IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *0928772 B.C. Ltd. v. Ross,*
2024 BCSC 1436

Date: 20240806
Docket: S174615
Registry: Victoria

Between:

0928772 B.C. Ltd., 0960416 B.C. Ltd., 0960420 B.C. Ltd., 0960423 B.C. Ltd., 096425 B.C. Ltd., Craig Little on his own behalf and as Trustee of the Little Family Trust, and as Executor for the Estate of Rose Little, Timely Little Investments Ltd., John Kwari, Cecilia Kwari on her own behalf and as Trustee of the 2010 Kwari Family Trust, Paulita Majo Holdings Ltd., Maria Kwari on her own behalf and as Trustee of the Paul Kwari Family Trust, 0811348 B.C. Ltd., Penny Peng as Executor for the Estate of Victor Peng, Gordon Peng with Penny Peng as Trustees of the Peng Family Trust, Peng Investments Ltd., Gerry Poon on his own behalf and as Trustee of the Poon Family Trust, Susan Ann Poon, Trimex Holdings Ltd., Su-Min Hsu on her own behalf and on behalf of the Hsu Family Trust, Formosa Holdings Ltd., Matthew Takoski on his own behalf and as Trustee of the Takoski Family Trust, 0863184 B.C. Ltd., Linda Jesson, James Jesson on his own behalf and with Douglas Southerland as Trustees of the Jesson Family Trust, J. Jesson Capital Inc., Shelby Donald on her own behalf and as Trustee of the Donald Family Trust, Larkdowne Consulting Inc., 0928818 B.C. Ltd., 0947797 B.C. Ltd. and 0947800 B.C. Ltd.

Plaintiffs

And:

Lindsay Ross, L.A.C. Ross Law Corporation, My Wee World Enterprises Inc., Lindsay Ross and the Estate of Rolf Paterson as Trustees of both the 2012 Ross Family Trust and the Ross Family Trust, Joanne Lynne Ross and 096429 B.C. Ltd.

Defendants

Before: The Honourable Justice Jackson

Reasons for Judgment

Counsel for the Plaintiffs:	D.S. Mulroney M. Mulroney
Counsel for the Defendants:	W.E. Pedersen
Place and Date of Trial:	Victoria, B.C. June 5-9, 12-16, 19-23, 26-30, July 5-7, 10-14, 17-21, 24-28, July 31-August 4, August 10-11, August 28-31 and September 1, 2023
Place and Date of Judgment:	Victoria, B.C. August 6, 2024

Table of Contents

I. OVERVIEW

[1] Lawyers owe a duty of loyalty to their clients. This duty of loyalty is essential to the integrity of the administration of justice. Public confidence in the integrity of administration of justice is of critical public importance: *R. v. Neil*, 2002 SCC 70 at para. 12. Where the duty of loyalty is betrayed, public confidence suffers.

[2] This action alleges the individual defendant Lindsay Ross, a lawyer formerly entitled to practice law in British Columbia, breached fiduciary duties he owed to the plaintiffs who were his clients. The action centres around two commercial real estate investments: the Travelodge Hotel and associated businesses in Sidney, B.C. ("TL") and the Parkside complex and associated businesses in Victoria, B.C. ("PKS").

[3] Mr. Ross solicited several of his wealthy clients to invest with him and provide personal guarantees in the acquisitions of TL and PKS, and served as their solicitor to structure and execute the acquisitions and supervise the closing of the transactions despite the fact that he and his wife, the individual defendant Joanne Ross, had a financial interest in both investments.

[4] Mr. Ross, his law firm, and Ms. Ross were all insolvent at the time he approached his clients about the investments, throughout the period when Mr. Ross was structuring the TL and PKS deals, and when the two transactions closed. Mr. Ross failed to disclose those insolvencies, as well many as other material facts. Indeed, Mr. Ross represented to his clients that all those participating in the TL and PKS investments were wealthy, financially sound co-investors. Mr. Ross acted as counsel to the TL and PKS investors knowing his personal interests were in conflict with the duty of loyalty he owed to those clients.

[5] The TL and PKS investment structures, designed and implemented by Mr. Ross and others associated with his law firm acting on his instructions, resulted in Mr. Ross, Ms. Ross, and their related entities receiving superior holdings in both the TL and PKS investments to those of his TL and PKS clients, without their knowledge. The superior investment position which Mr. Ross created for his related entities was in spite of the fact that the Rosses had failed to make their required

financial contributions for either the TL or the PKS investments, prior to the closing or at all. He did not disclose that information to his TL and PKS investor clients. When those facts were discovered, after both deals had closed, he fabricated an explanation, involving a fictitious escrow agreement, in an effort to excuse his egregious acts of concealment.

[6] Making generalized assertions of potential tax savings, and cloaked in complex and ever-changing corporate structures he failed to adequately explain, Mr. Ross exploited his solicitor-client relationships with his TL and PKS investor clients for the financial benefit of himself and those related to him. Mr. Ross used information he had gained about his clients in the course of his previous representation of them, as well as bullying tactics, and leveraged the trust his clients reposed in him, to create an environment that enabled him to execute the TL and PKS transactions in a manner that accommodated and concealed his, his wife's and his law firm's increasing state of insolvency, effectively gaslighting his clients by causing them to doubt their own understanding of the deals Mr. Ross had initially promoted to them. Mr. Ross did not explain to his clients the nature or extent of his conflict of interests and failed to provide them with the information they required to enable them to obtain independent legal advice.

