IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.,* 2024 BCSC 614

Date: 20240416
Docket: S142529
Registry: Vancouver

Between:

0731431 B.C. Ltd., Daljit Singh Mattu, 0892995 B.C. Ltd., Rajpreet Singh Sangha, Grewal Management Ltd. and Jasprit Singh Grewal

Plaintiffs

And

Panorama Parkview Homes Ltd., 690174 B.C. Ltd., Jaswant Singh Sangha, Parmjit Kaur Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills, Balbir Kaur Dale, Crowe MacKay & Company Ltd. in its capacity as Trustee in Bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd. and 690174 B.C. Ltd.

Defendants

- and -

Docket: S151275
Registry: Vancouver

Between:

Daljit Singh Garcha and Jaswinder Kaur Garcha

Plaintiffs

And

690174 B.C. Ltd., Panorama Parkview Homes Ltd., Jaswant Singh Sangha, Parmjit Kaur Sangha, Raveen Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills, Balbir Kaur Dale, Grewal Management Ltd., Jasprit Singh Grewal, Crowe MacKay & Company Ltd. in its capacity as Trustee in Bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd. and 690174 B.C. Ltd.

Defendants

- and -

Docket: B150826
Registry: Vancouver

In the Matter of the Bankruptcy of Jaswant Singh Sangha

- and -

Docket: B160405
Registry: Vancouver

In the Matter of the Bankruptcy of Panorama Parkview Homes Ltd.

- and -

Docket: B160406
Registry: Vancouver

In the Matter of the Bankruptcy of 690174 B.C. Ltd.

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Counsel for Parmjit Kaur Sangha:	D.K. Magnus
Appearing in person:	D.W. Wills P. Johal
Place and Dates of Hearing:	Vancouver, B.C. March 11, 13 and April 8, 2024

Place and Date of Judgment: Vancouver, B.C.
April 16, 2024

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Introduction

[1] Amongst the orders sought in their notice of application filed February 1, 2024, the plaintiffs in this action, Daljit and Jaswinder Garcha ("Garchas"), apply for an order obliging Crowe Mackay & Company, the trustee in bankruptcy of the bankrupt estates of Jaswant Singh Sangha, Panorama Parkview Homes Ltd., and 690174 B.C. Ltd. ("Crowe Mackay"), and Crowe Mackay's former counsel, Fasken Martineau DuMoulin LLP ("Fasken"), to pay interest on funds Justice Sewell had ordered them to repay.

[2] Justice Sewell's order ("Repayment Order") required Crowe Mackay and Fasken to repay some of the funds they took ("Repaid Funds") from funds held in trust by Fasken, for payment of their fees, pursuant to interim court orders issued from time to time in the insolvency proceedings.

[3] The Repayment Order was issued on October 1, 2021 (and entered May 24, 2022) following a lengthy trial in this and related complex commercial and insolvency proceedings in VA S142529, B150826, B160405, and B160406. Justice Sewell's reasons for judgment are indexed at 2021 BCSC 607 [*Trial Reasons #1*] and 2021 BCSC 1925 [*Trial Reasons #2*]. Justice Sewell's reasons that specifically concern the Repayment Order and relate to the interest issue raised on this application are found at paras. 177–232 of *Trial Reasons #2*. The Repayment Order as well as other orders issued by Justice Sewell were upheld by the Court of Appeal (the Court's reasons are indexed at 2023 BCCA 376). Prior reasons for judgments issued by Justice Bowden concerning interlocutory applications are indexed at 2018 BCSC 1049.

[4] At the outset of the hearing, Crowe Mackay and Fasken advised they would pay, on an *ex gratia* basis, post-judgment interest but not prejudgment interest.

