

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Equustek Solutions Inc. v. Jack*,
2024 BCCA 104

Date: 20240315
Docket: CA46900

Between:

**Equustek Solutions Inc.,
Robert Angus, and Clarma Enterprises Ltd.**

Appellants
(Plaintiffs)

And

**Morgan Jack aka Matt Garcia aka Matt Garci aka Ian Taylor,
Andrew Crawford aka Derek Smythe,
Datalink Technology Gateways Inc., Datalink 5, Datalink 6,
John Doe, Datalink Technologies Gateways LLC,
Lee Ingraham aka Darren Langdon, Mike Bunker,
Igor Cheifot aka Jolio Fernandez, Alexander Cheifot aka Randy Schtolz,
Frank Geiger aka Felix Fernandez, Alfonso Doe,
Colin Marsh, and Kathleen Marsh**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Fitch
The Honourable Justice Griffin
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated
May 29, 2020 (*Equustek Solutions Inc. v. Jack*, 2020 BCSC 793,
Vancouver Docket S112421).

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Place and Date of Hearing:

Vancouver, British Columbia
June 13–15, 2023

Written Submissions Received:

June 14 and 16, 2023

Place and Date of Judgment:

Vancouver, British Columbia
March 15, 2024

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice Horsman

Summary:

The appellants sued several parties for breach of confidence, passing off and conspiracy. At trial, they obtained judgment against some defendants, but not all. They appeal the dismissal of their claims against Lee Ingraham, Colin Marsh and Mike Bunker. They also appeal certain aspects of the damages and costs awards.

Held: Appeal dismissed with respect to the majority of the grounds of appeal, but allowed with respect to the Bullock costs order. There is no merit to the main grounds of appeal, which are essentially challenges to the judge's findings of fact. The evidence supported the judge's findings of fact. The judge's reasons illustrate that she grappled with the large quantity of evidence and the varying theories advanced by the appellants at trial. With respect to the application for a Bullock order, the judge overlooked the appellants' argument that they should be allowed to claim against the unsuccessful defendants the costs that the appellants must pay the successful defendants. The order at trial is varied to allow the appellants to recover the costs of the successful defendants as against the non-participating unsuccessful defendants.

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Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] This case involves claims of breach of confidence, passing off, and conspiracy made by the appellant Equustek Solutions Inc. (“Equustek”), its principal Robert Angus, and his holding company Clarma Enterprises Ltd. (“Clarma”) (collectively, the “appellants”). In brief, the appellants allege that former employees or business associates, assisted by others, wrongfully took Equustek’s confidential information and used it to create a rival protocol converter product; they then passed off the rival product as Equustek’s in order to benefit from Equustek’s goodwill and to redirect Equustek’s customers to their own business.

[2] After many preliminary applications, a lengthy trial ensued. Some defendants appeared and defended; others did not participate at trial. There were multiple issues, including the credibility of the witnesses. Much of the evidence was circumstantial, technical, and complicated.

[3] The appellants’ notice of civil claim was amended six times as the theory of the case evolved, with the final version filed just before trial and described as the Fifth Further Amended Notice of Civil Claim (for ease of reference, the “NOCC”). The appellants’ NOCC groups all the defendants together in many allegations, and so the trial judge ordered the appellants to file an annotated notice of civil claim, specifically identifying the claims against each defendant.

[4] After a 73-day trial, the judge resolved the many factual and legal issues in a comprehensive judgment totaling over 100 pages, indexed as 2020 BCSC 793 (“Trial Reasons”).

[5] The judge found liability against the defendants who did not participate at trial: Morgan Jack, the Datalink defendants (“Datalink”), and Igor Cheifot and Alexander Cheifot (the “Cheifots”) (together, “the Non-Participating Defendants”). The judge also found partial liability against Andrew Crawford. For ease of reference, I will refer to all defendants against whom there was a finding of liability as the “Liable

Defendants”. The judge awarded \$1 million in damages for Equustek’s loss of sales from March 2018 to the date of trial, jointly and severally against the Liable Defendants.

[6] However, the trial judge dismissed the claims against Colin Marsh, Lee Ingraham, and Mike Bunker (together the “Successful Defendants”).

[7] After a subsequent three day hearing, the judge ordered additional damages (reasons indexed as 2021 BCSC 2126 — “Damages Reasons”).

[8] In summary, including the damages awarded in the Trial Reasons, the judge awarded:

- a) \$40,000 damages for copyright infringement, jointly and severally against all the Liable Defendants except the Cheifots;
- b) \$1,000,000 damages for Equustek’s loss of past sales, as against all the Liable Defendants;
- c) \$1,189,000 damages for Equustek’s future lost sales, as against all the Liable Defendants;
- d) \$6,183,000 as disgorgement of Datalink’s profits from past sales, as against the Liable Defendants except Mr. Crawford;
- e) \$1,189,000 as disgorgement of Datalink’s profits from future sales, against all the Liable Defendants except Mr. Crawford;
- f) \$250,000 in punitive damages against Mr. Jack as operating mind of the Datalink defendants;
- g) \$100,000 in punitive damages against each of the Cheifots; and,
- h) special costs against all Liable Defendants except Mr. Crawford, against whom a special costs award for 50% of trial costs was made.

[9] The appellants submit that the total award, including punitive damages and interest as at the time of appeal, amounts to \$11,074,268.

[10] On this appeal, the appellants raise numerous issues with the trial judge's findings. The appellants say that judgment should have been granted against Mr. Ingraham and Mr. Marsh for breach of confidence, and against Mr. Ingraham and Mr. Bunker for passing off. Alternatively, the appellants say judgment should have been granted against Mr. Ingraham and Mr. Marsh for conspiracy. The appellants have informed this Court that subsequent to trial, Mr. Crawford has filed a bankruptcy claim, and so they are not seeking any new basis of liability against him on appeal, but will still pursue issues of quantification of damages and costs.

[11] The appellants also challenge the judge's awards of damages and seek disgorgement against Mr. Crawford and any of the Successful Defendants who were found liable on appeal. The appellants also challenge aspects of the costs orders.

[12] In my view, the multitude of issues raised on appeal do not raise any points of law. Despite the attempt to frame some of the grounds as legal issues, this is essentially an appeal of factual findings of the trial judge.

[13] The appellants' approach on appeal has been to comb through the large record of evidence at trial and pick out those pieces that support the inferences they wish to have drawn against the Successful Defendants, while ignoring or underplaying the contrary evidence and contrary inferences that were open to the trial judge.

[14] Indeed, the appellants' arguments depend on this Court accepting their subjective interpretation of bits and pieces of a complex and large body of evidence, minimizing or ignoring evidence that supports the judge's findings, parsing the reasons for judgment, and rejecting the interpretation of the whole of the evidence made by the trial judge. Also, in some instances, the appellants' arguments depend on this Court ignoring the way the appellants framed the theory of their claims at trial.

[15] In my view, the Trial Reasons show that the judge grappled with the many issues and she was aware of the appellants’ varied arguments as well as the defences. The judge properly instructed herself on the law and carefully resolved multiple contested factual issues. The evidence from the witnesses and in the documents, including email communications, was nuanced and complex. It was a case in which the vast quantity of evidence, written and oral, was circumstantial and required interpretation. The judge did not accept the appellants’ interpretation on some points, but this does not amount to a ground for appellate interference.

[16] For the reasons that follow, the appellants have failed to establish that the judge misapprehended the evidence or made a palpable and overriding error in her findings on liability and damages.

[17] There is one costs issue that has merit, which I will address.

Chronology

[18] Given the multiple factual issues and many parties, I have summarized relevant facts and parties in two tables.

[19] The first table sets out a chronological summary of events.

Late 1980s–1998	Robert Angus reverse engineers a protocol converter invention of Allen-Bradley, which held patents over its DH+ protocol. He calls his product the DFK1000. He and his company Equus develop a business relationship with Colin Marsh and his companies who distribute the DFK1000 protocol converter in Canada and the United States (“US”) under a verbal distribution agreement.
1993	Mr. Angus hires Andrew Crawford, a recent engineering graduate, to work at Equus.

1996	Lee Ingraham works for a few months at Equus as an electrical engineer. He does not work on the DH+ project.
1998–2001	Allen-Bradley alleges that the DFK1000 infringes its patented DH+ product and sues Mr. Marsh’s companies in the US. The lawsuit is settled in 2001, and Mr. Marsh agrees not to sell Equus products in the US.
2000–2001	Mr. Crawford leaves Equus to work at Automation Anywhere Inc. (“AAI”), a company related to Morgan Jack and Mr. Marsh. AAI is eventually wound up in 2001 and Mr. Crawford returns to work for Equus.
2001	After settling with Allen-Bradley, Mr. Marsh sells his business to Mr. Jack, who operates under the Datalink companies. Mr. Jack and Datalink continue the distribution of Equus products on the same oral terms with Mr. Angus and Equus.
2001–2003	Equus sues Mr. Marsh on a personal guarantee as well as his company Sage in relation to unpaid receivables. The latter claim was settled before trial. The claim against Mr. Marsh went to trial, where he was successful and obtained an award of special costs against Equus (2003 BCSC 1783).
2005	<p>Mr. Angus sells Equus (before paying the special costs judgment obtained against it in favour of Mr. Marsh). He incorporates Equustek to carry on with design and manufacture and for Clarma to own the intellectual property.</p> <p>Mr. Crawford leaves Equustek. He begins to work on a project for Mr. Jack and Datalink to develop their own protocol converter DH+ device — the GW1000 — which he does eventually.</p>

	<p>Mr. Ingraham joins in the Datalink effort to develop a new protocol converter, assisting on the physical (hardware) components and later in providing technical support.</p> <p>Mr. Bunker is hired by Datalink to provide website services.</p> <p>Igor Cheifot also begins working with Datalink in around 2005.</p>
2005–2011	<p>The GW1000 protocol converter is developed by Datalink, with the first product shipping in 2008. Mr. Jack and Datalink do not inform Equustek and continue to act as Equustek’s distributor. Mr. Jack engages in a practice of switching the GW1000 product for orders of Equustek’s product (a practice described in the judgment as “bait and switch”). He includes a document in the customer package that directs them to an unindexed website that has been prepared by Mike Bunker at Mr. Jack’s direction. The website cannot be found on a regular Google search because it is unindexed (thus hidden from Mr. Angus). The trial judge describes this as the “concealment strategy”. The website goes live and becomes searchable in 2011.</p>
April 2011	<p>The appellants file the original Notice of Civil Claim.</p>
September 3, 2011	<p>The appellants obtain an order from Lease J. prohibiting Mr. Jack and Datalink from referencing or using any of Equustek’s product images, manuals, or product names. The order also requires them to post a statement on their websites in which the GW1000 is sold or advertised, that they no longer distribute Equustek products and they instead instruct customers to contact Equustek directly. They were also ordered to deliver a list of all the names and contact details</p>

	of all customers who ordered an Equustek product from Datalink since January 1, 2007.
March 21, 2012	The appellants obtain an order from the case management judge Fenlon J. (as she then was) for further terms requiring Mr. Jack and Datalink to amend the statements posted on the Datalink website and to comply in full with the order of Leask J.
June 20, 2012	The appellants obtain an order from Dickson J. (as she then was) striking the response to civil claim of Mr. Jack and Datalink.
July 26, 2012	The appellants obtain an <i>ex parte Mareva</i> injunction order from Punnett J. against Mr. Jack and Datalink, which freezes their assets (reasons indexed as 2012 BCSC 1490). The court finds that the defendants did not deliver the customer list and most of the websites continue to be in violation of the court orders. The court notes that the impact of the injunction will prohibit the Datalink defendants from dealing with any of their assets worldwide and in practical terms may prohibit them from carrying on business (para. 45).
August 3, 2012	The appellants obtain an order from Fenlon J. containing wide prohibitions on the use of intellectual property by Mr. Jack and Datalink.
December 13, 2012	The appellants obtain an order from Tindale J. for Mr. Jack and Datalink to cease carrying on business through any website, including those attached in a schedule to the order, and that they take down all such websites. (Note that Mr. Bunker was not a party to the litigation until 2014.)
June 13, 2014	The appellants obtain an injunction order from Fenlon J., restraining Google Inc. worldwide from indexing or referencing a list of websites associated with Datalink (reasons indexed as

	2014 BCSC 1063). Google appealed the order, but it was ultimately affirmed by the Supreme Court of Canada (2017 SCC 34).
March 9, 2015	An <i>Anton Piller</i> order (referred to in various interlocutory judgments as “APO”) is granted to the appellants, allowing for a search of the Cheifots’ residences and resulting in the seizure of documents and evidence. The seized documents identify that the Cheifots had Equustek source code on their computers. Hard drives reveal hundreds of email conversations among the defendants about the GW1000 and the litigation.
March 22, 2018	Fifth Further Amended Notice of Civil Claim filed (the version at trial).
2018–2019	The trial takes place.
May 29, 2020	<p>Trial Reasons released. The judge found no liability against Mr. Ingraham, Mr. Marsh, or Mr. Bunker (the Successful Defendants). The judge found against the Liable Defendants as follows:</p> <ul style="list-style-type: none"> a. Mr. Jack and the Datalink defendants for breach of confidence, passing off, copyright infringement and conspiracy; b. the Cheifots for breach of confidence and conspiracy; and, c. Mr. Crawford for breach of confidence and copyright infringement.
March 26, 2021	Trial judge grants Mr. Bunker’s application for double costs (2021 BCSC 544 — “Bunker Costs Reasons”).
March 30, 2021	Trial judge dismisses Mr. Marsh’s application for double costs (2021 BCSC 568 — “Marsh Costs Reasons”).

