, Mr. Salter, through Mr. Guo’s translation, explained how property is bought using the numbered companies. He and Mr. Guo drew a diagram

for Ms. Tian's benefit to understand a purported tax benefit of buying the land through a numbered company. I find that Ms. Tian and Mr. Wang clearly understood after this meeting that they were buying the properties through numbered companies that wholly owned the land. They also believed there was some kind of tax benefit to buying the land in this way. They still did not know of Mr. Nath and Mr. Horvath's interest in the properties or that they would be profiting from the sales.

7. Third Meeting at Equip Law – June 8, 2016

[126] A third meeting at Equip Law was scheduled for June 8, 2016 to complete the transfer documents for the Sumas Mountain Property. Before that meeting, Mr. Guo contacted Ms. Tian by WeChat and told her she would need a bank draft for $2,773,327.32 to complete the purchase. His message stated that he had been in contact with Mr. Salter who informed him of this.

[127] Ms. Tian obtained two bank drafts, one in the amount of $1,972,500 and the other in the amount of $800,000 both payable to Equip Law in trust. She also wrote a cheque during the meeting to Equip Law in the amount of $827.22. She gave these to Mr. Salter at the June 8 meeting.

[128] With these payments and the payments made on May 16, 2016, the plaintiffs paid a total of $3,223,327.32 for the Sumas Mountain Property. According to a statement of adjustments prepared by Equip Law, this breaks down to $3,150,000 for the Property, $72,500 in property transfer tax, $100 for the purchase price of the shares in 191 Ltd, and $727.32 for payment of Equip Law's account for work associated with changing the directors and registered and records office of the numbered company. I heard no evidence as to why the plaintiffs were asked to pay Equip Law's account for this item when Equip Law was acting for Mr. Nath and Mr. Horvath, but the plaintiffs have not claimed for this in their closing argument.

8. Project Management Meeting – June 2016

[129] In June 2016 a project management meeting was held at Vantone Development's office in Langley. There were two major items for discussion at this

meeting: one was to hear a presentation about marketing the properties once they were developed and the other was to approve the development budget for the Prince George project. It had been decided at some point prior to that meeting that the Prince George Property would be developed first.

(a) Meeting Attendees

[130] Mr. Wang, Ms. Tian, Mr. Guo, Mr. Nath, and Mr. Horvath attended this meeting. Zsolt Horvath was also present but he did not participate. Mr. Guo, Mr. Horvath, and Zsolt testified that Haitao Wang attended this meeting but Mr. Wang and Haitao deny this. Ms. Tian gave no evidence about this meeting but apparently she attended.

[131] I find that Haitao attended the meeting. He recalls attending a meeting at the Vantone Development office in Langley but he initially believed it was near the end of 2016. After further cross-examination he suggested it was in August or September 2016. Zsolt's evidence on this is the most reliable and I accept it. He has no stake in whether Haitao attended the meeting or not. He believed the meeting was in June 2016 but candidly offered that his recollection of the date was probably influenced by what he heard in the courtroom. Nevertheless, his description of the meeting accords with what would have been discussed at that early stage of the project and I am satisfied based on his evidence that Haitao attended. As I discuss below, I find Mr. Wang's recollection of the June 2016 meeting is unclear and his evidence that Haitao did not attend is unreliable.

(b) Budget and Project Development Cost Payments

[132] The main purpose of the meeting was to discuss a proposed budget for the project development and obtain Ms. Tian's and Mr. Wang's approval of that budget.

[133] Sometime prior to the meeting, Mr. Nath and Mr. Horvath had prepared a budget document that outlined the project development costs on a month-by-month basis through to the end of December 2016. The numbers in the budget were not based on any research or investigations to ascertain what the actual development

costs might be. At some point, Mr. Guo provided a written Chinese translation of the document for Ms. Tian. In fact, it may be that Mr. Guo prepared the original document himself with information from Mr. Nath and/or Mr. Horvath.

[134] The document is entitled “Budget for PG Development Project 2016”. It identifies tasks and permits that were needed to advance the project and identifies monthly amounts required for each task covering June through December with a total budget amount for each month for all tasks and an overall budget amount of $2,893,000. (This appears to be an error because the total of the stated monthly payments is $2,864,000.) The items included a site survey; civil engineering for hydro, cable, storm, and sewer; BC Hydro poles; natural gas; geotechnical work; water well testing; land clearing; road preparation; septic systems; management office/site manager; subdivision permit; highway use permit; and landfill permit.

[135] For some items, such as site survey, geotechnical work, and subdivision permit, the budgeted amounts ($100,000, $84,000, and $50,000 respectively) fell within a single month, implying those expenses were expected to be incurred in that month. From this it could reasonably be inferred that these tasks would be completed in that month or soon after. For other items, such as civil engineering, land clearing, and road preparation, there were monthly budgeted amounts through October or, for civil engineering, into November.

[136] The budget called for the following monthly payments, which total $2,864,000.

June	July	August	September	October	November	December
$455,000	$576,500	$556,500	$556,500	$506,500	$206,500	$6,500

[137] The budget was approved at the June meeting. Ms. Tian testified that, thereafter, Mr. Guo maintained she had to make the monthly budgeted payments to keep the project on track. Any delay in the payments could delay the project. I

accept Ms. Tian's evidence on this with the exception of the November and December payments which I will discuss in a moment.

[138] Ms. Tian on behalf of Weihe paid the full monthly budgeted amounts to Vantone Developments between June and December with the exception of the July payment which was paid at $1,500 less than the budgeted amount. Thus, Weihe paid a total of $2,862,500 to Vantone Developments in project development costs for the Prince George project. Zsolt, who was working for Vantone Developments, was often dispatched by Mr. Nath and Mr. Horvath to collect the payments from Ms. Tian.

[139] However, in November 2016, Mr. Guo recommended to Ms. Tian in a WeChat message that she hold off on making the November payment of $206,500. Ms. Tian acknowledged receiving this message before she made the November payment. Despite Mr. Guo's advice, she made the payment as well as the small December payment of $6,500. I will return to this when discussing Mr. Guo's liability for the misappropriated Project Development Funds.

[140] In addition to these amounts, Ms. Tian on behalf of Weihe also paid Vantone Developments a further $82,000 for a lidar survey that she was told was required for the subdivision of the Sumas Mountain Property. However, no survey has ever been produced and I find that no survey was ever done. The request for this payment came by email from Zsolt who testified he was directed by Mr. Nath to write it. He knows nothing about the survey or whether one was ever done. I accept his evidence on this point.

(c) The Marketing Presentation

[141] The second item covered at the June project management meeting was marketing of the properties. There is disagreement about who gave that presentation. Mr. Wang testified quite emphatically that Zsolt gave the presentation but Zsolt, Mr. Horvath, and Mr. Guo say it was Mr. Nath. The only significance of this disagreement relates to establishing the extent of Zsolt's involvement in the project and his possible knowledge (real or constructive) of the appropriation of Project Development Funds.

[142] I find that Mr. Nath made the marketing presentation, not Zsolt.

[143] It is evident that Mr. Wang was not paying close attention to the discussion and the presentation on marketing. His recollection that Zsolt gave the presentation is not reliable. Mr. Wang testified in cross-examination that "when marketing was being talked about, they were speaking English and I don't know anything about that business so I didn't say anything." He said he was not involved in the discussion about marketing: "You guys were all discussing that – blah blah – and I could not understand." Later, he said: "There was a slide or power point show and someone did the presentation. The rest I don't remember" [emphasis added].

[144] I found Zsolt to be a reliable and sincere witness whose evidence about his own limited involvement in the project was convincing and not undermined in cross-examination. He was hired by Vantone Developments to do some administrative work on the project management. Despite being given the title "Research and Planning", Zsolt's work rarely amounted to anything more than writing emails or letters as dictated to him by Mr. Nath or Mr. Horvath, collecting cheques from Ms. Tian for the development costs, and running errands for Mr. Nath or Mr. Horvath. The most substantive work he did was cold-calling some potential contractors and accompanying Mr. Nath to an initial meeting with the project engineers in Prince George, but this was essentially a note-taking role.

[145] Unlike many of the other defendant witnesses, Zsolt's testimony was not contradicted or impeached. He answered questions frankly and succinctly, explaining only when necessary. When his recollection was unclear or potentially influenced by what he had heard during the trial, he was careful to point that out. I find his evidence to be sincere and reliable.

[146] Zsolt said he was in the room during the June meeting because it was the only available workspace in the office. He sat at a corner of the boardroom table working on his laptop and did not pay close attention to the meeting. He testified that he knows nothing about marketing real estate and would be incapable of giving a presentation on that subject. I accept that evidence. It is considerably more reliable

than Mr. Wang's recollection on this point and I have no hesitation in concluding that Zsolt did not give the marketing presentation.

(d) Outcome of the June Meeting

[147] The plan that emerged from the June meeting was that the clearing and development of the Prince George Property would begin immediately with the objective of having at least some cleared and serviced lots available for pre-sale by the end of 2016. The pre-sales would generate revenue to further invest in the development without the plaintiffs putting up more capital. As matters transpired, however, it is clear that the prospect of having cleared and serviced lots ready for pre-sale by the end of 2016 was pure speculation and grossly naive. It was nothing more than an ill-informed fantasy.

9. Beginning of the Project Development

(a) Dennis Voss Hired as Project Site Manager

[148] In late June 2016, Mr. Horvath and Mr. Nath, through Vantone Developments, hired Dennis Voss as the site manager for the Prince George project. He was responsible for its day-to-day on-site management. He regularly dealt with the project engineers and attended meetings with government permitting agencies. He was authorized to hire subcontractors as needed and to "do anything that needed to be done to get the project done." He also reviewed and checked invoices from subcontractors before forwarding them to Vantone Developments (Mr. Nath or Mr. Horvath) for payment.

[149] Mr. Voss was educated as an engineer in Germany and had worked largely in the area of home design and construction. His interest was in designing and building energy-efficient houses and he hoped that by taking on the site manager position he would later be given a chance to design and build houses for the project.

[150] Mr. Voss was hired as a contractor using the unincorporated business name, "V-Ventures". Vantone Developments (using the Project Development Funds) paid him $4,500 per month and paid for a rental accommodation for him and his family

adjacent to the Prince George Property. He moved to Prince George in July 2016 with his spouse Elena Voss and their children. Elena Voss assisted Mr. Voss in his site management duties.

[151] The plaintiffs argue that hiring Mr. Voss to manage the project is a breach of the First Project Agreement which provides that Mr. Nath and Mr. Horvath would do the development work with Mr. Guo serving as general manager. They argue Mr. Nath and Mr. Horvath were to be the ones on-site doing the development work. However, the budget document approved at the June project management meeting expressly budgets $6,500 per month for an on-site project manager and site office. Thus, the parties accepted that someone other than Mr. Nath or Mr. Horvath would be the site manager on the project. This does not absolve or excuse Messrs. Horvath, Nath, and Guo from fulfilling their own management duties under the Project Management Agreements but it does justify the hiring of Mr. Voss.

[152] Mr. Voss dealt primarily with Mr. Horvath and, to a lesser extent, Mr. Nath. He reported to one of them on a daily basis but said Mr. Nath effectively withdrew his involvement with the project by September 2016 to focus on other things, leaving Mr. Horvath in charge. Mr. Voss had few dealings with Mr. Guo whom he believed to be one of the investors rather than a project manager. He said Mr. Horvath made it clear to him that he was only to discuss numbers on the project (which I take to be the costs) with Mr. Horvath.

[153] I found Mr. Voss to be a credible and reliable witness. He has strong views on how poorly the project was managed and executed by Mr. Nath and Mr. Horvath but that is neither surprising nor, as we shall see, unjustified. He was on the site every day dealing with the day-to-day challenges and significant problems with the project. His blunt criticisms of the project management are quite justified. Mr. Voss is one of the few non-expert witnesses who has no direct or family-related interest in the outcome of the litigation. I found his evidence not only credible but also helpful in understanding the events respecting the Prince George project. Unless stated otherwise, I accept Mr. Voss' evidence about these events.

(b) McElhanney Consulting Hired

[154] On June 28, 2016, Vantone Developments hired McElhanney Consulting Services Ltd. (“McElhanney”) as the engineers for the project. The contract was signed by Mr. Horvath on behalf of Vantone Developments although it identified Zsolt as the “client representative”. This is likely because Zsolt accompanied Mr. Nath to the first meeting with McElhanney in Prince George.

[155] Brendan Masson is a civil engineer and the manager of engineers in McElhaney’s Prince George office. He came to be involved in the project in August 2016 after the original project engineer was unable to continue due to personal circumstances. Mr. Masson primarily received instructions from Dennis and Elena Voss and to a lesser extent, Mr. Nath. He dealt with Mr. Horvath only a few times and always assumed Mr. Nath was the main representative from Vantone Developments. There is no evidence that he ever dealt with Zsolt Horvath despite Zsolt being identified as the “Client Representative” in the contract.

[156] The contract with McElhanney states that Vantone Developments is looking to subdivide the Prince George Property into four-acre lots. This is the first time the evidence discloses an intention to make the lots four acres rather than one. There is no evidence that this change was discussed with Ms. Tian or Mr. Wang and, in fact, it is not even apparent that Mr. Guo was aware of the change. Regardless, Mr. Masson testified that four acres is the minimum lot size for a rural subdivision with the type of servicing available for this area. Dennis Parkhill, a land appraiser with Kent MacPherson, explains in his appraisal report that the four-acre minimum is due to the absence of community sanitary sewer and domestic water services in the area.

[157] The Scope of Work for the project as outlined in the McElhanney contract provides for development of a subdivision plan; conducting an environmental assessment; meeting with the Fort George Regional District; conducing geotechnical and hydrogeological investigations; preparing a detailed design of the roads and water drainage; seeking necessary approvals from the Regional District and the

Ministry of Transportation and Infrastructure ("MOTI"); and construction of the subdivision. McElhanney's cost estimate for the work was $1,150,000, excluding GST and regulatory approval fees. The estimate assumed that the work would be done in summer-like conditions in the absence of snow.

[158] As engineer of record for the project, McElhanney would eventually have been called upon to certify that the road construction in the subdivision met MOTI's standards. However, as will be seen, McElhanney found it necessary to withdraw as engineer of record before the project could reach that stage.

(c) McElhaney's and Mr. Voss' Warnings

[159] In July 2016, while the project was still being planned, Mr. Voss relayed to Mr. Horvath and Mr. Nath advice and warnings he received from McElhanney about how the project was being developed. Mr. Nath and Mr. Horvath ignored these warnings and directed Mr. Voss to press on with the project.

[160] Mr. Voss warned that the topography of the Prince George Property was challenging and road construction could be expensive. He relayed McElhanney's advice that reducing the planned number of lots from 30 to 15 would allow for construction over hills and valleys whereas maximizing the use to 30 lots would require extensive cut and fill work which would drive up the costs. Mr. Voss proposed that he do some "due diligence" investigations on this issue if Mr. Horvath or Mr. Nath did not want to do that work themselves, but Mr. Horvath would not permit this. He insisted on developing the maximum number of lots possible and directed Mr. Voss to press ahead with the project on this basis.

[161] Mr. Voss also suggested, on McElhanney's advice, that on-site material (or "native soil") be used for filling the subgrade for the roads as much as possible as this would keep costs down. He and McElhanney recommended that road construction be postponed to May 2017 because native soils on site would be too wet in the fall of 2016 to properly compact for road construction. Pressing ahead through the fall would require trucking gravel in from off-site quarries to use as dry, compactable fill whereas waiting until May 2017, when the weather was warm,

would allow native soils to dry and be suitable for compacting in the subgrade. Obviously, trucking in gravel from off-site would add to the overall project costs, but Mr. Nath and Mr. Horvath rejected this recommendation.

[162] Mr. Voss and McElhanney also warned against proceeding with road construction before a preliminary layout plan was completed and approved by MOTI. They warned that if the initial layout had to change to make the plan feasible or to receive MOTI approval, any work done before a necessary change might be wasted. Again, however, Mr. Nath and Mr. Horvath rejected this advice and told Mr. Voss to press on with road construction before a preliminary layout had been approved.

[163] As will be seen, these warnings proved to be well founded as all of the problems McElhanney and Mr. Voss cautioned against arose throughout the fall of 2016. These problems overwhelmed the project and, together with Mr. Nath's and Mr. Horvath's misappropriation of the Project Development Funds, forced the project to shut down in late 2016.

(d) The Project Plan

[164] The original development plan was to subdivide the Prince George Property into 30 residential fee-simple building lots. This required the construction of a U-shaped public road throughout the property to access the lots. Since the lots were to be fee simple, the road would have to meet MOTI's standards for a public highway as it would later be dedicated to the Province of British Columbia once the project was complete. Thus, MOTI had to approve the subdivision plan including the road design. This is a process that can take months or, if complicated, even years. It was McElhanney's job, amongst other things, to ensure these requirements were met in the design and construction of the road and to prepare the application to MOTI for approval.

[165] Mr. Masson said there were several iterations of the design and it is not common to have that many. However, the topography of the Prince George Property was rolling and undulating and this made for significant engineering challenges to design an economically feasible subdivision.

[166] After the first round of engineering, it was discovered that the U-shaped road design would be onerous and difficult to construct because of the topography. Moreover, MOTI would require twice the amount of gravel than initially anticipated for the first layer of the roads to meet the public highway standard (700 to 750mm instead of 350mm). All of this would add significant cost to the road construction.

[167] McElhanney therefore came up with a second design that entailed two cul-de-sacs (labeled Road A and Road B) rather than the U-shaped road, but this would reduce the number of lots. Mr. Nath and Mr. Horvath were upset by this and pressed to maintain the 30-lot subdivision.

[168] Thus, in September 2016 McElhanney proposed a third design that would change the project from being a fee-simple subdivision to a bare-land strata. This new approach entailed the cul-de-sac design but added some access by way of driveways (Driveway A and Driveway B). It had the advantage of flexibilities around lot layouts and setbacks. Essentially, the roads and driveways would be private strata property and, while MOTI approval was still needed, the full stringent requirements for a public highway would not be necessary for those roadways. This gave McElhanney the ability to maintain most of the planned lots (29 rather than 30) but these would be strata lots rather than fee simple.

[169] The bare land strata proposal was approved by Mr. Nath and Mr. Horvath and communicated to McElhanney by Mr. Voss. However, neither Mr. Nath nor Mr. Horvath discussed this change with Mr. Guo, Mr. Wang or Ms. Tian. Ms. Tian and Mr. Wang did not learn of the change until they began pursuing this lawsuit in 2017. It seems Mr. Guo learned of it around the same time.

[170] As McElhanney explained to Mr. Nath and Mr. Horvath by letter to Vantone Developments dated October 12, 2016, the bare land strata proposal had risks. It was an unfamiliar concept in the Prince George region and McElhanney warned this could create challenges in obtaining the Regional District’s approval for the subdivision. It might also give pause to potential buyers who may be reluctant to invest in an unfamiliar interest in land that is not fee simple.

[171] The tone and content of that letter makes it clear that McElhanney had significant concerns about the bare land strata proposal that it wished to document in writing. The letter observed that the initial scope of McElhanney's services had expanded and evolved in response to "challenging geotechnical, topographic and environmental conditions present on the site" and confirmed that these have been discussed with Vantone Developments throughout. It also confirmed that McElhanney has made design changes, namely the bare-land strata, based on Vantone Developments' instructions. It notes there are "technical challenges and significant time-pressure[s]" associated with meeting Vantone Developments' requirements and, in light of that, McElhanney confirmed its concerns about proceeding with a bare land strata.

[172] The letter closed with this caution:

> **Guarantee of Approval** - McElhanney has acted according to your instruction and will not be liable whatsoever if PLA [preliminary layout approval], or final subdivision approval is ultimately withheld. McElhanney has responded as required to information requests from the Ministry of Transportation and Infrastructure during the PLA process, and will continue to do so. However, the ultimate decision-making power lies with MoTI, and McElhanney holds a technical role only.

[173] Mr. Masson testified that time pressures were communicated to him through Dennis and Elena Voss. He said they had some "frantic" meetings during which the Vosses made requests of McElhanney with very short deadlines. He also had a number of phone calls in which Mr. Voss seemed very stressed. It is clear from Mr. Voss' evidence that he and Elena Voss were working under enormous pressures from Mr. Horvath and Mr. Nath.

[174] A further small design change became necessary in October 2016 when Mr. Voss discovered that a 100-metre section of Road A had been built five metres out of alignment with the design. This meant either that the portion of the road had to be realigned or there needed to be a design change. Fortunately, Mr. Masson was able to modify the design to bring the road into proper alignment.

10. Work on the Project

(a) Road Construction

[175] In July 2016, Mr. Voss hired Teare Creek Contractors to do clearing work and road construction on the project despite the fact that work on the subdivision plan was in its early stages. Mr. Voss was being pressured by Mr. Nath and Mr. Horvath to press on quickly with road construction.

[176] In fact, Teare Creek was directed to start work on clearing (removing trees) and grubbing (removing stumps) when the U-shaped roadway was still contemplated. By the time the cul-de-sac design was proposed in September 2016, Teare Creek had already cleared and grubbed the full area for the U-shaped road. Thus, some of this work, particularly on the curve of the U, was wasted and added unnecessarily to the cost of the project. This extra cost could have been avoided if Mr. Nath and Mr. Horvath waited for the subdivision approval before starting road construction but Mr. Voss said Mr. Nath and Mr. Horvath were willing to "bear the risk" of a change. The plaintiffs, however, were not given this choice even though it was their money that was put at risk.

[177] There were other financial risks to starting road construction before MOTI approved the preliminary layout. If MOTI rejected the application, the cost of building roads to the date of the rejection could be lost or wasted (depending on what design changes might be needed) and Weihe, as land owner, could be liable for restoring the site to mitigate sediment and erosion concerns. Teare Creek's principal, Dan Sindia, confirmed that the usual practice for road construction is to wait for preliminary layout approval before starting work. Here, though, he was instructed to start work in advance of that.

[178] Even more problematic was the fact that Mr. Nath and Mr. Horvath insisted on proceeding with road construction in the fall when soils were wet and air temperatures too cold to dry them. Once a roadway is cleared and grubbed, the topsoil and part of the subsurface must be stripped to set the foundation for the road. That foundation must be compacted to standards specified by MOTI (regardless of

whether it is a public highway or a strata road) to support the road and the weights that it will carry. If the subsurface is not properly compacted, the road can crack or sink.

[179] Proper compaction is difficult to achieve in wet weather. Damp or muddy soils do not properly compact so the subsurface must be excavated down to a level where soils are dry and then refilled with dry fill that will properly compact. Moreover, subsurface soils should be above freezing temperature for proper construction. Since the soil temperature is usually warmer than the air, work can proceed (in dry weather) when the air temperature is below zero but it should be no less than minus 5 degrees Celsius.

[180] For these reasons, it is much better to do road construction in the spring and summer when the air temperature is warm, soils are dry, and onsite material can be used in the subsurface to support the road. Mr. Masson said the optimum time to do road construction is April to October. However, the fall of 2016 was unusually wet in Prince George so even doing road construction in September and October of 2016 was ill-advised.

[181] The soil at the Prince George Property was especially problematic because it is silty with a heavy clay content. This made compaction even more difficult. McElhanney did a geotechnical investigation of the site and produced a final geotechnical report in September 2016. It found that the proposed road construction was feasible from a geotechnical perspective but made a number of recommendations to manage the wet and silty soil. These recommendations included proceeding in favourable (i.e. warm) weather conditions so that soils could properly dry and placing geotextile in the subsurface when constructing the roads. Geotextile is an inexpensive fabric that prevents sediment from migrating through the subsurface and helps to keep the subsurface compacted to support the road.

[182] Mr. Voss testified that when he received McElhanney's geotechnical report "we realized we might have problems with the onsite material. When we ran compaction tests, we found we could not achieve sufficient compaction." He said

that because “time was a critical factor, the only option was to exchange the material”. That is, dry fill material had to be brought in from offsite for the road subsurface to achieve the necessary compaction. Some 21,000 cubic metres of gravel was brought in for this purpose. Mr. Voss said “[i]f we had more time, we would have allowed the material to dry.”

[183] Mr. Voss agreed that this decision added hundreds of thousands of dollars to the project. However, Mr. Horvath was contacting him daily and constantly telling him he needed to see progress on the project. Mr. Horvath told him money was no object. There was a plan to start selling the first lots by the end of the year and Mr. Voss was told to do everything he could to make that happen. At some point Mr. Voss cautioned Mr. Horvath that he was making rushed and ill-advised decisions to keep the project moving and these increased the expenses for the project but Mr. Horvath was undeterred.

[184] Despite bringing in off-site gravel to fill the subsurface, there were still problems with the gravel’s quality. Teare Creek sourced the gravel from two different quarries in the Prince George area. It had to be sieve-tested before it was laid to ensure that it met the required specifications for compacting. Sieve testing involves taking a sample from the gravel and running it through a sieve to measure the size of the gravels, sands and fines. Sixteen sieve tests were conducted, and of these, only four fell within the acceptable standard and gradation limit. While Mr. Voss initially maintained in cross-examination that some of these failed tests were only marginally outside the required gradation limit, he did concede that these nevertheless resulted in failed tests.