Background

Remedy ordered by Justice Sewell

[5] Justice Sewell's determination that funds should be repaid is discussed in *Trial Reasons #2* at paras. 195–225. He found that funds held in Fasken's various trust accounts for persons involved in the insolvent project (referred to by the parties as well as court orders and reasons for judgment as "vendor trust accounts") were taken by Crowe Mackay and Fasken pursuant to interim court orders that preserved the rights of all parties to challenge fees and allocations amongst the various claimants at a later date. In particular, Sewell J. said:

> [219] All of the Term Payment Orders provide that any party can apply for an order that the Trustee fees be paid out of a different Vendor Trust Account. In this case, I find that the expense of participating in the Civil Actions and Bankruptcy Appeals must be paid to a large extent from the funds otherwise belonging to the Bankrupts. The law is clear that a bankrupt estate has no higher right to property than the bankrupt: *Flintoft* at 634; regarding rights to third-party property specifically see *Yukon v. Yukon Zinc*, 2021 YKCA 2 at paras. 138-150 [*Yukon Zinc*].
>
> [220] I am also mindful of the fact that throughout these proceedings both the Trustee and Fasken have been charging their normal hourly rates for their services. Thus, the order I will make will not deprive them of compensation for their services but will result only in a reduction in the hourly rates they will recover even if the amount that can be charged to the 2007 Joint Venturers is reduced: *Confederation Financial Services*, quoted above at para. 155.
>
> [221] I have not overlooked the passivity of the plaintiffs in allowing the assessments of costs to proceed without taking any action. However, having reviewed the evidence filed in support of the assessments I find that it was not unreasonable for those parties to regard the assessments as interim and to conclude that they would have an opportunity to make submissions on the allocation of the proceeds of the Project once judgment on the merits had been rendered.
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> [Emphasis added]

[6] Justice Sewell determined that the circumstances were such that the Court should intervene to avoid the administration of justice falling into disrepute. Justice Sewell found the overall fees charged to be unreasonable and ordered those charges above a certain amount to be repaid.

[7] He determined that the parties whom he referred to as the "plaintiffs" were entitled to a remedy under s. 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985. c. B-3 [*BIA*]. That section provides:

> **Appeal to court against trustee**
>
> **37** Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
>
> [Bold in original]

[8] Justice Sewell's reasons reflecting that remedy were issued in a related action, VA S142529. The plaintiffs in that action – 0731431 B.C. Ltd., Daljit Mattu, 0892995 B.C. Ltd., Rajpreet Singh Sangha, Grewal Management Ltd., and Jasprit Singh Grewal – do not include the Garchas. It is not clear to me from his reasons whether Sewell J. meant the plaintiffs in all of the actions before him at trial, which would include the Garchas. However, the Repayment Order (excerpted in part below) that was ultimately entered in this action, i.e., the Garchas' action, reflects that they are included within the ambit of the s. 37 remedy.

[9] Justice Sewell determined he had the authority to limit that amount of the proceeds from the impugned project, held in a vendor trust account set up for a group which included the Garchas, called the "2007 Joint Venturers", that Crowe Mackay could utilize to pay its fees and legal expenses, even though the release of funds for those purposes was authorized under prior court orders: *Trial Reasons #2* at paras. 218–221.

[10] Although Sewell J. was highly critical of certain aspects of the conduct of Crowe Mackay and Fasken, he did not find that they had misappropriated any of the Repaid Funds or had otherwise committed a breach of trust.

[11] Justice Sewell determined that Crowe Mackay and Fasken were entitled to retain just over $4 million on account of their fees and legal expenses, and in respect of the account held for the 2007 Joint Venturers, they must repay amounts taken above $1 million. He said in *Trial Reasons #2*:

[222] Taking into account the above circumstances, the provisions of the *BIA*, and the entitlements of the parties pursuant to the RFJ, I conclude that it is appropriate to make the following orders in addition to the orders I previously set out in the RFJ issues:

1. The amount of fees, including legal fees, that the Trustee and Fasken are entitled to retain from the funds held in trust is:

(a)	Panorama entitlement (line 20 Schedule A)	$1,287,725
(b)	Jaswant entitlement (line 20 Schedule A)	$1,182.609
(c)	690174' own entitlement (line 20 Schedule A)	$577,976
(d)	Share of 2007 JV 21/23 entitlement (Schedule A)	$1,000,000
	TOTAL:	**$4,048,310**

2. The Trustee and Fasken will refund into an account held for the 2007 Joint Venturers any amount that they have withdrawn in excess of $1,000,000 from their share of the proceeds. In so doing they may utilize any funds remaining in trust to the credit of the other two Bankrupt Estates.

3. The amounts remaining in Vendor Trust Accounts established pursuant to the Sale Process Order after the above adjustments will be consolidated and transferred into trust accounts that correspond to the entitlement of the remaining parties as set out in Schedule A to the Tenth Report. If the parties are unable to agree on the calculation of the amounts to be deposited into each new trust account there will be a reference to the Registrar to determine the proper amounts.