March 30, 2021	Trial judge dismisses Mr. Ingraham’s application for double costs (2021 BCSC 569 — “Ingraham Costs Reasons”).
June 17, 2021	Trial judge awards the appellants special costs against Mr. Crawford for 50% of the trial costs (2021 BCSC 1180 — “Crawford Costs Reasons”).
August 20, 2021	Trial judge dismisses the appellants’ application for a <i>Sanderson</i> costs order compelling the Liable Defendants to pay the Successful Defendants’ costs. She also dismisses the appellants’ alternative application for a <i>Bullock</i> costs order that would permit the appellants to recover the costs of the Successful Defendants by claiming the costs as a disbursement against the Liable Defendants (2021 BCSC 1641 — “ <i>Sanderson/Bullock</i> Reasons”).
October 29, 2021	Trial judge awards additional damages (2021 BCSC 2126 — “Damages Reasons”).

Who’s Who and What’s What

[20] Given the number of parties and issues, I also find it convenient to set out in table form the relevant terms and names of the parties (alphabetically sorted). The descriptions include a summary of background facts found by the trial judge.

AAI	Automation Anywhere Inc., a company started by Mr. Jack and closely aligned with Mr. Marsh and his company Sage. Mr. Crawford worked with AAI in 2000–2001.
Allen-Bradley	Short form name of a US company that invented and patented a computer network, the DH+ network, allowing various pieces of industrial machinery to communicate with each other. A protocol converter was an essential component of the network. In 1988, Allen-Bradley sued Mr. Marsh and his companies for distributing the product invented by Robert Angus under the Equus company name, which was an alleged patent

	<p>infringement. Mr. Angus claimed to have reverse engineered the DH+ network and invented his own protocol converter. The lawsuit was settled in 2001 with Mr. Marsh agreeing not to distribute the Equus product in the US.</p>
<p>Angus, Robert (an appellant and plaintiff)</p>	<p>An engineer and the principal of his design and manufacturing company (first Equus, then Equustek Solutions Inc.,) and his holding company (Clarma Enterprises Ltd.).</p> <p>He reverse-engineered a DH+ network invented and patented in the US by Allen-Bradley and invented his own protocol converter, the DFK1000 that later evolved into the DL2000. It was capable of interfacing with the Allen-Bradley systems on the closed DH+ network, but it was a less expensive alternative to the Allen-Bradley protocol converter. He called the device “Data Link”, initially using the prefix “DL” for his products until this litigation began and his distribution agreement with Mr. Jack terminated. After that, he used the “EQ” prefix for the Equustek products.</p>
<p>Bunker, Mike (a respondent and Successful Defendant)</p>	<p>A website designer who also provides “Search Engine Optimization” (“SEO”) services. In or around 2005, Mr. Jack hired Mr. Bunker as a contractor to work on Datalink’s internet presence. He was added to the litigation in 2014.</p> <p>The judge found no liability against Mr. Bunker. In the Bunker Costs Reasons, the judge found he was entitled to double costs at Scale B from the time of his 2017 offer to settle.</p>
<p>Cheifot, Igor and Alex (the “Cheifots”) (Liable Defendants)</p>	<p>Igor Cheifot and his father Alex Cheifot are both engineers who worked on developing protocol converters for Datalink. Igor worked on software and Alex on hardware. In early 2015, the appellants obtained an APO, which allowed for a search of their residence. They were found to be in possession of Equustek source code. Around the summer of 2015, they appear to have left the jurisdiction and did not participate in defending themselves in the lawsuit. They also did not participate on appeal.</p>

	<p>The judge concluded the Cheifots were liable for breach of confidence and conspiracy, but she did not find a basis for liability against the Cheifots for passing off.</p>
<p>Crawford, Andrew (Liable Defendant)</p>	<p>An engineer who worked for Mr. Angus between 1993 and 2005, with a brief hiatus in 2000–2001 when he worked with AAI in association with Mr. Jack and Mr. Marsh. After 2005, Mr. Crawford began working part-time for Mr. Jack and his Datalink companies. Mr. Jack persuaded Mr. Crawford to work on a DH+ product for Datalink, which became the GW1000. Mr. Crawford’s work had to do with the design of the software.</p> <p>The trial judge determined that Mr. Crawford misused confidential information obtained in his employment at Equustek, in the development of the GW1000, and was thus liable for breach of confidence. He was also found liable for copyright infringement.</p> <p>After a subsequent costs hearing, the judge awarded special costs against Mr. Crawford for 50% of the trial costs (Crawford Costs Reasons).</p>
<p>Datalink and Datalink companies (Liable Defendants)</p>	<p>For purposes of trial and appeal, the Datalink companies are a number of companies of which Mr. Jack is principal, all named as defendants.</p> <p>Mr. Marsh previously owned a Datalink entity, but he did not during the material times at issue.</p> <p>The name Datalink was first used by Mr. Angus when he developed his line of protocol converters in Equus and Equustek, and he also used the prefix DL for the DL2000 model number of his product and other products.</p>
<p>DH+ network</p>	<p>A patented invention by the company Allen-Bradley that allows various pieces of industrial machinery to communicate with each other. A protocol converter is necessary to allow the network to function.</p>
<p>DH+ source code</p>	<p>The source code that the appellants claim was part of their patented invention for the Equustek protocol converter, and which they say was a critical piece of confidential information</p>

	that the defendants stole and misused to create their own protocol converter, the GW1000, and associated technical documents.
DL2000	A model number of the Equus and later Equustek protocol converter, with “DL” representing Mr. Angus’s early name for his products, Datalink. The predecessor product was the DFK1000. There were additional DL products, including the DL3500. Later Equustek products used the EQ prefix.
Equus	Predecessor company owned by Mr. Angus. Equus engaged Mr. Marsh to distribute its product; later, Mr. Jack purchased Mr. Marsh’s business and was distributor of its product.
Equustek Solutions Inc. (“Equustek”) (an appellant and plaintiff)	Mr. Angus’s company. Mr. Jack and Datalink were distributors of Equustek product until the oral distribution agreement was terminated by the appellants in January 2011.
GW1000 and QPAB	The GW1000 and its predecessor QPAB were DH+ products developed by Mr. Crawford under Mr. Jack’s direction in 2005 and following years, initially for Mr. Jack’s Datalink companies. The judge found that Mr. Crawford used Equustek’s confidential information in the development of these products.
Ingraham, Lee (a respondent and Successful Defendant)	An engineer who worked briefly as an engineer in training for Mr. Angus at Equus in 1996. However, in his role he did not work on the DL2000 or any DH+ project at Equus. Mr. Ingraham began working for Mr. Jack’s projects at Datalink on a part-time basis in 2005, and then full time as a contractor in 2007. His main roles involved providing customer support, assembling protocol converters (the hardware, not designing the software), and dealing with parts suppliers. The judge found no liability against Mr. Ingraham.
Jack, Morgan (Liable Defendant)	The principal and directing mind of the Datalink defendants. He purchased Mr. Marsh’s business around 2001 and began distributing the Equus products through Datalink. He

	<p>subsequently distributed Equustek products until the appellants terminated the distribution agreement in January 2011.</p> <p>In 2005, he hired Mr. Crawford to develop a product for Datalink that would reduce or eliminate its reliance on Equustek’s products. Mr. Jack was the person who would benefit from development of the GW1000, as he was the one solely in control of Datalink. He was the architect of the marketing plan, which was found by the trial judge to be passing off.</p> <p>He moved to Mexico after the litigation started, and he did not participate at trial.</p> <p>He wrote many emails to other defendants, many of which the appellants relied upon to argue that liability against the other defendants should be inferred. The emails suggested Mr. Jack and others considered Mr. Angus to be highly litigious and this motivated them to maintain secrecy and aliases.</p> <p>The judge found Mr. Jack and the Datalink companies liable for breach of confidence, passing off, copyright infringement, and conspiracy.</p>
<p>Marsh, Colin (a respondent and Successful Defendant)</p>	<p>An engineer with experience in automation. Pursuant to a verbal distribution agreement with Mr. Angus, he sold Equus protocol converters through his companies (Sage in Canada and Datalink in the US).</p> <p>In 1998, his companies were sued by Allen-Bradley in the US on the basis that the Equus product infringed the Allen-Bradley patents. The lawsuit was settled in 2001 with Mr. Marsh agreeing to cease selling Equus products in the US by end of that year.</p> <p>He or his company Sage engaged in business with AAI.</p> <p>In earlier litigation, Equus sued Sage and Mr. Marsh. The claim against Sage for unpaid receivables was settled. The claim against Mr. Marsh for a personal guarantee was dismissed in 2003 (2003 BCSC 315; special costs to Mr. Marsh — 2003 BCSC 1783).</p>

	<p>In approximately 2001, Mr. Marsh sold his business and customer list to Mr. Jack for a nominal sum of \$10,000, payable only if the company became profitable again.</p> <p>During the material times at issue involving the development of the GW1000 and the passing off, Mr. Jack was the directing mind behind the respondent Datalink companies. Mr. Marsh claimed to have no interest in the Datalink companies and the judge accepted his evidence.</p> <p>In 2004, Mr. Marsh moved to France.</p> <p>The judge found that Mr. Marsh had no meaningful contact with Mr. Crawford and Mr. Jack during their development of the GW1000. He had no contact with Mr. Ingraham between 1996 and the commencement of trial in 2018. He never met Mr. Bunker and did not correspond with him.</p> <p>The judge found no liability against Mr. Marsh.</p>
<p>Non-Participating Defendants</p>	<p>The Liable Defendants who did not participate in the trial, namely, Mr. Jack, Datalink, and the Cheifots. In other words, all the Liable Defendants except Mr. Crawford.</p>
<p>Vapourware</p>	<p>A practice that involves advertising non-existent products on the internet to gauge the potential demand for them. Mr. Jack used vapourware on the Datalink website to try to make Datalink’s line-up of GW1000 products look bigger than it was. He directed Mr. Bunker to change the Datalink website listing of EQ7000 (an Equustek product) to DL7000 (said to be Datalink vapourware).</p>

Grounds of Appeal

[21] I counted over 20 issues raised by the appellants on appeal. In order to appreciate and consider the many issues raised by the appellants, particularly in light of shifting positions, considerable judicial time has been spent reviewing the pleadings, the evidentiary record, the submissions at trial, and the judge’s findings. After reviewing this large quantity of material, I have reached the view that the

appellants' arguments on appeal are simply challenges to the judge's findings of fact — findings which are well supported by the evidence.

[22] The grounds of appeal can be grouped together into the following issues, namely, whether the trial judge erred in:

- a) failing to find Mr. Ingraham liable for breach of confidence;
- b) failing to find Mr. Marsh liable for breach of confidence;
- c) failing to find Mr. Ingraham liable for passing off;
- d) failing to find Mr. Bunker liable for passing off;
- e) failing to find Mr. Ingraham and Mr. Marsh liable for conspiracy or as joint tortfeasors;
- f) measuring damages; and
- g) awarding costs.

Standard of Review

[23] The judge properly instructed herself on the key legal principles relevant to the various claims advanced.

[24] One of the most difficult issues at trial was the issue of whether Datalink had in fact misused Equustek's confidential information when developing its own product, the GW1000, or had it been designed from the ground up.

[25] Ultimately, the trial judge decided that issue in Equustek's favour, concluding that Mr. Crawford had used some of Equustek's confidential information when he developed the QPAB and then the GW1000.

[26] All of the Successful Defendants directly denied knowing that the GW1000 was designed using Equustek's trade secrets, denied participating in any breach of

confidence or passing off, and denied being part of a collective profit-sharing enterprise with Mr. Jack and Datalink.