[7] Mr. Ross breached fiduciary duties he owed to the plaintiffs who were his clients. Joanne Ross was an integral, knowing, and willing, participant in his efforts.

[8] For the reasons that follow, I find in favour of the plaintiffs and award them the remedies they seek.

[9] In these Reasons I do not recite in detail the evidence that was led at trial. In these Reasons, I instead confine myself to the findings of fact that I have made from a consideration of the totality of the evidence. Where evidence was led for, or I admitted it for, a limited purpose or purposes, I have considered it only for those purposes.

II. THE PARTIES AND OTHERS INVOLVED

[10] As many of the parties share the same last name, for clarity at times I refer to them in these Reasons by their first names, intending no disrespect.

A. Lindsay Ross and L.A.C. Ross Law Corporation

[11] The defendant Lindsay Ross was a lawyer called to the bar of British Columbia in 1989. He began practicing law at Bennett Jones in Alberta. He moved to Vancouver, B.C. and practiced for several years with the law firm of Russell Dumoulin before moving to Victoria in 1992 where he joined the law firm of Pearlman Lindholm and became a partner. Mr. Ross' law practice focussed on corporate solicitor's work, as well as tax and estate planning. In addition to law, he studied accounting extensively but did not work as an accountant.

[12] While at Pearlman Lindholm, Mr. Ross met Mr. Kim Johnson, another lawyer at that firm. Mr. Johnson was called to the bar of British Columbia in 1984.

[13] After leaving Pearlman Lindholm, Mr. Ross set up his own firm in Victoria, the defendant L.A.C. Ross Law Corporation ("RossLaw"), through which he continued to practice until some time around 2015 and was at all times its sole director. Mr. Ross' law practice continued to focus on corporate solicitor's work, as well as tax and estate planning.

[14] RossLaw carried on business under the name Ross, Johnson & Associates ("RossJohnson"), which was presented as an apparent partnership between RossLaw and Mr. Johnson's law corporation, K.E. Johnson Law Corporation ("JohnsonLaw"), although there was no formal partnership arrangement. Although the two firms had separate ESILAW (pronounced by witnesses as 'easy law') accounting software programs, both firms' programs had the same password. JohnsonLaw and RossLaw also shared a server. As noted by Mr. Johnson, Mr. Ross had "ready access to the information about trust amounts" in the JohnsonLaw accounts.

[15] RossLaw's offices were located on the fourth floor of 888 Fort Street in Victoria B.C., in a space RossLaw and JohnsonLaw leased from 888 Fort Street Holdings Ltd. ("888 Fort Street Ltd." and the "Fort Street Lease").

[16] Mr. Ross is highly intelligent, charismatic, and a gifted orator.

[17] Mr. Ross was suspended from the practice of law by the Law Society of British Columbia in 2020.

1. Alex McRae

[18] Alex McRae was called to the British Columbia bar in 2009. Following his call, he focussed his practice in the area of personal injury law. Around February 2012, Mr. McRae began working for Mr. Ross as a junior solicitor at RossLaw. When Mr. McRae began working at RossLaw he did not have a strong background, in depth knowledge, or significant experience, in commercial transactions. As a result, he did not advise clients independently and worked under Mr. Ross' supervision and direction.

[19] Mr. McRae had two small children at the time. The work demands put on him by Mr. Ross were significant and he found it a challenge to be able to leave work at a reasonable time. When he did, it drew the ire of Mr. Ross.

[20] Mr. McRae described Mr. Ross' work practices: Mr. Ross provided instructions to RossLaw staff verbally, or wrote them out in longhand, and an iterative back and forth process followed. Staff prepared work based on Mr. Ross' instructions and sent the draft work back to Mr. Ross, who would then suggest edits, verbally or through handwritten notes, followed by further updated drafts by staff, and so on. In drafting agreements, use of the words "made as of" by Mr. Ross reflected that the agreement was actually made on a later date and backdated. Mr. McRae relied on representations and explanations by Mr. Ross about various things, including whether documents existed.

[21] Mr. McRae's involvement in the TL and PKS transactions was limited, and was all done based on Mr. Ross' directions. Mr. McRae was away from the office on a training course when the PKS deal closed, which upset Mr. Ross.

[22] Mr. McRae remained working at RossLaw until at least the end of 2013.

2. Natalie Sparling

[23] Natalie Sparling (later Natalie Smith, but for ease of reference I will refer to her as Ms. Sparling throughout these Reasons) began to work at RossLaw in April 2012 as an articled student. Her articles were split between RossLaw and a firm operated by Don McKnight. Mr. McKnight's offices were also located on the fourth floor at 888 Fort Street, the same floor as RossLaw. Ms. Sparling was called to the British Columba bar on August 14, 2013 and became a full-time associate with RossLaw. Ms. Sparling continued to work with Mr. Ross, at RossLaw and his subsequent firm, until June 2016. Ms. Sparling's description of the ways in which Mr. Ross gave instructions to her aligned with the description given by Mr. McRae. Mr. Ross did not write emails to send instructions to her, but would occasionally forward to her emails he had received from others. That is consistent with the testimony of Mr. McRae, and others, and the documentary evidence.

[24] I will say more about the work Ms. Sparling did in relation to the TL and PKS transactions later in these Reasons. For now, I will simply note that at all times when she performed legal work on either file, she was an articled student working under Mr. Ross' supervision.