4. As I have previously ordered, the Garchas will be entitled to a pro rata first charge on the amounts held in trust for Parmjit, Ranjit/Svender and Wills and Dale to compensate them for their share of the $1,000,000 deducted from the 2007 Joint Venturers' entitlement set out in Schedule A of the Tenth Report.

[Bold in original; underlining added]

[12] It is clear from *Trial Reasons #2* that Sewell J. approached his assessment of the adjustments to be made and the amount to repaid as a matter of fairness:

> [223] On a very rough basis, the adjustments I have ordered will result in the Trustee and Fasken recovering 2/3rds of their fees and the 2007 Joint

> Venturers recovering 2/3rds of the amount they have been found to be entitled to in the RFJ. I consider this to be a fair result.
>
> [224] Even after these orders the Trustee and its counsel will still have obtained a substantial benefit from the interim payment process. That process relieved them of the burden of carrying the costs of the administration and litigation and ensured that they had full security for the payment of the amounts to which they were found to be entitled on the final assessment required by the *BIA*.
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> [Emphasis added]

Entered Repayment Order

[13] The key terms of the Repayment Order entered in the Garchas' action, which includes declaratory relief grounded on s. 37 of the *BIA*, requiring repayment followed by an allocation of the repayment amount into various vendor trust accounts are extracted below:

> **THIS COURT DECLARES THAT: …**
>
> 6. The Plaintiffs [Garcha, Rajpreet and Mattu] are entitled to a remedy under s. 37 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "*BIA*"). Pursuant to s. 37 of the *BIA*, the amount of fees, including legal fees, that the Trustee and Fasken Martineau DuMoulin LLP ("Fasken") are entitled to retain from the Net Proceeds is limited to $4,048,310, subject to further review under ss. 151 and 152 of the *BIA*, allocated as follows: …
>
> **THIS COURT ORDERS THAT:**
>
> 1. With respect to the fees that the Trustee and Fasken have already taken under the Directions Motion Order and Term Payment Orders, pursuant to s. 37 of the BIA the Trustee and Fasken are entitled to retain $1,000,000 of the fees taken from the 2007 Joint Venturers' Share but will refund into an account held for the 2007 Joint Venturers (the "2007 JV Account") any amount that they have withdrawn in excess of $1,000,000 from the 2007 Joint Venturers' Share. In so doing, the Trustee and Fasken may utilize any funds remaining in trust to the credit of the other Bankrupts' estates, being Jaswant and Panorama. After this adjustment, the amounts remaining in the Vendor Trust Accounts will be consolidated and transferred into trust accounts that correspond to the entitlement of the remaining parties as set out on line 20 of Schedule A hereto, subject to the further adjustments as ordered herein (and, with respect to the 2007 Joint Venturers' Share other than the Plaintiffs' Entitlement, subject to this Court's orders of May 18, 2021). If the parties are unable to agree on the calculation of the amounts to be deposited into each new trust

> account, there will be a reference to the Registrar to determine the proper amounts.
>
> [Bold in original; underling added]

[14] As seen from that extract of the Repayment Order, the specific amount to be repaid was not directly specified. After the amount was determined by the parties, approximately $1,947 million, the funds were repaid by Crowe Mackay and Fasken on October 30, 2023 where they were placed in an interest-bearing trust account.

[15] The reference to “Vendor Trust Accounts” in the extract from the Repayment Order refers to various vendor trust accounts established for different investors/venturers. As will be seen from the discussion that follows, those accounts were created for administrative purposes and were intended to hold funds realized from different projects but were not meant to reflect entitlement or ownership.

[16] Justice Sewell’s reasons for judgment and the Repayment Order itself do not address the issue of entitlement to interest raised on this application.

[17] The Repayment Order was settled before the Registrar in the wake of contested positions that did not relate to the entitlement to interest issue raised on this application.

[18] Although the Repayment Order does contain provisions in the declaratory relief section (terms 4 and 10) providing for the Garchas to recover interest on trust property and damages for breach of fiduciary duty committed by other parties, it appears that the parties did not turn their minds to whether Crowe Mackay and Fasken are obliged to pay interest on the Repaid Funds.