[185] There is no evidence to suggest that gravel that falls just outside of the gradation limits – even if considered slight – is acceptable for subgrade fill for a road. In the absence of any evidence to say these failed test results are only a very slight and inconsequential deviation from the required standard such that they would still be acceptable as fill for a road subgrade, I can only treat a failed test as a failed test.

On this basis, I conclude that most of the sieve tests for the fill that was trucked in to the site failed the required sieve testing.

[186] Mr. Voss testified that once the stripping had been completed on the roads McElhanney inspected and approved the work. After this Teare Creek started building the first of the two cul-de-sac roads (Road A) by first laying geotextile on the subgrade and then bringing in gravel to fill in the subsurface. In cross-examination, though, Mr. Voss acknowledged that geotextile was not laid on all the road areas.

(b) Tote Road

[187] In addition to the problems with the development roads, Teare Creek also experienced some problems with the tote road. A tote road is a temporary road used to access the site during construction. It is generally rudimentary because it is temporary. In this case, the tote road was an extension of Sylvia Road which is the main public access road to the property. The tote road was to have later become the main access road for the subdivision and thus would eventually have to be built to MOTI standards for a full public highway, including stripping the upper layer and compacting the subsurface. However, that was not necessary until after the subdivision roads were completed. While the subdivision was developed, the tote road could remain as a rudimentary access road for construction vehicles.

[188] In this case, though, the tote road was overbuilt for what would normally be required. It was wider than most tote roads and, at one point, Teare Creek laid gravel on it. Mr. Masson expressed concern that this placement of gravel suggested Teare Creek and Vantone were purporting to build the road as a full public highway without doing the necessary compaction of the subsurface. However, Mr. Voss and Mr. Sindia explained that the tote road was too soft and muddy as it was first built so Teare Creek leveled it to give trucks better access. Despite that, at one point a truck became stuck on the tote road so it had to be further built up to better support the heavy traffic. Mr. Voss also testified that Vantone Developments was cited by the municipal authority for allowing trucks to track mud on to public roads so he and Teare Creek laid gravel on the tote road to reduce the muddiness. Mr. Voss knew

this gravel would later have to be removed when it came time to fully build up the road to MOTI standards and he always intended that the gravel would be temporary.

[189] Mr. Voss also said the tote road was built wider than the minimum width for safety reasons to ensure trucks could pass each other without risk of driving into the slope. He said the roadway would eventually have to be cleared to that width anyway when it came time to build it out to a full public highway so he did not see this as a wasted expense.

[190] I am not persuaded the tote road was improperly constructed. It was certainly overbuilt for an ordinary tote road but I accept that Mr. Voss and Teare Creek needed to find a solution to its instability and muddiness. This was another difficulty with continuing construction during wet weather but that was directed by Mr. Nath and Mr. Horvath, not Mr. Voss and Mr. Sindia. I accept Mr. Voss and Mr. Sindia intended that the gravel they placed on the tote road was a temporary measure to address the problem of mud and instability and they were not cutting corners on what was to have later become the main public access road to the subdivision.

(d) Facades of Progress

[191] In the fall of 2016, as the project was getting bogged down by wet weather and gross mismanagement, Mr. Voss tried to make the project seem more advanced than it actually was when Mr. Wang or Haitao Wang came to see it. For example, in October 2016, Mr. Voss, at Mr. Nath and Mr. Horvath's direction, tried to arrange for the installation of hydro poles "just for the optic" to give the appearance that the power line installation was close at hand. However, the estimate to install these poles was $10,000 per pole so this plan was abandoned.

[192] In September 2016 Mr. Voss asked Mr. Masson to remove the word "preliminary" from a copy of the subdivision plan that was going to be presented to Mr. Wang, but Mr. Masson refused this request.

[193] At one point, Mr. Voss arranged for 600 cubic metres of gravel to be placed on Road A to give the appearance that it was substantially completed except for the

seal coat and asphalt. Mr. Voss confirmed that there was no construction purpose served by placing this gravel.

[194] Mr. Voss took these measures at Mr. Horvath's direction or because he was feeling the pressure from Mr. Horvath to present the project in a good light to Mr. Wang.

11. McElhanney Withdraws as Engineer of Record

[195] On October 6, 2016, McElhanney withdrew as the engineer of record for the project. By then, Mr. Masson had often told Mr. Voss of his concerns with the project construction proceeding too quickly and in the face of wet weather against McElhanney's advice. He felt that McElhanney would not be able to certify that the project was proceeding with sound engineering practices when called upon to do so. He summarized those concerned in a letter to Vantone Developments as follows:

> McElhanney has been to the property twice already to perform subgrade reviews; however, due to wet weather combined with fine-grained native soils, we were unable to perform the required field reviews. The native soil has poor workability (has high ambient moisture content that exceeds optimum moisture for placement in the fall) and constant rain on the property has resulted in minimal progress. Vantone Development Group has opted to keep carrying out construction activities on the property in these poor conditions and as such McElhanney is unable to perform field reviews that move the project forward. It is our opinion that continued work on the site will deteriorate the subgrade which will make future field verification difficult. We have advised Vantone of the poor conditions, and have had conversations with the contractor on site regarding the workability of the soils. As Vantone Development Group has decided to continue construction on the bare land strata roads it is our opinion that McElhanney cannot undertake field reviews if construction in these conditions continues.

[196] Mr. Masson explained in his evidence that McElhanney will only do a subgrade review if they expect a positive outcome. He said their inspector could see by observing the subgrade the two times she went out to the site that it would not pass a review because the soil was too wet. Mr. Masson said with this report, there was no point in conducting a formal field review since the inspector knew it is going to fail.

[197] Despite withdrawing as engineer of record, McElhanney continued work on the subdivision plan, road design, and preliminary layout plan but it no longer took responsibility for oversight on the project to ensure compliance with MOTI requirements. McElhanney completed the subdivision plan by the end of 2016 and submitted it to MOTI for approval in January 2017. On June 15, 2017, long after the Project was dead, MOTI gave preliminary layout approval for the subdivision.

12. Lack of Project Planning, Management, and Supervision

[198] The Prince George project was hopelessly mismanaged. There was a complete failure to conduct any feasibility studies for the project before the land was purchased or before ground was broken on the development. There was no advance planning for the project, and road construction proceeded before essential plans and approvals were completed. As I have said, the work was done in horrendous weather conditions that caused the project costs to balloon unnecessarily. The work itself was grossly mismanaged by Mr. Nath and Mr. Horvath who ignored critical advice and warnings from Mr. Voss and McElhanney. It was not managed at all by Mr. Guo who abdicated his duties under the Project Management Agreements.

[199] From the time the project budget was approved in June 2016 through to the termination of work in November 2016, Mr. Guo, Mr. Horvath, and Mr. Nath failed utterly to meet their obligations under the Project Management Agreements. None of them gave any serious attention to supervising the work on the project or following the expenditures.

(a) Mr. Guo

[200] After the June 2016 project management meeting, Mr. Guo abdicated his duties under both Project Management Agreements and left matters to Mr. Horvath and Mr. Nath to run. He did not speak to any of the project contractors and did not know who they were. He never dealt with McElhanney or met with any of the project engineers. He left that to Mr. Nath and Mr. Horvath. He was not involved in the decision to convert the project to a bare-land strata and it appears he did not even know about that decision until after this lawsuit was commenced.

[201] Mr. Guo claims that at or shortly after the June 2016 project management meeting, Mr. Wang replaced him as project manager with Haitao Wang and this is why he was not doing any oversight on the project. Mr. Guo claims that, thereafter, he served merely a translator who was helping out his old friends. He claims he had been relieved of his obligations under the Project Management Agreements, including the indemnity he gave in the second agreement.

[202] I do not accept his evidence on this for several reasons.

[203] First, no other witness corroborated Mr. Guo's evidence. As far as Mr. Horvath was concerned, Mr. Guo was to be the project manager. He said Mr. Guo was largely shut out of that position by Mr. Nath who did not want him involved and Mr. Horvath largely acquiesced in that. However, Mr. Horvath was never given to understand that Mr. Wang or Ms. Tian had removed Mr. Guo from his management position.

[204] Second, I find it highly unlikely that Haitao would be put in charge of a project he knew nothing about. Ms. Tian and Mr. Wang made a multi-million-dollar investment in the properties and their development and the success of that investment hinged on Mr. Nath and Mr. Horvath whom they barely knew. Their only connection to them was through Mr. Guo whom they trusted completely. It may be that Mr. Wang wished for Haitao to gain some knowledge or experience by being involved in the project in some capacity but I do not accept that he and Ms. Tian cast aside the project management plan to install Haitao as project manager in place of their trusted friend and only connection to Mr. Nath and Mr. Horvath.

[205] Moreover, Haitao lacked the ability to communicate effectively in English which would be essential to deal with Mr. Horvath and Mr. Nath. While Mr. Guo asserts that Haitao's English was good and much better than Haitao let on, Zsolt Horvath, who travelled to the Prince George Property with Haitao on one occasion, testified that his English "was not good" and they could barely communicate. I find Zsolt's evidence to be the most reliable on this point.

[206] I find that Haitao and the plaintiffs downplayed and even denied the fact that they expected Haitao to be involved in marketing the properties. They likely did this to minimize their family's own activities with respect to the project and to maintain that Mr. Guo was fully responsible for all its failures. The plaintiffs have not been forthright in their evidence about the extent of Haitao's anticipated involvement in marketing the project. This affects Mr. Wang's and Haitao's credibility generally but, despite that, I am not persuaded Haitao was expected to have anything more than a role in marketing the project and was never installed as project manager to replace Mr. Guo.

[207] Third, at no time did Mr. Guo confirm in writing or otherwise to Mr. Wang or Ms. Tian that his obligations under the Project Management Agreements had come to an end. In light of the very substantial indemnity Mr. Guo gave in the Second Project Management Agreement, it is inconceivable that he would not have confirmed in writing that he was no longer bound by this obligation.

[208] In his examination for discovery, Mr. Guo confirmed that he "never once said to Mr. Wang or Ms. Tian, listen, I'm not your project manager; this isn't my job". He also confirmed that neither Mr. Wang nor Ms. Tian told him they were "agreeable to terminating these agreements". Mr. Guo confirmed on discovery that he "only took the position that the project management agreements were null and void and of no force and effect after this lawsuit started". Mr. Guo's efforts to explain these admissions at trial was unconvincing. After reflecting on this discovery evidence overnight while under cross-examination, Mr. Guo suggested he met with Mr. Wang at the Burnaby casino sometime in June 2016 and told Mr. Wang that if he was not going to give him the authority to manage the project, he could not continue as manager. He said he and Mr. Wang reached a "mutual understanding of this". This explanation was not put to Mr. Wang in cross-examination and was not given on discovery. It contradicts Mr. Guo's discovery evidence and I find the explanation lacks any credibility.

[209] Mr. Guo also claims Ms. Tian and Mr. Wang were well aware he was not involved in managing the project because of the time Mr. Guo spent with them, and Ms. Tian in particular, over the summer of 2016. I do not accept this. The point was not put to either Mr. Wang or Ms. Tian in cross-examination and, in any event, they were given no reason to believe that Mr. Guo was not meeting his managerial duties in the time he was not with them. It was never expected that Mr. Guo would be on-site at the project to carry out his role. His job was to supervise the project from a higher level and ensure that the plaintiffs' investment was prudently and properly managed.

[210] Fourth, in correspondence in February 2017, after work on the project stopped, Mr. Guo suggested to Mr. Horvath that he was required to provide an ongoing record of payments to contractors as part of "our initial agreement." Mr. Guo confirmed this was a reference to the First Project Management Agreement. Thus, as late as February 2017, Mr. Guo suggested that the First Project Management Agreement was still in force. He was also acting in his capacity as project manager at this time to sort out the failure to pay contractors.

[211] Mr. Horvath and Mr. Guo testified that Mr. Nath did not want Mr. Guo involved in the project so Mr. Nath, with Mr. Horvath's acquiescence, cut Mr. Guo out of any involvement after the June project management meeting despite the terms of the First Project Management Agreement. As Mr. Horvath stated in his evidence, Mr. Nath told him that this "is our project – yours and mine" and he did not want Mr. Guo involved at all. Mr. Horvath said he just went along with that decision.

[212] This might help explain why Mr. Guo ceased to be involved in managing the project but it does not excuse him from his obligations under the Project Management Agreements. At no time prior to February 2017 did he try to assert himself to Mr. Nath or Mr. Horvath or try to assume his rightful position as project manager. Nor did he report to Ms. Tian or Mr. Wang that he was being shut out of his management role by Mr. Nath and Mr. Horvath contrary to the Project

Management Agreements. He simply acquiesced in his exclusion from the project and allowed Mr. Nath and Mr. Horvath to run it without any oversight.

[213] Mr. Guo made much of the fact that Mr. Wang, Ms. Tian, and even Haitao made trips to see the progress on the Prince George project throughout 2016. He argues this is inconsistent with Mr. Wang and Ms. Tian claiming to be silent investors in the project. However, as Mr. Voss observed, there is nothing unusual about a silent investor doing a site visit to a project to see how the investment is progressing.

[214] Mr. Guo suggested that Mr. Wang expressed satisfaction with the progress on these site visits but I find Mr. Wang had neither the experience nor the expertise to determine for himself whether the work was being done satisfactorily or if the apparent progress was up to standard. He had no idea whether he was getting value for his investment because it was Mr. Guo's job to oversee that aspect of the project.

[215] In sum, I find that Mr. Guo never resigned and was not removed from the role of project manager as that role was defined in both Project Development Agreements. It is clear that Mr. Guo was sidelined in this role by Mr. Nath and Mr. Horvath but Mr. Guo did not attempt to assert his authority as set out in the First Project Management Agreement. Rather, he gave up on managing the project without advising Mr. Wang or Ms. Tian. He abdicated his duties as project manager with a misguided expectation or hope that Mr. Horvath and Mr. Nath would competently run the project without his oversight.

(c) Mr. Horvath

[216] Mr. Horvath also failed utterly to fulfill his obligations under the First Project Management Agreement, including with respect to both the planning and the execution of the development.

[217] With respect to planning, Mr. Horvath agreed his responsibilities under the First Project Agreement included planning the project, identifying how the properties could be developed in a feasible manner, and how they could be developed

profitably. However, he took no steps to conduct a feasibility analysis for either property or determine if either could be profitably developed at the price Weihe paid for the land or, for that matter, at any price.

[218] As described earlier, Mr. Horvath, along with Mr. Nath, directed work to begin on the Prince George Property despite there being no permits in place, incomplete engineering drawings, no subdivision plan prepared let alone approved, and no preliminary layout approval granted by MOTI. Mr. Horvath confirmed on discovery that most contractors were unwilling to work on the project without proper permitting or final engineering drawings in place. Teare Creek was an exception to this.

[219] Mr. Horvath admitted that he left the management of the road construction to Mr. Voss and Mr. Nath even though he was supposed to be involved under the terms of the First Project Management Agreement. He admitted he was not tending to the duties that he had agreed to perform. As discussed earlier, he directed work to continue into the fall when native soils were too wet to be of use in subsurface compaction.

[220] Mr. Horvath obtained no market research to determine how converting the project to a bare land strata might affect the project's marketability or its ultimate feasibility to earn a profit. Neither Mr. Nath nor Mr. Horvath communicated to Mr. Guo or Mr. Wang that they were changing the project to a bare land strata. They made that decision on their own.

[221] Mr. Horvath was not aware that McElhanney had stopped doing field reviews of the roadwork when it withdrew as engineer of record. He did not know if Vantone Developments (i.e. Mr. Nath) had hired another firm to do those field reviews after McElhanney withdrew. He did not know or turn his mind to whether another engineering firm had become engineer of record or how Vantone Developments was going to get MOTI approval for the roads without an engineer of record.

[222] Despite his failure to pay attention to these important details of the development, Mr. Horvath pressured Mr. Voss on a daily or near-daily basis to press

ahead with the project and advance it quickly so that some presale lots would be ready for sale by the end of 2016 as he has promised the plaintiffs. He put Mr. Voss under this enormous pressure while ignoring the advice he was receiving about the substantial problems with this approach and turning a blind eye to what was actually happening on the site.

(d) Mr. Nath

[223] Mr. Nath was involved in getting the Prince George Project started. He met with McElhanney and got Mr. Voss set up in Prince George. However, by September 2016 he had largely backed away from his involvement, although he continued to take Weihe's money out of the project for his own use. Mr. Voss testified that by September he was no longer dealing with Mr. Nath and was taking his direction solely from Mr. Horvath. When Mr. Voss discovered in November 2016 that contractors had not been paid, he was unable to reach Mr. Nath.

[224] Thus, Mr. Nath largely abandoned his management responsibilities over the project. Since Mr. Nath did not appear at trial, we have limited evidence of what he knew about the project development throughout the fall and into winter of 2016. However, his duties under the First Project Management Agreement were the same as Mr. Horvath's and he did not even try to fulfil those duties. He likely knew of the problems with the manner in which construction was proceeding but, even if he did not know, he ought to have because that was his responsibility.

13. Misappropriation of Project Development Funds

[225] Throughout the summer and fall of 2016, Ms. Tian paid the Project Development Funds to Vantone Construction as required by the First Project Management Agreement and the budget approved at the June 2016 project management meeting. As these payments were being made, Mr. Nath and Mr. Horvath withdrew large sums from those funds and appropriated that money – more than $2 million – to their own use or to other projects they were working on.

[226] The plaintiffs tendered an expert report of Mr. Russel Law, a forensic accountant who traced the money (as best he could) that the plaintiffs paid for both the purchase of the Properties and the Project Development Funds. Mr. Law used a "first in – first out" methodology to trace the funds. He suggested this was a logical way to trace the funds in part because Vantone Development's account had a zero balance when Weihe funds were deposited into it.

(a) Profits from the Property Flips

[227] Mr. Law's report shows that Mr. Nath and Mr. Horvath used the profits they received from flipping the properties for their own purposes, be it other projects, personal expenditures or, in Mr. Horvath's case, real estate investment.

[228] Mr. Horvath maintains it was his right to spend the profit he received from the flips since he claims he had no duty to disclose the flips or the profits to the plaintiffs. As I discuss later in these reasons, I reject this submission because Mr. Horvath and Mr. Nath were in a business partnership with Weihe and they had a duty to disclose this profit to Weihe as their partner.

(b) Misuse of Development Funds

[229] Mr. Law's report, and the banking and other financial documents that support it, show that Mr. Nath and Mr. Horvath appropriated most of the $2,862,500 that Weihe advanced in Property Development Funds. I am satisfied they also appropriated the $82,000 for the lidar survey of the Sumas Mountain Property that was never done. They used this money personally or diverted it into other projects they were working on.

[230] Vast sums of this money are untraceable. Mr. Nath and Mr. Horvath transferred money into a Vantone Construction account (controlled by Mr. Horvath and unrelated to Vantone Developments), a Developro account (controlled by Mr. Nath), or to Mr. Nath and Mr. Horvath personally. From those accounts many hundreds of thousands of dollars were withdrawn as cash. Where expenditures can be traced, Mr. Law finds that Weihe money was spent at casinos, car dealerships,

jewelry stores, restaurants, clothing stores, and the like. However, most of the expenditures are untraceable because money was taken out in cash.

[231] The amount cash withdrawn is nothing short of staggering. In a table of "Significant Individual Cash Withdrawals", Mr. Law identifies over $2.4 million in cash withdrawals from various bank accounts controlled by either Mr. Nath or Mr. Horvath. Some of these items are identified as "debit memos" which Mr. Horvath suggested refers to a bank draft but even excluding those transactions, the cash withdrawals are still in excess of $2 million.

[232] Of the $2,862,500 the plaintiffs paid to Vantone Developments in Project Development Funds, Mr. Law opines that only $376,808.98 was actually spent on the Prince George project. This does not consider an additional $435,727.19 that Mr. Horvath paid personally (mostly in 2017 and from funds he had already misappropriated) to satisfy unpaid contractors on the project and Mr. Voss' salary and rent. Thus, putting these amounts together, approximately $812,536 was spent on the Prince George Project. The rest – approximately $2,049,964 – was misappropriated by Mr. Nath and Mr. Horvath.

[233] Mr. Law's estimate of the amount spent on the Prince George Property may be slightly low in that some of the items he considered to be "personal" expenditures may have been project-related. For example, he included air travel as a personal expense but this likely included the cost of air travel to Prince George when one or more of the plaintiffs went to view the project. On the other hand, there are some items that Mr. Law erroneously attributes to the Prince George Project such as a June 6, 2016 payment of $656.25 to Aberdeen Helicopters in Prince George. Zsolt Horvath testified that he was in Prince George with Mr. Nath around that date and Mr. Nath chartered a helicopter to look at other properties for his own benefit. Thus, this item is not a project-related expense.

[234] Thus, the estimate of $812,536 having been spent on the Prince George Project is an approximation but, given the widespread use of cash, it is impossible to be more precise. None of the defendants seriously challenged Mr. Law's opinion on

the amount actually spent on the Prince George project nor suggested that the stated amount was higher (apart from Mr. Horvath's evidence about his additional payments in 2017). I therefore accept Mr. Law's opinion that $376,808.98 was spent on the Prince George project as that is the best available approximation. I also accept, as I discuss below, Mr. Horvath's evidence that he paid the additional $435,727.19, but this was after he and Mr. Nath had appropriated substantial amounts of cash that is traced to Weihe's development cost payments.

[235] In cross-examination, Mr. Horvath agreed that he and Mr. Nath had withdrawn Project Development Funds from Vantone Development's account for their personal use and for other projects. Mr. Horvath specifically agreed that some of these funds ($450,000) were used to buy a property for himself and Ms. Horvath, that some of the funds were used to pay for his daughter-in-law's school (Zsolt's wife), and to buy gifts for Zsolt and Ms. Horvath. He was aware that Mr. Nath withdrew money for his own use. He was also aware that Mr. Nath was a gambler and a heavy drug user.

14. Project Work Terminates

(a) Contractors Not Paid

[236] In November 2016, Mr. Voss learned that several contractors, including Teare Creek, had not been paid. He tried contacting Mr. Nath to discuss this but Mr. Nath could not be reached and would not return his calls. When he reached Mr. Horvath, he was told Vantone Developments was waiting for a payment from the investor and for money to be released. Mr. Voss said he got "a bunch of excuses" in response to his inquiries "so all we could do was wait."

[237] Mr. Horvath admitted that in November 2016 Vantone Developments did not have the funds in its account to pay the contractors who were owed money. He agreed this was because he and Mr. Nath had withdrawn money out of the account for their own use.

[238] Teare Creek stopped work on the project in November and Mr. Sindia, Teare Creek's principal, pursued Mr. Horvath for payment. In December 2016, Mr. Horvath flew Mr. Sindia to Vancouver and took him home for lunch to discuss the payment issue. He gave Mr. Sindia two post-dated cheques drawn on Vantone Development's account, one for $259,665 post-dated for January 4, 2017 and one for $386,364 post-dated for January 11, 2017. Neither of these cheques cleared when they came due.

[239] By late January, Mr. Voss was sufficiently concerned about unpaid contractors that he contacted Mr. Guo whom he thought was one of the investors. He said Mr. Guo seemed shocked by the news and remained in constant communication with Mr. Voss throughout February and into March trying to sort the matter out.

[240] On February 3, 2017, Mr. Guo emailed Mr. Horvath asking him to provide a signed document the following day confirming that all the contractors and subcontractors on the project had been paid. Mr. Guo confirmed in cross-examination that he asked for this letter because he did not know if it was true that contractors had gone unpaid and he had not been monitoring how Vantone Developments was using the Project Development Funds.

[241] Mr. Horvath responded to Mr. Guo's email stating he would provide the requested confirmation but needed more time to get the "paperwork" together. This prompted a firm response from Mr. Guo:

> Joe,
>
> I prepared a list of payment (as an example) for you. Please fill out all the information and send to me.
>
> This should been [*sic*] done a long time ago when the payments were made according to our initial agreement.

[242] Mr. Horvath provided written confirmation that contractors had been paid but gave no particulars of the payments. The written confirmation was false as Mr. Horvath admitted in his examination for discovery.

[243] This prompted further and increasingly angry responses from Mr. Guo. In a February 11, 2017 email, Mr. Guo told Mr. Horvath that he had left him “in the dark at a hell” and insisted that he “pay the contractors NOW!” He said “You and Yunal [Nath] cannot pocket the money for yourself and/or use it for other businesses and for your families!” On February 22, 2017 Mr. Guo emailed Mr. Horvath stating that, by his estimate, only $410,000 had been spent on contractors yet Weihe had advanced $2,862,000 in development costs. He appears to have received the information about payments to contractors from Mr. Voss or perhaps directly from Mr. Sindia and McElhaney. He demanded to know why contractors had not been paid.

[244] On March 9, 2017, after several more emails requesting confirmation that contractors were paid, Mr. Guo wrote this email to Mr. Horvath:

> Joe,
>
> Please spend your time on the documents and send me over today!!! You have already put me in a VERY VERY VERY awkward position for over two months now!!! Please send the supporting documents now. This is part of your work. You have to get the payment summary completed. There is NO such "easy job" or "easy life" for just collecting money for doing nothing, even if reluctant to put your expenses together and send the supporting documents over to who pay you! What is your philosophy, Joe? I do not understand you now! Do you think that you can simply ignore me? If I do not receive the payment supporting documents today, I might have to seek other alternatives to get these information by contacting each individual contractors! I do not want to see your jumping into a bigger problem. Please stop all your work now, and get me the documents today!