3. Barb Gable

[25] Barb Gable completed her paralegal training in 1985 and began working with Mr. Ross at Pearl Lindholm in 1991. Ms. Gable later continued working for Mr. Ross at RossLaw beginning around 1992 or 1993. By the time of the events at issue in this case, Ms. Gable had worked for Mr. Ross for over 20 years. Ms. Gable typically worked 35-40 hours per week over four days, and came in when needed on her days off. Ms. Gable was loyal to Mr. Ross.

[26] Ms. Gable's role was to follow instructions given to her by Mr. Ross. Mr. Ross would dictate information to his staff, including Ms. Gable, including emails to be sent out, sometimes standing at their shoulder.

[27] Ms. Gable prepared the incorporation documents for the TL transaction as well as the necessary corporate resolutions and subscription agreements and took steps to obtain the required liquor licenses. The PKS transaction was similar, save for the liquor licenses. Ms. Gable also prepared a closing agenda for Mr. Ross, which went through multiple changes as the PKS structure changed. On closing of the PKS transaction Ms. Gable was also involved in registering all of the various interests in the strata lot allocations with the Land Titles Office.

[28] Ms. Gable did not work for Mr. Johnson and had no role in monitoring the investment monies that came in on either the TL or the PKS transaction.

4. Susana Duarte

[29] Susana Duarte has a law degree from Portugal and had worked there as a lawyer before moving to Canada. In 2010 she began working as a paralegal/legal assistant at RossLaw. In 2012 and 2013 Ms. Duarte worked on the TL and PKS transactions, preparing the documents either set out in closing agendas prepared by Mr. Ross or other staff based on his instructions. Ms. Duarte continued working for RossLaw until the day the PKS transaction closed in March 2013.

B. Joanne Lynne Ross

[30] Joanne Ross is a university graduate. She has worked in various fields over the years, including as a teacher. Between 2011 and 2013 she helped out on part-time basis at RossLaw but had no set schedule.

[31] Ms. Ross was a signatory on the RossLaw bank accounts, as were Ms. Gable and Mr. Ross. Ms. Ross did bank deposits, as did Ms. Gable.

C. My Wee World Enterprises Inc., Rolf Paterson, The 2012 Ross Family Trust and The Ross Family Trust

[32] The defendant My Wee World Enterprises Inc. (“MWW”) is a B.C. company incorporated in 2008 and is wholly owned by Ms. Ross, who is also its sole director.

[33] Rolf Paterson was the father of Joanne Ross. Prior to his death in 2017, Mr. Paterson and Mr. Ross were trustees of the two defendant trusts: The 2012 Ross Family Trust (“2012RossTrust”) and The Ross Family Trust (“RossTrust”).

[34] On May 11, 2020, the plaintiffs filed a notice of discontinuance as against the Estate of Rolf Paterson as trustees of both the 2012RossTrust and the RossTrust, pursuant to the terms of a settlement agreement between the plaintiffs and Ann Paterson, in her capacity as the personal representative of the late Rolf Paterson, which was executed on or about May 7, 2020.

[35] Mr. Ross testified he has been a trustee of the 2012RossTrust since 2012. The documents establishing the RossTrust and the 2012RossTrust are not in evidence. The plaintiffs requested the constating documents for the 2012RossTrust but Mr. Ross did not produce them. Based on the names of those entities, the nature and purpose of a family trust, and the fact that the 2012RossTrust was used as an investment vehicle for the TL and PKS transactions by Mr. Ross, I find the RossTrust and the 2012RossTrust were established to hold assets to the benefit of Mr. Ross and members of his family and are entities related to him.

[36] The Rosses participated in the TL and PKS transactions. The 2012RossTrust and MWW were the vehicles through which the Rosses obtained their interest in those two transactions. Both the 2012RossTrust and MWW received interests in shares in the companies created to hold the assets acquired in the TL and PKS transactions.

D. Defined terms for the Defendants

[37] For ease of reference, at times in these Reasons I refer to Lindsay Ross and Joanne Ross collectively as the Rosses, and to the Rosses, MWW, the RossTrust, and the 2012RossTrust collectively as the “Ross Entities” or the “Defendants”.

E. Cecilia Kwari, John Kwari, The 2010 Kwari Family Trust and Paulita Majo Holdings Ltd.

[38] The plaintiff Cecilia (also known as Lita) Kwari was born in Indonesia in 1944. English is not her first language. At the age of 25 she moved to Canada with her then fiancée, later husband, Paul Kwari, and both attended the pharmacy program at the University of British Columbia (“UBC”). Within two years Cecilia had completed her certification in the field of pharmacy and continued to work as a pharmacist until she retired in 2007.

[39] Cecilia and her family have many investments, one being a medical building they developed around 1989 which has several tenants, including her family’s pharmacy. Cecilia ran her various business interests through various corporate and trust vehicles. Cecilia’s family also owns real estate, both in Ontario and British Columbia. Her investment company is the plaintiff Paulita Majo Holdings Ltd. (“KwariHoldCo”). The plaintiff the 2010 Kwari Family Trust (“2010KwariTrust”) is a trust for which Cecilia is trustee. It was set up by Mr. Ross. KwariHoldCo is an amalgamated company incorporated pursuant to the laws of British Columbia, and its predecessor, Majo Holdings Ltd., was also incorporated pursuant to the laws of B.C.

[40] Cecilia is the mother of the plaintiff John Kwari. John was born in 1981, graduated from St. Michael’s University School, after which he attended Johns Hopkins University obtaining a bachelor’s degree in biophysics and economics. After university he worked in the United States for Capital One. After his father, Paul Kwari, passed away in 2009, John returned to Victoria to take over his father’s consulting business, PK Consulting Ltd., and help with his family’s business dealings. RossLaw served as PK Consulting Ltd.’s company records office. Upon

John's return he became the steward of his family's assets and started his own business, Care RX Enterprises.