[19] The absence of any treatment by Sewell J. concerning interest potentially payable is not determinative of the application. Interest was not dealt with by Sewell J. in his reasons for any of the awards he made. Inclusion of interest payable in the Repayment Order on the Garchas’ award against other parties for breach of fiduciary duty arose as a result of the parties’ turning their minds to the issue before the Registrar. In these circumstances, the fact that the Repayment Order is silent to

entitlement to interest concerning the Repaid Funds cannot be construed as a determination of the issue by Sewell J.

Court of Appeal

[20] In upholding Sewell J.'s orders (and findings), the Court of Appeal described Sewell J.'s concern regarding fees to be with Crowe Mackay's use of the Repaid Funds for final recovery of professional fees unrelated to the litigation after he found the 2007 Joint Venturers owned them beneficially. The prior orders, including an order referred to as the "Directions Motions Order", authorizing payment of fees, were all said to be interim where the rights of all parties to challenge fees on a review were preserved. Nonetheless, the Court of Appeal determined that Sewell J. had not found, nor suggested, that Crowe Mackay acted without lawful authority when it initially withdrew and disbursed funds:

> [135] As noted, the judge interpreted the Directions Motion Order as granting the Trustee lawful authority to use funds which had been found to be beneficially owned by the 2007 Joint Venturers to pay litigation costs in accordance with the *Residential Warranty* principle. However, he interpreted the Term Payment Orders as only granting the Trustee authority to use trust funds for ongoing expenses on an interim basis, subject to further court review as to the amount payable and who was responsible for payment. In other words, the judge found the Term Payment Orders did not authorize the Trustee to retain funds which had been found to be beneficially owned by the 2007 Joint Venturers and use them for final payment of general administrative costs.
>
> [136] In our view, that is the import of the judge's statements in paras. 165 and 183 of the Second Set of Reasons, read together, generously, and in the context of his reasons as a whole. Although his words could have been clearer, **he was not suggesting the Trustee acted without lawful authority when it initially withdrew and disbursed the funds to meet its ongoing administrative costs. His concern was its retention and use of the funds to finally recover professional fees unrelated to the litigation after he had found the 2007 Joint Venturers owned them beneficially***: at para. 166.*
>
> [137] We see no error in the judge's interpretations of the Term Payment Orders or the Directions Motion Order. Given their language, the circumstances in which they were made, and the *Residential Warranty* principle, in our view those interpretations are correct. As Justice Smith explained in *Yu v. Jordan*, 2012 BCCA 367, the provisions of a court order are not to be interpreted in a vacuum. Rather, the correct approach "is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted": *Yu* at

> para. 53; *Sutherland v. Reeves*, 2014 BCCA 222 at para. 31. That was the approach adopted by the judge.
>
> [Underlining emphasis in original; bold emphasis added]

[21] Crowe Mackay and Fasken point out that Sewell J.'s "finding" in his *Trial Reasons #2* (referred to by the Court of Appeal in the prior extract) that the 2007 Joint Venturers beneficially owned the Repaid Funds to be returned to their administrative account was made on October 1, 2021, and submit that if a cause of action to recover the Repaid Funds arose, it was on that day.

Positions of the Parties

The Garchas

[22] The Garchas now seek to vary the Repayment Order to require Crowe Mackay and Fasken to pay prejudgment and post-judgment interest in respect of the Repaid Funds. Their application is grounded on Rules 13-1(14) and 13-1(17) of the *Supreme Court Civil Rules* and s. 37 of the *BIA*, or alternatively ss. 7(2), 8, and 9(1) of the *Court Order Interest Act*, R.S.B.C. 1996, c. 79 [*COIA*].

[23] The combined effect of Rules 13-1(14) and 13-1(17) is to provide the court with authority to review and vary an order as settled and to correct it for an accidental slip or omission or to amend it to provide for any matter that should have been but was not adjudicated upon. Since the issue was not dealt with by Sewell J. in his reasons, the omission of interest in the Repayment Order is not due to an accidental slip or omission. The question is whether I should amend the Repayment Order on the basis that the question was not adjudicated upon.

[24] The Garchas' position in this respect is two-fold.