[245] I pause to note that the tone of these emails is inconsistent with Mr. Guo’s suggestion that Mr. Wang had relieved him of all his management duties in June 2016. Clearly, he was deeply worried and even panicked by the prospect that Mr. Horvath and Mr. Nath might have misappropriated the money he was entrusted to manage under both Project Management Agreements. Had it become Haitao Wang’s responsibility to manage the project, there is no reason that Mr. Guo would show this level of concern. Nor would he be in a “very very very awkward position” or “in the dark at a hell” as a result of Mr. Horvath’s failure to pay the contractors. These emails, along with Mr. Guo’s efforts to trace the development funds and his

constant communication with Mr. Voss on the subject are consistent only with Mr. Guo still being the project manager.

(b) Mr. Horvath Begins Paying Contractors

[246] Between January and May 2017, Mr. Horvath made payments to contractors on the project using money he put back into the Vantone Development account as well as money from Vantone Construction (his family's company, not shared with Mr. Nath), and his personal account. He had also started paying Mr. Voss' salary and rent in October 2016 and continued to do so until May 2017 even though he understood that Mr. Nath had told Mr. Voss to stop work on the project in October.

[247] Mr. Horvath took the court through these payments with reference to his bank statements and with the assistance of an aid to the court he had prepared to summarize the payments. Some payments to Mr. Voss were duplicated in the aid to the court and should be excluded. Mr. Horvath identified one payment of $2,500 to Mr. Voss that was not included in the aid. In total, Mr. Horvath paid $36,700 for Mr. Voss's salary and rent between October 2016 and May 2017.

[248] In January 2017, Mr. Horvath started paying the unpaid contractors directly. He paid a total of $399,027.19 from January 17, 2017 to May 4, 2017. The vast majority of this money ($335,000) was paid to Teare Creek, much of it in cash. He paid McElhanney $14,863.54, L&M Engineering $13,167.15, Westrek $24,971.50, and Waterfall Drilling $11,025.

[249] Thus, in total, Mr. Horvath paid $435,727.19 to Mr. Voss and unpaid subcontractors.

[250] Mr. Horvath also testified that on December 7, 2016 he deposited $15,000 into Vantone Development's bank account to clear a negative balance and another $17,040 on January 17, 2017 for the same purpose.

(c) False Invoices to Cover-up the Misappropriations

[251] In March 2017, Mr. Horvath told Mr. Voss that to keep the project going he needed to persuade Mr. Wang and Ms. Tian to invest more money. To do this, he needed to provide them with invoices that matched the Project Development Funds they had already advanced. He asked Mr. Voss to provide an invoice that overstated what he had charged for his site management duties. Mr. Voss refused to do this but did eventually agree to provide Mr. Horvath with a blank V-Ventures invoice. Mr. Voss manipulated the formatting on that invoice so he could later distinguish it from a legitimate invoice. Mr. Horvath denied that he asked Mr. Voss for a fake overstated invoice but I prefer Mr. Voss' evidence on this point. Regardless, Mr. Horvath admitted that he asked Mr. Voss for the blank invoice and that he gave that blank invoice to Mr. Nath who filled in the amount ($348,867.75) and returned it to Mr. Horvath with "a bunch of other stuff" that Mr. Horvath passed on to Mr. Guo.

[252] Mr. Nath also created a fictitious invoice from a made-up company he called NBC Enviro in the amount of $87,500 and gave it to Mr. Horvath who passed it on to Mr. Guo.

[253] Mr. Horvath also asked Mr. Sindia to prepare a fictitious invoice to overstate the amount Teare Creek had charged for work on the project. He told Mr. Sindia that if he provided the inflated invoice he would be able to pay Teare Creek what it was legitimately owed. Mr. Sindia therefore reissued Teare Creek's November 18, 2016 invoice that had originally been $386,364.30 including GST. The fictious replacement invoice inflated this amount by just over $400,000 to $789,144.30.

[254] Eventually, by April 2017, Mr. Horvath admitted to Mr. Guo that he and Mr. Nath had appropriated much of the Project Development Funds. He provided Mr. Guo with a copy of Vantone Development's bank statements for June 3, 2016 through December 30, 2016 with handwritten notations identifying the deposits of the plaintiffs' Project Development Fund installments and the major withdrawals by or transfers to Mr. Nath and Mr. Horvath. He did not explain any of the ongoing smaller payments or transfers.

[255] In April 2017, after receiving this information from Mr. Horvath, Mr. Guo finally told Mr. Wang about the true status of the Prince George project and that Mr. Nath and Mr. Horvath had misappropriated vast amounts of the Project Development Funds. Mr. Guo denied he waited this long to tell Mr. Wang and claimed he informed him in January 2017 as soon as he learned about the problem. However, he was impeached on this point with discovery evidence where he said he informed Mr. Wang and Ms. Tian about the problems in April 2017. His attempt to explain away the inconsistency was not credible and, in any event, he admitted in his response to civil claim (para. 14) that he told Mr. Wang about the misappropriations in April 2017. I find Mr. Guo did not inform either Mr. Wang or Ms. Tian about the problems with the project until April 2017.

[256] Upon learning of this in April 2017, the plaintiffs retained legal counsel and started this action.

(d) Settlement with Teare Creek

[257] In the course of this trial, the plaintiffs (who were defendants in the related Teare Creek action) settled with Teare Creek for a payment of $307,500. This was paid in full satisfaction of Teare Creek's claim for unpaid work. Thus, the plaintiffs paid $307,500 in addition to the $2,862,500 in Project Development Costs for the Prince George Property.

15. Neither Project was Financially Viable

[258] Neither the Prince George project nor the Sumas Mountain project was ever financially viable or even achievable as planned. Even if the Prince George project had completed, it would have lost money. The Sumas Mountain project would likely have never broken ground since the plan would have required a variance to the Official Community Plan. Further, the necessary services for a subdivision on the Sumas Mountain Property were simply not there.

(a) Prince George Project

[259] As I have discussed earlier, the Prince George project was hopelessly mismanaged by Mr. Nath and Mr. Horvath and not managed at all by Mr. Guo. I find it was doomed to fail and did fail because of that gross mismanagement.

[260] However, even if the project had been properly managed, it was likely never going to be viable. Given the inflated amount that the plaintiffs paid for the land, the realistic development costs, and the market for rural residential properties in the area at the time, there was no way the plaintiffs were going to recover their investment costs. That was readily ascertainable before the investment was made if anyone had thought to do a feasibility study before embarking on the project. Mr. Horvath admitted that it was his responsibility to do so.

[261] Dennis Parkhill, a land appraiser, opined that the value of the Prince George Property as of May 26, 2016 was $375,000. That is $175,000 less than the $550,000 that Mr. Nath and Mr. Horvath, through Developro, agreed to pay for the property and $1,125,000 more than the $1.5 million Weihe paid for it.

[262] As I have said, Mr. Parkhill's expert report, as with all the expert appraisal reports, was admitted into evidence without objection or cross-examination. Further, there is no other expert evidence challenging or disputing any of the appraisal evidence or the opinions given by the appraisers about the value of the Properties or their feasibility for residential development.

[263] In assessing the market value of the Prince George Property, Mr. Parkhill considered the financial feasibility for its development. He opined that a 30-lot subdivision with 4-acre lots was physically possible but not financially feasible. He stated:

> Regardless of whether a proposed use is within the realm of probability, physically possible and legally permissible, the use must be profitable and provide the highest return to the owner of the land. Prior to acquiring land for subdivision, an experienced developer will conduct a feasibility analysis based on a preliminary lot layout which complies with existing or achievable zoning. The feasibility analysis may mirror the Subdivision Development Approach, an appraisal technique which requires the estimation of the market

> value of the proposed lots within the hypothetical plan of subdivision less deductions for marketing, planning and engineering, off and on-site servicing, RDFFG fees, administration and overhead, construction loan financing, an allowance for developer's profit and a deferral to account for the construction and marketing period.

[264] After assessing lot values for similar-sized lots (4.0 acres) in the area, Mr. Parkhill estimates the average market value for a completed lot on the Prince George Property in 2016 would have been $127,500. Based on a 30-lot subdivision, this would generate gross net sales revenue of $3,825,000. In fact, the best that McElhanney could have achieved in an acceptable layout was a 29-lot bare land strata subdivision which, based on a lot value of $127,500, would have generated gross net sales revenue of $3,697,500.

[265] Even if the budgeted development cost of $2.864 million was realistic and leaving aside for the moment the acquisition costs for the Property, this would leave room for about $800,000 in net revenue, but this does not include the financing costs for the investor, marketing costs for selling the land, accounting and legal fees, insurance, or property taxes.[1] But even taking the $800,000 as net revenue without factoring in these other costs, the plaintiffs were already on track to lose $700,000 on the Project once the $1.5 million purchase price for the Property is factored in.

[266] Mr. Parkhill opines that the proposed 30-lot subdivision is not economically viable. In his opinion, the highest and best use for the Prince George Property in 2016 was:

> … a speculative holding with a potential for development of a single family dwelling conditional to construction of an access road and extension of overhead power and telecommunication services along part of the dedicated Sylvia Road alignment to the selected homesite location.
>
> [Emphasis added]

[1] Mr. Parkhill estimates the financing costs to be $213,320, the marketing costs to be in the range of $191,250, and the other costs to be $153,000. Factoring in these estimates would bring the net revenue down to be less than $250,000.

[267] In other words, the best thing that could have been done with the Prince George Property in 2016 was to hold it for some possible future development.

[268] Mr. Parkhill also analyzed the absorption rate for rural residential properties in the West Beaverley area (where the Prince George Property is located) and opined that there was supportable market demand for approximately five lot sales annually if priced competitively. That means that it would take close to six years to sell all 29 lots. This would substantially increase the financing costs for the development, not to mention the property's carrying costs, such as property taxes, once the subdivision was complete.

[269] Even if the plaintiffs had paid fair market value for the Prince George Property ($375,000) the project was still not feasible when considering the additional costs for marketing, legal fees, insurance, and property taxes as well as the carrying costs during the six or so years it would likely take to sell the residential lots.

[270] The plaintiffs also tendered a report of Scott Jamieson who estimated the cost to complete the Prince George project. Assuming that road construction to date met MOTI standards and using Teare Creek Contractors' rates, he estimated the cost of completion would be $950,000. However, he opined that the road as constructed had a high risk of failure by deformation due to clay in the subgrade and high moisture content during construction. He opined that at least partial reconstruction would be required.

[271] He states that "if one assumes that a completely separate project" was required, the cost, including engineering, drawings, surveys, permits, environmental services, and construction, would be $2,669,000. He notes that this estimate is based on higher construction costs in 2018 than existed in 2016. Interestingly, this suggests that the June 2016 budget of $2.893 million ought to have been more than enough to complete the project (had it been properly managed and if the Project Development Funds were not substantially misappropriated). However, as Mr. Parkhill's report demonstrates, the project still would not have been financially viable.

(b) Sumas Mountain Project

[272] The Sumas Mountain project never progressed beyond a pipe dream and, given what stood in the way, it is almost certain that it never could have been developed in the way that was imagined. Again, a simple feasibility study would have shown this.

[273] Larry Dybvig is a land appraiser who opined on the value of the Sumas Mountain Property as of November 20, 2018 and June 29, 2019. He also opined on the development potential for the property. He noted that the Official Community Plan designates the area where the Sumas Mountain Property is located as rural which calls for a gross density of 8-hectare (almost 20-acre) lots. This significantly restricts the type of development that could occur on the Sumas Mountain Property and certainly excludes the half-acre or one-acre lots that Messrs. Guo, Nath and Horvath suggested were feasible. At best, seven lots could have been developed on the property rather than the 150 or 300 lots imagined.

[274] Mr. Dybvig explained the function of an Official Community Plan and described how it restricts the ability to secure a zoning change that might have facilitated the imagined development:

> The process for developing an Official Community Plan ("OCP") typically involves considerable social, economic, and demographic research and an extensive public consultation process. OCPs serve to express a municipality's aspirations for future land uses within its borders, guide capital budgeting and direct the handling of rezoning applications. In British Columbia, municipalities generally cannot rezone properties for a use or development scale that is contrary to the OCP; rezonings of this nature first require an amendment to the OCP.

[275] He further opined:

> Given the nature of development in the area and the pattern of municipal land use policy, it is unlikely that the municipality would rezone the property to a use or density inconsistent with the subject's OCP designation.

[276] The plan to develop the Sumas Mountain Property hung on a grossly-misguided notion that Mr. Nath had a relative who worked in some level of

government who could pull in some favours and get the zoning and OCP changed. Of course that was never going to happen.

[277] Mr. Dybvig opined that since zoning restrictions were unlikely to be change, the optimal improvement for the property would be a seven-lot rural acreage development. He said the feasibility of that use is untested and would require satisfactory engineering and environmental studies as well as land use development permits and approval to construct a road over Crown land. None of that was done.

[278] The development potential was also crippled by the fact there was no road access to the property (other than a gated forest service road) and no services. Mr. Dybvig said:

> …whether [seven lots] is optimal will depend on the cost to provide roads and servicing. As a practical matter, the extent to which these items are affordable is largely dependent on the value of the end lots. At a minimum, lots would require roads, possibly in a strata subdivision (which allows greater flexibility in design relative to municipal road standards) and electricity, telephone/cable/internet. Natural gas is unlikely to be available due to area terrain. Domestic water would likely be by a private system such as a well, and domestic sewer would involve a private system such as an engineered septic system and field.

[279] Jason Upton of EDIS Appraisals Ltd. states in his report that there is no proven potable water supply at the property and the nearest municipal water supply is 7 km to the southwest.

[280] Assuming these servicing problems could be overcome, Mr. Dybvig estimated that each of the seven lots might sell for an average price of $485,000 (total, $3,395,000). Development and servicing costs would need to be deducted from these values to consider the feasibility of development. Mr. Dybvig did not estimate those costs but noted they would be higher later in 2018 due to a market rise.

[281] Given that the plaintiffs paid $3.15 million for the property, it was certain they would lose a large amount of money on any development of the Sumas Mountain Property.

16. Current Status of the Prince George Property

[282] Despite some $812,000 having been spent on developing the Prince George Property plus the $307,500 the plaintiffs paid to settle Teare Creek's claim, I find the Plaintiffs have received no benefit from this investment. There is no evidence that the Property itself is more valuable now with the partially-built roads than it was before any roadwork began.

[283] Further, there is no expert evidence contradicting Mr. Jamieson's opinion that the roads as constructed to date would have to be at least partially reconstructed due to a risk of failure from clay in the subgrade and high moisture content. I have considered Mr. Sindia's cross examination of Mr. Jamieson (which was done before the plaintiffs settled with Teare Creek) but nothing in that cross-examination leads me to reject Mr. Jamieson's opinion. It is undisputed that Teare Creek was instructed to proceed with road construction in unfavourably wet conditions and it is not at all surprising that the subgrade would show unacceptably high levels of clay and moisture. None of the defendants in the Weihe action cross-examined Mr. Jamieson or led expert evidence to contradict his opinion.

[284] Based on Mr. Parkhill's opinion discussed earlier, I find there is presently no option to develop the Prince George Property in an economically feasible way. The best use of the land, as he said, is to hold it for some possible future development. It is conceivable that some amount of the road construction done to date might come to have some value in the future if development becomes feasible but at this point that is only speculation.

[285] The work done by McElhanney might only come to have some value to the plaintiffs if a development modeled on that subdivision plan becomes feasible. However, there is no basis on which I might conclude that the design will or might have some value in the future. This is not to suggest that the work done by McElhanney or other subcontractors was substandard. McElhanney did the work it was instructed to do and even got the subdivision plan through the preliminary layout approval process. Mr. Masson and others from McElhanney cautioned Mr. Horvath

and Mr. Nath (through Mr. Voss) about problems it saw in how the project was proceeding but those were ignored and McElhanney was instructed to continue with its work. McElhanney and other contractors cannot be faulted for doing the work they were instructed to do. However, given that the project was never viable in the first place and the many problems that were caused by Mr. Nath and Mr. Horvath's mismanagement and Mr. Guo's abdication of his management responsibilities, McElhanney's work ultimately added no value to the land.

[286] Several of the defendants have suggested that the plaintiffs are at least partially responsible for their losses by not seeing the project to its conclusion in 2017. This would have required another substantial investment by the plaintiffs to restart the project. While the original $2,891,500 advanced by Weihe development in Project Development Funds should have been more than enough to complete the project (based on Mr. Jamieson's opinion), most of that money was long gone having been taken by Mr. Nath and Mr. Horvath. Further, it is clear from Mr. Parkhill's unchallenged opinion that development of that property was simply not economically viable. It would have been foolish for the plaintiffs to throw good money after bad to complete a money-losing development.

[287] In short, I can only conclude that the plaintiffs received no value for and no benefit from the $3,170,000 they invested in the development of the Prince George Property in Project Development Funds and the settlement payment to Teare Creek. Nor did they receive any value for the $82,000 they paid for the lidar survey of the Sumas Mountain Project.

V. Issues

[288] These facts and the plaintiffs' claims give rise to a long list of issues I will turn to next. I will set out those issues in the categories and largely (but not entirely) in the order I address them below. I propose to deal first with issues relating to the purchase of the properties, including the profits Mr. Nath and Mr. Horvath earned from the flipping the properties. I will then deal with the Project Development Funds and related claims.

Claims Relating to the Purchase of the Properties

- Are Mr. Nath and Mr. Horvath liable to account for the profits they earned from the sale of the properties to the plaintiffs?

    - Subsumed in this issue whether Mr. Nath and Mr. Horvath owed the plaintiffs a fiduciary duty to disclose their interest in the properties and the profit they would earn.

- Are Mr. Nath and Mr. Horvath liable for the inflated price they paid for the Prince George Property (above fair market value) which cost they passed on the plaintiffs in the property sales?

- Is Mr. Guo liable to account for the inflated purchase price that the plaintiffs paid for the properties, including Mr. Nath and Mr. Horvath's profits from the flips and the inflated price of the Prince George Property?

- Are Mr. Nath, Mr. Horvath and/or Mr. Guo liable for the plaintiffs' losses that flow from having purchased the properties on the basis of any fraudulent or negligent misrepresentations? If so, what damages flow from any such misrepresentations?

    - Subsumed in these issues are whether misrepresentations were made, whether they were fraudulent or negligent, and whether the plaintiffs reasonably relied on these misrepresentations.

Liability for Project Development Funds

- Are Mr. Nath and Mr. Horvath liable for Project Development Funds and the lidar survey funds they appropriated to their personal and other uses? Are they liable for the $812,536 that was actually invested in the Prince George Property? Are they liable for the $307,500 settlement with Teare Creek?

    - Subsumed in these questions are whether Mr. Nath and/or Mr. Horvath had a contractual, fiduciary, or other duties that restricted their use of the

Project Development Funds and whether they can be liable for money that was actually spent on the Prince George project.

- Is Mr. Guo liable for any of these same amounts?
    - Subsumed in this issue are whether Mr. Guo had a contractual, fiduciary, or other duty to monitor the expenditure of Project Development Funds and the project more generally and whether he breached any of those duties.
    - Also subsumed in this issue is whether Mr. Guo is liable for these amounts based on the guarantee in the Second Project Management Agreement.

Claim Against Ms. Xie

- Did Ms. Xie guarantee the plaintiffs' investment?
- Is Ms. Xie liable for receiving funds that Mr. Law has traced to her business or to a joint account she held with Mr. Guo from either the profits from the property sales or the Project Development Funds?

Equitable Mortgage in the Guo/Xie Properties

- Are the plaintiffs entitled to an equitable mortgage in certain real properties owned by Mr. Guo and Ms. Xie under the terms of an indemnity and guarantee?

Claim against Katalin Horvath

- Is Katalin Horvath liable for receiving funds paid to her from the profits from the property sales or for the plaintiffs' money being used to pay a $450,000 down payment on a property bought jointly in Mr. and Ms. Horvath's names?

Equitable Charge on Proceeds from the Sale of Horvath Property

- Are the plaintiffs entitled to an equitable lien on monies held in trust from the sale of the Horvaths' real property purchased using either profits from the property sales or money appropriated from the Project Development Funds?

Claim Against Zsolt Horvath

- Is Zsolt Horvath liable for receiving funds paid to him from the profits from the property sales?

Interest Claim

- Are the plaintiffs entitled to claim damages for interest they incurred in borrowing funds to buy the properties and invest in their development?

Punitive Damages

- Are the plaintiffs entitled to an award of punitive damages against any of Messrs. Nath, Horvath, or Guo?

Mr. Guo's Third Party Claim

- Is Mr. Guo entitled to a contribution or indemnity from any of Mr. Nath, Mr. Horvath, Vantone Developments, or Developro for any amounts he is liable pay the plaintiffs?

VI. Claims Relating to the Purchase of the Properties

1. The Plaintiffs' Claim

[289] With respect to the purchase of the properties, the plaintiffs seek damages totaling $1,625,000 which is the difference between the fair market value for the properties in May 2016 and the amount they paid Mr. Nath and Mr. Horvath for them. This encompasses the $1.45 million profit Mr. Nath and Mr. Horvath earned by flipping the properties to the plaintiffs and the $175,000 difference between what Messrs. Nath and Horvath paid for the Prince George Property in May 2016 and its fair market value at that date as appraised by Mr. Parkhill. Since a $175,000 loss

was passed on to the plaintiffs in the sale of the property, they claim it as part of their damages even though it was not a gain to Messrs. Nath and Horvath. These claims are grounded in breach of fiduciary duty, conspiracy, and fraudulent or negligent misrepresentation. The plaintiffs initially sought rescission of the contracts to buy the properties but elected not to pursue that relief at trial.

2. Are Mr. Horvath and Mr. Nath liable for the profits they took from the sale of the properties to the plaintiffs?

[290] I find that Mr. Nath and Mr. Horvath had a fiduciary duty to disclose to the plaintiffs that they had an interest in the properties and that they would earn a substantial profit from the plaintiffs' purchase of them. They breached that duty by failing to disclose this and are accountable to the plaintiffs for the profits they took.

(a) Fiduciary Duty – General Legal Principles

[291] A fiduciary duty is one of the most onerous duties imposed by law. It serves to protect a vulnerable party against abuse by another in certain types relationships or in particular situations. Within the context of a fiduciary relationship, the fiduciary must act with undivided loyalty to the beneficiary by placing the beneficiary's interest above their own and forsaking all other interests in favour of the beneficiary: *Alberta v. Elder Advocates of Alberta Society,* 2011 SCC 24; *Roussy v. Savage*, 2019 BCSC 1669.

[292] Fiduciary duties exist automatically within certain types of relationships such as a trustee-beneficiary or a solicitor-client relationship. These are referred to as *per se* fiduciary relationships. As will become important in a moment, a partnership is a category of *per se* fiduciary relationship.

[293] Fiduciary duties can also arise on an *ad hoc* basis where one party (the fiduciary) has given an undertaking of responsibility to act in the best interests of the other party (the beneficiary) whose legal interests are vulnerable to the fiduciary's exercise of power or discretion. In *Elder Advocates* at para. 36*,* the court identified the following three elements that a claimant must show to establish an *ad hoc* fiduciary relationship:

(1) An undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;

(2) A defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and

(3) A legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[294] With respect to an undertaking to act in the beneficiary's best interest, the court looks to whether the alleged fiduciary has expressly or by implication undertaken to act with loyalty to the beneficiary and exercise a discretion or power in the beneficiary's interests. A fiduciary must have bound themselves in some way to protect the beneficiary's interests and relinquished their own self-interest and the interests of all others in favour of the beneficiary: *Galambos v. Perez,* 2009 SCC 48 at paras. 76-78; *Elder Advocates*, para. 31.

[295] Fiduciary law focuses on vulnerability that arises from the relationship between the parties. Vulnerability in a broad sense resulting from factors that are external to the parties' relationship might be relevant but the real concern is with vulnerability that arises from the parties' relationship itself: *Galambos* at para. 68.

(b) Mr. Nath and Mr. Horvath's duty to disclose their interest in the Properties

[296] I find that Mr. Nath and Mr. Horvath were under a fiduciary duty to disclose to the plaintiffs their interest in the properties and the profits they would make from the sales because they were in a partnership with Weihe to develop those very lands. That partnership gave rise to a *per se* fiduciary relationship in which each party had a duty to disclose any profit one would make at the expense of another from a transaction concerning the partnership. A transaction to acquire the very land that the partnership was to develop is one that concerns the partnership. Mr. Nath and Mr. Horvath breached their duty by failing to disclose (and, in fact, actively

concealing) their interest in the properties and the profit they would make from the sale to the plaintiffs.