[41] In 2018, John moved to Indonesia. John represented Cecilia's business interests, both before and after he moved to Indonesia in 2018.

[42] Mr. Ross had been Cecilia's lawyer and legal advisor (and Paul's until his death) since 1989, including in 2012 and 2013, and was also the lawyer for KwariHoldCo and the 2010KwariTrust. Mr. Ross drafted wills, advised on, set up, and prepared documents for various corporate structures for the Kwari family's business ventures, including a shareholder agreement for Care RX, to which John served as CEO. In his role as CEO of Care RX and steward of the various Kwari family businesses and assets, John had extensive dealings with Mr. Ross and obtained a broad array of legal advice and services from him.

[43] Mr. Ross did all of the Kwari family's legal work. Mr. Ross provided legal advice to John Kwari with respect to trusts and other legal structures of which Cecilia Kwari and her children were beneficiaries or through which they held beneficial interests in assets.

[44] The Kwari family relied on Mr. Ross heavily and were very fond of him. They socialized together on occasion, attended charity golf events, and had various dinners. Mr. Ross showed off what he described to John as his classic car collection. Mr. Ross spoke at Paul Kwari's funeral.

[45] Cecilia and John collectively invested in both the TL and PKS transactions. The KwariHoldCo and the 2010KwariTrust were the vehicles through which Cecilia and John obtained their interest in those two transactions. Both KwariHoldCo and the 2010KwariTrust received interests in shares of the companies created to hold the assets acquired in the TL and PKS transactions. At times in these Reasons I will refer to Cecilia Kwari, John Kwari, KwariHoldCo, and the 2010KwariTrust collectively as the "Kwari Family Plaintiffs".

F. Maria Kwari, Cyrus Ren, 0811348 B.C. Ltd and The Paul Kwari Family Trust

[46] Cecilia is also the mother of the plaintiff Maria Kwari. Maria was also a long time client of Mr. Ross. When Maria purchased an interest in a pharmacy franchise in 2006, Mr. Ross was her lawyer and formed the purchasing company, which maintained its company records office at RossLaw until 2014.

[47] Maria Kwari is married to Cyrus Ren. Mr. Ren was born in 1977, graduated from Burnaby High School and went on to study marketing and international trade, obtaining a Bachelor of Commerce degree in 2007. Mr. Ren met Mr. Ross through Maria and her family and also became one of his clients.

[48] Mr. Ross incorporated several holding companies for Maria and Cyrus, prepared their wills between 2010 and 2012, set up a family trust, and incorporated a holding company for them, the plaintiff 0811348 B.C. Ltd. (“MariaHoldCo”). Mr. Ross incorporated MariaHoldCo some time between 2007 and 2009 and MariaHoldCo also maintained its company records office at RossLaw.

[49] Maria is a trustee of the plaintiff The Paul Kwari Family Trust (“PaulKwariTrust”).

[50] Maria and Cyrus only invested in the TL transaction. MariaHoldCo and the PaulKwariTrust were the vehicles through which Maria and Cyrus obtained their interest in that transaction. Both MariaHoldCo and the PaulKwariTrust received interests in shares of the companies created to hold the assets acquired in the TL transaction.

G. Su-Min Hsu, The Hsu Family Trust and Formosa Holdings Ltd.

[51] The plaintiff Su-Min Hsu was born in China in 1948, graduated from high school in Taiwan, and studied basic accounting while living there. Ms. Hsu was referred to Mr. Ross by Cecilia Kwari.

[52] Ms. Hsu testified with the assistance of a Mandarin interpreter. She does not speak English. Ms. Hsu has three children: David, Daniel and Diana. Daniel was

born in 1972 and graduated from Mount Douglas Secondary School. Daniel studied hotel and restaurant management at college before taking the realtor course at UBC, which he completed in June 2012. Whenever Ms. Hsu met with Mr. Ross, she was accompanied either by one of her children or by the plaintiff Penny Peng, who was a long time friend. Mr. Ross was aware Ms. Hsu required translation assistance and was unable to communicate independently in English. Ms. Hsu knows how to use email but cannot read business documents written in English.

[53] The plaintiff Formosa Holdings Ltd. ("HsuHoldCo") is a company in which Ms. Hsu has an interest, which Mr. Ross set up for her shortly before the TL and PKS transactions. HsuHoldCo's company records office was maintained at RossLaw.

[54] Mr. Ross was Ms. Hsu's lawyer beginning in about 2007 and provided various legal services, including setting up the plaintiff The Hsu Family Trust ("HsuTrust"), of which Ms. Hsu is a trustee. Ms. Hsu continued to be a client of Mr. Ross throughout the period that began before John Kwari learned about the TL and PKS deals from Mr. Ross until after both acquisitions closed.

[55] Ms. Hsu invested in both the TL and PKS transactions. The HsuHoldCo and the HsuTrust were the vehicles through which Ms. Hsu obtained her interest in those two transactions. Both the HsuHoldCo and the HsuTrust received interests in shares of the companies created to hold the assets acquired in the TL and PKS transactions.

H. Craig Little, Rose Little, The Little Family Trust and Timely Little Investments Ltd.

[56] The plaintiff Craig Little was born in 1954 in Saskatchewan. He moved to the Cowichan Valley and has lived in same property since 1957. He is a high school graduate and attended one year at the University of Victoria. Mr. Little began the business called Arbutus RV in 1988. Like many of the other plaintiffs he has been successful in opening and operating his business.