[27] The evidence that the appellants relied upon to support their various theories of liability as against the Successful Defendants was largely circumstantial, and much of it was used by the appellants to try to cast doubt on the credibility of the Successful Defendants.

[28] It was open to the judge to find the Successful Defendants credible and to draw inferences other than guilt from the circumstantial evidence.

[29] It is not open to this Court to reconsider credibility, re-weigh the evidence and engage in our own inference-drawing exercise. Yet this is what the appellants have asked us to do on this appeal. They have selected pieces of evidence, ignored contrary evidence, and asked this Court to find that the judge committed errors by not interpreting the evidence in their favour.

[30] This Court recently reiterated the standards of review on appeal in *Garcha v. 690174 B.C. Ltd.*, 2023 BCCA 376. The appellants' approach makes it necessary to emphasize these principles again. As stated in *Garcha*:

[17] The issues raised on appeal involve questions of law, questions of fact, and questions of mixed law and fact. The governing standards of review are set out in *Housen v. Nikolaisen*, 2002 SCC 33.

[18] Pure questions of law (including questions of jurisdiction and statutory interpretation), are reviewed for correctness: *Housen* at para. 8.

[19] Findings of fact and factual inferences drawn from evidence cannot be reversed in the absence of palpable and overriding error: *Housen* at paras. 10, 19.

[20] Questions of mixed fact and law from which a legal question is not readily extricable also attract a deferential standard of review: *Housen* at para. 36. If an appellant or cross-appellant can demonstrate that a conclusion of mixed fact and law was materially affected by the application of an incorrect legal standard, a failure to consider a required element of a legal test, or some other error in principle, it may amount to an error of law and be assessed on a correctness standard. Otherwise, the more stringent standard of palpable and overriding error applies: *Housen* at para. 36.

[21] These standards of review are binding on us.

[22] And, in their application, they limit our authority to engage with the evidence and to reach factual conclusions different from the judge. In the context of a lengthy and fact-intensive trial, the importance of adhering to the governing standards of review cannot be overstated. As made clear by the Supreme Court of Canada in *Housen*, it is not the role of an appellate court to retry cases and to “substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities”: at para. 3, citing *Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (C.A.) at 204.

[23] Finality in the litigation process is important. For questions of fact and mixed fact and law in particular, this Court’s responsibility on appeal is to “review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge”: *Housen* at para. 4, emphasis added.

[24] These principles may seem trite to some. However, at the hearing of the appeal, the Court sometimes had to remind counsel of the role of an appellate court and the standards of review. Some of the submissions made to us were more appropriately submissions for a trial court and although couched in the language of appellate review, when distilled to their essence, they invited us to stand in the shoes of the judge and to reweigh the evidence. This, we cannot do.

...

[25] As emphasized by the Supreme Court of Canada in *R. v. G.F.*, 2021 SCC 20:

[69] ... Appellate courts must not finely parse the trial judge’s reasons in a search for error ... Their task is much narrower: they must assess whether the reasons, read in context and as a whole, in light of the live issues at trial, explain what the trial judge decided and why they decided that way in a manner that permits effective appellate review ...

[Emphasis added.]

Analysis

[31] I do not find it necessary to set out in these reasons every sub-issue argued by the appellant, but I will address the various themes of argument.

1. Breach of Confidence

Legal principles

[32] The trial judge correctly set out the law on breach of confidence at para. 135 of the Trial Reasons:

Kelleher J. provided a helpful summary of the law of breach of confidence in *XY, Inc. v. International Newtech Development Incorporated*, 2012 BCSC 319 [XY, Inc., SC]; appeal allowed only in relation to injunctive relief and unjust enrichment, 2013 BCCA 352 [XY, Inc., CA]:

[202] The general principle underlying breach of confidence is that where a person obtains information in confidence, the person may not use the information for activities detrimental to the person who makes the communication: *Terrapin Ltd. v. Builders' Supply Co. (Hayes) Ltd.* (1959), [1960] 5 R.P.C. 128 (C.A.). It is an equitable cause of action, rather than a tortious one: *Economic Interests in Canadian Tort Law* (Peter T. Burns and Joost Blom (Markham: LexisNexis, 2009)) ("Economic Interests") at 213. The wrong is comprised of three elements: (a) the information conveyed was confidential; (b) it was communicated in confidence; and (c) it was misused by the party to whom it was communicated: *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 at 47 (U.K. ChD.), cited by La Forest J. in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 635-36.

[203] Material can remain confidential even though it is available to the public. "[W]hat makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process": *Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd.* (1948), 65 R.P.C. 203 (U.K.C.A.) at 215, quoted with approval by Sopinka J., dissenting in part, in *Lac Minerals Ltd.* at 610.

[Emphasis added.]

[33] Further, the judge properly instructed herself on the principle that someone who knowingly receives confidential information, or who ought to have known it was confidential (constructive knowledge), may be equally liable for breach of confidence. This was discussed in *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 19, 1999 CanLII 705 and cited in the Trial Reasons at para. 240:

The plaintiffs rely on constructive knowledge to prove the breach of confidence claim against Mr. Ingraham, citing *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 at para. 19:

19 Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice

of that fact even if innocent at the time of acquisition) and impose its remedies. ...

[Emphasis added.]

[34] On appeal, the appellants also refer to *Apotex Fermentation Inc. v. Novopharm Ltd.* (1998), 162 D.L.R. (4th) 111, 10 W.W.R. 455 (Man. C.A.) [*Apotex*]. That case does not alter the above principles, but it emphasizes a heightened risk of the use of confidential information when an employee establishes a business in competition with a former employer.

[35] The judge found that Mr. Crawford’s work in developing the Datalink products, the QPAB and GW1000, relied on confidential information he obtained from Mr. Angus when working at Equustek, and he was thus liable for breach of confidence (Trial Reasons at para. 238).

[36] The judge considered a number of pieces of evidence collectively in coming to this conclusion, while acknowledging that individual pieces of evidence might not have been enough to prove the appellants’ case (Trial Reasons at para. 231). Mr. Crawford claimed that he designed the GW1000 independently by reverse engineering, but he produced no documentation in the form of lab notes, a log book, or expert opinion to substantiate this claim (para. 237). While still working at Equustek, Mr. Crawford began translating Equustek source code into C language, the language he used for Datalink products, and before leaving Equustek he backed up the source code on a disk (paras. 164, 211, 213, 221, 222, 235). There were “fingerprints” identified, meaning features in the GW1000 that also existed in the Equustek protocol converter, including DH+ variables and diagnostic counters and labels. There was a dispute about whether some of this information was in the public domain, but the judge accepted Mr. Angus’s evidence that it was not (para. 234).

[37] The judge found the other Liable Defendants also liable for breach of confidence based on deemed facts and constructive knowledge that Mr. Crawford used confidential information to create the Datalink products (Trial Reasons at para. 253).

[38] The appellants submit that the judge erred in failing to find Mr. Ingraham and Mr. Marsh liable for breach of confidence.

Did the trial judge err in failing to find Mr. Ingraham liable for breach of confidence?

[39] The appellants argue the trial judge ought to have found Mr. Ingraham liable for breach of confidence on the basis of constructive knowledge. Their argument relies on pieces of circumstantial evidence from which they say an inference should be drawn that Mr. Ingraham ought to have known that Mr. Crawford was using confidential information. They also say because the judge drew negative inferences against Mr. Crawford, similar reasoning should have resulted in negative inferences being drawn against Mr. Ingraham.

[40] The appellants also suggest that, rather than consider what Mr. Ingraham ought to have known, the judge simply accepted Mr. Ingraham's subjective evidence that he did not know that Mr. Crawford used confidential information.

[41] In my view there is no merit to these submissions.

[42] Mr. Ingraham gave evidence to the effect that:

- he agreed to participate in Datalink because a key parameter of the project was to build new technology from the ground up;
- he believed Mr. Crawford had the skill to build the DH+ interface without relying on any materials of Equustek;
- he often made inquiries of Mr. Crawford who indicated he was working from original material;
- they made deliberate choices to use different components than that used by Equustek;
- he had no reason to disbelieve Mr. Crawford when he told him that he was building the product from the ground up;

- he did not have the same technical knowledge as Mr. Crawford; and,
- he did not write source code and had no need to understand it to do his own work.

[43] Overall, the trial judge found that Mr. Ingraham was a credible witness (Trial Reasons at para. 125).

[44] The appellants' argument that the judge ought to have drawn similar inferences against Mr. Ingraham that were drawn against Mr. Crawford fails to recognize the different roles, knowledge and evidence that applied to each defendant. The trial judge concluded that Mr. Crawford must have used confidential information conveyed to him during the course of his employment with Mr. Angus to later develop the QPAB and then the GW1000 (Trial Reasons at para. 238).

[45] The appellants criticize the trial judge for not saying exactly how Mr. Crawford breached confidence; that is, they say she did not identify what pieces of technical information he must have taken from Equustek and when. In fact, there were many pieces of circumstantial evidence, which, in totality, led the judge to draw the inference that Mr. Crawford must have done so in some way. I point out two examples of evidence that distinguish Mr. Crawford's circumstances from Mr. Ingraham's: 1) Mr. Crawford worked on DH+ projects at Equustek and copied source code; and, 2) Mr. Crawford did not produce any documentation to show how he reverse engineered Equustek's DH+ product (paras. 233–237).

[46] Mr. Ingraham was in a different situation. He had not worked on DH+ products at Equustek. He was not duplicating Mr. Crawford's work and had a different knowledge and skillset. Contrary to the appellants' theory of the case, Mr. Ingraham did not know of Mr. Crawford's previous unauthorized use of Equus source code at AAI, so it cannot be said he ought to have been especially suspicious of Mr. Crawford (Trial Reasons at para. 246). And while Mr. Ingraham was unable to produce all early documents because he had given them to the Liable Defendants,

he retained (and therefore produced in the litigation) his log book for his work on the GW1000.

[47] The trial judge's reasons show that she was fully aware of the constructive knowledge theory advanced against Mr. Ingraham and the evidence that the appellants relied on, which she reviewed carefully (see for example, Trial Reasons at paras. 241–251). The judge did not simply rely on Mr. Ingraham's assertion that he did not know Mr. Crawford was using confidential information. She examined Mr. Ingraham's evidence critically from the perspective of whether he ought to have known, in the context of the working relationships of the defendants, his role, his knowledge (or lack thereof) of Mr. Crawford's work history at AAI and Equus, and his communications with Mr. Crawford.

[48] Mr. Ingraham's evidence that he had no reason to believe Mr. Crawford was using confidential information was also relevant. The appellants' arguments downplay this important evidence. As the judge summarized in her Trial Reasons, Mr. Ingraham trusted Mr. Crawford for a number of reasons:

[246] The plaintiffs maintain that Mr. Ingraham did not conduct due diligence to assure himself that Mr. Crawford was not simply copying from Equustek source code when he produced the QPAB and the GW1000. On cross-examination Mr. Ingraham said that the issue of building the product from the ground up was discussed extensively and he trusted Mr. Crawford. Mr. Ingraham said he had no reason to believe that Mr. Crawford would be referring to or relying on any former source code or drawings or parts list in his possession. As I am satisfied he was not aware of the intricacies of the AAI episode or of Mr. Crawford's previous unauthorized use of Equus source code, I accept his evidence in this regard.

[Emphasis added.]

[49] The appellants have not shown that the judge made any error in finding Mr. Ingraham credible when he said he had no reason to believe that Mr. Crawford was relying on Equus source code or other confidential information.

[50] Further, and contrary to the appellants' submissions, the judge did not limit her analysis to pre-lawsuit conduct. In her credibility and conspiracy analyses

regarding Mr. Ingraham, she specifically considered his conduct once the claim was filed (Trial Reasons at paras. 120–125, 358–359).

[51] In short, all defendants suspected that Mr. Angus would act aggressively to thwart competition for a new DH+ product. They took steps to make it more difficult for Mr. Angus to discover they were developing a competitive product, and these secretive tactics continued after he sued them. Each ground of appeal on liability depends, in part, on accepting the appellants' insistence that the only inference to draw from this secretive conduct is guilt. However, that is not the only available inference. It is not unknown in the field of intellectual property for litigation to be advanced for strategic reasons. When a person takes steps to protect themselves from a competitor who has a reputation of being fiercely litigious, it does not necessarily indicate wrongdoing. The judge carefully analyzed the behaviour of the various defendants in this regard; she was unpersuaded that the secretive conduct of Mr. Ingraham and Mr. Marsh was evidence of guilt.

[52] The judge considered all of the evidence and in the end, was not satisfied that the appellants had proven on a balance of probabilities that Mr. Ingraham ought to have known that Mr. Crawford was using confidential information (Trial Reasons at para. 252).

[53] The appellants have not shown that the judge made any palpable and overriding error in reaching this conclusion.