[297] The partnership relationship is confirmed in the First Project Management Agreement which describes the parties' business arrangement as a "joint development" and a "cooperation partnership":

> In order to develop realty projects more efficiently, to bring expertise and knowledge of each individual into the platform, to achieve reciprocal advantages and win-win cooperation, based on friendly discussion and mutual benefits, both Party A and Party B entered into the following agreement on May 21, 2016 in the City of Burnaby, British Columbia, Canada for a joint development for two properties in Abbotsford and Prince George:
>
> 1. Both Party A [Weihe] and Party B [Guo, Horvath and Nath] establish cooperation partnership for the following two property parcels:
>
> [descriptions omitted]
>
> [Emphasis added]

[298] A partnership is defined as "the relation which subsists between persons carrying on business in common with a view of profit": *Partnership Act,* R.S.B.C. 1996, c. 348, s. 2. This aptly describes the business arrangement the parties made. They were carrying on the business of a "joint development" of the properties and doing so in common with one another. The purpose of this business arrangement was to earn a profit which was to be split 85% to Weihe as the partner who put up all the capital and 5% to each of Messrs. Guo, Horvath, and Nath for the work, expertise, and knowledge they would bring to the project.

[299] A partnership is a *per se* fiduciary relationship: *Roussy,* para. 284; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 596-597. Partners owe one another a duty of utmost good faith that includes a requirement to account to one another for any undisclosed profit earned from a transaction concerning the partnership: *Rochwerg v. Truster*, 58 O.R. (3d) 687, 2002 CanLII 41715 (Ont. C.A.). In *Chandler v. Rasmussen*, 2012 BCSC 1010, Justice Fitzpatrick discussed this duty as follows:

> [39] There is, of course, a duty of good faith as between partners in relation to all partnership dealings and transactions: see R.C. I'Anson

> Banks, *Lindley & Banks on Partnership*, 18th ed. (London, UK: Sweet & Maxwell Limited, 2002) at 469. The authors, at 474, state that this duty is such that:
>
> > … one partner was not at liberty to make a profit at the expense of his co-partners without their full knowledge and consent, whether that profit was made directly or indirectly, *e.g.* by appropriating some benefit to himself which he ought to have acquired, if at all, on behalf of all the partners.
> >
> > [Emphasis added]

[300] Mr. Nath and Mr. Horvath could not make an undisclosed profit from the sale of the properties to Weihe. The properties were the very subject the First Project Management Agreement that confirmed the partnership for the development of those very lands.

[301] Mr. Horvath maintains that he and Mr. Nath had no obligation to disclose their interests in the properties or the profits they would make because the First Project Management Agreement was not signed (and thus a partnership not formed) until May 21, 2016, which was three days after the plaintiffs executed documents agreeing to buy the properties. He argues that no partnership, and thus no partnership duties, existed when Weihe agreed to buy the land.

[302] I reject this for several reasons.

[303] First, by May 18, 2016 when Ms. Tian signed the purchase documents, the parties had already agreed to formulate the partnership. It was not yet the subject of a written agreement but it was the arrangement the parties had settled on with one another before the plaintiffs agreed to buy the land. Without the plan to develop the properties in partnership with one another, the plaintiffs would not have bought the land.

[304] In fact, Messrs. Guo, Horvath, and Nath had agreed among themselves how they could manage the properties and develop them even before Mr. Guo took the proposal to Mr. Wang. Mr. Guo and Mr. Horvath agreed in their respective examinations for discovery that their plan was to entice Mr. Wang to invest in the properties and their development, and Messrs. Guo, Horvath and Nath would be

responsible for the development. Mr. Horvath also confirmed this in cross-examination at trial:

> Q. And you had previously discussed that if he [Mr. Wang] bought it [the Properties] you would do the development?
>
> A. If he did buy it, we would have the rights to develop it.
>
> Q. When the proposal to buy was made to Mr. Wang, it was proposed that you would develop the properties?
>
> A. That's what was discussed. I don't know what Mr. Guo told Mr. Wang.

[305] This plan was discussed with Mr. Wang when Mr. Guo, Mr. Horvath, and Mr. Nath were showing him the properties on May 15 and 16, 2016. When Mr. Wang announced at the May 16, 2016 dinner that he and Ms. Tian would be investing in the properties, the parties had already discussed the arrangements, including that Mr. Nath and Mr. Horvath would do the development as Weihe's development partners and would each be rewarded by a 5% share of any profits. That is the arrangement the parties toasted at the dinner.

[306] Second, the land transactions did not complete until after the First Project Management Agreement was signed. The sale of the Prince George Property completed on May 26, 2016 and the Sumas Mountain Property on June 29, 2016. Mr. Nath and Mr. Horvath had a duty as partners – certainly by no later than May 21, 2016 after the First Project Management Agreement was signed – to advise the plaintiffs that they would be profiting from the sales that would complete in the following weeks.

[307] Further, since the condition precedent for the Sumas Mountain Property remained open when the First Project Management Agreement was signed, Mr. Horvath and Mr. Nath had a fiduciary obligation as Weihe's partners to advise the plaintiffs of the opportunity to conduct a feasibility study and that Weihe need not complete the purchase if the contemplated development was not feasible. Mr. Horvath admitted that one of his and Mr. Nath's duties under the First Project Management Agreement was to assess the feasibility of developing the properties. Mr. Nath and Mr. Horvath placed themselves in a conflict of interest (at the latest)

once they signed the First Project Management Agreement because, by then, it was in their self interest to see that the land sales complete even if that put the profitability of the partnership's enterprise at risk. This conflicted with their duty to assess the feasibility of the projects and advise their partner that it need not complete the purchase of the Sumas Mountain Property if, prior to June 15, 2016, its development was found to be unfeasible.

[308] As Mr. Nath and Mr. Horvath breached their fiduciary duties as Weihe's partners by failing to disclose their interest in the two Properties and the profits they would make by the sale, they are jointly and severally liable to Weihe for the $1,450,000 in secret profits they earned from the sale.

[309] With respect the $175,000 overpayment based on the market value of the Prince George Property as at May 2016, this loss did not arise directly from Mr. Nath and Mr. Horvath's failure to disclose their interest in the property. However, had they complied with their fiduciary obligation and disclosed their interest in the properties, I find the plaintiffs would not have bought the properties and would not have suffered this $175,000 loss. I therefore find that, but for Mr. Nath and Mr. Horvath's breach of fiduciary duty, the plaintiffs would not have incurred this loss and they are entitled to claim it as damages for the breach. That said, I also find they can claim it under a misrepresentation which I will deal with later.

(c) Conspiracy

[310] The plaintiffs also make a claim against Messrs. Nath, Horvath, and Guo in conspiracy. It may not be strictly necessary to address this issue given my findings on breach of fiduciary duty but since it might affect whether liability is joint and several, I will address the issue. Here I will address the issue as between Mr. Nath and Mr. Horvath. I will address Mr. Guo later.

[311] The legal principles applicable to unlawful conduct conspiracy were recently summarized as follows in *Caroti v. Vuletic*, 2022 ONSC 4695:

> [583] For defendants to be liable for the tort of unlawful conduct conspiracy, the following elements must be established:

> a) The defendants acted in combination, that is, in concert, by agreement or common design;
>
> b) The defendants committed unlawful acts;
>
> c) The defendants' conduct was directed towards the plaintiff;
>
> d) The defendants knew or should have known that injury to the plaintiffs was likely to occur; and
>
> e) The defendants' unlawful conduct caused injury to the plaintiff.
>
> *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 26.
>
> [584] To prove unlawful conduct conspiracy, it is not necessary to show that the pre-dominant purpose of the defendants' conduct is to injure the plaintiff. But in the prevailing circumstances, the defendants should have known that injury to the plaintiff would ensue, and the plaintiff must have suffered actual damage: *LaFarge* at p. 472; *Agribrands* at para 24. For the tort of unlawful conduct conspiracy, the "unlawful conduct" part of the test may be satisfied by a breach of contract, an actionable tort, or a breach of fiduciary duty: *Extreme Venture Partners Fund I LP v. Varma*, 2019 ONSC 2907 at para. 247; affirmed 2021 ONCA 853 at para. 39.

[312] The evidence is clear that Mr. Nath and Mr. Horvath acted in concert by agreement or common design to acquire the right to buy the Prince George and Sumas Mountain Properties and flip them to the plaintiffs for a substantial profit which they shared. It does not matter that they each purchased the properties separately because the overall scheme was a common design to share in the overall profits of selling both properties to the plaintiffs. This was an unlawful act as it was a breach of fiduciary duty and it was obviously directed towards the plaintiffs from whom they conspired to extract a substantial undisclosed profit. They knew the plaintiff would be injured by overpaying for the properties with most of the profits going to them.

[313] I have no hesitation in finding Mr. Nath and Mr. Horvath are liable in unlawful conduct conspiracy. While their breach of fiduciary duty alone is likely sufficient to establish their liability as joint and several, this finding of conspiracy confirms it.

3. Is Mr. Guo liable to account for the Nath/Horvath profit and/or the inflated purchase price for the Prince George Property?

[314] I am not persuaded that Mr. Guo is liable as a fiduciary to account for Messrs. Nath and Horvath's secret profits or the inflated price the plaintiffs paid for the properties. Mr. Guo did not share in the profits they received. Nor did he receive any direct benefit from the sale apart from the potential for his share of any profits from the project itself. I am satisfied that Mr. Guo did not know Messrs. Nath and Horvath were to earn a profit from the sale of the properties. It was in Mr. Guo's pecuniary interest to maximize the project's profits and this would be threatened by two other partners taking a substantial profit from the land acquisition costs. I am satisfied that Mr. Guo would have acted on this if he knew Messrs. Nath and. Horvath were taking that profit.

[315] I also find that Mr. Guo was not under a fiduciary duty to protect the plaintiffs' interests in their decision to buy the lands at the price they did. Mr. Guo was a partner under the First Project Management Agreement and therefore owed Weihe the same duties as Mr. Horvath and Mr. Nath did. As I discuss below, I find that Mr. Guo also had an *ad hoc* fiduciary obligation under both Project Management Agreements to prudently and carefully manage Weihe's investment of Project Development Funds. However, Mr. Guo was not a fiduciary for the purposes of giving the plaintiffs advice on the purchase price for the properties or explaining or translating the legal documents prepared by Equip Law.

[316] I accept that Mr. Wang and Ms. Tian were vulnerable in the sense that Mr. Wang did not understand English and Ms. Tian's English was very basic at best. They relied on Mr. Guo at the Equip Law meetings to translate the documents prepared by Mr. Salter. However, this is not a vulnerability that arose from the relationship between the plaintiffs and Mr. Guo. The plaintiffs' limitations with English was an external factor that made them vulnerable.

[317] Further, while the plaintiffs placed considerable trust in their (then) friend Mr. Guo, they did not cede control or decision-making authority to him over the

decision to buy the properties. They remained in control of that decision and were not pressured by Mr. Guo or anyone to sign the documents on May 18, 2016. In *Pan Pacific Recycling Inc. v. So*, 2006 BCSC 1337, an employer alleged that an employee had become a fiduciary because he acted as interpreter on behalf of the employer in a contract negotiation. Justice Sigurdson found that while the employee had an obligation to act honestly and provide a full and proper translation, his obligations did not amount to a fiduciary duty because he did not have any scope to exercise discretion on behalf of the employer:

> [19] As an interpreter, Mr. So would be under an obligation to act honestly and provide full and proper translations to his employer. However, he was not the negotiator and he did not have any scope for the exercise of discretion, nor could he affect the beneficiary's legal or practical interests. Given that Mr. So did not have any particular discretion, neither Mr. Lin nor Pan Pacific were particularly vulnerable or at Mr. So's mercy. I recognize that as an employee who is interpreting he had an obligation to be honest and to not withhold information but I do not find that Mr. So became a fiduciary on that basis, nor do I find that he acted dishonestly or withheld information.
>
> [Emphasis added]

The same may be said here. It was the plaintiffs' choice to buy the properties or walk away. They had not ceded the power to make that decision to Mr. Guo.

[318] I also find Mr. Guo did not act dishonestly when he explained and translated the documents to Mr. Wang and Ms. Tian. He assured them that they were standard legal documents but I find he likely believed this to be true himself. He relayed Mr. Salter's explanation of the documents in summary terms rather than a line-by-line translation. As he acknowledged, he translated only the key business terms. However, it was undoubtedly evident to Mr. Wang and Ms. Tian that Mr. Guo's explanation of the documents in Mandarin was only a summary and not a line-by-line translation.

[319] During the course of the May 18, 2016 meeting at Equip Law, Mr. Guo learned that Mr. Horvath and Mr. Nath were directly involved in the land transactions. He understood that Mr. Nath controlled Developro which was the vendor of the Transfer Agreement for the equitable interest in the Prince George

Property and in the Share Purchase agreement by which 121 Ltd was to be transferred to Weihe. Mr. Nath signed those documents as Developro's authorized signatory. Mr. Horvath signed the Transfer Agreement and Share Purchase Agreement for the Sumas Mountain Property and 191 Ltd which was to acquire that property. Despite learning that Mr. Nath and Mr. Horvath were directly involved in the transaction, Mr. Guo did not make inquires as to why this was so. Nor did he bring this fact to Ms. Tian and Mr. Wang's attention.

[320] Nevertheless, I am not persuaded Mr. Guo intended to misrepresent or selectively represent the transaction to the plaintiffs. He did not understand the full significance of Mr. Horvath and Mr. Nath's involvement himself. As far as he understood, they were involved in the transaction because they had secured the properties for Weihe to purchase. Mr. Wang and Ms. Tian also knew of this, at least to some extent, since they knew they were reimbursing Messrs. Nath and Horvath for the deposits paid (or purportedly paid) for the properties.

[321] Further, Mr. Guo did not know at that time that Mr. Nath and Mr. Horvath were profiting from the sale. He did not make inquiries about Mr. Nath and Mr. Horvath's interest once he learned they were directly involved in the sale as a prudent person might have done but I am not persuaded he understood that something nefarious was afoot or that he intentionally withheld that information from the plaintiffs.

[322] The plaintiffs argue that even if Mr. Guo did not breach a fiduciary obligation in failing to advise them or make inquiries about Mr. Nath and Mr. Horvath's interests, he was nevertheless negligent in failing to advise them of this. However, I am not persuaded that Mr. Guo was operating under a duty of care. He was translating and explaining the documents but the plaintiffs knew he had no expertise in understanding the transaction and they were not relying on him – at least not reasonably – for this purpose.

[323] I also find that Mr. Guo was under no fiduciary or other obligation to ensure the plaintiffs had independent legal advice. He mischaracterized Mr. Salter's role to the plaintiffs in suggesting he was a lawyer on the transaction. He did not tell them

that Mr. Salter was representing Mr. Horvath and Mr. Nath but nor did he tell them Mr. Salter was representing Ms. Tian and Mr. Wang. As I have found earlier, Ms. Tian's English, though very basic, was sufficient to understand Mr. Salter when he recommended that she and Mr. Wang retain their own lawyer. I am also satisfied that Mr. Guo translated this advice for Ms. Tian and Mr. Wang.

[324] Further, Ms. Tian had dealt with lawyers on many occasions in land transactions. She regularly used her own lawyer when buying pre-sale and other investment properties. In fact, she went to see her own lawyer after the second meeting at Equip Law to ask him to do a title search to determine if Weihe was shown on title to the properties. She would have understood the role and significance of retainer agreements and would have known that neither she nor Mr. Wang signed any such agreement with Mr. Salter. I accept that she and Mr. Wang did not fully understand the transaction or Mr. Salter's role but I am satisfied they knew of Mr. Salter's advice that they retain their own lawyer. I find neither was vulnerable to Mr. Guo's statements about Mr. Salter's role.

[325] With respect to the purchase price of the lands more generally, I find that Mr. Guo is not liable in breach of fiduciary duty for the fact the plaintiffs paid an inflated price (although I find later that Mr. Guo is liable for a portion of the $175,000 overpayment due to a negligent misrepresentation). While Mr. Wang and Ms. Tian had no experience in real estate development, they had extensive experience in buying and selling real estate – considerably more than Mr. Guo. They knew that prudence dictated getting an appraisal of property before making a significant investment in it. Ms. Tian routinely did so for any property purchase she made in excess of $1 million. Despite this, they did not get an appraisal of either property. Nor did they inquire whether an appraisal had been done or ask Mr. Guo how it had been determined that the properties were reasonably priced. The plaintiffs knew better than to invest $4.65 million in real estate without knowing if an appraisal had been done and they were not relying on Mr. Guo to opine on the value of the land. They knew he had no such expertise.

[326] Finally, Mr. Guo is not liable under the guarantee in the Second Project Management Agreement for the inflated purchase of the Properties. The written guarantee Mr. Guo gave relates only to money the plaintiffs would invest in the development of the project, not the cost of buying the land. This is evident the face of the guarantee. The plaintiffs claim that Mr. Guo (and Ms. Xie) gave a broader verbal guarantee prior to the plaintiffs buying the land and that verbal guarantee applied to the purchase price of the land but I am not persuaded there was any agreement or a representation that Mr. Guo would give a broader guarantee. The guarantee he was willing to give is contained in the Second Project Management Agreement and if it was to have been broader than this, it would have been incorporated into the written agreement. The plaintiffs have not proven that a broader guarantee was given.

[327] If follows from these findings that Mr. Guo was not part of a common design with Messrs. Nath and Horvath to take a secret (or any) profit from the sale of the properties in breach of fiduciary duty and thus I find Mr. Guo was not part of the conspiracy discussed earlier between Mr. Nath and Mr. Horvath.

4. Were the plaintiffs induced to buy the properties by one or more misrepresentations?

(a) The Context

[328] The plaintiffs allege that Mr. Guo made or conveyed on behalf of Mr. Nath and Mr. Horvath 18 untrue statements about the properties, the proposed transactions to buy those properties, and the development potential of the properties. They claim these statements were designed to and did induce them into buying the properties, and, but for these misrepresentations, they would not have bought them. They claim the misrepresentations are fraudulent or, alternatively, negligent such that they are entitled to damages from Messrs. Horvath, Nath, and Guo for the inflated price they paid for the properties.

[329] I have already found that Mr. Nath and Mr. Horvath are liable in breach of fiduciary duty for the inflated price the plaintiffs paid for the lands, so

misrepresentation would be an additional ground of liability. I have found that Mr. Guo is not liable as a fiduciary for the inflated purchase price so I must now consider whether misrepresentation provides a different basis for liability.

[330] Mr. Guo denies making some of the 18 statements and admits making others. For those that he admits making, he maintains he was simply translating information provided by Mr. Nath and Mr. Horvath and the plaintiffs knew this to be the case.

[331] Since the plaintiffs seek damages but no longer seek rescission of the contracts to purchase the properties, only negligent and fraudulent misrepresentation are in issue. Rescission is a remedy for innocent misrepresentation but damages are not: *Pacific Playground v. Endeavour Develop.,* 2002 BCSC 126 at para. 24.

(b) Legal Principles

[332] There are two forms of misrepresentation that can ground an action for damages: fraudulent or negligent. Although often raised in the context of contract law (as in this case), both have their origins in tort law. Fraudulent misrepresentation is grounded in the tort of deceit while negligent misrepresentation is a species of negligence: Bruce MacDougall, *Misrepresentation and (Dis)Honest Performance in Contracts,* 2nd ed (Toronto: LexisNexis Canada, 2021) [MacDougall] at p. 359, ¶ 5.2; pp. 320-321, ¶ 5.10-5.11; p. 427, ¶ 6.2-6.3. Fraudulent misrepresentation is a deliberate act designed to mislead whereas negligent misrepresentation is inadvertent misconduct.

i. Fraudulent Misrepresentation

[333] The test for fraudulent misrepresentation was summarized in *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8 at para. 21:

> [21] From this jurisprudential history, I summarize the following four elements of the tort of civil fraud: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss.

[334] In *Ma v. Nutriview Systems Inc.*, 2014 BCSC 25 (aff'd 2016 BCCA 4; leave to appeal to SCC ref'd [2016] S.C.C.A. No. 83) Justice Kelleher endorsed Professor Fridman's assessment of the nature of fraudulent misrepresentation, including its serious nature and the requirement for intent:

> [174] In G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011) at 284, Professor Fridman described the distinction between fraudulent and non-fraudulent misrepresentations. He stated that a fraudulent representation "is one which is made with knowledge that it is untrue and with the intent to deceive."
>
> [175] At 287, Professor Fridman went on to state that an allegation of fraud is a very serious matter:
>
> > Clearly, while the courts will protect an innocent party from gross fraud, they will not attempt to protect a contracting party from all types of conduct. In accordance with the general principles of the law of contract, a party is expected to look out for himself, and make his own bargains. If he has done foolishly, that is his own fault and he is left to his own devices. Only from totally improper conduct, in this instance fraud, will he be granted protection and a remedy by the courts.

[335] In *Derry v. Peek,* 14 App. Cas. 337 at 374, [1889] U.K.H.L. 1, a leading English case on misrepresentation, Lord Herschell said:

> To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth.

[336] The element of knowledge that a statement is untrue may be met by proving the representor was willfully blind to the truthfulness of the statement or reckless as to its truth. Willful blindness requires that the representor was subjectively suspicious as to the truth of the representation but chose not to investigate that suspicion. It is not sufficient to show that a reasonable person in the same circumstances would have or ought to have been suspicious: *Wescom Solutions Inc. v. Minetto*, 2019 ONCA 251 a para. 9.

[337] A statement will be made recklessly if it is made without caring whether it was true or false: *Demichelis v. Vancouver Canucks Limited Partnership*, 2014 BCSC 1368 at para. 24; *Cranewood Financial Corp. v. Norisawa*, 2001 BCSC 1126 at para. 246. In *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd*, 2017 ABCA 378 at para. 34, the court endorsed Professor MacDougall's formulation

of recklessness in *Misrepresentation* which is now found at p. 375, ¶ 5.36 of the second edition:

> Recklessness typically involves a person's stating information in an authoritative way without having bothered at all to find out whether the information is accurate.

ii. Negligent Misrepresentation

[338] The test for negligent misrepresentation is set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110 which remains a leading case on the subject:

> The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5)the reliance must have been detrimental to the representee in the sense that damages resulted.

[339] As Professor MacDougall writes at p. 428, ¶ 6.4: "It is the duty of care that is at the heart of negligent misrepresentation…". A duty of care may arise where there is a sufficient relationship of proximity between the representor and the representee such that, in the reasonable contemplation of the representor, the representee could be harmed by the representor's carelessness. A relationship of proximity will arise if a defendant ought reasonably foresee that a plaintiff will rely on the defendant's representations and that reliance, in the particular circumstances of the case, would be reasonable. When these two factors are present, it can be said that a "special relationship" exists between the parties: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, para. 24.

[340] As to whether reliance in any given case was reasonable, the court in *Hercules Management* at para. 43 endorsed five general *indicia* of reasonable reliance articulated by Professor Bruce Feldthusen in *Economic Negligence* (3rd ed. 1994) at pp. 62-63. These are neither exhaustive nor a checklist but they "help to distinguish those situations where reliance on a statement is reasonable from those where it is not." The *indicia* are:

(1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.

(2) The defendant was a professional or someone who possessed special skill, judgment, or knowledge.

(3) The advice or information was provided in the course of the defendant's business.

(4) The information or advice was given deliberately, and not on a social occasion.

(5) The information or advice was given in response to a specific enquiry or request.

(c) What Representations were Made?

[341] As noted, the plaintiffs identify 18 statements they say are untrue and induced them into buying the properties. I would group those 18 statements into the following categories:

a) a statement that Mr. Guo had been following the investment opportunity for several years;

b) statements about the profit-generating potential of the properties;

c) statements about Mr. Horvath's experience with property development;

d) statements about the cost of acquiring the properties;

e) statements about the urgency of buying the properties;

f) statements about Mr. Salter and Equip Law's role in the transaction.

i. Following the Investment Opportunity

[342] Mr. Guo denies telling the plaintiffs he had been following the opportunity for several years. The plaintiffs bear the onus of proving that he made this statement. I am not persuaded that he did. As I have discussed earlier, Mr. Wang's memory for detail is not strong and I consider his evidence on this point with caution.

[343] Even if Mr. Guo made this statement, I am not persuaded that the plaintiffs relied on it or did so reasonably. There is no evidence Mr. Guo had significant

history experience with real estate investment, but the plaintiffs had considerable experience, and reliance is unlikely where the representee possesses greater expertise on the matter than does the representor: *The Pas (Town of) v. Porky Packers Ltd*, [1977] 1 S.C.R. 51 at 68. Thus, even if Mr. Guo made the statement that he had been following these properties for several years (and I am not persuaded that he did) I find the plaintiffs did not rely, or reasonably rely, on this statement in deciding to buy the properties.

[344] As I discuss in a moment, however, I am persuaded that Mr. Guo advised the plaintiffs that Mr. Horvath and Mr. Nath had been following this opportunity for some time.

ii. Statements about the Profit Potential

[345] The next set of statements concern the opportunity to profit from the development. These include that the market had "matured" and this was a rare opportunity to invest; that there was good potential to subdivide the properties into one-acre or possibly (for the Sumas Mountain Property) half-acre residential lots; and there was a potential to earn $50 million or more in profit from the development. This last statement may have been based on a representation that it would cost approximately $200,000 or $300,000 to develop each lot and each lot could sell for $800,000.