[57] Craig and Rose Little were spouses. Ms. Little passed away shortly before the trial of this action began. Mr. Little is the executor of her estate.

[58] Mr. Little was referred to Mr. Ross in mid-2012 by his friend Matthew Takoski, another client of Mr. Ross. Mr. Little retained Mr. Ross around May 2012 to undertake a corporate restructuring and tax planning exercise involving numerous companies, and prepare will documents. Mr. Ross also set up the plaintiff The Little Family Trust ("LittleTrust"), of which Craig is a trustee, for the Littles in or about December 2012. Much of the work was delayed but was eventually completed in 2014 or 2015, with the exception of the will which Mr. Ross never did complete.

[59] The plaintiff Timely Little Investments Ltd. ("LittleHoldCo") is a corporation incorporated by Mr. Ross for the Littles on December 28, 2012 as 0958749 B.C. Ltd. ("LittleHoldCo"), with the corporate name subsequently being changed.

[60] The Littles collectively invested in both the TL and PKS transactions and obtained their interest in the TL transaction personally by receiving interests in shares of the companies created to hold the assets acquired in the TL transaction. The LittleHoldCo and the LittleTrust were the vehicles through which the Littles obtained their interest in the PKS transaction. Both LittleHoldCo and the LittleTrust received interests in shares of the companies created to hold the assets acquired in the PKS transaction.

I. Penny Peng, Victor Peng, The Peng Family Trust and Peng Investments Ltd.

[61] The plaintiff Penny Peng was born in China in 1940, and went to university in Taiwan, graduating as a social worker. Before coming to Canada she studied English as a second language and continued to work on her English after immigrating. Ms. Peng was married to the plaintiff Victor Peng, also born in 1940, who had studied mining engineering and chemistry. Mr. Peng is now deceased. Ms. Peng is the executor of his estate.

[62] Ms. Peng was referred to Mr. Ross by Cecilia Kwari around 2005 or 2006. In 2006, Mr. Ross was retained by the Pengs to establish the plaintiff The Peng Family Trust ("PengTrust") of which Ms. Peng is a trustee. Mr. Ross also prepared a co-ownership agreement for a joint venture the Pengs invested in with the members of the Hsu family. The plaintiff Peng Investments Ltd. ("PengHoldCo") is Ms. Peng's company. PengHoldCo was incorporated by a lawyer whose name Ms. Peng could not recall and its company records office has remained at that lawyer's firm.

[63] The Pengs collectively invested in both the TL and PKS transactions. The PengHoldCo and the PengTrust were the vehicles through which the Pengs obtained their interest in those two transactions. Both PengHoldCo and the PengTrust received interests in shares of the companies created to hold the assets acquired in the TL and PKS transactions.

J. Gerry Poon, Susan Poon, The Poon Family Trust and Trimex Holdings Ltd.

[64] The plaintiff Gerry Poon was born in 1964 and immigrated from Hong Kong. He graduated from UBC pharmacy in 1989. Over the course of his career he has owned and operated several pharmacies.

[65] Gerry Poon and Susan Poon are spouses. Ms. Poon was born in 1963 in Vancouver, B.C. She moved to Courtenay B.C. at a young age and graduated high school there in 1981. After graduating she worked in sales.

[66] The Poons married in 1992. Ms. Poon was a full-time stay at home mother until 1999, when she began working from time-to-time in the family's pharmacy business. In 2015, at the age of 51, she began working full-time.

[67] In 2006 Mr. Poon co-purchased a pharmacy with the plaintiff Maria Kwari. Mr. Ross was Mr. Poon's lawyer for that transaction. Mr. Ross set up the Poons' investment company —the plaintiff Trimex Holdings Ltd. ("PoonHoldCo")—as well as their family trust—the plaintiff The Poon Family Trust ("PoonTrust"). PoonHoldCo maintained its company records office at RossLaw and RossLaw prepared its annual

corporate filings until some time after the TL and PKS deals had closed. Throughout 2012 and 2013, the Poons used Mr. Ross for all of their personal and corporate legal matters.

[68] The Poons collectively invested in both the TL and PKS transactions. PoonHoldCo and the PoonTrust were the vehicles through which the Poons obtained their interest in those two transactions. Both PoonHoldCo and the PoonTrust received interests in shares of the companies created to hold the assets acquired in the TL and PKS transactions.

K. Matthew Takoski, The Takoski Family Trust and 0863184 B.C. Ltd.

[69] The plaintiff Matthew Takoski is a businessman who owns and operates the group of Baan Thai restaurants in Victoria, B.C. Some time in 2009 or 2010, Mr. Takoski was looking for a lawyer to provide him with tax planning advice and retained Mr. Ross. In January 2010 Mr. Ross provided legal services in the settlement of the plaintiff The Takoski Family Trust ("TakoskiTrust") of which Mr. Takoski is the sole trustee, and assisted Mr. Takoski with the reorganization of his corporate structure (sending his reporting letter in June 2015). As part of that reorganization, Mr. Takoski became the sole director, officer and shareholder of the plaintiff 0863184 B.C. Ltd. is ("TakoskiHoldCo"). TakoskiHoldCo's company records office was maintained at RossLaw.

[70] Mr. Ross continued to do legal work related to Mr. Takoski's business holdings through July and August of 2012, and in so doing communicated with Mr. Takoski's accounting advisors. In or around February 2013, Mr. Ross prepared Mr. Takoski's will.