[25] First, they submit that s. 37 of the *BIA* confers wide discretionary power to the court to provide a remedy where a claimant has been aggrieved by the wrongful acts of a trustee, which they point out was the finding of Sewell J. and upheld by the Court of Appeal. Relying on case authorities such as *Re Hancock; Ex parte Spraggett*, [1952] 1 D.L.R. 785, 1952 CanLII 123 (O.N.C.A.), they are entitled to be

compensated for all loss and damage suffered by reason of the wrongful acts of Crowe Mackay and Fasken as found by Sewell J.

[26] The Garchas' position is that if the Repaid Funds had not been taken by Crowe Mackay and Fasken but left in an interest-bearing vendor trust account where they had been placed, the amount of the Repaid Funds they are entitled to would now be greater than the present amount. However, they do not confine their claim for interest to the amount of the Repaid Funds in excess of the amount allowed by Sewell J. as funds were drawn from the 2007 Joint Venturers' vendor trust account from time to time. The Garchas contend that interest should be paid on the whole amount of the Repaid Funds when the first withdrawal was made, to October 1, 2021, on the basis that the Repaid Funds are trust funds that were taken to pay professional fees for work criticized by Sewell J.

[27] Although in their written submissions, the Garchas said the date on which interest should be calculated was in early January 2017, evidence provided by Crowe Mackay and Fasken establish that the first withdrawal was on January 17, 2017.

[28] Alternatively, the Garchas contend that the provision for recovery of the Repaid Funds in the Repayment Order is a pecuniary judgment entitling them to prejudgment interest under the *COIA* since the first amount was withdrawn to pay fees.

[29] Depending on whether prejudgment interest is paid per the claim in equity or the *COIA*, the quantum of the Garchas' claim for prejudgment interest ranges from $98,761.81 to $111,372.64.

Crowe Mackay and Fasken

[30] At the start of the hearing, Crowe Mackay and Fasken disagreed that they are obliged to pay prejudgment interest. Key aspects of their opposition may be summarized as follows:

(a) not only is the Repayment Order silent on the point, no order or declaration requiring them to pay interest was made or referred to by Sewell J. in his reasons;

(b) the Repayment Order is not a pecuniary judgment; there was no specific judgment issued in favour of the Garchas and the 2007 Joint Venturers for the Repaid Funds;

(c) alternatively, if it is construed as a pecuniary judgment, then the cause of action did not arise until Sewell J. found on October 1, 2021 that the source for the Repaid Funds were trust funds, and had to be repaid, meaning that the cause of action arose on the date he issued the Repayment Order;

(d) consequently, the Garchas' only possible entitlement to interest is to post-judgment interest;

(e) prejudgment interest could only be awarded under the Court's equitable jurisdiction; however, there is no basis to do so in the circumstances of this case since all funds taken to pay the professionals' accounts were authorized under prior court orders (albeit interim orders);

(f) section 37 of the *BIA* is therefore inapplicable as there were no misappropriated expenses and no breach of trust; and

(g) instead, Sewell J. found the fees taken were unreasonably high and as a matter of fairness, calibrated the amounts Crowe Mackay and Fasken may keep and those they must repay.

[31] When the hearing resumed on a subsequent day following a brief recess, Crowe Mackay and Fasken advised me that they would pay prejudgment interest under the Court's equitable jurisdiction, on an *ex gratia* basis, without conceding they were obligated as a matter of law to do so.

[32] Crowe Mackay and Fasken calculate the amount to be just over $19,476.47, based on the interest (compounded) that would have accrued on each withdrawal taken after the total amount approved by Sewell J. was reached, based upon rates paid on Fasken's trust accounts from time to time, until October 1, 2021 (which is the date of the Repayment Order). They provided evidence establishing that by October 25, 2019, those withdrawals reached the amount allowed by Sewell J. and were followed by subsequent withdrawals on November 20, December 6 and 23, 2019, and February 11, April 2, June 18, and July 7, 2020.

The *COIA* is Not Engaged

[33] If there is entitlement to prejudgment interest, it must be found in equity since the Repayment Order is not a pecuniary judgment falling under the *COIA*, for these reasons.