[54] At the appeal hearing and in supplemental submissions, the appellants added an additional ground of appeal — they say the judge failed to address their claim that Mr. Ingraham directly participated in breach of confidence by copying a DH+ interface board from Equustek.

[55] I do not find merit in this submission for several reasons.

[56] First, the appellants' submissions at trial relied on constructive knowledge of Mr. Ingraham to prove the breach of confidence claim against him. The appellants

did not press the argument at trial that Mr. Ingraham took confidential information when he briefly worked for Equus on non-DH+ projects in 1996.

[57] Second, the judge found that it was Mr. Crawford who copied the DH+ interface (Trial Reasons at paras. 231–239).

[58] Third, despite the appellants’ position at trial, the judge appreciated that a sub-theme of the appellants relied on direct participation by Mr. Ingraham. They asserted that since Mr. Ingraham did not understand the function or electrical components of the DH+ interface when working on the QPAB and later the GW1000, it logically meant he must have copied them from Equustek’s design (Trial Reasons at para. 247).

[59] It is obvious that the judge considered and rejected this theory. She set out a passage from Mr. Ingraham’s cross-examination in which he denied having this knowledge or that it was necessary for him to have it to perform his work (Trial Reasons at para. 248). She clearly accepted this evidence (para. 251).

[60] For those reasons, I am not persuaded that the trial judge made any error in concluding that Mr. Ingraham was not liable for breach of confidence.

Did the trial judge err in failing to find Mr. Marsh liable for breach of confidence?

[61] Several times in the NOCC, the appellants grouped Mr. Marsh in with allegations made against “defendants” generally. The NOCC claimed that Mr. Marsh was part of a conspiracy with Mr. Jack, Datalink and other defendants “to act in concert using unlawful means to destroy Equustek’s business in order that they could appropriate all of Equustek’s business, profits, and goodwill for themselves” (NOCC at Part 1, para. 33). The unlawful means included stealing Equustek’s trade secrets in order to build Datalink products, passing off Equustek’s products as their own, and using Equustek’s trademarks to drive traffic to the Datalink websites (para. 35). The NOCC alleged that the defendants set out to steal trade secrets by soliciting Mr. Crawford to copy the Equustek board schematics and source code and

disclose the trade secrets to other defendants in order to build the Datalink products to fully replace the Equustek products in the marketplace and generate the profits for themselves (para. 47). They alleged that the defendants, including Mr. Marsh, knowingly received proceeds from the use of the trade secrets and sales of the Datalink products (para. 49C).

[62] The central theory of the appellants' claim was that Mr. Marsh was secretly part of the Datalink business, and he profited from the design and build of the GW1000 using Equustek trade secrets.

[63] The judge did not accept this theory. The judge found that Mr. Marsh had sold his business to Mr. Jack and moved to France. Mr. Marsh had no meaningful contact with Mr. Jack and Mr. Crawford when they developed the GW1000, and had no knowledge of it and nothing to do with it. Mr. Marsh found out in 2006 or 2007 that Mr. Jack was selling a new product, but Mr. Marsh told him it was a mistake because it would compete with Mr. Angus's product and provoke a lawsuit. He believed, however, that Mr. Crawford and Mr. Jack had developed the product themselves. Mr. Marsh advised Mr. Jack on many occasions to focus on selling non-DH+ products in order to avoid provoking Mr. Angus (Trial Reasons at paras. 77, 258, 365, 368, 372).

[64] The judge found that Mr. Marsh gave credible evidence (Trial Reasons at para. 131). She accepted that he had no knowledge and nothing to do with the development of the GW1000, noting that it was a DH+ product and Mr. Marsh was aware from previous litigation with Mr. Angus that he would be angry about the competition (para. 372). Further, she found there was no evidence in the numerous emails between Mr. Jack, Mr. Crawford, and Mr. Ingraham between 2005 and 2011 to show that "Mr. Marsh had any stake in the GW1000 or Datalink or any knowledge of the development of the GW1000 or how it was to be marketed" (para. 373).

[65] On appeal, the appellants rely on certain excerpts from the Trial Reasons to highlight Mr. Crawford's admissions that he had been provided with source code from Equus early on when Mr. Marsh was involved with AAI in 2000–2001 (Trial

Reasons at paras. 31, 163, 211, 227, 254 (albeit the latter two findings implicate Mr. Jack)). The appellants say this evidence ought to have led to a finding of breach of confidence against Mr. Marsh; they say it was an error in principle for the judge to fail to consider the “obvious implications” of this evidence.

[66] As a reminder, Mr. Marsh and Mr. Jack started AAI around 2000–2001; Mr. Crawford left Equus and worked for AAI in that period. However, Mr. Crawford then returned to work with Equustek.

[67] The appellants’ focus on appeal is on the judge’s statement that “Mr. Crawford admitted for the first time during his testimony at this trial that he had been provided a copy of Equus’s source code to work from at AAI, confirming Mr. Angus’s long-held suspicions about what AAI was doing” (Trial Reasons at para. 31). Mr. Crawford said he had been “bamboozled by Mr. Marsh” into using Equus source code and board schematics for AAI projects (para. 227). The judge also set out the appellants’ theory that either Mr. Marsh or Mr. Jack had provided the source code to Mr. Crawford when he left Equustek to work for AAI, and there was no evidence of what happened to that version of source code when AAI folded (para. 211).

[68] Yet at trial, the appellants also relied on the assertion that Mr. Crawford denied he had achieved a workable DH+ interface at AAI. AAI was wound up in 2001 (Trial Reasons at paras. 32–33). The appellants maintained that Mr. Crawford was unable to decipher and implement DH+ until he returned to work for Equustek (para. 225).

[69] On appeal, the appellants obscure the distinction between evidence and a theory of liability. The evidence of what happened at AAI was in large part meant to assist in assessing the credibility of what happened years later. For instance, the appellants relied on the AAI incident in an attempt to cast doubt on Mr. Ingraham’s belief that Mr. Crawford had independently designed the GW1000. The judge did not accept this argument (Trial Reasons at paras. 247, 251).

[70] The theory that Mr. Marsh had improperly used Equus trade secrets 20 years earlier at AAI was not the theory of liability at trial. There was nothing in the NOCC that pleaded liability arose because of something that happened at AAI years earlier in the unsuccessful attempt to develop a product. Rather, the misuse of trade secrets was all to do with the products developed at Datalink when Mr. Crawford was hired by Mr. Jack in 2005 and subsequently. The appellants' theory was that Mr. Crawford copied Equustek's source code on to backup disks when he was preparing to leave Equustek in 2005, and he subsequently used it to develop the QPAB and the GW1000. The judge accepted this theory and imposed liability against Mr. Crawford on that basis (Trial Reasons at paras. 235, 238).

[71] In other words, the case against Mr. Crawford for breach of confidence was based on the use of confidential information provided to him by Mr. Angus when working at Equustek; it was not based on a piece of source code provided to him by Mr. Marsh at AAI.

[72] As for the appellants' theory of liability against Mr. Marsh for breach of confidence, it was rooted in speculation that he was secretly a part owner of Datalink and participated in Mr. Crawford's misuse of trade secrets. The judge found as a fact that Mr. Marsh did not have any involvement or any stake in the GW1000 or Datalink in the relevant period (Trial Reasons at paras. 372–373). There was evidence to support this finding.

[73] Accordingly, the appellants have not demonstrated any basis to interfere with the judge's conclusion that Mr. Marsh is not liable for breach of confidence.

2. Passing Off

Legal principles and pleadings

[74] The trial judge set out the correct test for the tort of passing off, relying on *Vancouver Community College v. Vancouver Career College (Burnaby) Inc.*, 2017 BCCA 41, leave to appeal ref'd, 37498 (18 January 2018) and *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120, 1992 CanLII 33 [*Ciba-Geigy*] (Trial

Reasons at paras. 290–291). The three elements of passing off are the existence of goodwill, deception of the public due to a misrepresentation, and damage (actual or potential) to the plaintiff as a result of the misrepresentation (*Ciba-Geigy* at 132). Substitution of one product for another requested by a customer should not be made without the customer’s knowledge (Trial Reasons at para. 291, citing *Ciba-Geigy* at 137).

[75] When considering the appellants’ arguments that the judge erred in failing to find Mr. Ingraham and Mr. Bunker liable for passing off, it is important to appreciate what the appellants’ pleadings state.

[76] The pleadings maintain that the “defendants” generally (not identifying which defendants) began “surreptitiously filling orders for Equustek products with their own Datalink products instead, in a kind of internet based ‘bait and switch’” (NOCC at Part 1, para. 50).

[77] They also plead that the “defendants” represented to the public by way of the Datalink websites that Mr. Jack and Datalink companies intended to sell and would sell Equustek products to the public. They further plead that these representations were false as the defendants intended to sell their Datalink products instead (NOCC at para. 51).

[78] Moreover, the appellants set out that while the defendants “continued to accept orders for Equustek products, and to accept payment on those orders, the [d]efendants actually shipped their Datalink Products to fill those orders” (NOCC at Part 1, para. 53). By substituting their Datalink products for the Equustek products that the customers ordered from them, customers received something different than what they had ordered and paid for (NOCC at Part 1, para. 55).

[79] And further, the NOCC pleaded that the defendants began to hold out Equustek products as their own products by (NOCC at Part 1, para. 56):

- a. Deleting references to Equustek from the Datalink websites;

- b. Obscuring the Equustek logo from the images of Equustek's products which the Defendants displayed on the Datalink websites;
- c. Altering the manuals for the Equustek products, which the Defendants made available for download on the Datalink websites, to remove Equustek's logo ...
- d. Supplying the Defendants' own GW1000 products with manuals substantially similar to the manuals for Equustek's products; and
- e. Covering over the Equustek logo on the Equustek products and packaging materials, and shipping the Equustek products to customers with a Datalink logo and packaging materials.

[80] The appellants' general pleading of passing off against all "defendants" was not helpful. When the judge requested that the appellants file an annotated pleading to clarify what claims were being pursued as against which individual defendants, they subsequently filed an annotated NOCC which stated in relation to para. 56: "other than Mike Bunker's role with respect to subpara b above, there is only direct evidence against Jack and the Datalink companies on para 56. As against the others, liability arises only via the conspiracy and accessory tort liability claims" (emphasis added). In other words, by their annotated pleading, the appellants conceded that they were not alleging that Mr. Ingraham directly engaged in passing off; nor were they alleging that Mr. Bunker did more than obscure the Equustek logo on products on the Datalink websites.

[81] In the annotated NOCC, the appellants also stated that their claim for injurious falsehood was subsumed in the claim for passing off. This claim was pleaded as follows:

62. ... The Defendants also began advising customers that
 - a. the Equustek products were no longer available;
 - b. the Equustek products were obsolete; and
 - c. the GW1000 line of products was an upgrade or consolidation of the Equustek products.

[Emphasis added.]

[82] The appellants further pleaded:

67. All of the Defendants' conduct above was intended to and did cause confusion in the marketplace between the Equustek products and the

Defendants' GW1000 line of products, in order that the Defendants could appropriate the Plaintiffs' goodwill and market share for themselves.

[Emphasis added.]

[83] There was little doubt that Mr. Jack, as the operating mind of Datalink, engaged in passing off by attracting customers as a distributor of Equustek products, and then trying to sell or substitute Datalink's own products instead. Equustek had goodwill and a good reputation at the time, and Mr. Jack employed tactics to deceive customers wishing to purchase an Equustek product from Datalink. These tactics included:

- a) A "bait and switch": when customers ordered an Equustek product from Datalink, Datalink would ship the GW1000 instead, together with a letter stating that this "next generation controller is a replacement to the [Equustek product]".
- b) The same product would be shipped with information on how to access the user manual on a website operated by Datalink but created by Mr. Bunker at Mr. Jack's request. This website was unindexed so that it was otherwise not searchable on internet search engines. On the same website, Mr. Jack featured older "DL" products, which were Equustek products. The public-facing website and internet searches would bring up the Equustek products, generating orders for Equustek that then would be subject to the bait and switch. Datalink was thereby benefitting from Equustek's goodwill.

(Trial Reasons at paras. 294, 299, 301, 302).

[84] The judge found Mr. Jack liable for passing off:

[305] Mr. Jack was unquestionably the architect of the marketing plan that saw Datalink offer the GW1000 as a replacement for Equustek products. I find he did so to take advantage of Equustek's reputation and promote his own product. Datalink was his company. It was not run as a collective with others. Mr. Jack controlled the messaging on the websites and he appears to have been the point of first contact with customers, issuing them quotes and then referring them to Mr. Ingraham if they had technical questions.

[85] None of the other individual defendants were found liable for passing off.