[346] First, I accept that these representations were made at least to Mr. Wang and probably Ms. Tian. Mr. Guo admitted to making these statements to Mr. Wang, although he said he was just translating what Mr. Nath or Mr. Horvath said. Mr. Horvath did not challenge Mr. Guo on this evidence but he denied telling Mr. Guo that developed lots could sell for $800,000 or that the projects could realize a profit of $50 million or more. He agreed that he and Mr. Nath said the estimated the development cost for each lot to be $250,000 to $350,000.

[347] I do not accept that Mr. Wang was *assured* that the properties could be subdivided into one-acre or half-acre lots but I am persuaded he and Ms. Tian were given to believe there was a good possibility that this could happen. This

representation was (artificially) bolstered by another misrepresentation that Mr. Nath had a family member in government who could secure approvals for this kind of subdivision.

[348] I accept that Mr. Nath and Mr. Horvath relayed these statements to Mr. Guo with the intent and expectation that he would pass them along to Mr. Wang. I find the specific information – including that the properties could be subdivided into one-acre or possibly half acre lots, the potential sale price for developed lots, and the potential to earn a profit in excess of $50 million – was likely given to Mr. Guo by Mr. Nath rather than Mr. Horvath. However, I accept Mr. Guo's evidence (which Mr. Horvath did not challenge) that Mr. Horvath brought the opportunity to Mr. Guo and told him it was a good opportunity to make money but they needed an investor.

[349] Mr. Nath and Mr. Horvath acted in concert with one another in bringing this opportunity to Mr. Guo and presenting it to him in a way that would convince him to persuade Mr. Wang to invest. Mr. Nath and Mr. Horvath agreed amongst themselves to buy the properties and flip them to Mr. Wang for a substantial profit. They kept that plan secret from Mr. Guo but to make it work, it was critical that Mr. Guo convince Mr. Wang that the investment was a good opportunity. That required Mr. Horvath and Mr. Nath to lay out a development proposal that would be attractive and convincing not just for Mr. Wang but also for Mr. Guo who would present it to Mr. Wang. While Mr. Nath may have taken the lead in painting the misleading picture of this development potential, I find that Mr. Horvath knew Mr. Guo was being given that picture with the intention and expectation that he would relay it convincingly to Mr. Wang. In my view, Mr. Horvath's acquiescence in that makes him as much a part of the misrepresentations as was Mr. Nath.

[350] Second, I find Mr. Guo, and Messrs. Nath and Horvath through Mr. Guo, made these statements to induce Mr. Wang and Ms. Tian to invest in the properties. As Mr. Guo admitted:

> Q. And the statement that you made to him on May 14th, 2016, and thereafter were in order to present the facts to him so that he would buy the properties; correct?

A. Yes.

[351] Third, I accept that the plaintiffs did in fact rely on these representations in making their decision to invest in the properties and the decision to do so was induced in part because of these representations. However, I do not accept that the plaintiffs relied (or reasonably relied) on an expectation that the properties *would* be subdivided into one-acre lots or that Mr. Nath's family member *would* be able to make this happen within government. Nor did they rely on an expectation that they *would* earn profits of $50 million or more. The representations were unduly optimistic but they were not promises. The plaintiffs knew there were uncertainties in all these points and that there was risk in making the investment.

[352] However, while Messrs. Nath and Horvath did not promise the contemplated subdivision would be achieved, they misrepresented the *prospects* for securing that subdivision through government approvals. In particular, they falsely represented that Mr. Nath's family member could assist achieving the subdivision and variance approvals. There was simply no factual basis on which to suggest there were good (or any) prospects to achieve approval for one-acre or half-acre-lot subdivisions on either property. These representations were designed to and in fact did create a false optimism for the potential profits that might be earned by developing these properties.

[353] Thus, while visions of profits that might exceed $50 million could well be characterized as "puffery" that is not actionable as a misrepresentation (*Pacific Playground*, para. 23), that is not the specific misrepresentation that is actionable here. Rather, the misrepresentation was that there was a factual basis to support the real potential to subdivide the properties into one-acre or half-acre lots. In fact, there was no factual basis to support that potential subdivision and Messrs. Nath and Horvath knew there was not.

[354] Thus, I find that Mr. Nath and Mr. Horvath made (or acquiesced in Mr. Guo making at their behest) these misrepresentations to the plaintiffs. They did so intentionally, knowing it was necessary to persuade the plaintiffs to buy the

properties at the price they were seeking. I find Mr. Nath, who took the lead on these representations, knew there was no basis for this optimism and Mr. Horvath was at least reckless in not caring whether there was or was not a factual basis for what was being represented. I am therefore satisfied that Mr. Nath and Mr. Horvath's misrepresentations were fraudulent.

[355] I find Mr. Guo's conduct in passing this information on to Mr. Wang and Ms. Tian comes very close to the recklessness standard for fraudulent misrepresentation but ultimately falls short of the mark. I find that he, like Mr. Wang, believed what had been presented to him by Mr. Nath and Mr. Horvath. He also believed that Mr. Nath and Mr. Horvath had knowledge and experience with residential property development and that they had good reason for suggesting the properties could be developed in the way they were suggesting. Mr. Guo accepted this at face value without looking into the veracity of it, but I am satisfied he was not indifferent to whether the representations were true. Mr. Guo had no experience in real estate development or residential home construction and he was grossly naive in having faith in Mr. Nath and Mr. Horvath. However, I am not persuaded this naivety rises to the level of fraud, even on a recklessness standard.

[356] Nor am I persuaded that this constitutes a negligent misrepresentation on Mr. Guo's part for the simple reason that the plaintiffs did not *reasonably* rely on Mr. Guo's knowledge of the subdivision potential. They knew the limited extent of Mr. Guo's experience in these matters and had no reason to believe Mr. Guo himself had any particular knowledge or expertise in subdivision development or rezoning. I find they relied on what Mr. Guo had relayed to them by Mr. Nath and Mr. Horvath but they did not rely, or reasonably rely, on Mr. Guo himself for his own knowledge of these matters. In short, they knew that Mr. Guo was simply relaying what Messrs. Nath and Horvath had told him.

iii. Mr. Horvath's Experience

[357] Mr. Wang testified that Mr. Guo represented to him that Mr. Horvath had decades of experience and was capable of managing a residential construction

project. Mr. Horvath and Mr. Guo denied this but I accept Mr. Wang's evidence on this point. Persuading Mr. Wang and Ms. Tian that Mr. Horvath had the experience and capability to manage the developments was critical to convincing them to buy the properties and invest in the projects. I also find that Mr. Horvath and Mr. Nath represented to Mr. Guo that they had the experience and capability to manage the projects and they did so knowing and expecting that Mr. Guo would relay this to Mr. Wang.

[358] Moreover, the terms of the First Project Management Agreement itself implies that Mr. Horvath and Mr. Nath had the expertise to manage the developments. The opening words of the agreement state that each individual will bring "expertise and knowledge … into the platform" (my emphasis) and that Messrs. Nath, Horvath and Guo have the "sole right of planning, design, monitoring, execution, marketing and sales, [and] project management for development". The clear inference from these terms is that the matters over which Mr. Nath and Mr. Horvath enjoy the "sole right" to carry out are matters in which they have "expertise and knowledge" which they are bringing "into the platform".

[359] Mr. Nath and Mr. Horvath knew that neither of them had the experience or the qualifications to manage a large-scale residential real estate development of the type being contemplated. Neither had ever done anything like that. Mr. Nath was largely a construction labourer with some skills in removing asbestos from buildings. Mr. Horvath had worked for a large and well-known real estate development firm in the past but his duties were residential construction and site supervision. He did not manage developments. Beyond this, Mr. Horvath had his own construction companies that built homes and other buildings but he had never taken on a multi-lot residential development of the nature contemplated here.

[360] Despite this lack of experience, both Mr. Nath and Mr. Horvath were content to have Mr. Guo tell Mr. Wang that at least Mr. Horvath had experience in residential real estate development that would equip him to manage the projects. They were also content to have this inferred in the First Project Management Agreement. This

was a misrepresentation that both knew to be false. I find they fraudulently misrepresented their experience and qualifications to Mr. Wang.

[361] Again, while I find Mr. Guo's conduct in relaying this misrepresentation to Mr. Wang and Ms. Tian falls very close to recklessness, I am not persuaded he was indifferent as to the truth of Mr. Horvath's experience and ability to manage the projects. He accepted Mr. Nath and Mr. Horvath's misrepresentation when he ought to have questioned it but fraudulent misrepresentation requires the representor to be *subjectively* suspicious as to the truth of the representation. It is not enough that a reasonable person in the same circumstances would make inquiries: *Wescom Solutions,* para. 9. The fact Mr. Guo did not question Mr. Horvath's qualifications does not mean he was indifferent to whether or not he had those qualifications. I accept that Mr. Guo believed that Mr. Horvath's experience with home construction and his past experience with a reputable real estate development firm truly equipped him to manage the development projects. Thus, I find that Mr. Guo did not fraudulently misrepresent Mr. Horvath's experience to Mr. Wang.

[362] However, I find that Mr. Guo was negligent in relaying this misrepresentation to Mr. Wang. Mr. Guo told Mr. Wang that he had known Mr. Horvath for some years. He knew Mr. Wang and Ms. Tian knew nothing about Mr. Horvath but if they were to be persuaded to invest in the properties and the development, they had to trust that Mr. Horvath was capable of managing the developments. Mr. Guo knew the plaintiffs had to rely and would rely on his advice about Mr. Horvath's experience and qualifications since all they knew about him was through Mr. Guo.

[363] In my view, this is sufficient to establish the necessary proximity to support a duty of care for negligent misrepresentation. Though Mr. Guo knew little or nothing about residential real estate development, he purported to know about Mr. Horvath and he vouched for his experience in presenting the investment opportunity to Mr. Wang. This was not a casual reference or a friendly recommendation of Mr. Horvath to Mr. Wang. It was a deliberate endorsement that was made with the objective of persuading the plaintiffs to invest in the properties and the development

from which Mr. Guo expected to eventually profit. He knew the plaintiffs would rely on his representation about Mr. Horvath and thus he knew or ought to have known that he should take care to ensure the representation accurate. Despite that, Mr. Guo took no steps to independently assess whether Mr. Horvath was qualified or capable of managing the developments but he suggested to the plaintiffs that he was. In my view, Mr. Guo was negligent in relaying this representation.

[364] The plaintiffs relied on this negligent misrepresentation in deciding to invest in the properties, but was their reliance reasonable? In my view it was. At least three of the five *indicia* of reasonable reliance adopted in *Hercules Management* are present here:

a) Mr. Guo had a financial interest in the transaction in that he stood to share in any profits from the development;

b) Mr. Guo was by no means a professional or a person of special skill when it came to real estate investment or land development and this was well known to the plaintiffs. However, Mr. Guo did profess some special knowledge of Mr. Horvath based on his own experience with him on the Pitt Meadows project.

c) Mr. Guo gave this advice deliberately in the context of a real estate investment proposal. Although he and Mr. Wang were very close friends, the advice was not given on a social occasion.

[365] I am satisfied that the plaintiffs reasonably relied on Mr. Guo negligent misrepresentation as to Mr. Horvath's skill, experience, and capability to manage the proposed projects. But for that misrepresentation, they would not have bought the Properties.

iv. Cost of Acquiring the Properties

[366] Mr. Nath and Mr. Horvath represented that the properties could be purchased for $5 million and later refined this to $4.65 million. They actively concealed the fact

that they themselves were purchasing the properties for a total of only $3.2 million and earning a $1.45 million profit from flipping them.

[367] In ordinary circumstances where the parties are acting independently, withholding this kind of information might be seen as distasteful but it is not an actionable misrepresentation. *Caveat emptor* still applies in the purchase and sale of real estate and parties are expected to look after their own interests. Here, however, the parties were in a fiduciary relationship. This puts their conduct in a significantly different light. It may be that within the context of a fiduciary relationship, this conduct might amount to a fraudulent misrepresentation. However, since it is the fiduciary context that makes it actionable, I consider it appropriate to confine Mr. Nath and Mr. Horvath's liability on this point to a breach of fiduciary duty rather than stretch it into fraudulent misrepresentation.

[368] With respect to Mr. Guo, he did not know Mr. Horvath and Mr. Nath were concealing the true purchase price of the properties. Mr. Guo did not question the purchase price or the valuation for the properties but neither did the plaintiffs. As I have found earlier, the plaintiffs had considerably more experience in buying real estate than did Mr. Guo. They knew to ask for an appraisal before buying property but chose not to. I have also found they knew that Mr. Salter was not their lawyer and chose to proceed with the purchase without having another lawyer scrutinize the transaction. To the extent it can be said that Mr. Guo negligently misrepresented the purchase price for the properties, I find the plaintiffs did not reasonably rely on that misrepresentation and it is therefore not an operative misrepresentation.

v. Urgency

[369] I accept that the plaintiffs were likely told there was some urgency to the transactions and were falsely led to believe that if they did not act, someone else might take up the opportunity. However, I find they did not rely on this misrepresentation in deciding to buy the properties. They were not pressured by anyone to sign the purchase documents at the May 18, 2016 meeting at Equip Law. As I said earlier, Mr. Wang was challenged on this point several times in cross-

examination and he avoided answering the questions. In the absence of reliance, this is not an operative misrepresentation.

vi. Mr. Salter and Equip Law's role in the transaction

[370] The plaintiffs allege that several statements about Equip Law and Mr. Salter were misrepresentations. These include that Mr. Salter would represent the plaintiffs, that he worked with a large firm, that he would hold the plaintiffs' funds in a trust account and only use them to purchase the properties, that numbered companies were being used for tax reasons, and the transfer documents he drafted were standard legal documents.

[371] I have already found that the plaintiffs (or at least Ms. Tian) understood that Mr. Salter was not representing them specifically. As to whether Mr. Salter worked for a large firm, I find this was not material to the plaintiff's decision to buy the properties as they had already decided to do so before meeting with Mr. Salter. Regardless, the plaintiffs attended at Mr. Salter's firm and could judge for themselves whether it was sufficiently "large" to sustain their expectations.

[372] I have also found that Equip Law used Weihe's funds to purchase the properties, albeit through numbered companies rather than directly. I am not persuaded that Mr. Guo misrepresented facts concerning the numbered companies. In a technical sense, the use of numbered companies is contrary to Mr. Guo's representation that Weihe's money would be used to buy the land when in fact it was used to buy shares in holding companies that held or would come to hold the land. However, the plaintiffs knew and understood this at the May 18, 2016 meeting and decided to proceed with the transaction. I accept that the plaintiffs did not fully understand why the transaction was structured that way (and nor did Mr. Guo) but they were under no misapprehension that they were buying the properties through the purchase of the numbered companies.

[373] The real problem with using the numbered companies is that it enabled Mr. Nath and Mr. Horvath to conceal their secret profit. Without the benefit of having their own lawyer, there was no one to recommend to the plaintiffs that they look

behind the documents to understand the true nature of the transaction. However, as I said earlier, Mr. Salter was not challenged in his evidence that he recommended to the plaintiffs that they retain their own lawyer and I have found that Ms. Tian's English was sufficient to understand this.

[374] Taken together, the alleged misrepresentations about Mr. Salter and Equip Law are elements of a larger misrepresentation of Mr. Nath and Mr. Horvath that the plaintiffs were buying the properties from third parties at the stated price when in fact they were buying the properties through Mr. Horvath and Mr. Nath at a substantially inflated price. However, as I have explained earlier, I find this is properly characterized as a breach of fiduciary duty rather than a fraudulent misrepresentation.

(d) Summary of Misrepresentations

[375] In summary, I find that Mr. Nath and Mr. Horvath fraudulently misrepresented the factual bases for believing the properties could be subdivided into one-acre or half-acre lots and Mr. Horvath's experience and qualifications to manage the development of the properties. I find Mr. Guo negligently misrepresented Mr. Horvath's experience and qualifications. I find the plaintiffs reasonably relied on these representations and were induced into buying the properties because of them. They are not the sole bases on which the plaintiffs made their investment decision but they were material factors in that decision and that is sufficient to support their claims in misrepresentation.

5. Damages for Purchase of the Properties

(a) Legal Principles

[376] Here I address the principles of damages arising from the breaches of fiduciary duty and the misrepresentations as they relate to the cost of acquiring the properties. I will address the principles relating to the use and misuse of the Project Development Funds later in these reasons.

[377] Damages for breach of fiduciary duty are grounded in principles of equity, although some guidance may be taken from principles of tort law: *Canson Enterprises Ltd. v. Boughton & Co*., [1991] 3 S.C.R. 534. An accounting of profits earned by a fiduciary from a breach is a common remedy. Messrs. Nath and Horvath must account for the $1.45 million profit they received from flipping the properties. They are jointly and severally liable to the plaintiffs for this amount. Further, they are also jointly and severally liable for the $175,000 overpayment for the fair market value of the Prince George Property on the basis that the plaintiffs would not have incurred this loss but for Messrs. Nath and Horvath's breach of fiduciary duty.

[378] Damages for fraudulent misrepresentation and negligent misrepresentation are assessed using principles of tort law: deceit for fraudulent misrepresentation and negligence for negligent misrepresentation: MacDougall at pp. 398-399, ¶ 5.95; pp. 488-489, ¶ 6.140. They aim to put the plaintiff in the position they would have been "but for" the misrepresentation. Where the misrepresentation has induced a party to enter into a contract that they would not have entered but for the misrepresentation, damages are measured by the losses the party suffered as a consequence of entering into the contract.

[379] As I will now discuss, while the point is somewhat unsettled, the present state of the law is that the compensable losses are not only those directly related to the misrepresentation, but also those additional losses that would not have been sustained if the party had not entered into the contract. However, in the case of negligent (but not fraudulent) misrepresentation, the loss must also have been foreseeable at the time of the misrepresentation.

[380] The point of uncertainty is whether all foreseeable losses are recoverable under negligent misrepresentation or only those that flow from the misrepresentation itself. In *Rainbow Industrial Caterers Ltd. v. Canadian National Railway*, [1991] 3 S.C.R. 3, Justice Sopinka, for the majority, found that all foreseeable losses, even those not directly related to the misrepresentation, are recoverable. This approach is based on the fact that the plaintiff would not have entered into the contract in the first

place (and thus would not have suffered any of the losses) but for the defendant's misrepresentation. In dissenting reasons, Justice McLachlin expressed the view that if a defendant can show the loss was caused by factors other than the misrepresentation, the chain of causation is broken and those losses are not recoverable.

[381] Justice McLachlin's view has received favourable judicial commentary in provincial appellate courts: *Hogarth v. Rocky Mountain Slate Inc.* 2013 ABCA 57 at paras. 33-43 (*per* Slatter J.A. concurring) and *Owners*, *Strata Plan LMS 3851 v. Homer Street Development Limited Partnership,* 2016 BCCA 371 at paras. 81-93. However, Sopinka J.'s majority judgment apparently still governs, at least when the duty on the defendant is imposed by common law rather than by statute: *Hogarth* at para. 9 (*per* O'Brien and Rowbotham JJ.A.) and *Homer Street* at paras. 93-94.

[382] Putting aside that uncertainty, both the majority and minority judgments in *Rainbow Industrial* are clear that the damage must still be foreseeable (i.e. not too remote) to be recoverable under *negligent* misrepresentation: *Rainbow Industrial* at 17 (*per* Sopinka J.) and 19 (*per* McLachlin J.); *Hogarth* at para. 9. As McLachlin J. said in *Rainbow Industrial* at p. 19:

> The final question is whether the loss found to be caused by the negligent misstatement was a reasonably foreseeable consequence of the misrepresentation when the misrepresentation was made, i.e., that it is not too remote.

[383] However, damages for *fraudulent* misrepresentation are not restricted by foreseeability. Justice McLachlin discussed this point in her concurring reasons in *Canson Enterprises* at 552, where she addressed this point in the context of a breach of fiduciary duty. She noted that the principles are the same for both breach of fiduciary duty and deceit, which is a form of fraudulent misrepresentation:

> Thus while the loss must flow from the breach of fiduciary duty, it need not be reasonably foreseeable at the time of the breach, as *Guerin* [*v. The Queen*, [1984] 2 S.C.R. 335] affirms. The considerations applicable in this respect to breach of fiduciary duty are more analogous to deceit than negligence in breach of contract. Just as "it does not lie in the mouth of the fraudulent person to say that they [the losses] could not reasonably have been

> foreseen", (*Doyle v. Olby (Ironmongers) Ltd.*, [1969] 2 Q.B. 158 (C.A.), at p. 167, so it does not lie in the mouth of a fiduciary who has assumed the special responsibility of trust to say the loss could not reasonably have been foreseen. This is sound policy. In negligence we wish to protect reasonable freedom of action of the defendant, and the reasonableness of his or her action may be judged by what consequences can be foreseen. In the case of a breach of fiduciary duty, as in deceit, we do not have to look to the consequences to judge the reasonableness of the actions. A breach of fiduciary duty is a wrong in itself, regardless of whether a loss can be foreseen. Moreover the high duty assumed and the difficulty of detecting such breaches makes it fair and practical to adopt a measure of compensation calculated to ensure that fiduciaries are kept "up to their duty".
>
> [Emphasis added]

[384] Though McLachlin J. was here writing for a concurring minority, her analysis was largely endorsed in a subsequent majority judgment of the Supreme Court of Canada in *Southwind v. Canada,* 2021 SCC 28 at paras. 70-77.

(b) Damages against Mr. Nath and Mr. Horvath for Purchase Price of the Properties

[385] Earlier I found that Mr. Nath and Mr. Horvath are jointly and severally liable to account for the profits of $1.45 million they earned by flipping the properties. This flows from their breach of fiduciary duty which compels them to account to Weihe as a beneficiary for their undisclosed profits. I also found they are liable for the $175,000 loss the plaintiffs suffered by overpaying for the Prince George Property in addition to the profit taken by Messrs. Nath and Horvath. Here I add that they are also liable for these amounts due to their fraudulent misrepresentations, made through Mr. Guo, that induced the plaintiffs to enter into the contracts to buy the properties. But for those misrepresentations the plaintiffs would not have bought the properties and suffered these losses.

[386] I would add that the Court of Appeal's decision in *Jak-B-Jak Investments Inc. v. Sadowick,* 2004 BCCA 201 adds further support for my finding that Messrs. Nath and Horvath are liable not only for the profits they took from flipping the properties but also the $175,000 overpayment. In that case, Newbury J.A., speaking for the court at para. 5, said that the general rule where fraud has induced a person to purchase land is to measure the damages as the difference between the price paid

and the actual fair market value of the purchased assets. Here that difference would capture the $175,000 overpayment for the Prince George Property as well as the profits taken by Messrs. Nath and Horvath.

[387] The defendants argue that I must account for the fact that the plaintiffs continue to own the properties which have increased in value since they bought them. The plaintiffs tendered expert appraisal reports which opine that the Prince George Property had a market value of $680,000 as of February 1, 2022 while the Sumas Mountain Property had a value of $3.46 million as of November 20, 2018. These are the most recent appraisals in evidence. None of the defendants tendered any evidence of the market value of the properties as of the date of trial. Using these appraisals, the Prince George Property increased in value by $305,000 between May 2016 and February 2022 while the Sumas Mountain Property increased in value by $770,000 between May 2016 and November 2018.

[388] In *Smith New Court Securities Ltd. v. Scrimgeour Vickers (Asset Management) Ltd.,* [1996] U.K.H.L. 3, [1997] A.C. 254 at 267 (H.L.), Lord Browne-Wilkinson summarized the principles applicable to damages for fraudulent misrepresentation in the context an inducement to acquire property. One of those principles is that the plaintiff “must give credit for any benefits which he has received as a result of the transaction”.

[389] The plaintiffs, of course, cannot claim the full cost of buying the properties while still retaining them, but that is not what they seek here. They only seek damages for the amount that exceeds the fair market value of the properties as of the date they bought them. *Smith New Court Securities* might suggest that the plaintiffs should give credit for the increase in value of the properties since the plaintiffs acquired them.

[390] The plaintiffs point out that damages for breach of contract are ordinarily assessed as at the date of breach, but they acknowledge that courts have a discretion to choose a different date that would arrive at a more just

result: *Ranisavljevic v. Sathasivam,* 2020 BCSC 413 at para. 114; *Panegos v. O'Byrne,* 2020 BCCA 352 at para. 10.

[391] However, the damages flowing from the purchase of the properties (as opposed to damages relating to the Property Development Funds) are not based in breach of contract. They are based on breach of fiduciary duty and fraudulent misrepresentation for Messrs. Nath and Horvath and negligent misrepresentation for Mr. Guo. The objective is to put the plaintiffs back in the position they would have been but for the breach.

[392] In order to fund their investment in the properties and the project development, the plaintiffs had to sell some of the pre-sale investment properties Weihe owned. Had they not been induced into buying the Prince George and Sumas Mountain Properties, they likely would have benefited from a rise in value in those investments. I do not have evidence of what those investments might have generated but since those properties were located in urban centres where property values have steadily increased since 2016, it is likely that the return on those real estate investments would have equalled or exceeded the increased value in the Prince George and Sumas Mountain Properties. On this basis I find a just result does not require any deduction for the increased value of the properties since 2016.