[71] Mr. Takoski invested in both the TL and PKS transactions. The TakoskiHoldCo and the TakoskiTrust were the vehicles through which Mr. Takoski obtained his interest in those two transactions. Both TakoskiHoldCo and the TakoskiTrust received interests in shares of the companies created to hold the assets acquired in the TL and PKS transactions.

L. James Jesson, Linda Jesson, The Jesson Family Trust and J. Jesson Capital Inc.

[72] The plaintiff James Jesson was born 1958 and graduated from high school in Salmon Arm, B.C. He met his wife, the plaintiff Linda Jesson, in 1980. The Jessons moved to Kamloops, B.C. where Mr. Jesson worked selling cars. In 1986, the Jessons got into the business of publishing several special interest magazines. When the Jessons were approached by someone who wanted to purchase half of their business some time between 2007 or 2009, Mr. Jesson retained Mr. Ross to represent their interests in that sale. In November 2009, Mr. Ross incorporated the company that became the plaintiff J. Jesson Capital Inc. ("JessonHoldCo") (originally incorporated as 0811375 B.C. Ltd.) for the Jessons, and settled the plaintiff The Jesson Family Trust ("JessonTrust") for them. JessonHoldCo's company records office was maintained at RossLaw. Mr. Ross also prepared the Jessons' wills. Mr. Ross continued as the personal and corporate lawyer for the Jessons thereafter until after the events at issue in this case.

[73] The Jessons collectively invested in both the TL and PKS transactions. The Jessons obtained their interest in the TL transaction personally and through JessonHoldCo, and they and JessonHoldCo received interests in shares of the companies created to hold the assets acquired in the TL transaction. JessonHoldCo and the JessonTrust were the vehicles through which the Jessons obtained their interest in the PKS transaction. Both JessonHoldCo and the JessonTrust received interests in shares of the companies created to hold the assets acquired in the PKS transaction.

M. Shelby Donald, The Donald Family Trust and Larkdowne Consulting Inc.

[74] The plaintiff Shelby Donald is a Victoria realtor. Ms. Donald met Mr. Ross in 2002 when he was retained to assist her and her husband, John Donald, with some corporate restructuring. In about 2010 and through 2011, Ms. Donald also retained Mr. Ross to provide her with legal advice in the course of a family business divestiture. In 2011, Mr. Ross set up the plaintiff The Donald Family Trust

("DonaldTrust") of which Ms. Donald is a trustee. The company records office for Ms. Donald's company—the plaintiff Larkdowne Consulting Inc. ("DonaldHoldCo")—was maintained at RossLaw.

[75] Ms. Donald only invested in the TL transaction. DonaldHoldCo and the DonaldTrust were the vehicles through which Ms. Donald obtained her interest in that transaction. Both DonaldHoldCo and the DonaldTrust received interests in shares of the companies created to hold the assets acquired in the TL transaction.

N. The TL companies

[76] The plaintiff 0928818 B.C. Ltd. ("818 BC") was incorporated on December 28, 2011, by a member of the RossLaw legal staff at the direction of Mr. Ross. Mr. Ross or a member of his legal staff at his direction also prepared the bylaws of 818 BC. Upon incorporation, Mr. Ross was 818 BC's sole director. He remained one of 818 BC's directors until about October 14, 2014. RossLaw served as 818 BC's agent. From incorporation until late 2014, 818 BC's company records office was maintained at RossLaw.

[77] By way of an asset purchase agreement dated May 29, 2012 (the "TL Purchase Agreement"), for an aggregate purchase price of $16,620,000, 818 BC acquired a number of assets associated with the TL business operations (the "TL Assets").

[78] Mr. Ross signed the TL Purchase Agreement on behalf of 818 BC.

[79] The plaintiff 0947797 BC Ltd. ("797 BC") is a B.C. company incorporated on August 13, 2012, at the direction of Mr. Ross by a member of his legal staff. Mr. Ross also directed the preparation of the articles of incorporation for 797 BC, which he signed. Upon incorporation, Mr. Ross was 797 BC's sole director, despite 797 BC's Register of Directors listing John Kwari and Mr. Ren as directors effective the same date. Mr. Ross remained one of 797 BC's directors until on or about October 14, 2014. On that date, Ms. Donald and Ms. Peng became directors of 797

BC. From incorporation until late 2014, 797 BC's company records office was maintained at RossLaw.

[80] The plaintiff 0947800 BC Ltd. ("800 BC") is a B.C. company incorporated on August 13, 2012, at the direction of Mr. Ross by a member of his legal staff. Mr. Ross also directed the preparation of the articles of incorporation of 800 BC, which he signed. From incorporation until late 2014, 8008 BC's company records office was maintained at RossLaw. Upon incorporation, Mr. Ross was 800 BC's sole director, despite 800 BC's Register of Directors listing Mr. Takoski and Daniel Hsu as being directors effective the same date. Mr. Ross remained one of 800 BC's directors until on or about October 14, 2014. On that date, Mr. Jesson, Mr. Little and Mr. Poon became directors of 800 BC.

[81] Both 797 BC and 800 BC were incorporated as part of the TL acquisition structure designed and implemented by Mr. Ross (collectively, with 818 BC, the "TL Purchasing Companies").