Did the trial judge err in failing to find Mr. Ingraham liable for passing off?

[86] The appellants submit that the judge erred in failing to find Mr. Ingraham liable for passing off.

[87] Mr. Ingraham’s role as a contractor for Datalink at the time was in technical support. When customers called or emailed Datalink with technical questions, Mr. Ingraham would handle the calls. He was not in sales or advertising.

[88] Mr. Ingraham admitted he learned that Mr. Jack was shipping the GW1000 to customers that had ordered the Equustek product. He said he was providing technical support only for the GW1000, and not for Equustek products.

[89] The judge described how Mr. Jack’s approach caused Mr. Ingraham some problems in his role:

[295] Mr. Ingraham acknowledged on cross-examination that on at least one occasion he received an email from a customer who had purchased a DL3500 DH+, an Equustek product, but had received a GW1000 DHP1 instead. He agreed that the customer’s reference to a “note in the box” was a reference to the letter that went out with the GW1000 telling consumers it was an update and replacement of the DL3500 and other Equustek products. Again, Datalink was associating its GW1000 to Equustek products. ...

...

[297] Mr. Ingraham agreed that he became aware in early 2008 that Datalink shipped GW1000 products in response to orders for Equustek products and that Datalink was claiming the GW1000 was an upgrade or a replacement of Equustek products. He said it caused him difficulty at times, in his role in tech support for Datalink, while Datalink was selling both Equustek products and the GW1000. He did not enjoy his tech support role, in particular, dealing with confused customers who had received products with different product numbers than they ordered from Mr. Jack. Customers who already had a DL3500 would receive a GW1000 instead of another DL3500 or other Equustek model.

[Emphasis added.]

[90] Mr. Ingraham admitted he told some customers that the GW1000 was a replacement of an Equustek product (Trial Reasons at para. 307). In his view, it was,

in fact, a replacement product as it substituted what Datalink was selling for that product. He said he was not suggesting Equustek products were no longer available.

[91] The judge reached the following conclusions concerning Mr. Ingraham, ultimately finding that his actions did not meet the elements for the tort of passing off:

[306] Mr. Ingraham knew of Mr. Jack’s marketing plan and while he did not think it was the best practice, he continued working for Datalink just as others did, such as Jennifer Ryane. He did not control how Datalink advertised the GW1000 or how Mr. Jack communicated with customers about the relationship between the GW1000 and Equustek protocol converters. He was not a party to the distribution agreement between Datalink and Equustek. On at least one occasion Mr. Ingraham suggested selling an Equustek product because the GW1000 that had been shipped did not meet the customer’s needs.

[307] Put at its most damning, Mr. Ingraham gave customers the impression that the GW1000 was a replacement for Equustek’s products that were previously offered by Datalink. He did not tell customers that they could not buy Equustek products generally, only that they were not available from Datalink.

[308] This is a fine distinction, but Mr. Ingraham was not driving the Datalink push to draw customers of Equustek products in and send them the GW1000. He did not control Datalink or the content of its internet messaging and he did not correct misapprehensions created by Mr. Jack’s marketing tactics.

[309] Mr. Ingraham’s conduct bordered on deceitful, but I am not satisfied on a balance of probabilities that his actions satisfy the three-part test of passing off or that he was acting as a joint tortfeasor with Mr. Jack.

[Emphasis added.]

[92] Based on the judge’s conclusion that Mr. Ingraham gave customers the “impression” that the GW1000 was a replacement for Equustek’s products, the appellants submit that the judge ought to have found him liable for passing off. They imply that Mr. Ingraham’s conduct was somehow an affirmation of Mr. Jack’s broader misrepresentations to customers.

[93] The appellants do not point to any evidence that the judge misapprehended or overlooked, they simply disagree with her interpretation of it.

[94] In the above passage, the judge set out the appellants' best case against Mr. Ingraham for passing off. The case against him was not strong, unlike the case against Mr. Jack.

[95] There was nothing in the appellants' pleading that suggested merely telling customers that the GW1000 "replaced" earlier Equustek products being sold by Datalink was a misrepresentation that amounted to passing off. Rather, the pleading was that the defendants misrepresented to customers that the Equustek products were no longer available, were obsolete, and that the GW1000 line of products was an upgrade or consolidation of the Equustek product (NOCC at Part 1, para. 62; Part 3, para. 14).

[96] Mr. Ingraham did not sell customers the GW1000 when they ordered an Equustek product — that was Mr. Jack's action. He did not take part in the design and content of the website. There is no evidence Mr. Ingraham told customers that the GW1000 was made by Equustek, was an upgrade of the Equustek product, or that the Equustek products were unavailable and obsolete.

[97] Again, the purpose of Mr. Ingraham's communications with customers was to provide technical support if the product was not working properly. That Mr. Ingraham saw the GW1000 as a replacement for the products that Datalink previously sold was not necessarily inaccurate. Datalink did, in fact, replace distribution of the Equustek product with the GW1000. The trial judge noted Mr. Ingraham's inclination for precision (Trial Reasons at paras. 123–124). Ultimately Mr. Ingraham's way of thinking about it is what the judge accepted.

[98] Mr. Ingraham could be described as possibly missing an opportunity to blow the whistle on Mr. Jack, but that is not a basis for liability. The judge described Mr. Ingraham's conduct as something that "bordered on deceitful", meaning it was close, but in all the circumstances the judge did not consider it crossed the line into deceit.

[99] Caution must be taken in equating moral weakness with liability for another person's conduct. The fact that it may have been morally questionable for Mr. Ingraham to continue to perform contract work for Mr. Jack, despite knowing of Mr. Jack's business practices, does not on its own justify imposing personal liability on him for Mr. Jack's conduct.

[100] The appellants complain that the judge referred to the fact that Mr. Ingraham was not driving the Datalink marketing plan and did not control Datalink. They say this was irrelevant to his liability for passing off. I disagree. This was relevant to the appellants' theory of liability advanced at trial. Their theory was not that Mr. Ingraham was directly engaged in passing off, but rather, that he was part of a conspiracy in which the defendants acted together to benefit from the passing off. That this was the appellants' position was underscored when they provided the annotated NOCC. This is why it was relevant for the judge to make findings that Mr. Jack was the architect of the plan and controlled Datalink, and it was not run as a collective.

[101] Mr. Jack directed Datalink's bait and switch, in which Datalink supplied the GW1000 to customers who ordered Equustek product. Mr. Jack also controlled the website and appears to have been the point of first contact with customers. These were the key aspects of Mr. Jack's conduct that amounted to passing off.

[102] Mr. Ingraham did not participate in the bait and switch or in designing the website. He was not a party to any sales contract with customers. Mr. Ingraham was in technical support and tried to walk a careful line in not misleading customers.

[103] In summary, it cannot be said that the judge misapprehended the evidence. Her findings were supported by evidence. She simply did not find the evidence of Mr. Ingraham's conduct sufficient to establish that he misled customers in a way that amounted to passing off of Datalink products for Equustek's. This conclusion was consistent with the appellants' pleading, which did not suggest that merely telling customers the GW1000 was a "replacement" product amounted to passing off.

[104] At trial, Mr. Ingraham argued that the appellants had not led evidence that anything he said or did caused them any damage. He submits on appeal that this causal link is necessary to establish passing off. This position overlaps with his argument that he did not make any misrepresentation. In effect, it is a submission that the actual damage to Equustek’s business was caused by Mr. Jack’s actions rather than by Mr. Ingraham answering queries in his role as technical support. The judge did not find this necessary to address, nor do I, given the judge’s findings that Mr. Ingraham did not make misrepresentations in the manner captured by the tort of passing off and the appellants’ claim.

[105] In my view, the appellants have not established any basis to interfere with the judge’s finding that Mr. Ingraham was not liable for passing off.

Did the trial judge err in failing to find Mr. Bunker liable for passing off?

[106] Mr. Bunker created the unindexed website as a contractor for Datalink, following Mr. Jack’s directions. At trial, the appellants described this as a “concealment strategy” and the judge adopted this language.

[107] Datalink used a website that was unindexed, meaning it did not appear in the internet search engines. The GW1000 was added as a product on the unindexed website, using similar wording to the letter that accompanied shipping of the product, describing it as a “next generation” and replacing the DL product line. The orders for the GW1000 came with information on how to access the non-searchable website (Trial Reasons at para. 58).

[108] It was not unusual for Mr. Bunker to create websites for customers that were not searchable by internet search engines (Trial Reasons at para. 59). This allowed companies to work on the look and functionality of a website before Mr. Bunker was instructed to take the most professional version of the website “live”, making it visible and searchable online (para. 59).

[109] Mr. Bunker also provided SEO services, using keywords that would direct people searching for protocol converters to Datalink’s website. Once he obtained a

domain name, he would turn it over to Mr. Jack who controlled it as the host (Trial Reasons at para. 98). The previously unindexed website went live in January 2011. Mr. Bunker also created additional websites at Mr. Jack's direction.

[110] Mr. Bunker said he had no relationship with any of the defendants except for Mr. Jack (Trial Reasons at para. 98). He also stated that "he never had any knowledge about the [appellants'] trade secrets, copyrights or trademarks, nor any knowledge about the business affairs of the other defendants" (para. 98). In addition, Mr. Bunker maintained that he had "played no role in Mr. Jack's online sales campaigns and had no agreement or venture with Mr. Jack or the other defendants" (para. 99). At the same time, he understood that Mr. Jack had an agreement to sell Equustek products and other products that were competitive with Equustek.

[111] The judge found there was little in the evidence that affected Mr. Bunker's credibility (Trial Reasons at para. 126). She noted that Mr. Bunker's skills had been used as part of the "secretive early marketing" of the GW1000; however, it was not uncommon for companies to create such websites that were not widely available as a sort of "soft launch" of a product (para. 126). In Mr. Bunker's line of work, unindexed websites "were not a hallmark of illegal activity" (para. 126).

[112] The judge also accepted that Mr. Bunker was not an engineer, so he did not understand what the GW1000 did; he also had no knowledge about what Equustek did, what they produced, or Mr. Jack's relationship with Equustek and its products (Trial Reasons at para. 127). She found that "Mr. Bunker was clearly naïve, in hindsight, to trust Mr. Jack and not make further inquiries about what he was being asked to do" (para. 128). However, she still found his evidence regarding his lack of knowledge about what Mr. Jack and Datalink were doing in relation to Equustek products was credible and reliable.

[113] When Mr. Angus eventually discovered the Datalink website and after it went live and was searchable, Equustek obtained a number of interlocutory injunction orders to cause Google to cease indexing search results for Datalink websites. The first court order was issued on June 13, 2014, followed by subsequent orders that

expanded the list of website search names created by Mr. Bunker at Mr. Jack's direction.

[114] On appeal, the appellants are critical of Mr. Bunker for not acting in accordance with court orders that had been obtained against Datalink and Mr. Jack. But this Court cannot presume that Mr. Bunker had direct knowledge of the content of the court orders. The judge made findings that he relied on what Mr. Jack told him about the lawsuit. The appellants do not suggest they obtained any order finding that Mr. Bunker was in contempt of any court order of which he was aware.

[115] The judge found that Mr. Bunker was not liable for passing off. She accepted Mr. Bunker's explanations that "he was a contractor who carried out his customer's instructions, [and] had no vested interest in Datalink apart from his interest in getting paid for piece work" (Trial Reasons at para. 324).

[116] In reaching that conclusion, the following evidence regarding Mr. Bunker supported her findings:

[312] Mr. Bunker understood Mr. Jack to be a reseller of hardware devices used in automated factories. He did not regard Mr. Jack as an important client and between 2005 and 2014, billed him a total of \$66,000 for work. Mr. Bunker did a few hours of office work in 2005 for Mr. Jack and some website work after that. He worked remotely, as he lived for a time in Argentina and then Montreal. Mr. Jack would provide a domain name for a website and ask Mr. Bunker to create the look of the website. He provided all the content to Mr. Bunker to upload and retained control over the website as the administrator.

[313] Mr. Bunker created websites for Mr. Jack that were hosted outside Canada. He said this was a normal thing to do because people tend to favour websites hosted in their own countries. Mr. Bunker also edited some documents for Mr. Jack before they were posted on Datalink websites.

[314] Mr. Bunker did not regard the hyphenated Datalink website as a secret one. He explained that when a new website is built, "you never want to index it in Google when it's not ready; otherwise the first impression when someone sees the site is it's incomplete and they're not going to take it seriously." As a result, a new website can be kept "turned off" and out of site of Google or other indexing systems until the client is ready to make it go live. This was a normal service Mr. Bunker provided to his clientele.