(c) Damages against Mr. Guo for Purchase Price of the Properties

[393] At this stage I am dealing only with Mr. Guo's liability for the losses the plaintiffs suffered based on that the purchase price for the two properties. Mr. Guo's liability is in negligent misrepresentation, specifically that Mr. Horvath had the knowledge and experience to carry out the development. It did not touch on the value of the properties or the price the plaintiffs paid for them.

[394] On the basis of the majority judgment in *Rainbow Industrial*, the plaintiffs' losses associated with the price they paid for the land (from both the overpayment of its market value, and the undisclosed property flips) were a consequence of them having bought the properties, which they would not have done but for Mr. Guo's negligent misrepresentation. lf McLachlin J.'s minority judgment in *Rainbow*

Industrial represented the current state of the law, Mr. Guo probably would not be liable for that loss because his misrepresentation did not relate to the value of the lands. However, Sopinka J.'s majority judgment still carries the day. Since the plaintiffs would not have entered into the contract and suffered these losses but for the negligent misrepresentation, I am compelled to find that they are losses incurred as a consequence of that misrepresentation.

[395] However, since Mr. Guo's misrepresentation was negligent rather than fraudulent, I must consider whether these losses were foreseeable (i.e. not too remote). In my view, it was foreseeable at the time of the negligent misrepresentation that the plaintiffs may not be paying market value for the properties since no appraisal had been done. On this basis, I find that Mr. Guo is severally liable with Messrs. Nath and Horvath for the $175,000 overpayment (subject to contributory negligence which I will deal with in a moment).

[396] However, it is my view that the mechanism by the plaintiffs suffered the $1.45 million loss at the hands of Messrs. Nath and Horvath earning a secret profit through flipping the properties is so extraordinary that this type of loss was not reasonably foreseeable at the time of Mr. Guo's negligent misrepresentation. I find this loss is too remote to attract liability on Mr. Guo's part for his negligent misrepresentation.

[397] Thus, dealing only with the purchase of the properties for the moment, I find Mr. Guo is jointly liable with Messrs. Nath and Horvath for the $175,000 difference between the market value of the Prince George Property as at May 2016 and the amount that Messrs. Nath and Horvath paid for that property, but not for the $1.45 million secret profit Messrs. Nath and Horvath took.

[398] That, however, does not end this issue because I also find that the plaintiffs are contributorily negligent for the loss I have attributed to Mr. Guo on the purchase price. Unlike fraudulent misrepresentation, contributory negligence can be a factor in a claim for negligent misrepresentation: MacDougall, p. 502, ¶ 6.174. This was the case in *Avco Financial Services Realty Ltd. v. Norman*, 64 OR (3d) 239, 2003 CanLII 47436 (Ont. C.A.), which was accepted by the British Columbia Court of Appeal in

Chapeskie v. Canadian Imperial Bank of Commerce, 2004 BCCA 154 at para. 13. In *Avco Financial Services Realty,* Justice Charon said at para. 32 that contributory negligence in the context of negligent misrepresentation examines the defendant's conduct in all the circumstances that surround the event that occasioned the loss. These circumstances may be much wider in scope than the circumstances surrounding the negligent misrepresentation. For this reason, a defendant might have reasonably relied on a misrepresentation but this reasonable reliance might co-exit with unreasonable or imprudent conduct by the defendant in the broader context.

[399] Earlier I found that the plaintiffs knew that prudence dictates getting an appraisal of real property before buying it but they opted not to do so or even inquire as to whether the purchase price had been assessed against an appraisal. Had the plaintiffs inquired about an appraisal and learned the true value of the properties, they would not have entered into the contract to buy the land, at least not at the price that was demanded. Thus, they contributed to the circumstances that caused their loss as to the overpayment for the land. I therefore find the plaintiffs are contributorily negligent for that loss and I assess their contribution at 50% of Mr. Guo's liability such that Mr. Guo is liable for $87,500 of the $175,000. Since contributory negligence does not negate fraudulent misrepresentation, this finding does not reduce Messrs. Nath and Horvath's liability.

(d) Summary of Damages for the Purchase of the Properties

[400] In summary, I make the following findings as to liability for damages in relation to the purchase of the two properties:

a) Mr. Nath and Mr. Horvath are jointly and severally liable to the plaintiffs for the $1.45 million in profits they earned from the sale of the properties and the $175,000 overpayment on market value for the Prince George Property. I award the plaintiffs damages against Messrs. Nath and Horvath, jointly and severally, for these amounts.

b) Mr. Guo is liable along with Mr. Nath and Mr. Horvath for the $175,000 overpayment on market value but only for half this amount – $87,500 – due to the plaintiffs' contributory negligence. Mr. Guo's liability for this amount is based on negligent misrepresentation. It does not extend to the $1.45 million in secret profits taken by Mr. Nath and Mr. Horvath as that mechanism of loss was too remote at the time of Mr. Guo's negligent misrepresentation. Mr. Guo's liability for this amount is not joint and several with Mr. Nath and Horvath due to the plaintiffs' contributory negligence: *Negligence Act*, R.S.B.C. 1996, c. 333, ss. 1, 2(c); *Leischner v West Kootenay Power & Light Co Ltd* (1986), 70 B.C.L.R. 145, 24 D.L.R. (4th) 641 (C.A.).

VII. Liability for Project Development Funds

1. Overview

[401] I turn now to the $2,862,500 in Project Development Funds the plaintiffs invested in the Prince George property, the $307,500 they paid to Teare Creek to settle its claim, and the $82,000 they paid to Vantone Developments for the lidar survey of the Sumas Mountain Property that was never done.

[402] By way of summary, I find that Mr. Horvath and Mr. Nath are jointly and severally liable in breach of contract, breach of trust, breach of fiduciary duty, and conspiracy for these full amounts (totalling $3,252,000). This is based on Mr. Nath and Mr. Horvath's gross mismanagement of the Prince George project and the misappropriation of $2,049,964 of the Project Development Funds in breach of the First Project Development Agreement and their fiduciary duties as partners and trustees of the Project Development Funds.

[403] I find that Mr. Guo is jointly and severally liable with Mr. Nath and Mr. Horvath for the full amount of the Project Development costs paid up to November 2016, namely $2,649,500. This excludes the $206,500 payment made in November and the $6,500 payment made in December after Mr. Guo advised Ms. Tian to hold off on making the payment. Mr. Guo is also jointly and severally liable with Mr. Horvath

and Mr. Nath for the $307,500 payment to settle Teare Creek's claim and the $82,000 paid for the survey of the Sumas Mountain Property. Mr. Guo's liability is in breach of contract and breach of fiduciary duty based on his complete failure to supervise the project in accordance with his managerial role under the Project Development Agreements. It is also based on the guarantee he gave in the Second Project Management Agreement.

[404] I find that Mr. Nath and Mr. Horvath are jointly and severally liable to Mr. Guo under Mr. Guo's third party claim for the full extent of Mr. Guo's liability to the plaintiffs.

[405] I will now explain my reasons for these conclusions.

2. Mr. Horvath's and Mr. Nath's Liability

(a) Breach of Contract

[406] Under the First Project Management Agreement, it was Messrs. Nath, Horvath, and Guo's obligation to develop the properties. The obligation is worded as a *right* for "planning, design, monitoring, execution, marketing and sales, project management for the development" but I agree with the plaintiffs that the agreement necessarily implies this is also an obligation. If that were not otherwise obvious, it would be made clear by clause 6 which states that Messrs. Nath, Horvath, and Guo "promise to complete the above mentioned projects in three and [*sic*] half years" (my emphasis).

[407] Where there is an agreement to supply professional services, it is normally an implied term of the agreement that the person providing those services will perform them with the skill and expertise that can expected of a professional of ordinary competence: *Scholtes v. Stranaghan* (1981), 26 B.C.L.R. 190 at 195-196, 1981 CanLII 555 (S.C.); *West Coast Paving Co. Ltd. v. British Columbia* (1984), 50 B.C.L.R. 234 at 244-245, 1983 CanLII 647 (S.C.). Here, I need not determine what standard of skill and competence can be expected of a land developer because

Mr. Nath and Mr. Horvath failed to meet even the lowest standard that might be expected.

[408] Mr. Horvath admitted that it was his and Mr. Nath's obligation under the First Project Management Agreement to carry out the development. As I have described earlier in these reasons, they failed utterly to do so with any degree of competence in almost every respect. As a result, the plaintiffs have nothing to show for their investment. The estimated $812,536 that was actually invested in the Prince George Project plus the additional $307,500 the plaintiffs paid to settle Teare Creek's claim added no value to the property.

[409] It is equally obvious that misappropriating some $2.078 million of the Project Development Funds was a breach of the First Project Management Agreement. The agreement states that Weihe will provide "necessary supporting funds to develop these two properties" budgeted at a total amount of $5 million. It says nothing about Messrs. Nath or Horvath being entitled to allocate these funds, even temporarily, to other projects. Further, as I discuss in a moment, Mr. Horvath agreed that the funds could only be used for the purposes of building the Prince George project and that the plaintiffs would not agree to their funds being spent on anything other than the Prince George Project.

[410] I also find that the plaintiffs' settlement with Teare Creek for $307,500 was a reasonable resolution of that claim and I find Mr. Nath and Mr. Horvath are liable for that amount as it was an expense incurred through their gross mismanagement of the project. Teare Creek claimed $546,819.50 plus pre-judgment interest and settled the claim with the plaintiffs for almost $240,000 less than this. While I have found (based on Mr. Jamieson's opinion) that there are likely problems with the roads constructed by Teare Creek, I am not persuaded that Teare Creek's work was deficient to the point that it had no claim to payment. It was working in substandard weather conditions that were not conducive to reliable road construction and it was Mr. Nath and Mr. Horvath who pressed for this to happen. Moreover, neither Mr. Horvath nor Mr. Guo argued that Teare Creek's work was substandard or that it

ought not be fully paid for its claim. In its response to civil claim in the Teare Creek action, Mr. Horvath alleged that Teare Creek failed to complete the work it was contracted to perform and it had continued to work after October 2016 when it was told to stop. However, these points were not pursued at trial.

[411] The plaintiffs had to resolve the dispute with Teare Creek either through settlement or in this trial. They chose to settle it and I find that choice was reasonable. Since all the Project Development Funds were gone (mostly to Mr. Nath's and Mr. Horvath's misappropriations), the plaintiffs had to use more of their own money to resolve the Teare Creek claim. It was the responsibility of Messrs. Nath, Horvath, and Guo to supervise Teare Creek's work and to pay for it out of the Project Development Funds but they failed to do so. I find Mr. Nath, Mr. Horvath, and, as I discuss below, Mr. Guo are liable to the plaintiffs for the Teare Creek settlement.

(b) Breach of Trust

[412] I find that Vantone Developments received the Project Development Funds from the plaintiffs under a trust obligation that it would only use those funds to develop the Prince George Property. Likewise, Vantone Developments received the $82,000 on a similar trust obligation that this money would be used for the sole purpose of carrying out the lidar survey of the Sumas Mountain Property.

[413] An express trust may be created where a person (the beneficiary) enters into an agreement with another (the trustee) for the transfer of property from the beneficiary to the trustee for the benefit of the beneficiary: *Sohi v. Sohi*, 2022 BCSC 434 at para. 22. Three "certainties" must exist for an express trust: certainty of intention to create a trust, certainty as to the property that is the subject of the trust, and certainty as to who the beneficiaries are of the trust. In the absence of a formal trust document, a court may determine whether the three certainties are established by the surrounding circumstances: *Virk v. Singh,* 2020 BCSC 225 at para. 121.

[414] I am satisfied the three certainties exist here. With respect to intention, Mr. Horvath agreed in his examination for discovery that the Project Development Funds could *only* to be used for the development of the Prince George Property:

> Q. And at the time that Vantone [Developments] received these monies you knew that they could only be used for the purposes of building out the project in Prince George; correct?
>
> A. Yes.

[415] He also knew that the plaintiffs would not agree to these funds being spent on anything other than their own project and, for this reason, Mr. Horvath never disclosed to the plaintiffs that he and Mr. Nath had used their funds on other purposes. On examination for discovery, Mr. Horvath agreed as follows:

> Q. And so not only had you and Mr. Nath made approximately 1.5 million dollars in undisclosed flip fees, if I can put it that way, but you and Mr. Nath were also involved in misappropriating funds that Weihe had paid to Vantone <u>to be used on the project only</u>; right?
>
> A. I can say yes.
>
> [Emphasis added]

[416] Second, there is certainty as to the subject matter of the trust, namely the Project Development Funds and the $82,000 provided specifically for a lidar survey.

[417] Third, there is certainty as to the beneficiary of the trust. It was either Weihe whose funds were transferred to Vantone Developments or, perhaps, it was the partnership established under the First Project Management Agreement. In either case, Weihe is the beneficiary or a beneficiary of the trust and Mr. Nath, Mr. Horvath, and Vantone Developments were restricted by the terms of the agreement and the trust to use those funds only for the development of the Prince George Property.

[418] Mr. Nath and Mr. Horvath, as the sole shareholders and directors of Vantone Developments, breached that trust obligation by misappropriating $2,078,964 in project development funds and $82,000 for the Sumas Mountain Property lidar survey. Initially, they misappropriated $2,485,691: Mr. Law found they invested only $376,809 in the Prince George Project which leaves $2,485,691 of the Project

Development Funds that went to Messrs. Horvath and Nath. However, Mr. Horvath later restored another $435,727 to the project by paying contractors between January and May 2017. Mr. Law was not aware of these payments so he did not count them as part of what was invested in the project. (I note that Mr. Horvath would have a claim against Mr. Nath for half of the amount Mr. Horvath paid back into the project but that does not affect their overall liability to the plaintiffs which I find is joint and several.)

[419] Mr. Horvath tried to rationalize the misappropriation on the basis that it is not uncommon for contractors to use payments on one job to support work on another. He said "when I have three or four different projects, I'm just bouncing money back and forth to the different projects." His position was that Weihe had paid what Vantone Developments would charge to do the work on the Prince George project but he and Mr. Nath were free to use the money for other projects so long as they eventually invested what was needed to complete the Prince George project.

[420] This same argument was rejected in *Columere Park Developments Ltd. v. Enviro Custom Homes Inc*., 2010 BCSC 1248 where the circumstances were similar to this case. There, a contractor (Enviro BC) misappropriated substantial funds advanced by a property owner (Columere) for the development of the property. Justice Melnick wrote:

> [46] It was argued on behalf of the defence that, once advances and deposits were paid to Enviro BC (or Enviro AB on behalf of Enviro BC), Columere had no property in the funds and Enviro BC was free to use them as it saw fit, subject to Enviro BC's contractual obligations to Columere. […]
>
> [47] The problem with the position taken by the defence is that it misunderstands the nature of the funds advanced to Enviro BC. Enviro BC was not being remunerated for work done, it was simply given access to Columere's funds for the use in accomplishing a contractual purpose.

[421] Justice Melnick went on to characterize the contractor's use of Columere's funds in that case as "essentially theft." I find the same can be said here.

[422] There was no agreement and no understanding that the Project Development Funds could be used for any purpose other than the Prince George project. Nor

were these funds a payment to Vantnone Developments for services rendered or to be rendered. For example, even if Vantone Developments could have completed road construction for less than the budgeted amount, it would not have been entitled to retain the full amount of the Project Development Funds attributed to road construction in the June 2016 budget. Mr. Nath and Mr. Horvath's only entitlement to remuneration is through the profit distribution arrangement under clause 8 of the First Project Development Agreement which gives each of them 5% of the net profits of the project. There is no other provision for remuneration.

[423] I therefore find that, in addition to breach of contract, Messrs. Nath and Horvath are liable in breach of trust for the $2,078,964 of the Project Development Funds plus the $82,000 for the lidar survey that they misappropriated.

(c) Breach of Fiduciary Duty

[424] I also find, in addition to the breach of trust, that the misappropriation of Project Development Funds constitutes a breach of fiduciary duty based on both a *per se* fiduciary relationship grounded in the partnership and an *ad hoc* fiduciary relationship.

[425] I have found earlier that Mr. Nath and Mr. Horvath were Weihe's partners under the First Project Management Agreement. Each of them owed a fiduciary duty to Weihe, their development partner, to use Weihe's Project Development Funds solely for the purpose of the land development that was the subject of the partnership. They had no entitlement to help themselves to those funds by misappropriating them to their personal use or other projects. In *Rochwerg v. Truster*, 58 O.R. (3d) 687, 2002 CanLII 41715 (C.A.), Justice Cronk said for the court at para. 62:

> Fundamental to this overarching fiduciary duty is the requirement that each partner place the interests of the partnership, and the avoidance of situations which create, or could create, a conflict between fiduciary duty and the interests of the partnership, ahead of a partner's private interests. Accordingly, partners are required to prefer the interests of the partnership over their own personal interests. The scope of the fiduciary duty in partnerships is of the broadest nature.

[426] It is obvious that misappropriating another partner's financial contribution to the object of the partnership is not in the interests of the partnership. It is much more egregious when the misappropriation is for the breaching partner's personal benefit. I have no hesitation in finding Messrs. Nath and Horvath's misappropriation of Project Development Funds was a breach of their fiduciary duty as Weihe's partners.

[427] Apart from the partnership, I find Mr. Nath and Mr. Horvath were subject to an *ad hoc* fiduciary duty to manage Weihe's Project Development Funds in Weihe's best interests. Messrs. Guo, Horvath, and Nath structured the First Project Management Agreement to give themselves the "sole right for planning, design, monitoring, execution … and project management". This was to be done through Vantone Developments which was the entity that received the plaintiffs' Project Development Funds and which was controlled by Mr. Nath and Mr. Horvath. This structure made the plaintiffs peculiarly vulnerable to Mr. Nath and Mr. Horvath's handling of Weihe's Project Development Funds and to discretionary decisions that Mr. Nath and Mr. Horvath might make in the exercise of their sole rights to plan, design, monitor, execute and manage the projects. By signing the First Project Management Agreement, which gave effect to this structure, and by receiving the Project Development Funds, Mr. Nath and Mr. Horvath undertook to manage those funds in the plaintiffs' best interests. They obviously breached that obligation.

(d) Conspiracy

[428] Lastly, I find that Mr. Nath and Mr. Horvath conspired to deprive the plaintiffs of the misappropriated Project Development Funds. Together they agreed to split the Project Development Funds plaintiffs between them, except for the relatively small amounts that were actually spent on the project. The conspiracy is undeniable.

3. Mr. Guo's Liability

(a) Breach of Contract

[429] Mr. Guo was contractually bound by the Project Management Agreements to oversee the management of the projects. As I have said, I agree with the plaintiffs that Mr. Guo's assumption under those agreements of the role of general manager

with the “high right” or “ultimate right” of decision making necessarily implies an obligation to carry out those duties.

[430] As I have found earlier, Mr. Guo abdicated his oversight duties on the project as early as June 2016. He took no steps to determine if the Prince George project was viable or what kind of development the zoning bylaws would permit. He did not determine what the minimum lot size would be for the subdivision or investigate the number of serviced lots that could be developed. Nor did he investigate or make any inquiries about the market demand for the kind of lots the project was developing. He left it to Mr. Horvath and Mr. Nath to hire the contractors for the Prince George Project, including Mr. Voss and Teare Creek. He did not involve himself in that process or attempt to oversee it. In fact, he did not even know who the contractors were. He never met with anyone from McElhaney. He took no steps in 2016 to satisfy himself that Vantone Developments was fulfilling the tasks in the 2016 budget. He paid no attention to how the plaintiffs’ Project Development Funds were being spent. He maintained in cross-examination that this was “not my role” and on discovery he confirmed he took no steps until February 2017 to ascertain how the money was being spent:

> Q. So I take it that was in February 2017 when you first started doing any kind of financial reconciliation with respect to the project; correct?
>
> A. Yes.
>
> Q. And it was at this time that you start monitoring the project; correct?
>
> A. Not monitoring. I start to learn what is going on.
>
> Q. And you corrected me because you never really monitored what was going on with the project. You only started asking questions in February of 2017; correct?
>
> A. Yeah, you're right.

[431] As this exchange suggests, it was not until February 2017, after Mr. Voss had contacted him to tell him contractors had not been paid, that Mr. Guo finally began to act under his managerial responsibilities. By then, however, it was too late. The Project Development Funds had been misappropriated and even that portion that

had been spent on the project was wasted because the project itself was not viable and road construction proceeded in grossly unfavourable weather conditions.

[432] Having failed utterly under his management obligations, Mr. Guo not only allowed an already unviable project to proceed prematurely in poor conditions but, worst of all, his lack of oversight allowed Mr. Nath and Mr. Horvath to misappropriate more than $2 million in Project Development Funds plus the $82,000 for a survey that was never done.

[433] All of this amounts to an obvious and egregious breach of Mr. Guo's obligations under the Project Management Agreements.

(b) Breach of Fiduciary Duty

[434] I also find that Mr. Guo was under an *ad hoc* fiduciary duty to prudently manage the plaintiffs' investment. Under both Project Management Agreements, the plaintiffs put up considerable amounts of money in Project Development Funds but ceded control of those to Mr. Guo with his "ultimate right" of decision making. Through an instrument drafted by Mr. Guo himself (the Project Management Agreements), Weihe gave to Mr. Guo this "ultimate right" to decide how the plaintiffs' money would be spent. It also gave Messrs. Guo, Horvath and Nath the "sole right" for planning, design, monitoring, execution, marketing and sales, and project management but this was to be overseen by Mr. Guo. By these terms, Weihe ceded full control over its investment to Messrs. Guo, Horvath, and Nath with Mr. Guo having the ultimate supervision over it. This made Weihe peculiarly vulnerable to Messrs. Guo, Horvath, and Nath's use, misuse, and indeed abuse of their power over Weihe's investment.

[435] In my view, this clearly meets the three elements for an *ad hoc* fiduciary duty: (1) Mr. Guo gave an undertaking to manage Weihe's funds in its bests interests. In fact, by his own evidence, it was Mr. Guo who insisted in having "ultimate right" of decision making"; (2) Weihe was vulnerable under the terms of the Project Management Agreement to Messrs. Guo, Horvath, and Nath's sole right to manage the project and Mr. Guo's "ultimate right" of decision-making; and (3) Weihe's

substantial legal or practical interest – its considerable financial investment – stood to be adversely affected by Mr. Guo's control over it. Mr. Guo was under a fiduciary duty to manage the project and supervise how Weihe's money was to be spent. He utterly failed to do so.

[436] Further, despite not knowing how the project was proceeding (apart from his superficial observations during site visits), Mr. Guo counselled Ms. Tian to continue making monthly payments for the Project Development Funds to Vantone Developments up to November 2016. He did so knowing he was not supervising the project as required by Project Management Agreements and without knowing what progress was being made on the project.

[437] This advice or direction to Ms. Tian was an exercise of Mr. Guo's authority under the Project Management Agreements. This was not a simple reminder or a suggestion to make the payments but rather was a direction from the person who was given the "high right" or "ultimate right" of decision-making for the management and execution of the project. If Ms. Tian did not follow Mr. Guo's direction, she could put Weihe in breach of the Project Development Agreements and potentially invalidate Mr. Guo's guarantee. In my view, Mr. Guo was impressed with a fiduciary duty when advising Ms. Tian to make the payments and it was incumbent upon him to ensure that Weihe's money was being properly spent before directing or advising Ms. Tian to make further payments. He failed to exercise even the most basic degree of care in this regard.

[438] The exception to this is the November 2016 payment of $206,500 and a small December 2016 payment of $6,500 which Mr. Guo counselled Ms. Tian to hold off on paying. In a WeChat message Ms. Tian sent to Mr. Guo in November 2016, she noted that there is still around $206,500 in project funds that are to be paid for November and asked Mr. Guo to call her. Mr. Guo responded by suggesting that she hold off on the payment for a little while "and we'll try to get them to finish the previous few parcels of land and then we'll see what to do." Despite this, Ms. Tian made the November and December payments. She said Mr. Guo had emphasized

in the previous months that the payments had to be made on time and if they were not made Ms. Tian would be responsible for any resulting project delays. She said she did not want that responsibility so she made the payment.

[439] Mr. Guo asked Ms. Tian in cross-examination if his opinion had become irrelevant to her by November 2016. She responded that his opinion was "very important" because "he's the one responsible for the project overall." Despite this, she did not seem to value his advice about the November 2016 payment.

[440] In re-examination, Ms. Tian was taken to an earlier (undated) WeChat message from Mr. Guo where he wrote "Vantone Development Group Ltd. payment amount $200,000. It is best if you can issue the cheque today." However, this exchange also refers to a change in the date for a June meeting at Equip Law so it was well before the November payment. Mr. Guo clearly gave different advice for the November payment and Ms. Tian chose to ignore that advice. In my view, Mr. Guo cannot be held responsible for the $206,500 payment in November or the $6,500 payment in December.

[441] Thus, I find that Mr. Guo is liable in breach of contract and breach of fiduciary duty for $2,649,500 of the Project Development Funds (excluding the November and December payments), the $307,500 payment to settle Teare Creek's claim, and the $82,000 for the survey. All of these losses occurred when he should have been supervising the project and monitoring the expenditures of the plaintiffs' money.