[82] Three other companies—Charles Dickens Pub Ltd. (in some documents "CDPL"), Sidney Cold Beer and Wine Store Ltd. (in some documents "SCBW"), and Victoria Ayr Port Hotel Ltd. (in some documents "VAPH") (collectively, the "TL Operating Companies")—were incorporated at the direction of Mr. Ross by a member of his legal staff around August 13 and 14, 2012, as part of the TL acquisition structure designed and implemented by Mr. Ross, to operate various ongoing businesses associated with the TL acquisition. Mr. Ross was a director of the TL Operating Companies from incorporation until about October 15, 2014 and their company records offices were maintained at RossLaw until April 2015.

O. The PKS companies

[83] The plaintiff 0928772 B.C. Ltd. ("772 BC") is a B.C. company incorporated on December 28, 2011, at the direction of Mr. Ross by a member of the RossLaw legal staff. Mr. Ross also directed the preparation of the bylaws of 772 BC. Upon incorporation, Mr. Ross was 772 BC's sole director, and remained its sole director until on or about February 15, 2013. 772 BC was the purchaser on all PKS

purchasing agreements from June 2012 to closing and was the sole principal borrower under the financing from used to purchase assets including interests in and related to certain strata lots in respect of Victoria City Strata Plan VIS6830 (the "PKS Assets").

[84] The plaintiff 0960416 B.C. Ltd. ("416 BC") was incorporated at the direction of Mr. Ross by a member of the RossLaw legal staff on or about January 18, 2013, along with the plaintiff 0960420 B.C. Ltd. ("420 BC"), the plaintiff 0960423 B.C. Ltd. ("423 BC"), the plaintiff 0960425 B.C. Ltd. ("425 BC"), and the defendant 0960429 B.C. Ltd. ("429 BC") (collectively, with 772 BC, the "PKS Purchasing Companies"). Mr. Ross served as 429's sole director up to February 15, 2013, at which point Mr. Little became an additional director. On January 18, 2013, 429 BC issued 100 Class A Common shares to RossLaw.

P. Defined terms for the Plaintiffs

[85] At times in these Reasons I refer to Cecilia, John, and Maria Kwari, Su-Min Hsu, Craig and Rose Little, Penny and Victor Peng, Gerry and Susan Poon, Matthew Takoski, James and Linda Jesson, and Shelby Donald, and their respective holding companies and family trusts collectively, as the "Individual Plaintiffs" for ease of reference. Where reference is made to the Individual Plaintiffs respecting a matter that arose after the death of either of Victor Peng or Rose Little, Individual Plaintiffs is to be understood to mean Penny Peng and Craig Little as executors of those plaintiffs' respective estates. Where reference is made to the Individual Plaintiffs in a context referencing statements made to or by them, those statements were made to or by the individuals.

[86] Cecilia and John Kwari, Su-Min Hsu, Craig and Rose Little, Penny and Victor Peng, Gerry and Susan Poon, James and Linda Jesson, and Matthew Takoski, all participated in both the TL and the PKS transactions, either personally or through their respective holding companies and family trusts. On matters relating only to the PKS transaction, for ease of reference at times in these Reasons I refer to those individuals and their respective holding companies and family trusts collectively, as

the “PKS Plaintiffs”. Where reference is made to the PKS Plaintiffs respecting a matter that arose after the death of either of Victor Peng or Rose Little, PKS Plaintiffs is to be understood to mean Penny Peng and Craig Little as executors of the estates of those plaintiffs. Where reference is made to the PKS Plaintiffs in a context referencing statements made to or by them, those statements were made to or by the individuals.

[87] Ms. Donald and Maria Kwari, with her husband Cyrus Ren, only participated in the TL transaction, through their respective holding companies and family trusts. For ease of reference at times in these Reasons I refer to Ms. Donald, Maria Kwari, and Cyrus Ren, and their respective holding companies and family trusts collectively as the “TL Plaintiffs”, recognizing that Cyrus Ren is not a plaintiff, but on the basis that he was Maria’s representative in many meetings with Mr. Ross owing to Maria’s health at the time. Where reference is made to the TL Plaintiffs in a context referencing statements made to or by them, those statements were made to or by the individuals.

[88] For ease of reference at times in these Reasons I refer to the Individual Plaintiffs, the TL Purchasing Companies, and the PKS Purchasing Companies (excepting the defendant 429 BC) collectively, as the “Plaintiffs”.

III. CREDIBILITY AND RELIABILITY OF THE EVIDENCE

[89] There are numerous material conflicts between the testimony given by Mr. Ross and by Ms. Ross, on the one hand, and the testimony offered by the Individual Plaintiffs and other witnesses who testified, both as part of the Plaintiffs’ case and as part of the case of the Defendants, as well as the documentary evidence tendered at trial, on the other. The conflicts include, but are by no means limited to, what Mr. Ross told the Individual Plaintiffs about various matters relevant to the TL and PKS transactions and the Rosses’ insolvency.

[90] Given my findings of fact regarding the reliability of the testimony and credibility of the witnesses are factors that influence my other findings of fact, I begin with a reliability and credibility analysis.

A. Applicable legal principles

[91] Reliability and credibility are related but distinct concepts: *Mather v. MacDonald*, 2016 BCSC 948 at para. 18, aff'd 2017 BCCA 323, citing *R. v. Perrone*, 2014 MBCA 74 at paras. 25–27, aff'd 2015 SCC 8.