[34] In the cases cited by the parties, and those cited within them, where the judgment was characterized as a pecuniary judgment because it "sounded in money" and could be enforced by a writ of seizure and sale, a judgment was sought and granted against the party required to pay interest: see, e.g., *Cabaniss v. Cabaniss*, 2010 BCSC 513; *Wepruk v. McMillan Estate* (1993), 87 B.C.L.R .(2d) 194, 1993 CanLII 6872 (C.A.); *S.G. & S. Investments (1972) Ltd. v. Golden Boy Foods, Inc*. (1991), 84 D.L.R. (4th) 751, 1991 CanLII 5735 (B.C.C.A.); *Graham v. Moore Estate*, 2004 BCSC 274; *Air Canada v. British Columbia (No. 2)* (1984), 12 D.L.R. (4th) 567, 1984 CanLII 553 (B.C.S.C.).

[35] Here, the Garchas did not sue Crowe Mackay and Fasken seeking judgment. No specific judgment was granted in favour of the Garchas.

[36] In view of the advice of the Garchas' counsel that he was appearing as agent for the other 2017 Joint Venturers as well, I will add that no such action was brought by or granted in favour of the other 2017 Joint Venturers in respect of the Repaid Funds.

[37] As seen from the excerpt of the Repayment Order in para. 13 of these reasons, the remedy granted to, *inter alia*, the Garchas was by way of declaratory relief, which does not fall within the meaning of a pecuniary judgment: *Crown Zellerbach Canada Limited v. British Columbia Forest Products Limited* (1979), 101 D.L.R. (3d) 240, 1979 CanLII 611 at para. 15 (B.C.C.A.). The order itself allows Fasken to retain $1 million and to refund the remainder into the 2007 Joint Venturers' vendor trust account which in turn was to be consolidated with all other vendor trust accounts, with appropriate allocations to be made to all accounts either by agreement or as determined by the Registrar.

[38] As Crowe Mackay and Fasken correctly point out, as I mentioned above, those accounts were set up consequent on the sales process order of Justice Brown, excerpted in part below, in the Sangha bankruptcy proceeding, B150826, issued on May 11, 2016 for administrative purposes and were not determinative of or evidence of ownership or entitlement to those funds:

> 4. FMD [Fasken] shall establish and maintain separate trust accounts for each of the Vendors in the same percentages as the Vendors respectively hold registered title to the respective Subdivision Lots as set out in Schedule "A" (collectively, the "Vendor Trust Accounts" and each, a "Vendor Trust Account") for purposes of holding in trust the net sale proceeds of any Subdivision Lot after payment of the applicable amounts set out in paragraph 5 and 7 hereof (the "Net Sale Proceeds") provided that such Vendor Trust Accounts shall be for administrative purposes only and shall not be determinative of, or evidence of, ownership or entitlement to such funds and no distribution of such funds shall take place without further court order upon prior notice to all of the Interested Parties.
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> [Emphasis added]

[39] This point was repeated in a subsequent order issued by Chief Justice Hinkson on July 6, 2016 and an order issued by Master Baker on August 11, 2016, and emphasized by Sewell J. in his *Trial Reasons #1* at para. 619.

[40] Crowe Mackay and Fasken also drew my attention to Justice Sewell's order of May 18, 2021 in this action, which I settled on January 17, 2024 after being advised by the parties of their consent and agreement as to its form, pointing out that it is further evidence that the Repayment Order is not a pecuniary judgment.

[41] That order permits the Garchas and other 2017 Joint Venturers to file with Crowe Mackay, as the trustee in bankruptcy, a proof of claim in the bankruptcy proceedings, which in turn would be assessed for validity and quantum in the bankruptcy:

> 2. **By Consent,** the Applicants [including the Garchas] and another, Gurcharan Singh Sandhu (together, the "**Claimants**"), each of whom is a 2007 Joint Venturer, shall have liberty to collectively file with the Trustee a Proof of Claim in the bankruptcy of 690174 B.C. Ltd. in Form 74 (Reclamation of Property), pursuant to s. 81 of the *Bankruptcy and Insolvency Act* [RSC 1985] c. B-3, seeking from the Trustee the return of the Claimants' property in the possession of the Trustee or its counsel (the "**Claimed Property**");
>
> 3. **By Consent,** the Claimed Property consists of money, being 66.66% (14/21) of the 2007 Joint Venturers profits of the Project) but excluding the interest of the Plaintiffs Garcha and 690184 B.C. Ltd.), as set out under the heading "2007 JV Participants" in Line 20 of Schedule A of the Trustee's Tenth Report to the Court filed in the Proceedings on April 23, 2021 (the "Tenth Report"), as the same may be amended or adjusted by the Trustee or the Court as a result of the Accounting Hearing or by the Court of Appeal, less
>
> a. the sum of $250,000.00 (the "Deficiency Settlement Payment"); and
>
> b. any fees and expenses of the Trustee and its Counsel which the Court orders or allows to be charged against the Claimed Property, as the same may be amended or adjusted by the Court of Appeal.
>
> [Bold and italics in original]