[315] In 2012, Mr. Bunker learned that Mr. Jack and his supplier were in a dispute. He was asked by Mr. Jack to change things on websites, but he did not obtain any further detail. When Mr. Bunker was added to the litigation in

2014, he was furious with Mr. Jack and demanded some compensation for upcoming legal bills. Mr. Jack gave him \$5,000.

...

[320] Mr. Bunker said that he had no knowledge of the Google orders until some time after he was joined in the litigation, so he made the changes that Mr. Jack requested to the various Datalink websites without knowing much more than that Mr. Jack and his supplier were in some kind of dispute. Mr. Jack said he was being harassed by an aggressive competitor and Mr. Bunker accepted the explanation. He also accepted the explanation that people working for Datalink used aliases because Mr. Jack wanted to make the company look bigger.

[321] Mr. Bunker agreed that he made images on websites smaller or blurrier at Mr. Jack's request, but had no reason to be suspicious because of his understanding that Mr. Jack was a reseller of products.

[322] Mr. Bunker identified an email he received from Mr. Jack on April 5, 2012 asking him to remove all content from a website, abgateways.com, so it could not be uploaded by Equustek. Mr. Jack referred in the email to going into default judgment on April 30. Mr. Bunker did not know what a default judgment was and had no idea of the status of the litigation at that time. He thought there was something wrong at Mr. Jack's end but did not talk to him about it because it was not his business and he was not involved.

[323] Mr. Bunker agreed that Mr. Jack emailed him in June 2012, asking him if he was available over the next couple of days to make fast changes to websites and remove any Equustek things from websites. There was also a reference to disclaimers and defending strategically. Mr. Bunker said he was available to do the work but testified that he was not participating in any legal defence, nor did he have any knowledge of what was transpiring. He denied using instant message systems to avoid email trails of communication with Mr. Jack.

[Emphasis added.]

[117] The appellants have not identified any palpable and overriding error. There was ample evidence to support the findings the judge reached.

[118] The appellants submit that liability can be imposed for passing off based on constructive knowledge and that Mr. Bunker ought to have known that what Mr. Jack was doing was passing off and that he was assisting him. But the judge's findings of fact do not support the conclusion that Mr. Bunker, as a website designer, ought to have known when he received website instructions from Mr. Jack, that Mr. Jack was passing off the GW1000 as an Equustek product.

[119] In summary, I would not accede to this ground of appeal.

3. Conspiracy

[120] The appellants submit that if they do not succeed on appeal on the issues related to breach of confidence and passing off, they ought to succeed in establishing that the judge erred in failing to find that Mr. Ingraham and Mr. Marsh are liable in civil conspiracy.

[121] They did not advance any submissions on appeal that Mr. Bunker should also be liable in conspiracy.

[122] Although the appellants raised arguments in their factum that the judge erred in finding no liability against Mr. Crawford for conspiracy, they are no longer pursuing these issues in light of Mr. Crawford filing a bankruptcy claim.

Legal principles

[123] The trial judge instructed herself correctly on the elements of civil conspiracy, which consists of “an agreement between two or more people who take concerted action towards a common goal, either by unlawful means or with a predominant purpose of causing harm (actual damage) to the plaintiff” (Trial Reasons at paras. 336–337, citing *Canada Cement LaFarge Ltd. v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 1983 CanLII 23).

[124] She also properly identified the evidentiary burden of proof associated with civil conspiracy, namely that the party alleging a conspiracy must be able to demonstrate actual damage resulting from the wrongdoers’ conduct. This evidentiary burden is high and requires compelling evidence, “either directly or by inference that there was an agreement between two or more parties which was implemented with resulting harm to the plaintiff” (Trial Reasons at para. 337, citing *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2019 BCSC 739 at paras. 117–120, appeal dismissed 2020 BCCA 130). In certain cases, there is no direct evidence because the conspirators have made extensive efforts to cover their tracks. As such, it becomes necessary to establish the conspiracy by way of inference from the totality of the evidence (para. 337).

Did the trial judge err in failing to find Mr. Ingraham and Mr. Marsh liable for conspiracy?

[125] Once again, it is important to ground the appellants' case in their NOCC.

[126] The judge set out the portions of the appellants' pleading related to the alleged conspiracy:

[338] The conspiracy in this case is delineated in the pleadings in the following terms:

33. At a time unknown to the Plaintiffs, the Defendants Jack, Colin Marsh, Kathleen Marsh, Crawford, Ingraham, Bunker, Igor Cheifot, Alexander Cheifot, Geiger, Alfonso Doe, and John Doe, and those of the Datalink Companies that were then in existence, *agreed to act in concert using unlawful means to destroy Equustek's business in order that they could appropriate all of Equustek's business, profits, and goodwill for themselves.*

34. This intention to harm the Plaintiffs was the predominant purpose of the Defendants at all material times.

35. The acts done in furtherance of the conspiracy, and the unlawful means used, include:

- a. stealing the Plaintiffs' Trade Secrets, below, in order to build the Datalink Products, as set out below;
- b. claiming Equustek's products as their own, and misrepresenting to the public that their own products were an upgrade or replacement of the Equustek products, which they said were no longer available;
- c. using the Plaintiffs' trademarks to drive traffic to the Datalink websites on the false pretense that they intended to sell the Equustek products under the Distribution Agreement;
- d. breaching the Distribution Agreement;
- e. infringing the Plaintiff's copyrights;
- f. organizing their assets and their corporate structure to make it as difficult as possible for the plaintiffs to identify who is involved, recover their intellectual property, or collect any damages;
- g. using false names in their dealings with their customers;
- h. using false names in their communications with one another, in order to create a false documentary record to be revealed in this litigation, in order to make it as difficult as possible for the plaintiffs to discover the truth about these events;
- i. giving false or misleading evidence and further concealing documents in these proceedings, in order to prevent the plaintiffs from discovering the full scale of the conspiracy;

- j. continuing to carry on business, or assisting Jack and the Datalink Companies to carry on business, after they had been prohibited from doing so by orders of this court;
- k. carrying on their scheme under multiple fictional corporate names
... [names listed]

and further particulars are set out in the balance of this Statement of Facts.

[Italic emphasis in original; underline emphasis added.]

[127] In the NOCC, Part 3, Legal Basis, the appellants again summarized their conspiracy claim:

1. The Defendants committed the tort of conspiracy by forming an agreement to act, and then by acting, in concert with the predominant purpose of harming the Plaintiffs and as such have caused the Plaintiffs to suffer loss and damage.
2. An alternative basis for the Defendants' liability in conspiracy is that the Defendants formed an agreement to act, and then acted, against the Plaintiffs using unlawful means, including by:
 - a. stealing trade secrets;
 - b. breaching the Distribution Agreement;
 - c. misrepresenting to the Plaintiffs and to the public that they were selling, and intended to sell, the Equustek products;
 - d. using the Plaintiffs' trademarks to drive traffic to their websites on the false pretense that they intended to sell the Equustek products under the Distribution Agreement;
 - e. breaching their contracts with their own customers to deliver the Equustek products which those customers had ordered and paid for;
 - f. claiming Equustek's products as their own, and misrepresenting to the public that their own products were an upgrade or replacement of the Equustek products, which they said were no longer available;
 - g. infringing the Plaintiff's copyrights; and
 - h. organizing their corporate structure to make it difficult to collect any damages;
 - i. and the other matters referred to in paragraph 35 of Part I above.

[128] The first element of a conspiracy claim is an agreement between the co-conspirators, or, at a minimum, a common design or common objective. In order for the appellants to succeed on their conspiracy claim as pleaded, they needed to

either establish that the Successful Defendants were part of an agreement that had a predominant purpose of harming the appellants, or that they were part of an agreement to act in concert for the purpose of appropriating all of Equustek's business, profits and goodwill for themselves (using unlawful means).

[129] Absent establishing that Mr. Ingraham and Mr. Marsh had one of these two common purposes shared with co-conspirators, the conspiracy claims against them could not succeed.

[130] The judge found that there was insufficient evidence to conclude that the defendants engaged in acts with the predominant purpose of causing harm to the appellants (Trial Reasons at para. 341). The appellants do not appear to take issue with this aspect of the judgment.

[131] The trial judge focused on the unlawful act branch of conspiracy. This was also the focus of the appellants in their closing submissions and on appeal.

[132] The essential problem with this part of the appellants' conspiracy claim is that it relied on the judge drawing some of the same negative inferences against Mr. Ingraham and Mr. Marsh that the appellants failed to prove in their breach of confidence and passing off claims.

[133] For example, contrary to the pleaded civil conspiracy allegations, the judge found that neither Mr. Ingraham nor Mr. Marsh were involved in stealing trade secrets in order to build the Datalink products. As set out above, the appellants have not established the judge erred in finding that these defendants did not breach confidence.

[134] Furthermore, contrary to the pleaded civil conspiracy allegations, Mr. Ingraham and Mr. Marsh did not engage in passing off or make misrepresentations to the public nor did they breach any agreements, or misuse trademarks and copyright.

[135] On appeal, the appellants submit they did not need to prove that Mr. Ingraham or Mr. Marsh engaged in unlawful acts so long as other members of the conspiracy committed unlawful acts. However, that was not the appellants' theory advanced at trial, which was based on Mr. Ingraham and Mr. Marsh also engaging in unlawful acts. This argument also overlooks the fact the appellants still needed to prove that Mr. Ingraham and Mr. Marsh were part of an agreement or shared a common purpose.

[136] The appellants point to bits of evidence regarding Mr. Ingraham and Mr. Marsh's post-litigation conduct relating to document production and encouraging or assisting Mr. Jack in the litigation. At trial, this evidence was relied on to support the inference that Mr. Ingraham and Mr. Marsh must have been part of the broader conspiracy, that is, as proof that they must have been involved in stealing trade secrets and in profiting from Datalink. However, the post-litigation conduct was never pleaded as a stand alone agreement and conspiracy claim.

[137] The pleadings alleged that the agreement or common purpose uniting the members of the conspiracy was to appropriate Equustek's business profits for themselves. The appellants asserted that each member of the alleged conspiracy was profiting from Datalink's business, and the appellants relied on circumstantial evidence and sought inferences to be drawn in this regard. However, this theory is contrary to the direct evidence of Mr. Ingraham and Mr. Marsh, and ultimately the judge did not accept the theory. It cannot be said that the judge made a palpable and overriding error in doing so given there was evidence to support her findings.

[138] Simply put, the appellants failed on the evidence to prove the conspiracy claims they had pleaded against Mr. Ingraham and Mr. Marsh. It was open to the judge to draw the inferences she did, including that post-litigation conduct by these parties was for reasons other than because they were part of the conspiracy.

[139] With respect to Mr. Ingraham, the judge was not satisfied that he knew or had reason to believe that the QPAB or GW1000 were built with Equustek's trade secrets (Trial Reasons at para. 358). Although he was aware that Mr. Jack used

“somewhat underhanded marketing tactics”, the judge was not convinced that Mr. Ingraham was part of an agreement with Mr. Jack and others “to carry out unlawful acts for collective economic gain” (para. 358). In reaching this conclusion, she pointed out that Mr. Ingraham had no economic interest in Datalink’s business apart from working as a contractor; he assisted with moving Datalink to Mexico, but he did so because he wanted to move on to other work given Mr. Jack was having issues paying him; and, she was not persuaded that he was being selective about document production in an attempt to thwart the appellants’ efforts to uncover evidence (para. 359).

[140] The appellants’ theory with respect to Mr. Marsh was that his actions, namely, counselling Mr. Jack’s response to the litigation, destroying the paper trail of his involvement, and suggesting ways to market the GW1000 and other Datalink projects, qualified as unlawful acts that were sufficient to hold him liable in conspiracy (Trial Reasons at paras. 362–363). The judge thoroughly reviewed the evidence about Mr. Marsh and his involvement (paras. 364–371); she ultimately accepted that Mr. Marsh had no knowledge of and nothing to do with the development of the GW1000, particularly given that it was a DH+ product and he knew Mr. Angus would be angry over the competition (para. 372). In addition, she noted that Mr. Marsh had previously been in litigation with Mr. Angus and he wanted to avoid that experience again. The judge also found there was no evidence in the numerous emails exchanged that Mr. Marsh had any stake in the GW1000 or Datalink. She accepted that he was drawn into the litigation because he decided to give a friend some advice and not because he wanted to “enter the fray against Mr. Angus as part of a conspiracy in exchange for a piece of Datalink’s financial gain” (para. 373). Ultimately, the judge was not satisfied that Mr. Marsh was part of an agreement directed at the common goal of gaining profits at Equustek’s expense through unlawful acts.

[141] The judge addressed and rejected all of the appellants’ theories on which they based their claim of civil conspiracy against Mr. Ingraham and Mr. Marsh.