(c) Liability under the Indemnity

[442] I also find that Mr. Guo is liable under the indemnity contained in the Second Project Management Agreement. That indemnity applies "[i]f the development projects fail and cause losses to [Weihe] due to the reasons of [Mr. Guo's] misconducts [*sic*]". Clearly the projects have failed and Weihe has suffered a substantial loss. The term "misconduct" is broad enough to capture Mr. Guo's failure to supervise and manage the project contrary to his contractual and fiduciary duties. Regardless, the Chinese version of the Second Project Management Agreement, which is the one the plaintiffs would have understood, does not use the word

"misconduct" but simply states that the indemnity applies if Weihe suffers a loss "due to [Mr. Guo]". The plaintiffs' loss was undoubtedly due to Mr. Guo's failure to supervise the project and monitor how the plaintiffs' Project Development Funds were spent.

(d) Weihe Money used in the Pitt Meadows Project

[443] I turn next to whether Mr. Guo received a personal benefit from the plaintiffs' money being diverted (by Mr. Horvath) into the building project on the Pitt Meadows property that was owned by Michael Gao through his company Sinominco. Mr. Guo entered into a lease agreement for that property in 2015 and thus may have benefited from the diversion of the plaintiffs' money into it.

[444] By way of background, on August 26, 2014, Mr. Horvath, through his business M&J Affordable Reno, contracted with Sinominco to build a 2500 square foot house on the Pitt Meadows property for "no more than … $190,000". On May 15, 2015, Sinominco contracted with Mr. Horvath, again through M&J Affordable Renos, to build a 4,000 square foot processing centre on the Pitt Meadows property which was to include an office, product processing rooms, storage space, and an electrical room. The contract price was "no more than $360,000 with a seven-month completion schedule."

[445] Mr. Guo facilitated the negotiations for these two contracts but both were signed by Mr. Gao on behalf of Sinominco. Despite the seven-month timeline set out in the contracts, construction of both buildings was still underway in 2016 and continued into 2017.

[446] On March 8, 2015, Mr. Guo entered into a 99-year lease of the Pitt Meadows property from Sinominco at a rate of $1,000 per month plus taxes. The rent was to be "reviewed and adjusted" every three years to "reflect the property lease market". The lease was registered against the property in the Land Title Office and was to take effect "[w]hen Obtaining Occupancy Permit from the City of Pitt Meadows". However, no occupancy permit was ever issued so the lease never took effect.

[447] There were significant cost overruns on the construction projects and Mr. Horvath requested additional funds from Sinominco to complete the work. Sinominco says it paid $1,251,313 to Mr. Horvath, including $268,000 between July 2016 and October 2016. Despite this additional money, Mr. Horvath did not complete the construction of either building and, on behalf of Sinominco, Mr. Guo had to hire another contractor to finish the jobs.

[448] Using the first-in/first-out methodology, Mr. Law determined that $201,713.27 of Weihe funds went into the cost of constructing the residence and processing facility on the Pitt Meadows property. In a reply report to Mr. Law's, Rosanne Walters of BDO was critical of Mr. Law for not accounting for payments that Sinominco made to Mr. Horvath between July and October 2016 in respect of the Pitt Meadows project.

[449] The plaintiffs argue that because Mr. Guo was to have the benefit of a 99-year lease of the Pitt Meadows property, he received a personal benefit from Mr. Horvath's use of Weihe funds to pay for the construction. I agree that Mr. Guo would have personally benefited from this if the lease had come into effect but I accept that, since an occupancy permit was never issued, the condition precedent for the lease was never fulfilled or waived. I also accept, as I have found earlier, that Mr. Guo did not know that the plaintiffs' money had been used by Mr. Horvath to cover the renovation costs for the Pitt Meadows property.

[450] On October 16, 2019, Mr. Guo and Mr. Gao agreed to terminate the lease in consideration of the sum of $10 paid by each from one to the other. Under the termination, Mr. Guo released and discharged any interest he had in the property. He also resigned as a director of Sinominco on the same day. The plaintiffs later amended their notice of civil claim to allege this was a fraudulent conveyance but they abandoned that at trial, presumably because of their settlement with Sinominco.

[451] Sinominco was a defendant in this action until just before the start of trial. The plaintiffs claimed that their money, impressed with trust obligations, had been invested in the improvements on the Pitt Meadows property and that Sinominico had

been unjustly enriched by that benefit. They claimed a resulting or constructive trust in the Pitt Meadows property. However, the plaintiffs settled with Sinominco for an undisclosed amount and thus the trust claim was not pursued.

[452] As a result of that settlement, the only relevance of the plaintiffs' money being diverted to the Pitt Meadows property is the suggestion that Mr. Guo stood to receive a personal benefit from this because of his 99-year lease. In view of that, the precise amount of Weihe money that can fairly be said to have been invested in that property need not be determined. The fact that Mr. Guo relinquished the 99-year lease before it took effect and the plaintiffs have not pursued that as a fraudulent conveyance also diminishes the importance of this issue.

[453] I accept that Mr. Guo stood to benefit from the diversion of Weihe money into the Pitt Meadows property given his right to the 99-year lease but I am not persuaded he knew that Weihe funds had been diverted to the project. Nor was he reckless or willfully blind to this. As I have said, it is clear from his correspondence with Mr. Horvath in February 2017 that he was genuinely surprised to learn that contractors on the Prince George project had not been paid and that the plaintiffs' money had been misappropriated. This was confirmed by Mr. Voss who said Mr. Guo seemed surprised when he called him in January 2017 to tell him contractors had not been paid. Nor, in my view, was Mr. Guo put on his inquiry about expenditures on the Pitt Meadows property since Mr. Gao and Sinominco advanced significant amounts of money to complete the Pitt Meadows project. Mr. Guo had no reason to think that this money was not covering the cost of Mr. Horvath's work on the Pitt Meadows project.

[454] In short, I find that any benefit that Mr. Guo might have received from the plaintiffs' funds being diverted into the Pitt Meadows property does not affect Mr. Guo's overall liability.

(e) Joint and Several Liability

[455] I find Mr. Guo is jointly and severally liable for the Project Funds (but with his liability excluding the November and December Project Development Fund

payments). I find he was not part of a conspiracy to misappropriate the Project Development Funds. However, he jointly committed with Mr. Nath and Mr. Horvath in the First Project Management Agreement to manage the Prince George project and all three of them breached that commitment. Further, all three breached a fiduciary duty in the mismanagement of the Project Development Funds. While the methods of breach were quite different (Mr. Guo abdicating his oversight responsibilities and Messrs. Nath and Horvath misappropriating funds), all three of breached a fiduciary duty as it relates to the Project Development Funds. On these bases, I find the liability between the three of them is to be joint and several.

3. Ms. Xie's Liability

[456] I turn now to Ms. Xie's potential liability. The plaintiffs allege three bases on which she is liable for some of their losses: the indemnity they allege she gave; a payment from Mr. Horvath to her company, Phoenix Travel; and certain deposits made to a joint account she has with Mr. Guo.

(a) The Alleged Indemnity

[457] As I said earlier, I am not persuaded that Ms. Xie offered her own indemnity for the plaintiffs' investment. She testified in her direct examination that she never pledged or mortgaged property to guarantee the success of the developments. That evidence was not challenged in cross examination. The plaintiffs argue that Ms. Xie only denied in her direct examination that she "pledged or mortgaged property" to guarantee the investment. They say she did not deny that she gave a personal guarantee to indemnify the investment. Thus, they argue, Ms. Xie is personally liable for the plaintiffs' losses even if she did not pledge her own assets in support of the indemnity.

[458] I reject that argument for several reasons. First, the plaintiffs seek to split a very fine hair by dissecting her evidence between giving a guarantee and pledging assets. Ms. Xie's English is not strong and she testified with the help of an interpreter. Like all the defendants, she was self-represented and her direct examination was conducted by Mr. Guo who is not a lawyer and whose English does

not come easily to him. The question that he asked and the answer that she gave should be considered in that context. It was as follows:

> Q. Did you ever pledge your mortgage to guarantee the success to Mr. Wang or Ms. Tian for their investment in the Prince George property development?
>
> A. No.

[459] In the context, I took this to be a denial that Ms. Tian guaranteed the success of the Prince George project. In my view, if counsel for the plaintiffs believed Ms. Xie's denial left room for a tacit admission that she offered an indemnity but without security, that ought to have put to her in cross-examination.

[460] Second, Ms. Xie denied attending both the dim sum breakfast meeting and the May 18, 2016 dinner meeting, which are the only two occasions on which the plaintiffs say she offered the indemnity. This suggests her answer to the question just quoted must have been a general denial of any indemnity because she denied being present on the only occasions when it is said she gave that indemnity.

[461] Third, Ms. Xie received no consideration for an indemnity. Under the two Project Management Agreements, it is Mr. Guo who is entitled to receive up to 15% of the net profits of the developments. Ms. Xie may stand to benefit from that as Mr. Guo's spouse but she is not a direct recipient of that benefit under the agreements. She would had to have received consideration in exchange for making a valid indemnity agreement.

[462] Finally, I find that if the plaintiffs had truly relied on an indemnity from Ms. Xie, they would have required it in writing as they had done with Mr. Guo's indemnity.

(b) Payment to Pheonix Travel

[463] The plaintiffs argue that Ms. Xie took a personal benefit by receiving $8,406.31 of Weihe's Project Development Funds from Mr. Horvath through her travel agency, Phoenix Travel.

[464] On September 4, 2020, Mr. Horvath made a payment of $15,600 to Phoenix Travel from Vantone Construction (not Vantone Developments). Using the first-in/first-out methodology, Mr. Law attributed $8,406.31 of this amount to Weihe's Project Development Funds. In other words, the $15,600 payment came from money in the Vantone Construction account that included Weihe money transferred from Vantone Developments and money from other sources.

[465] Mr. Guo and Ms. Xie explained the $15,600 payment as a complicated arrangement between Mr. Horvath and Michael Gao of Sinominco to remedy an overpayment that Mr. Gao had made to Mr. Horvath for the construction costs on the Pitt Meadows property. Ms. Xie testified that Mr. Gao had overpaid Mr. Horvath by $15,600 but rather than having Mr. Horvath reimburse Mr. Gao, Mr. Gao directed Mr. Horvath to pay the money to Mr. Guo and Ms. Xie to compensate them for some car lease payments they had made on Mr. Gao's behalf. Ms. Xie produced WeChat messages between her and Mr. Gao dated August 23, 2016 discussing this transaction.

[466] Mr. Guo testified that he and Ms. Xie had leased two cars in Canada on Mr. Gao's behalf. One of those was for Mr. Gao's use when he was in Canada and the other was for Mr. Gao's mother to use to drive Mr. Gao's daughter (who lived in Vancouver) to school. The first car was leased in David Guo's name (Mr. Guo and Ms. Xie's son) and he said he had use of the car when Mr. Gao did not need it. Mr. Gao regularly reimbursed Mr. Guo and Ms. Xie for the lease payments.

[467] Ms. Xie testified that when she spoke with Mr. Horvath about Mr. Gao's request to transfer the money to her and Mr. Guo, she gave Mr. Horvath the account number for Phoenix Travel and Mr. Horvath deposited the money into that account. Ms. Xie did not transfer the $15,600 out of Phoenix Travel account or use it specifically to pay the leases on the two vehicles or reimburse herself and Mr. Guo for the payment of the leases. It remained in Phoenix Travel's account and was used for various expenses. She says it was recorded as a shareholder loan.

[468] Ms. Xie's explanation for this money is convoluted and the arrangement over the lease of the vehicles on Mr. Gao's behalf is murky, particularly since David Guo had use of one of the vehicles. Regardless, I am not persuaded this payment demonstrates that Mr. Guo or Ms. Xie were knowing participants in the misappropriation of Weihe's money or knowingly received money that had been misappropriated by Mr. Horvath. I make this finding for three reasons.

[469] First, despite the complexity of Ms. Xie's explanation, its essential foundation is supported by the contemporaneous WeChat messages she exchanged with Mr. Gao. Manufacturing those WeChat messages to support a made-up story about the use of $15,600 would be very elaborate, especially when only $8,406.31 of that amount is attributable to Weihe. I find these messages are authentic and were not created to cover up an improper payment.

[470] Second, as I have found earlier, Mr. Guo was genuinely shocked in February 2017 to learn that Prince George contractors had not been paid and that Mr. Horvath and Mr. Nath had misappropriated Project Development Funds to themselves. Since the Phoenix Travel transaction was in September 2016, it was well before Mr. Guo knew the plaintiffs' money had been misappropriated.

[471] Finally, I observe that $8,406.31 pales in comparison to the more than $2 million Mr. Nath and Mr. Horvath misappropriated. It is inconceivable that Mr. Guo and Ms. Xie would be content to receive that very small sum if they had colluded with Mr. Nath and Mr. Horvath in a scheme to misappropriate the plaintiffs' money.

[472] For these reasons, I reject the plaintiffs' argument that Ms. Xie and Mr. Guo knowingly received Weihe trust money through Phoenix Travel.

(c) Other Payments to Ms. Xie and Mr. Guo

[473] The plaintiffs also argue, based on Mr. Law's report, that another $8,000 of misappropriated Wiehe money was paid to Mr. Guo and Ms. Xie. I find, however, that these payments did not come from the plaintiffs' money and Mr. Guo along with other witnesses adequately explained them.

[474] Mr. Law opined that a June 9, 2019 transfer of $3,000 from Vantone Construction's account with the notation "Cherry" (Ms. Xie's English name) on the bank statement was a payment of Weihe money to Mr. Guo and Ms. Xie. His opinion is based on the fact that Mr. Guo and Ms. Xie's personal bank account statement shows an incoming transfer of $3,000 on June 8, 2016, the previous day. In cross-examination, Mr. Guo confronted Mr. Law on how the $3,000 could be received in the Guo/Xie account the day *before* it was purportedly transferred out of the Vantone Construction account.

[475] Mr. Law's response was unconvincing. He initially suggested that the transfer may have happened after the transferring bank's transaction cut-off time so that the transaction would be dated the following business day on June 9. However, this was not only speculative but it does not explain why the receiving bank would have recorded receiving the money on June 8. Perhaps it might have had a later transaction cut-off time than the transferring bank but that seems unlikely and just more speculation. When pressed further on the point, Mr. Law suggested, again with no evidence, that cut-off times for automated transactions are based on the Eastern (i.e. Toronto) time zone. I found that speculation even more unpersuasive.

[476] Mr. Guo also called Stephanie (Dong Yong) Xue to explain the $3,000 deposit into his account. Ms. Xue rented a house in Burnaby that Mr. Guo was managing for Mr. Gao. Ms. Xue testified that she paid Mr. Guo $3,000 rent in cash in June 2016 and Mr. Guo said this money was deposited into his personal account. I accept this evidence and I am not persuaded by Mr. Law's opinion and explanation that the $3,000 was transferred from Vantone Construction.

[477] Mr. Law offered the same rationale of transaction cut-off times to explain another transaction to which he matched a cash deposit of $5,000 into the Guo/Xie account on August 3, 2016 at 6:10 p.m. As that deposit was made after 6:00 p.m. it would have been posted on the next business day, August 4, 2016. Mr. Law then matched this with a $5,000 cash withdrawal from a Vantone Construction account on the same day, August 4, 2016. Mr. Law suggested the withdrawal from the Vantone

Construction account was likely after hours on August 3, 2016 and posted for August 4, 2016. Mr. Guo pointed out in his cross-examination of Mr. Law that that the withdrawal was from a branch in Pitt Meadows while the deposit was at a branch in downtown Vancouver. He suggested there was insufficient time between an after-hours withdrawal in Pitt Meadows to get downtown by 6:10 p.m. to make the deposit. Mr. Law's only explanation was to speculate that the transactions were likely coordinated.

[478] In fact, Mr. Guo's son, David Guo, explained that this Guo/Xie account is one he shared with his parents and he deposited the $5,000 which was cash that his uncle had given him for a specific purpose. He was not challenged on this in cross-examination and I accept David Guo's evidence.

(d) Conclusion on Ms. Xie

[479] I therefore find the plaintiffs have not proven that Ms. Xie offered to guarantee the plaintiffs' investment or that she knowingly received misappropriated Weihe funds. I would dismiss the plaintiffs' action against her.

5. Equitable Mortgage in Guo Properties

[480] The plaintiffs seek a declaration that they are entitled to an equitable mortgage in Mr. Guo's property based on his indemnity in the Second Project Management Agreement. The terms of the indemnity provide that Mr. Guo assumes "full responsibility" for any losses the plaintiffs suffer by his misconduct and he agrees to compensate Weihe and "guarantee it by using all [his] assets". The agreement does not specify the assets that are pledged to secure the guarantee and nothing was registered against any of Mr. Guo's property at the time of the indemnity to secure the guarantee.

[481] The plaintiffs seek an equitable mortgage in respect of two properties described in the amended notice of civil claim: one is a residential property in Burnaby and the other is a strata property also in Burnaby. As I understand it, both properties are owned jointly by Mr. Guo and Ms. Xie but I have not been directed to

evidence confirming this. The plaintiffs argue that even though these properties are not specified in the indemnity, they are capable of being ascertained at the time of enforcing the guarantee and thus may be subject to an equitable mortgage.

[482] The plaintiffs rely on *Vancouver v. Smith* (1985), 63 B.C.L.R. 180, 1985 CanLII 461 (C.A.) where the court discussed when and now an equitable mortgage may arise. On behalf of the court, Hutcheon J.A. at para. 11 quoted from *Falconbridge on Law of Mortgages*, 3rd ed. (1942) at pp. 69-74 as follows:

> An equitable mortgage therefore is a contract which creates in equity a charge on property but does not pass the legal estate to the mortgagee. Its operation is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court.
>
> […]
>
> An agreement in writing duly signed, however informal, by which any property is made a security for a debt due or a present advance, creates an equitable charge upon the property…
>
> The intention of the parties as to the terms and extent of the security may be established by extrinsic evidence. The agreement need not specifically describe the property if it is otherwise sufficiently ascertained or ascertainable, and the charge created by the agreement may extend to after acquired lands. A general charge for value on all the existing property of the mortgagor is not void for uncertainty if the property to which it attaches can be ascertained at the time of enforcement, and such a charge is not contrary to public policy.
>
> [Emphasis added]

The plaintiffs rely on the emphasized passages to say that it was not necessary to specify the secured property at the time of the guarantee.

[483] However, returning to *Vancouver v. Smith*, the court found that the instrument at issue in that case was too vague in identifying what property was subject to an equitable mortgage to be enforceable. Again, speaking for the court on this point, Hutcheon J.A. said:

> [16] … What we are concerned with here is whether there is sufficient certainty in the two documents, the letter of undertaking and the letter of demand, to amount to an enforceable agreement on the part of Smith to give a mortgage over the condominium he owned in Delta. That certainty is

> lacking. Neither in the letter of undertaking nor in the letter of demand is the property (that is to say, the condominium) specified. I view the letter of undertaking as a promise to give security in the future on request over unspecified real property and unspecified personal property. The letter of demand is, as I see it, a demand to give security over an equally vague description of property.
>
> [17] To use some of the language used in the case of *Mornington (Countess) v. Keane* (1858), 2 De. G. & J. 292, 44 E.R. 1001, it is giving startling effect to the letter of demand to say that every part of Smith's property is to be so bound on 17th September 1982, that he cannot deal with it except subject to the charge.
>
> [Emphasis added]

[484] In his concurring reasons for judgment, Esson J.A. said:

> [20] … The most, I think, that can be taken from the undertaking to provide collateral security in the second sentence is that at some time in the future the debtor promises to give security on some, perhaps all property, real or personal, then owned by him. No means is provided for determining what property is to be the subject of the charge, and that being so the undertaking is so vague as to be wholly unenforceable.
>
> [Emphasis added]

[485] Justice Esson's description of the undertaking in that case can also be said of the guarantee given in the Second Project Management Agreement, namely that at a time in the future Mr. Guo will give security of unspecified property he owns with no means of determining what property is subject to the charge. The uncertainty is further complicated by the fact (as I understand it) that Ms. Xie is also an owner of the properties as a joint tenant but she provided no indemnity herself, let alone pledged her property to guarantee Weihe's investment.

[486] The plaintiffs have cited no other authority in support of their claim for an equitable mortgage over the two Burnaby properties. It may be open to the plaintiffs to execute against any interest Mr. Guo has in the properties in the enforcement of the judgment against him (I make no finding on that point) but on the authorities cited by the plaintiffs, I am not persuaded that the properties are now subject to an equitable mortgage.

VIII. Liability of Katalin Horvath

[487] Mr. Law traces $35,500 to Ms. Horvath from the money realized by the sale of the properties. He does not trace any of the Project Development Funds to her. However, in addition to the $35,500, the plaintiffs claim she is also liable to account for the benefit she received for the use of $450,000 of the plaintiffs' money for a down payment on a house on 73B Avenue in Surrey that the Horvaths bought jointly for a total cost of $1,130,000. Mr. Horvath confirmed that he used money obtained from the plaintiffs to buy this property, although he was not specific as to whether it was money from the flip of the Prince George and Sumas Mountain Properties or from the development funds or both.

[488] On October 26, 2016, Mr. and Ms. Horvath bought another property on 68th Avenue in Surrey and on November 30, 2016 they bought a third property on Robson Road in Chilliwack for $240,000. They financed the purchase of these two properties by mortgaging the 73B property. Mr. Horvath agreed in cross-examination that they would not have been able to buy these properties without having received money from plaintiffs.

[489] These properties have since been sold by the Horvaths and the proceeds of sale – some $367,000 – are being held in trust by a law firm pending resolution of the plaintiffs' claim to these proceeds. No explanation was given in the evidence for why only $367,000 remains when $450,000 was used as the initial down payment.

[490] During closing argument, Ms. Horvath conceded that if the properties had been purchased with money that was improperly taken from the plaintiffs, be it by misappropriating the Project Development Funds or by way of a breach of fiduciary duty in respect of the property flips, she would not assert any claim to the sale proceeds held in trust. Since the evidence confirms that the properties were acquired with the plaintiffs' money, only Mr. Horvath makes a claim to the funds held in trust.

[491] The plaintiffs claim against Ms. Horvath in knowing receipt and knowing assistance. Liability for knowing receipt arises when a stranger to a trust knowingly

receives or applies trust property to their own use and benefit: *Citadel General Assurance Co. v. Lloyds Bank Canada,* [1997] 3 S.C.R. 805 at para. 25. The principle also applies where the funds were derived from a breach of fiduciary duty: *West Bros. Frame & Chair Ltd. v. Yazbek*, 2019 BCSC 1844 at para. 148. The requirement of "receipt" limits the defendant's liability to the money that can be traced to the defendant's personal possession: *Yazbek*, para. 151; *Vancouver General Health Authority v. Moscipan*, 2019 BCCA 17 at para. 76. Constructive knowledge is sufficient to establish liability. That is, if something came to the defendant's attention that should "arouse suspicion in an honest, reasonable" person such that the person was put on inquiry of the potentially suspicious circumstances, constructive knowledge may be established.

[492] Knowing assistance requires proof that the defendant participated in the breach of trust (*Gold v. Rosenberg,* [1997] 3 S.C.R. 767 at para. 32) and actual knowledge, recklessness, or wilful blindness as to the breach: *Citadel* para. 22. Unlike knowing receipt, constructive knowledge will not suffice for knowing assistance. Recklessness would require that Ms. Horvath knew there was a risk the funds she received had been obtained in a breach of trust but accepted them anyway. Wilful blindness requires that she was subjectively suspicious as to the source of the funds but chose to ignore that suspicion.

[493] Ms. Horvath testified that she did not inquire into Mr. Horvath's business or financial affairs and they did not discuss them. She was aware of Vantone Developments but did not know its purpose before reading the court documents for this case. She was not aware of what projects Mr. Horvath was working on in 2016, other than the Pitt Meadows project.

[494] Over the years, including before the events of this case, Mr. Horvath put money in Ms. Horvath's account at CIBC every month which she used to pay family bills or buy groceries. This was usually between $2,000 and $3,000 a month and the most she received in this way was $5,000 which was in 2018. She does not share a bank account with Mr. Horvath.

[495] However, on May 27, 2016, she received a deposit of $10,000 in her account from Vantone Construction. She said she believed this was for some extra expenses such as car insurance. She maintained that at least some of this amount was part of the regular expense payments Mr. Horvath made to her account but she eventually acknowledged that it was a gift from Mr. Horvath. She also agreed that a $5,000 payment on June 9, 2016 was a gift. On July 8, 2016, $20,500 was transferred into her account and the same day there were two transfers out of her account of $3,000 and $5,000. She could not say where the $20,500 came from or where the two transfers out went.

[496] The plaintiffs say in their closing argument that “Mr. Horvath was moving hundreds of thousands of dollars through [Ms. Horvath’s] bank account to undisclosed payees.” They do not specify the funds they refer to. On September 29, 2016, $62,990 was deposited in Ms. Horvath’s account and on October 21, 2016 another $64,990 was deposited to her account. However, she was not cross-examined on where this money came from and Mr. Law does not speak to these deposits in his report. It seems that it may have come from Michael Gao or Sinominco because otherwise she would have been asked about it.