[42] Crowe Mackay and Fasken also correctly point out that there is no entered order that provides judgment in favour of the Garchas and the other 2017 Joint Venturers against them.

Equity

[43] Equity is the only basis in this case in which to consider entitlement to prejudgment interest.

[44] Cases holding that interest earned on funds held in trust form part of the corpus – e.g. *Garcha v. Randhawa*, 2017 BCSC 980; *Great Northern Insulation Services Ltd. v. King Road Paving and Landscaping Inc.*, 2019 ONSC 3671; *K-Vet Ltd., Re* (1989), 78 C.B.R. (N.S.) 282, 1989 CarswellOnt 198 – offer little to no guidance in the circumstances of this case where the Repaid Funds were taken.

[45] Cases discussing the right of the beneficiary to choose the most favourable remedy or valuation where a breach of trust has occurred are of no assistance since this is not a case where misappropriation of trust funds or breach of trust was found. The repayment was ordered by Sewell J. because he found the fees charged by Crowe Mackay and Fasken beyond a certain amount were unreasonable having regard to specific conduct. His assessment of the amount to be repaid was premised on fairness.

[46] Should interest be paid?

[47] In my opinion, it should. Equity requires interest to be paid on the Repaid Funds in the circumstances of the findings made by Sewell J. to avoid the administration of justice falling into disrepute. Interest that should have been earned had the withdrawals in excess of the amount permitted by Sewell J. to be retained by Crowe Mackay and Fasken not been taken is the loss occasioned by what Sewell J. found to be the aggrieved conduct falling within the ambit of s. 37 of the *BIA*: *Trial Reasons #2* at para. 217.

[48] How should the amount be determined?

[49] I disagree with the approach taken by the Garchas. Requiring Crowe Mackay and Fasken to pay interest on the whole of the funds from January 17, 2017 to October 1, 2021 engages an unreasonable and punitive factual premise that they should have acted in what all parties describe as intensely complex, hard-fought litigation while waiting to be paid until their fees were approved, in circumstances where they did not charge interest on their accounts and proactively sought court approval for payment of their accounts.

[50] To say, as the Garchas did in their submissions, that since Sewell J. was critical of the professionals' conduct that predates the date of their first withdrawal beyond the permitted amount, overlooks the fact that Sewell J. was satisfied that they should be paid for much of the work they did, i.e., two-thirds of their fees. It would also require an in-depth, prolonged factual analysis of each of their services to

determine which fall within the purview of Sewell J.'s findings that led to his invoking the s. 37 remedy, which may well prove to be a fruitless, time-consuming, and cost-prohibitive attempt to correlate those services to his ultimate assessment, lacking any semblance of proportionality.

[51] In my opinion, the methodology proposed by Crowe Mackay and Fasken to calculate prejudgment interest provides an appropriate equitable means to satisfy the remedial objectives of s. 37 of the *BIA* in the circumstances of this case.

[52] As a result, I would vary the Repayment Order per Rule 13-1(17) to add an additional term requiring prejudgment interest to be paid on the Repaid Funds in accordance with the methodology proposed by Crowe Mackay and Fasken.

Disposition

[53] The Repayment Order is varied per Rule 13-1(17) to add the following additional terms.

[54] Crowe Mackay and Fasken shall pay prejudgment interest on the Repaid Funds, calculated per the methodology proposed by Crowe Mackay and Fasken, i.e., compounded interest on each withdrawal from October 25, 2019 to October 1, 2021, at rates paid on Fasken's trust accounts as established in Exhibit "A" to the first affidavit of Jona Valdez sworn on April 8, 2024.

[55] Crowe Mackay and Fasken shall pay post-judgment interest on the Repaid Funds at rates set by the Registrar from time to time, until those funds were repaid into trust in accordance with the Repayment Order.

"Walker J."