I repeat the point that the appellants ignore on appeal: all of the judge’s findings are supported by evidence.

[142] The appellants also submit the trial judge’s reasons are inadequate for failing to detail the elements of the conspiracy for which she imposed liability against Mr. Jack, Datalink and the Cheifots. They say the judge had to make findings as to what the conspiracy was in order to determine if the Successful Defendants were parties to it, that is, what was agreed on, when, and who had what roles.

[143] This argument ignores the fact that the defendants who were found liable in conspiracy did not participate in the trial (i.e., all of the Liable Defendants except for Mr. Crawford), and their responses to civil claims had been struck out. The judge held that the appellants were entitled to judgment against them “pursuant to the allegations in the pleadings” (Trial Reasons at paras. 346, 352). The appellants have no proper ground for criticizing the judge for allowing their claim as pleaded against those defendants.

[144] It is also quite obvious from the judge’s reasons as a whole as to what distinguishes the Successful Defendants’ situation from that of the Liable Defendants.

[145] Unlike the Successful Defendants, the judge found that Mr. Jack was directly involved in breach of confidence and passing off, including the bait and switch and the messaging on the website (Trial Reasons at paras. 288, 305).

[146] The judge also found that the Cheifots were in possession of Equustek source code and she found them liable for breach of confidence (Trial Reasons at paras. 255–256).

[147] The judge accepted that Mr. Jack was the person profiting from Datalink, and that the Cheifots received proceeds from the sale of the Datalink products (Trial Reasons at paras. 352, 400).

[148] All of these findings against Mr. Jack, Datalink and the Cheifots — unlawful acts and that they were profiting from the Datalink business — fit within the pleaded allegations of conspiracy in the NOCC. It also distinguishes their situations from that of Mr. Ingraham and Mr. Marsh who were not found to have engaged in theft of trade secrets or passing off, or to be profiting from the Datalink business.

[149] I find it unnecessary to delve into the appellants’ several arguments on appeal that the judge “ignored evidence” in considering the conspiracy claims against Mr. Ingraham and Mr. Marsh. These arguments are themselves based on evidence that the appellants ignore, including Mr. Ingraham and Mr. Marsh’s direct denials. As I read the judgment as a whole, in the context of the pleadings and the submissions at trial, it is clear the judge understood the conspiracy theory being advanced by the appellants and had a good grasp of the voluminous evidence. The judge simply took a different view of the evidence than the interpretation argued by the appellants.

[150] The appellants have failed to establish any basis for appellate interference in the judge’s dismissal of the conspiracy claim against Mr. Ingraham and Mr. Marsh.

Joint tortfeasors or “accessory liability”

[151] At trial, the appellants advanced the position that the defendants were joint tortfeasors. They conceded in their submissions that the elements of being a joint tortfeasor were essentially the same as being a civil co-conspirator, as both require concerted action to a common end (*XY, LLC v. Zhu*, 2013 BCCA 352 at para. 42, leave to appeal ref’d, 35555, 35557, 35561 (20 February 2014) [*XY, LLC*]).

[152] The appellants submit that the judge erred in failing to find Mr. Ingraham and Mr. Bunker were liable as joint tortfeasors for passing off.

[153] In my view, the trial judge sufficiently disposed of the culpability of Mr. Ingraham and Mr. Bunker when finding them each not directly liable for these claims and in concluding they were not part of a conspiracy or joint enterprise.

[154] The appellants draw an analogy in this case to *XY, LLC* in which employees of a company were found to have committed the torts of deceit and civil conspiracy, and were jointly and severally liable together with their employer. However, the facts of *XY, LLC* are distinguishable. There, the liable employees directly and knowingly made misrepresentations to the plaintiff. In a subsequent trial, they were also found to have each played a direct part in a plan to steal and misuse XY's confidential information (*XY, LLC v. Canadian Topsires Selection Inc.*, 2016 BCSC 1095 at para. 262).

[155] In the present case, the judge found that neither Mr. Ingraham nor Mr. Bunker made the misrepresentations that formed the basis of the claim of passing off. Likewise, she did not find them to be part of any concerted action toward a common end necessary to found conspiracy or joint and several liability.

[156] Further, the judge found that Mr. Ingraham did not know that Mr. Crawford had used trade secrets.

[157] The appellants also argue that Mr. Ingraham should have been found liable as an "accessory" for breach of confidence, and that the judge failed to consider their alternative submission in this regard. Presumably, the appellants use the language "accessory liability" instead of "joint tortfeasor" because breach of confidence attracts equitable remedies and, it can be argued, is not a tort (see Peter T. Burns and Joost Blom, *Economic Interests in Canadian Tort Law* (Markham: LexisNexis, 2009) at 213).

[158] As set out earlier, equity will pursue confidential information into the hands of a third party in circumstances where the third party receives it knowingly, or later learns it was communicated in breach of confidence (*Cadbury Schweppes* at para. 19). In my view, based on the findings of the trial judge, this theory as against Mr. Ingraham is simply not viable.

[159] This is not a situation akin to the situation in *Apotex*, where the defendant and its senior officials had actual knowledge of, or were wilfully blind to, the fact that a

new employee was wrongfully using confidential information and Novopharm was enriched by its acquisition of those secrets (see *Apotex* paras. 146–150).

[160] The context of the working relationship between Mr. Crawford and Mr. Ingraham is relevant. Mr. Ingraham was not Mr. Crawford’s employer. He was a contractor who sought and obtained assurances from Mr. Crawford that what he was designing was original, and this was consistent with what he understood to be the goal of the project, which was to design the DH+ product from the ground up.

[161] The appellants were unable to prove that Mr. Ingraham had knowledge of Mr. Crawford’s breach of confidence. On the judge’s findings, Mr. Ingraham did not receive information from Mr. Crawford, knowing (or constructively knowing) it to be confidential, or learning this later in the course of their work together. These findings do not allow any basis for imposing liability on Mr. Ingraham for Mr. Crawford’s breach of confidence, directly or indirectly.

[162] I therefore see no merit to the appellants’ submissions that the judge erred in failing to impose liability on Mr. Ingraham and Mr. Bunker for passing off as joint tortfeasors with the Liable Defendants, or on Mr. Ingraham for breach of confidence as “accessory liability”.

4. Measuring damages

Did the trial judge err in measuring damages?

[163] In the Trial Reasons, the judge awarded the appellants damages against the Liable Defendants based on Equustek’s past loss of sales, in the amount of \$1,000,000. In the Damages Reasons, the judge also awarded the appellants damages based on Equustek’s future loss of sales, in the amount of \$1,189,000. The total damages awarded for Equustek’s lost sales was \$2,189,000. These damages were awarded as joint and several damages against Mr. Jack, Datalink, the Cheifots, and Mr. Crawford (Trial Reasons at para. 392; Damages Reasons at para. 20).

[164] On appeal, the appellants submit that this category of damages should have been based on Datalink's estimated profits, rather than Equustek's loss of sales.

[165] In the subsequent Damages Reasons, the judge ordered that Mr. Jack, Datalink and the Cheifots disgorge profits from Datalink's past and future sales, in the amounts of \$6,183,000 and \$1,189,000 respectively, totalling \$7,372,000. The appellants assert that disgorgement should also have been ordered against Mr. Crawford and the Successful Defendants. Given my conclusions that the judge did not err in failing to impose liability on the Successful Defendants, this argument has implications only for Mr. Crawford.

[166] Mr. Crawford did not appear on appeal. We are advised that Mr. Crawford has filed for bankruptcy and that, because of this, the appellants have agreed not to advance any new basis of liability against him. However, the appellants submit that it is still available to them to challenge the measure of damages or amount of costs awarded against Mr. Crawford.

[167] Central to the judge's award of disgorgement of profits was her conclusion that Mr. Jack and the Cheifots had an interest in Datalink, thereby profiting from the wrongful conduct (Trial Reasons at para. 401). With respect to Mr. Crawford, the judge found that he did not have an ownership stake or interest in Datalink, so she did not make a disgorgement of profits award against him (paras. 357, 401). I see no basis to interfere with these findings.

[168] On appeal, the appellants submit that the policy goal of deterrence can justify an order for disgorgement in instances of wrongful misuse of confidential information by an individual, even where the individual does not participate in the profits.

[169] I have difficulty understanding how this argument translates to an error by the trial judge. She understood that disgorgement orders were being sought against "individuals with an interest in the Datalink defendants" (Trial Reasons at para. 401). The appellants do not suggest the judge erred in her characterization. Instead, they advance a justification for making this award against Mr. Crawford that is

disconnected from profit-earning. I do not consider it open to the appellants to seek disgorgement of profits from Mr. Crawford on appeal on this new basis.

[170] I will consider the appellants' arguments that the judge made errors in her determination of damages based on Equustek's past loss of profits. As this is a measure of damages issue, these arguments are applicable to Mr. Crawford.

[171] At trial, the appellants relied on the expert report of Mr. Mackay who provided a range of \$1.8 to \$2.3 million for the appellants' past losses. The appellants challenge the judge's assessment of \$1 million for past losses in light of this evidence.

[172] The appellants take issue with the judge's assessment that factors independent of Datalink's operations contributed to a reduction in Equustek's sales; specifically, the effect of a Google injunction and the failure of Equustek to innovate or launch an aggressive internet campaign to counteract Datalink's internet presence (Trial Reasons at paras. 389–391).

[173] In my view, the appellants' arguments fail to recognize that the measure of damages is discretionary. The judge weighed the various factors and assumptions, which were supported by the evidence, in trying to assess what reduction of sales could be attributed to the Liable Defendants' wrongdoing. I see no error in the judge's approach.

[174] The appellants also take issue with the judge's assessment of loss-based damages. They argue that they were entitled to profit-based damages, which, as demonstrated by her subsequent disgorgement order, would have amounted to a higher award. The judge considered both options and determined that an assessment based on lost profits was more accurate (Trial Reasons at para. 379). I see no basis to interfere with her conclusion.

[175] Contrary to the appellants' submissions, the judge's subsequent award of disgorgement of profits was not inconsistent with her measure of damages against Mr. Crawford. This argument fails to appreciate the different findings made against

the Non-Participating Defendants. The judge was also prepared to make assumptions against the Non-Participating Defendants because they failed to produce any documentation and abandoned the litigation (Damages Reasons at para. 25). That the judge was not prepared to make these assumptions in awarding damages against Mr. Crawford was within her discretion and fair.

[176] In my view, the appellants have not met the standard of review for challenging the judge’s assessment of damages.

[177] I wish to address one final matter with respect to damages. In oral submissions, counsel for the appellants remarked that the judge’s award of disgorgement of profits, in addition to loss-based damages, may have amounted to duplication of the damages awarded against Mr. Jack, Datalink and the Cheifots. There is some merit to this observation. However, these parties have not appealed the order, so I am of the view that it would be inappropriate to embark on an independent consideration of this point.

5. Awarding costs

Consideration of Mr. Bunker’s offers to settle

[178] The judge found that Mr. Bunker was entitled to double costs pursuant to Rules 9-1 and 14-1 of the *Supreme Court Civil Rules*, as a result of the plaintiff’s failure to accept settlement offers prior to trial (“Bunker Costs Reasons”).

[179] The appellants challenge this order.

[180] Mr. Bunker made two offers to settle on the basis of a dismissal on the merits of the proceeding against him on a without costs basis plus a release. One offer was made on August 1, 2017, open for two months; and another offer with essentially the same terms, on March 23, 2018, open until March 30, four days before trial.

[181] In order for the offer to settle to have costs consequences, it must be one that ought reasonably to have been accepted. In considering this, the judge weighed the factors in *Hartshorne v. Hartshorne*, 2011 BCCA 29, namely, the timing of the offer,

whether it had some relationship to the claim, whether it could easily be evaluated, and whether some rationale for the offer was provided.

[182] The judge considered the fact that, after Mr. Bunker was added to the litigation in 2014, he quickly provided a list of documents and submitted to examination for discovery (Bunker Costs Reasons at para. 18).

[183] In considering the strength of the appellants' case against Mr. Bunker, the judge referred to a number of the appellants' claims against him, and his evidence that his actions regarding the website were not unusual services to provide customers. The judge also referred to the appellants' assertion that Mr. Bunker made admissions on discovery that they said implicated him in assisting Mr. Jack to evade court orders. The judge referred to a letter from Mr. Bunker's counsel to appellants' counsel, attempting to clarify Mr. Bunker's discovery evidence and pointing out that Mr. Bunker never saw any court order (Bunker Costs Reasons at para. 20). On appeal, the appellants submit the judge was in error in referring to this letter given it was not in evidence.