[497] I am satisfied that Ms. Horvath lacked the subjective knowledge and suspicion about the $35,500 transferred into her account such that she is not liable in knowing assistance. However, this amount was substantially higher than the amounts Mr. Horvath regularly transferred into Ms. Horvath’s account for family expenses. I find these larger transfers, including two fairly sizable “gifts” of $5,000 or more should have put her to an inquiry as to the source of the money. Why was Mr. Horvath suddenly gifting these sums to Ms. Horvath? This makes her liable in knowing receipt for the amounts she received. Thus, I find Ms. Horvath is liable in knowing receipt for the $35,500 traced by Mr. Law.

[498] I also find Ms. Horvath is liable in knowing receipt for half of the $450,000 that was traced into the down payment on the Surrey property. I accept the plaintiffs’ argument that the relatively sudden rise in the Horvaths’ fortunes that permitted

them to buy several properties at once ought to have put Ms. Horvath on inquiry as to the source of this apparent success. Ms. Horvath received and shared in the benefit of $450,000 that was used for the down payment. In *Cambrian Excavators Ltd. v. Taferner*, 2006 MBQB 64, the defendant husband was found to have received and benefited from the defendant wife's misappropriation of money that was used to buy a property jointly in their names. The court held that the husband was liable for half the traceable proceeds. Our Court of Appeal favourably discussed *Cambrian Excavators* in *Moscipan,* at paras. 74-76.

[499] I find that Ms. Horvath is liable for $225,000 being half the value of the down payment on the Surrey home. After applying half the value of the proceeds held in trust, Ms. Horvath's liability arising from the down payment should be in the range of $41,500. To the extent it is necessary to determine the precise amount for which Ms. Horvath is liable for the $225,000 after giving her credit for half the proceeds held in trust, I would refer that to the registrar for determination.

[500] Thus, I find that Ms. Horvath is liable in knowing receipt for the $35,500 she received in her account plus $225,000 being half the value of the down payment on the Surrey property that was purchased jointly in her and Mr. Horvath's names. She is to be credited for half the value of the proceeds being held in trust from the sale of the properties. Given Mr. Horvath's breach of fiduciary duty, the plaintiffs are entitled to a constructive trust in the full amount of the money held in trust.

[501] The plaintiffs have not sought an order that Ms. Horvath's liability in knowing receipt is joint and several with the other defendants and I make no order to that effect.

IX. Liability of Zsolt Horvath

[502] The plaintiffs claim against Zsolt Horvath for $9,900 he and his spouse received in Weihe funds according to Mr. Law's report plus the $82,000 for the lidar survey of the Sumas Mountain Property that was never done. These claims are based in unjust enrichment, knowing receipt, and knowing assistance. The plaintiffs argue that Zsolt knew or ought to have known about the misappropriation of Weihe

monies because he worked at Vantone Developments, his parents suddenly found themselves able to buy three real properties, and because he participated in a particularly suspicious transaction at Mr. Nath's request.

[503] $7,000 of the $9,900 attributed to Zsolt was a gift to him and his spouse, Jessica, to help with the cost of Jessica's nursing program at Langara College. Jessica started nursing school in 2015 but took time off when they had their first child in January 2016. They had used their own money to pay the costs of schooling and as a result they became short of money for their own living expenses. They had some financial help from Jessica's parents and moved in with them. Mr. Horvath also provided some help by giving Jessica $7,000 on May 27, 2016. Zsolt did not know the source of this money and did not question it since, as I discuss below, it was not unusual for his dad to provide some money when it was needed.

[504] According to Mr. Law, this $7,000 came from the profits of the flips of the properties. Since it was provided to Jessica and Zsolt before any Project Development Funds had been advanced to Vantone Developments, it is not money that was impressed with the trust associated with the Project Development Funds. It was also paid before Zsolt started working at Vantone Developments. I find there was no reason at the time Zsolt received this money for him to have believed it had come from the plaintiffs or that Mr. Horvath had received it through a breach of a fiduciary duty or some other unlawful means.

[505] With respect to the $2,900, Zsolt testified that this was a reimbursement for cash he had earlier transferred to Mr. Horvath at Mr. Horvath's request on June 1, 2016. Zsolt testified that Mr. Horvath asked him to get $2,900 in cash for him and he would e-transfer the amount back to Zsolt. Zsolt did not question what the money was for or why Mr. Horvath wanted to do this transaction. He simply obliged his father. During his evidence, Zsolt took the court through the bank records that traced this transaction. In short, Zsolt did not receive (or at least benefit from) this $2,900 because it was a repayment for money he had advanced in cash to Mr. Horvath.

[506] As with the $7,000, this transaction occurred before Weihe paid any Project Development Funds and before (or perhaps on the first day) Zsolt started working for Vantone Developments. At the time, Zsolt would have had no reason to suspect these payments had anything to do with misappropriation of funds or breach of fiduciary duty.

[507] Mr. Law's first-in/first-out analysis would not capture the specific nature of this transaction. Mr. Horvath did not explain the transaction in his evidence but I am satisfied that Zsolt simply obliged his dad's request. It was a strange request but in the context of this family relationship and Zsolt's general unfamiliarity with business financial practices, I accept his explanation of the transaction and find that it does not impute Zsolt with knowledge – real or constructive – of the misappropriation of Wehie funds or his father's breach of fiduciary duty.

[508] Despite this, the plaintiffs maintain that Zsolt ought to have been alert to the fact that the money his dad gave him was Weihe money because of his subsequent involvement in Vantone Developments. Their argument, I gather, is that after some time of being exposed to Vantone Development's activities, Zsolt ought to have reflected on the money Mr. Horvath gave him and Jessica months earlier and realized it had come through some improper means. The plaintiffs also argue that Zsolt is guilty of knowing assistance for his role in collecting the $82,000 for the lidar survey of the Sumas Mountain Property that was never done. In view of these arguments, I will review the evidence and make findings about Zsolt's involvement with Vantone Developments.

[509] On May 30, 2016, Mr. Horvath asked Zsolt to accompany him on a trip to see the Prince George Property. Zsolt was reluctant to go because, unlike his father and brothers, he was not interested in the construction business. However, he went at his dad's request and during the trip Mr. Horvath offered Zsolt a job with Vantone Developments, working as an office assistant for $20 per hour. After discussing it with Jessica, Zsolt decided to take the job even though it was not his area interest.

With Jessica on maternity leave and planning to be back in school, the family needed the money.

[510] In the first week on the job, Zsolt was tasked with finding subcontractors for the Prince George Property. He contacted a tree-removal service and set up a meeting with McElhanney which he later attended with Mr. Nath on June 6, 2016 in Prince George. Mr. Nath asked him to take notes, which he did, but he was unfamiliar with the matters Mr. Nath and the McElhanney engineer discussed since he had no experience in project development. He said it was like they were speaking a different language and it was all new to him. This was the only time he dealt with McElhanney.

[511] After the first week or two on the job, Zsolt's work became sporadic and it was agreed he would start coming to the office only a couple days a week. His work evolved into writing emails and communications as directed and dictated by Mr. Nath and, to a lesser extent, Mr. Horvath, running errands, getting lunch for Mr. Nath or Mr. Horvath, and even taking Mr. Nath's car to be washed. He was also tasked with picking up cheques from Ms. Tian. He did not do any banking for Vantone Developments, he had no access to Vantone Developments' bank accounts or cheques, and his only use of a Vantone Development credit card was to buy lunch or cigarettes for Mr. Horvath or Mr. Nath.

[512] Zsolt went to Prince George two more times in 2016. One trip was in June 2016 to show his uncle (Mr. Horvath's brother) the project. Zsolt thought this might have been the same trip when he attended the McElhanney meeting but he could not say for sure. The only other trip was in October 2016 when Haitao Wang wanted to see the progress on the Prince George project and Mr. Horvath was unable to accompany him because he was stuck in Mexico with a delayed flight returning from a holiday. Zsolt therefore stepped in to arrange the travel and accompany Haitao and his realtor friends on the trip.

[513] In October 2016, Mr. Nath told Zsolt that he was not needed as much at Vantone Developments and in early December he was told his employment was

being terminated. Mr. Horvath agreed to keep Zsolt on until December 31 so he could be paid for the Christmas statutory holidays. He continued doing a small amount of work in January – sending emails and preparing T-4s for Vantone Construction and Vantone Development employees – and was paid for that work. He also prepared records of employment for Vantone Developments' employees being laid off. After January 2017, he was done work with Vantone Developments and had no further connection with the company.

[514] Zsolt testified that throughout his time working at Vantone Developments he was not aware of any wrongdoing on Mr. Nath or Mr. Horvath's part, and he was not involved in the day-to-day business of the company. He said he had no knowledge of the misappropriation of Weihe funds or how the company was spending its money. He said it did not seem unusual that his dad had money in 2016 because he always had money and gave Zsolt and his siblings what they needed.

[515] Zsolt testified that when growing up, his parents always took care of him and his siblings. They did not have to worry about money as Mr. Horvath would provide them with money for lunch and other needs. They did not have a lavish existence but they had what they needed.

[516] Zsolt never talked about money at home with his parents and has never had access to Vantone Developments' or Mr. Horvath's bank statements. He noted that in 2005 Mr. Horvath bought a house in Surrey and he bought Zsolt a car. He had also bought cars at some point for Zsolt's four siblings. In 2014, when Zsolt and Jessica were married in Hawaii, Mr. Horvath paid the airfare for the wedding guests. Thus, Zsolt says, it was not unusual in 2016 to see Mr. Horvath with money.

[517] The plaintiffs also rely on Zsolt's involvement in a patently questionable bank transaction done at Mr. Nath's request to suggest Zsolt ought to have been alert to wrongdoing. On October 12, 2016, Zsolt was driving Mr. Nath to the bank when Mr. Nath told him he needed a favour. He asked to deposit some money in Zsolt's personal account and then transfer it out to another account. Zsolt agreed to this since Mr. Nath was his boss and his dad's business partner. He believed he had no

reason to distrust Mr. Nath. When they got to the bank counter, Zsolt learned the amount of the transfer was $115,000. Mr. Nath asked the teller to deposit the money into Zsolt's account and then transfer it out again to another account. Zsolt did not know the money was being transferred from Developro and he did not understand what Mr. Nath was doing or why he was doing it.

[518] The transaction itself is patently dubious and Zsolt ought to have questioned it. However, I am not persuaded that this lapse in judgment establishes he was a knowing recipient of the plaintiffs' misappropriated money. Zsolt received no benefit from this transaction and it was done almost six months after Zsolt and Jessica received the $7,000 payment and the $2,900 cash exchange Zsolt did at his father's request on June 1, 2016. I find the October transaction is too far removed from the May and June transactions to impute constructive knowledge of fraud for those earlier transactions.

[519] The plaintiffs also rely on unjust enrichment against Zsolt in respect of the $9,900 but there are two problems with this claim. First, the $7,000 payment was a gift and a gift of money can be a juristic reason for an enrichment: *Moore v. Sweet,* 2018 SCC 52 at para. 57.

[520] Second, Zsolt was not enriched by the $2,900 payment because it was reimbursing him for cash he had just given to Mr. Horvath.

[521] Third, Zsolt's enrichment by way of the $7,000 does not correspond to Weihe's deprivation. To establish the element of a corresponding deprivation, the impugned benefit does not need to be conferred directly by the plaintiff on the defendant but there must be some causal connection between the two: *Moore v. Sweet,* at paras. 43-48. As stated in that case:

> [43] …the plaintiff must demonstrate that the loss he or she incurred *corresponds* to the defendant's gain, in the sense that there is some causal connection between the two (*Pettkus* [*v. Becker*, [1980] 2 S.C.R. 834] at p. 852). Put simply, the transaction that enriched the defendant must also have caused the plaintiff's impoverishment, such that the defendant can be said to have been enriched ***at the plaintiff's expense*** (P. D. Maddaugh and J. D. McCamus, *The Law of Restitution* (loose-leaf ed.), at p. 3-24).

[522] Here, Zsolt did not deprive Weihe of this $7,000 by receiving it as gift from Mr. Horvath. It was Mr. Horvath and Mr. Nath who deprived Weihe of the money through the flip. While the correspondence in the deprivation need not be direct, I find the gift to Zsolt and Jessica of $7,000 was not the same transaction by which Weihe was deprived of that money (and much more).

[523] The plaintiffs also claim that Zsolt is liable in knowing assistance for the $82,000 Weihe paid for the lidar survey that was never done. As I have said earlier, knowing assistance requires the plaintiff to prove not only that a fraudulent or dishonest breach of trust occurred but also that the defendant accused of knowing assistance participated *knowingly* in that breach: *Gold v. Rosenberg* at para. 32. The knowledge requirement may be actual knowledge, recklessness or wilful blindness: *Citadel* at para. 22.

[524] The plaintiffs argue that since Zsolt sent an email to Ms. Tian on August 15, 2016 asking for this payment he knowingly assisted Mr. Nath and Mr. Horvath in the misappropriation of the $82,000 that was never spent on a survey. However, Zsolt sent this email in the course of his employment with Vantone Developments and as directed by Mr. Nath. I find he had no reason at that time to question the legitimacy of the request or to believe the survey either was not done or would not be done. I find the plaintiffs have not established any wrongdoing on Zsolt's part in this transaction or that he knowingly assisted Mr. Horvath and Mr. Nath in a breach in respect of this money.

[525] Finally, the plaintiffs argue that Zsolt received a benefit by living rent-free for a time in the Surrey home that Mr. Horvath purchased using Weihe money. They say he ought to have been alive to the fact (or at least highly suspicious) that Mr. Horvath had used money misappropriated from the plaintiffs to buy that home. I am not persuaded by this. I am not convinced that Zsolt had sufficient (or any) familiarity with his parents' finances such that he reasonably ought to have known they could not afford to buy the Surrey home without having misappropriated the plaintiffs' money. Of course he would have to believe that Mr. Horvath had come into

some financial success but that belief is not necessarily unreasonable, particularly since Mr. Horvath had started work on a major development in Prince George. Zsolt did not know how that project was structured financially or how Mr. Horvath was to be remunerated for his involvement.

[526] Regardless, the plaintiffs have not sought to quantify the financial benefit Zsolt enjoyed by living in this house rent-free and have not claimed any amount of damages or compensation from Zsolt for this benefit. They confine their remedial claims against Zsolt to the $9,900 identified in Mr. Law's report and the $82,000 for the Sumas Mountain Property lidar survey fees. I find Zsolt's knowledge of the purchase of the Surrey home has no bearing on whether he ought to have questioned the $9,900 or the payment of the lidar survey.

[527] For these reasons, I dismiss the plaintiffs claims against Zsolt Horvath.

X. Interest Claim

[528] The plaintiffs seek compensation for the interest payments they had to make to borrow funds they invested in the properties and the project. They have provided mortgage statements indicating that, to the date of the trial, they paid $187,950 on these borrowed funds.

[529] Counsel for the plaintiffs have not cited any authority supporting the plaintiffs' entitlement to claim this interest. They briefly referred me to *Columere* at paras. 54 and 57-58 where Justice Melnick awarded interest to a landowner who was forced to take out a loan to finance the completion of a residential development project after the defendant had misappropriated funds previously provided for the development. However, in that case, the loan had to be obtained (and the interest paid) in order to finish the project after the contractor misappropriated project development funds. In essence, the plaintiff had to borrow money to mitigate against their losses. That is different to borrowing money to invest in the project in the first place.

[530] However, in *Jak-B-Jak Investments,* the Court of Appeal upheld an award of interest beyond that prescribed by the *Court Order Interest Act* on the basis that it

was necessary to make the plaintiff whole for the defendant's fraudulent misrepresentation. In that case, the plaintiff bought a campground from the defendant in reliance on the defendant's fraudulent representation as to the campground's revenues. They financed the purchase through a mortgage granted to the defendants at 9.1% (compounded) per annum. The trial judge awarded interest at this amount but without compounding it. He considered he had discretion to order interest above rate prescribed by the *Court Order Interest Act* but not to award compound interest. That latter conclusion was overturned on appeal and, more importantly for the present claim, Newbury J.A., speaking for the court, found that the compound interest paid by the plaintiff was properly recoverable as damages for the defendant's fraudulent misrepresentation. She said at para. 21:

> It is true … that interest is in the discretion of the trial judge. However, this was not really an award of interest, but a damage award and the principle is that the plaintiff should be made whole. I see no reason why the corporate plaintiff should not receive its full compensation…

[531] In *Dean v. Rise 'N Bake Pastries Inc.*, 2001 CarswellOnt 669, 2001 CanLII 28361 (Ont. S.C.) (aff'd 2002 CarswellOnt 4028, 2002 CanLII 53219 (Ont. C.A.)) Stone J. awarded as damages interest the plaintiffs had paid on a mortgage on their home to finance the purchase of the defendant's business. They were induced into buying the business by a negligent (but not fraudulent) misrepresentation.

[532] Ms. Tian confirmed in the direct examination that she mortgaged two properties to help finance the cost of acquiring the lands and to pay the Project Development Funds. She identified the bank statements in evidence relating to these. She was not cross-examined on this evidence. The bank statements indicate that she paid $187,950 in interest. In my view, this was a foreseeable expense that incurred as a consequence of Messrs. Nath and Horvath's fraudulent misrepresentation and Mr. Guo's negligent misrepresentation that induced the plaintiffs into buying the properties, and the breaches of fiduciary duty of all three of Messrs. Nath, Horvath, and Guo. I find those three defendants, along with Vantone Developments and Developro, are jointly and severally liable for this amount.

[533] The plaintiffs are entitled to pre-judgment interest for the amounts I have awarded. There will need to be a reconciliation as between the award of financing interest that I have just made and entitlement to pre-judgment interest to ensure there is no double recovery of interest. If necessary, I would refer that matter to the Registrar for resolution.

XI. Punitive Damages

[534] The plaintiffs claim punitive damages against Mr. Guo, Mr. Horvath, Mr. Nath, and Developro.

[535] Punitive damages are awarded where the misconduct of the defendant is "so outrageous" that punitive damages are rationally required to act as a deterrent: *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at para. 100. The award must serve a "rational purpose" and "represent a proportionate response to the behaviour of the defendants and the harm caused": *Whiten* at para. 150. The "rationality" test applies to both the question of whether an award of punitive damages should be made and in determining the quantum of the award: *Whiten* at para. 101. Punitive damages are not "at large" and an award of punitive damages "is rational 'if, but only if' compensatory damages do not adequately achieve the objectives of retribution, deterrence, and denunciation": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 at para. 87.

[536] In *Whiten*, the Supreme Court of Canada explained the rationale for punitive damages as follows:

> [36] Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[537] The plaintiffs rely on *Caroti v. Vuletic*, 2022 ONSC 4695 where the Ontario Superior Court awarded $150,000 in punitive damages against defendants who, through breach of contract, fraud, conspiracy and breach of fiduciary duty, enriched themselves at the expense of the plaintiff investors by taking funds the plaintiffs had invested in a real estate investment and development scheme devised by the defendants. The defendants heavily mortgaged the development lands and took the mortgage proceeds for themselves without completing or diligently pursuing the development.

[538] There are obvious parallels with this case. Earlier I found, based on Melnick J.'s comments in *Columere,* that Mr. Nath and Mr. Horvath's misappropriation of the plaintiffs' Project Development Funds, knowing they could only be used for the Prince George project, essentially amounted to theft. I agree that is conduct that offends the court's sense of decency and is deserving of an award of punitive damages against Mr. Nath and Mr. Horvath.

[539] I am not persuaded that Mr. Guo's conduct is deserving of punitive damages. His complete abdication of his management responsibilities under the Project Management Agreements cost the plaintiffs over $2 million in losses to Mr. Nath and Mr. Horvath's misappropriations and another $812,000 in wasted expenditures on a failed development. However, he did not engage in a deliberate course of conduct to take advantage of the plaintiffs or line his own pockets with their money. Unlike Mr. Nath and Mr. Horvath, Mr. Guo received nothing of the plaintiffs' money. His conduct is a gross dereliction of his contractual and fiduciary duties but I am not persuaded it reaches the level of high-handedness that is required for an award of punitive damages.

[540] The plaintiffs claim for $150,000 in punitive damages is based on what was awarded in *Caroti.* In that case, however, the damages (other than punitive damages) exceeded $10 million, which is more than double the damages in this case.

[541] An award of punitive damages must be proportionate to the degree of vulnerability of the innocent party; the harm or potential harm directed specifically at the plaintiff; the need for deterrence; other penalties, both civil and criminal, which have been or are likely to be inflicted on the wrongdoer for the same misconduct; and the advantage wrongfully gained by the wrongdoer from the misconduct: *Zhang v. Zhang,* 2022 BCSC 2156 at para. 380. In that case, damages of just over $5 million were awarded plus $100,000 in punitive damages.

[542] In this case, Mr. Nath and Mr. Horvath's conduct not only involved the misappropriation of over $2 million to their own benefit or to other projects they were working on but also an attempt to deceive the plaintiffs, though Mr. Guo, with false and inflated invoices from subcontractors. In my view an award of $100,000 for punitive damages against those two defendants is appropriate.

XII. Mr. Guo's Third Party Claim

[543] Mr. Guo has made a third party claim against Mr. Horvath, Mr. Nath, and Vantone Developments for any amounts that he may be found liable to pay the plaintiffs. Mr. Horvath's third party claim against Mr. Guo was not pursued.

[544] I find that Mr. Nath and Mr. Horvath are jointly and severally liable to Mr. Guo under Mr. Guo's third party claim for the full extent of Mr. Guo's liability to the plaintiffs. As I have found earlier, Messrs. Nath and Horvath made misrepresentations about the investment opportunity to Mr. Guo with the intent of convincing Mr. Guo that investing in the properties was a good idea. This was necessary so that Mr. Guo would make a persuasive case to Mr. Wang for the investment. Thus, I find Messrs. Nath and Horvath are liable to Mr. Guo for the damages he must pay in relation to the purchase price of the properties.

[545] With respect to the Project Management Funds and other damages, Messrs. Nath and Horvath deliberately excluded Mr. Guo from his management role on the project and concealed their misappropriations from him until well into 2017. While Mr. Guo bears substantial responsibility for allowing this to happen and for failing to assert himself in the supervising role he had committed to, this does not excuse

Mr. Nath and Mr. Horvath from liability under Mr. Guo's third party claim for their deliberate exclusion of Mr. Guo from the project management, their misappropriation of the plaintiffs' money, and their own gross mismanagement of the project.

[546] I therefore allow Mr. Guo's third party claim in full against Mr. Nath, Mr. Horvath, Vantone Developments, and Developro.

XIII. Summary of Damages and Remedies

[547] By way of summary, I award damages to the plaintiffs as follows:

Item	**Amount**	**Assignment and Apportionment of Liability**
Profits from the sale of the properties	$1,450,000	Nath and Horvath (Joint and Several). Katalin Horvath liable for $35,500 of this amount based on knowing receipt but her liability is not joint.
Market value overpayment for the Prince George Property	$175,000	Nath and Horvath jointly and severally liable for the full amount. Guo severally (but not jointly) liable along with Nath and Horvath for $87,500 of this amount.
Project Development Funds	$2,862,500	Nath, Horvath, and Guo (joint and several) but Guo's liability limited to $2,649,500 due to exclusion of $213,000 for November and December Project Development Fund payments. Katalin Horvath is liable for $225,000 of this amount, less one half of the proceeds of the sale of the Horvath properties that are being held in trust but her liability is not joint.
Sumas Mountain Lidar Survey	$82,000	Nath, Horvath, and Guo (joint and several)
Teare Creek Settlement	$307,500	Nath, Horvath, and Guo (joint and several)
Investment Interest	$187,950	Nath, Horvath, and Guo (joint and several)
Punitive Damages	$100,000	Nath and Horvath (joint and several)
Costs	TBD	
Pre-judgment Interest	TBD	
Total Damages	**$5,164,950**	

[548] I would add that to the extent that Vantone Developments and Developro still have assets, they are also jointly and severally liable along with Mr. Nath and Mr. Horvath for the misappropriation of Project Development Funds. Develpro is also liable for any of the $1.45 million in profits it received from the sale of the properties to the plaintiffs.

[549] Neither counsel nor any of the defendants specifically identified how much of the Project Development Funds Developro received through Mr. Nath and Mr. Horvath's misappropriations. I gather that Developro likely has no assets or, if it does, those assets are substantially less than what it received in misappropriated funds, in which case it is likely futile to specifically calculate this amount. However, should it be necessary to do so, I would refer that matter to the Registrar to do the calculation based on Mr. Law's reports and the bank statements in evidence.

[550] As mentioned earlier, the plaintiffs reached a settlement with Sinominco and with Mr. Salter/Equip Law with respect to claims made against them. The court does not know the terms of those settlements but now that judgment has been given, it may be necessary to adjust the damage awards I am making to account for those settlements to ensure there is no double recovery for the plaintiffs. I will leave it to counsel and the parties to deal with that issue and to advise the Court as appropriate.

[551] The claims against Yue Chun Xie and Zsolt Horvath are dismissed.

[552] Mr. Guo is entitled to be indemnified by Mr. Nath, Mr. Horvath, Vantone Developments and Developro under his third party claim for the full amount of his liability to the plaintiffs.

[553] The parties requested the opportunity to address the issue of costs once receiving these reasons for judgment. They may arrange to do so through Supreme Court Scheduling.

"Kirchner J."