[184] I do not consider that the judge's reference to the letter from Mr. Bunker's counsel was in error or was material. The issue is not whether the letter was in evidence at trial. It is what the appellants knew about Mr. Bunker's position when they were evaluating the settlement offer. This letter formed part of the background as to what they might expect to be Mr. Bunker's evidence at trial. The letter from counsel was, however, only one aspect of the judge's consideration of what the appellants knew about Mr. Bunker's position when they received the settlement offers.

[185] In considering the reasonableness of the settlement offer, the judge carefully reviewed the appellants' case against Mr. Bunker and Mr. Bunker's response. The point of the judge's analysis was to show that the appellants should have been well aware of the risks of trial in their case against Mr. Bunker.

[186] In short, the judge was, by the time of her various costs awards, fully versed in the pre-trial and trial positions of the parties. It was open to the judge to consider that the offers made by Mr. Bunker were ones the appellants ought reasonably to have accepted. I see no basis for interfering with her discretion to award Mr. Bunker double costs from the date of the 2017 offer.

Special costs against Mr. Ingraham for time spent on Patton report

[187] After trial, the appellants sought special costs from Mr. Ingraham for all court time related to an expert report prepared by Mr. Patton. This application was dismissed in the Damages Reasons.

[188] The appellants were critical of the fact that, when Mr. Patton's report was circulated by counsel for Mr. Ingraham to all defendants, it included the appellants' client list, thereby distributing information to all defendants that was subject to a confidentiality order.

[189] In considering the application for special costs in relation to this issue, the judge considered the fact that counsel for Mr. Ingraham took responsibility for the mistake. When he was alerted to the inadvertent disclosure, he took steps to correct it and retrieve copies. The judge found that this error was not the sort of reprehensible conduct deserving of reproof that attracted special costs (Damages Reasons at paras. 27–30).

[190] The appellants say the judge's conclusion was contrary to findings she made in a pre-trial ruling on October 2, 2018 dealing with the admissibility of the Patton report. Mr. Ingraham disagrees, pointing out that the judge acknowledged the disclosure was made in error, but she still admitted the report. While she described the conduct of Mr. Ingraham's counsel as careless, she did not say that the conduct was reprehensible.

[191] Contrary to the appellants' submissions, I do not see anything inconsistent as between the judge's pre-trial ruling and her costs ruling. In her pre-trial ruling, she left the costs issue to be addressed later.

[192] The costs ruling was a discretionary decision made by the trial judge who was aware of all the relevant circumstances. I see no basis for appellate interference.

Sanderson or Bullock Orders as to costs

[193] The judge dismissed the appellants' application to compel the Successful Defendants to collect their costs from the Liable Defendants rather than from the appellants (a *Sanderson* order), or alternatively, to allow the appellants to include their costs liability to the Successful Defendants as a disbursement on their costs claim against the Liable Defendants (a *Bullock* order) (*Sanderson/Bullock* Reasons). The appellants challenge this order as well.

[194] It is clear that the judge properly instructed herself on the test for these types of orders. In the *Sanderson/Bullock* Reasons at para. 7, she set out the following passage of *Provost v. Dueck Downtown Chevrolet Buick GMC Limited*, 2021 BCCA 15:

[16] It is not disputed that Dueck, as the successful party, is entitled to its trial and appeal costs. The question is whether these costs should be paid by the plaintiffs (Cst. Provost, the AG, and Ms. Brundige) or by the unsuccessful defendants (Mr. Bolton and the Minister) under Rule 14-1(18) of the *Supreme Court Civil Rules*, which provides the basis for what are commonly referred to as *Sanderson* and *Bullock* orders. As this Court noted in *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528:

[50] In Fraser, Horn & Griffin, *The Conduct of Civil Litigation in British Columbia*, 2nd ed. looseleaf (Markham: LexisNexis, 2007), the authors explain at para. 38.19:

Rule 14-1(18) provides that the court may order that a successful plaintiff pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant. Such order is commonly known as a *Bullock* order. The Rule also provides that the court may, as an alternative, order that the unsuccessful defendant pay the costs of the successful defendant directly. Such order is commonly known as a *Sanderson* order. A court may make such order where there is more than one defendant in an action and also where actions have been consolidated for trial or ordered to be tried at the same time.

... Where all parties are solvent, it does not matter much which form of order is made. The advantage of a *Sanderson* order in such a case is confined to avoiding circuitousness.

If the unsuccessful defendant is insolvent, then the *Bullock* form of order imposes a hardship upon the plaintiff who may recover nothing from the unsuccessful defendant and yet has to pay the successful defendant. A *Sanderson* form of order, on the other hand, imposes the hardship upon the successful defendant. Where the successful defendant is blameless, the courts have generally refused to make a Sanderson order.

[Emphasis added.]

[17] The threshold test for a *Sanderson* or *Bullock* order is whether it is reasonable for the plaintiff to have joined the successful defendant in the action. If this is satisfied, the question becomes whether it “would be just and fair in the circumstances” for the unsuccessful defendant to pay the successful defendant’s costs: *Davidson* at paras. 53–56. In *Grassi v. WIC Radio Ltd.*, 2001 BCCA 376 at para. 32, Justice Southin described the secondary consideration as whether the unsuccessful defendant “ought” to pay the costs of the successful defendant. The decision to award a *Sanderson* or *Bullock* order is a matter of discretion, which must be exercised judicially based on the judge’s assessment of the circumstances of the case: *Robertson v. North Island College Technical and Vocational Institute* (1980), 119 D.L.R. (3d) 17 (B.C.C.A.) at para. 14.

[195] The judge further cited *Provost* at paras. 18–19 for the proposition that there must be something the unsuccessful defendant did in order to justify an order that the unsuccessful defendant pay the successful defendant’s costs. For example, asserting the other defendant was the culprit in the case.

[196] The judge found that the threshold for such an order was met in relation to Mr. Ingraham and Mr. Marsh. It was reasonable to add them as defendants given what was known to the appellants at the time. The judge found it was not reasonable to add Mr. Bunker as a defendant. On her view of the evidence, Mr. Bunker’s minor role as a website designer did not justify adding him as a defendant (*Sanderson/Bullock* Reasons at paras. 10–13). I see no reason to interfere with this aspect of the judge’s analysis.

[197] Mr. Crawford argued that he took no steps to bring the successful defendants into the litigation, so he should not be responsible for the Successful Defendants’ costs. The judge agreed (*Sanderson/Bullock* Reasons at paras. 15, 21). I consider that it is not open to the appellants to challenge this conclusion for two reasons.

[198] First, it is a discretionary decision entitled to deference and the appellants have not established that the judge made an error in principle in the manner in which she considered Mr. Crawford's role in the litigation. That is sufficient to dispose of this ground of appeal.

[199] Second, it appears to me that by seeking to make Mr. Crawford liable for the Successful Defendants' costs, the appellants are seeking to establish a new basis for liability against him. This is something the appellants have advised us they agreed to not pursue given his bankruptcy filing.

[200] Returning to the judge's costs ruling, she said she was not satisfied that she should exercise her discretion to order that the Successful Defendants collect their costs against the unsuccessful defendants (*Sanderson/Bullock Reasons* at para. 21).

[201] This ruling only dealt with the application for a *Sanderson* order.

[202] In my view, implicit in the judge's ruling was the understanding that it could be difficult for any party to recover against the Non-Participating Defendants given that they had left the jurisdiction. In light of this, if the Successful Defendants were limited to recovering their costs from the Non-Participating Defendants, they might never recover their costs.

[203] The judge noted that the Successful Defendants did not do anything to cause each other to be named as defendants.

[204] The judge also mentioned that the Successful Defendants did not point their fingers at each other and were cooperative in the pre-litigation process. While the appellants' criticized Mr. Marsh for destroying documents, this occurred before he was added as a party.

[205] The appellants submit that the judge was wrong to view the Successful Defendants this way, and she should have considered those defendants' collaboration, including Mr. Marsh destroying documents and counselling others to

do so. In my view, the appellants' argument is simply a request for us to reconsider the factors considered by the judge. It cannot be said she overlooked these factors, she just saw the conduct of the Successful Defendants differently than as submitted by the appellants. There is nothing wrong with the judge considering the Successful Defendants' role in the litigation when she was considering the overall fairness of the costs order. This is not an error in principle.

[206] The judge also pointed out that the matter was a complex piece of litigation that was "made more complex by the [appellants'] conspiracy theories, which were ultimately not proven against the successful defendants" (*Sanderson/Bullock* Reasons at para. 23).

[207] In my view, the above observation indicates that the judge considered that the ordinary rule as to costs should apply to the Successful Defendants as a matter of fairness. In other words, the appellants should be responsible for the costs of the Successful Defendants because the appellants were responsible for making the litigation so complex against them.

[208] I see no basis for interfering with the judge's exercise of discretion insofar as it relates to dismissing the appellants' application for an order that the Liable Defendants pay the costs of the Successful Defendants (a *Sanderson* order). It was within the judge's discretion to conclude that this order would be unfair to the Successful Defendants in the circumstances.

[209] However, I agree with the appellants that the judge made an error in dismissing their application for a *Bullock* order. This was an alternative position that the judge appears to have overlooked when she dismissed the application for a *Sanderson* order.

[210] The judge did not expressly address the issue of whether the appellants ought to be able to claim against the Liable Defendants for the costs the appellants would have to pay the Successful Defendants. In my view, excepting Mr. Crawford

for the reasons I have already given, there is no reason not to exercise discretion in favour of this order as against the Non-Participating Defendants.

[211] Certainly the misconduct of the Non-Participating Defendants made uncovering the facts of what happened much more difficult for the appellants and added to their suspicions regarding the existence of a conspiracy. Mr. Jack, the Datalink defendants, and the Cheifots contributed to the litigation being advanced by the appellants against the Successful Defendants. It also would not prejudice the Successful Defendants to make a *Bullock* order.

[212] In my view, the trial judge's error in overlooking the application for a *Bullock* order ought to be remedied by an order allowing the appeal to this extent: the trial judge's order will be varied such that the appellants will be permitted to claim the costs that the appellants will have paid to the Successful Defendants as a disbursement in their costs claim against the Non-Participating Defendants, namely as against Mr. Jack, Datalink and the Cheifots.

Disposition

[213] The appellants have been unsuccessful on almost all of the grounds of appeal. The appeal will be allowed only to vary the judge's final order of May 29, 2020 entered September 27, 2022, adding a term that the appellants may claim the costs they pay to Mr. Ingraham, Mr. Marsh, and Mr. Bunker as a disbursement in their costs claim against Mr. Jack, Datalink, and the Cheifots, and varying terms 43, 44, and 45 of the order accordingly.

[214] Despite the above variation of the trial order, the respondents have been substantially successful on appeal; therefore, Mr. Ingraham, Mr. Marsh, and Mr. Bunker are entitled to their costs.

[215] Mr. Marsh and Mr. Bunker submit that in the event they are successful, they ought to be entitled to increased costs of this appeal.

[216] Increased costs require the registrar to determine what fees would be allowed if special costs had been ordered, and to allow as costs half of those fees or such other proportion as ordered by the Court: *Court of Appeal Rules*, B.C. Reg. 120/2022, R. 70.

[217] The threshold question for ordering increased costs is whether ordinary costs would be unjust in the circumstances, considering all relevant factors. In *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2017 BCCA 176, this Court listed some examples of where increased costs have been awarded:

[11] Increased costs have been awarded where the issues raised in the appeal were complex; the issues extended beyond the immediate interests of the parties; the conduct of the parties unnecessarily lengthened the proceeding by, for example, raising spurious issues; where there was significant disparity between actual costs and recoverable costs, although this alone is not determinative; and any other factor that, together with these factors, would have resulted in an injustice to the successful parties: *Asselstine v. Manufactures Life Insurance Co.*, 2005 BCCA 465 at paras. 5 and 6; *Vukelich v. Mission Institution*, 2005 BCCA 75 at para. 62; *Bank of Montreal v. Peri Formwork Systems Inc.*, 2012 BCCA 252 at paras. 39–40, and 42; and *Graham v. Moore Estate*, 2003 BCCA 601 at para. 6(3).

[218] In my view, ordinary costs would not be unjust in the circumstances of this appeal and increased costs are not justified. While it was a factually complex appeal, Mr. Marsh and Mr. Bunker were easily able to illustrate that the evidence supported the judge’s findings regarding them. The issues did not extend beyond the parties. While the result of the appeal has gone against the appellants, I would not go so far as describing the arguments as spurious.

[219] I would measure the costs awarded to Mr. Ingraham, Mr. Marsh and Mr. Bunker on appeal on Scale B, given the matter was of more than usual complexity.

I agree:

“The Honourable Justice Griffin”

“The Honourable Mr. Justice Fitch”

I agree:

“The Honourable Madam Justice Horsman”