[92] Credibility involves the assessment of the trustworthiness of a witness' testimony based on their sincerity, meaning their willingness to speak the truth as they believe it to be: *United States v. Bennett*, 2014 BCCA 145 at para. 23, leave to appeal to SCC ref'd, 35839 (30 October 2014), citing *R. v. Morrissey*, 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.). A witness whose evidence on a point is not credible cannot give reliable evidence on that point: *Bennett* at para. 23, citing *Morrissey* at 526. In a civil case, the starting point is often a presumption that a witness' evidence is truthful, but that presumption can be displaced: *Halteren v. Wilhelm,* 2000 BCCA 2 at para. 15, leave to appeal to SCC ref'd, 27786 (21 September 2000); *Hardychuk v. Johnstone*, 2012 BCSC 1359 at paras. 10–11.

[93] Reliability involves the assessment of the witness' ability to accurately observe, recall and recount the events in issue: *Bennett* at para. 23. A witness can be sincere and yet mistaken and their testimony unreliable, in full or in part: *Faryna v. Chorny,* [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). Unreliable evidence can include bare assertions without content or explanation, answers that are incomplete, and information that is selectively disclosed by a witness: *Bennett* at para. 26.

[94] Credibility cannot be considered in isolation, but rather is to be assessed in the context of all of the evidence: *Peters v. Brosseuk*, 2004 BCSC 239 at para. 7. In assessing the credibility and reliability of a witness' testimony, relevant factors include whether they had an opportunity to observe the events and the context in which that opportunity arose (e.g., was it in an unusual event, a stressful event, or a routine encounter?), the firmness of their memory, whether their evidence harmonizes with independent evidence the trier of fact accepts, whether their testimony given in direct and under cross-examination differs, whether their

testimony seems unreasonable, impossible, or unlikely, whether they have a personal interest in the matter, and, with caution, their demeanour while giving evidence: *Faryna* at 357; *Proctor v. Owen*, 2005 BCCA 538 at para. 7; *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186–187, aff'd 2012 BCCA 296.

[95] The evidence of a witness must be assessed for its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable": *Faryna* at 357; *Gichuru v. Smith*, 2013 BCSC 895 at para. 130, aff'd 2014 BCCA 414. A comprehensive assessment of credibility enables the Court to "satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth": *Faryna* at 357.

[96] In *Bradshaw,* Justice Dillon summarized a methodology for credibility assessment that I consider to be fair and efficient:

> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

B. Analysis

[97] The testimony of the Individual Plaintiffs was direct and responsive to the questions they were asked. They were not evasive. Their testimony was plausible, consistent but not identical, and was supported by the documentary evidence and the testimony of independent witnesses.

[98] In addition, the testimony of the Plaintiffs' witnesses, particularly but not only Dr. Brad Amson, Dr. Brian Draper, and Mr. Don McKnight, provided a cohesive and largely consistent version of events which aligned with the testimony of the Individual Plaintiffs who gave evidence on the same matters. I find them to be credible witnesses.

[99] Dr. Amson is a general surgeon in Victoria, B.C. Mr. Ross was his lawyer from 1992 until some time after the PKS transaction closed. Mr. Ross incorporated his professional medical corporation, his investment company, and the company records offices for both were maintained at RossLaw. Dr. Amson described Mr. Ross as his lawyer and friend. Dr. Amson gave direct, candid evidence. His answers left me with the impression he was genuinely saddened by the breakdown in the relationship between him and Mr. Ross in the years following the close of PKS. He did not avoid questions. He was careful not to be unkind about Mr. Ross when answering, but would not make concessions he felt were unwarranted.

[100] Dr. Brian Draper has been an oral surgeon in Victoria, B.C. since 1980. He was direct and firm about his dealings with Mr. Ross, but did not appear not hostile or angry. He took the time to read documents put to him and took care with his answers. I was left with the impression this was because he wanted all of his answers to be fully accurate, and not because he was taking time to formulate his answers to the questions asked.

[101] Mr. Don McKnight, an experienced Victoria lawyer, provided evidence by way of affidavit as part of the Plaintiffs' case and was cross-examined. Mr. McKnight gave direct answers to the questions asked. He was not evasive. His evidence was consistent and aligned with documents attached to his affidavit. Mr. McKnight denied the truth of parts of an affidavit Mr. Ross had sworn in another piece of litigation which attribute certain actions to Mr. McKnight. I find Mr. McKnight to have been a credible witness who provided reliable evidence which was not shaken, in the least, on cross-examination.

[102] I have no concerns that the evidence of the Individual Plaintiffs or the other witnesses who testified for the Plaintiffs, including Mr. Andrew Hashmi who worked on the TL and PKS transactions providing accounting support, Mr. Abbott who was a client and business associate of Mr. Ross, or Mr. Ren, was tainted by any collusion. While several of the Plaintiffs' witnesses' memories about minor peripheral matters had faded with the passage of time, they were candid about where their memories had faded and, with one exception, had good recall of important events and facts.

[103] The exception is the testimony of Ms. Hsu. I agree with the Defendants that Ms. Hsu was not a reliable witness given she testified that she did not have a memory about most things. Given her age and the passage of time, that is not surprising. Her testimony did not alter the overall factual matrix and so my finding that her evidence is not reliable does not play a significant role in the analysis and my overall findings of fact.

[104] Ms. Duarte testified as part of the Defendants' case. She gave direct, responsive answers to the questions asked and was confident in her manner. Ms. Duarte was not comfortable with some of Mr. Ross' legal practices, including the treatment of Mr. Takoski's $100,000, which I address later in these Reasons. I accept her evidence that her discomfort with that situation was one of the reasons she chose to leave RossLaw.

[105] Mr. McCrae and Ms. Sparling testified as part of the Defendants' case. Mr. McRae attended in response to a subpoena. Both had been very inexperienced when they began working at RossLaw. Both had very little—if anything—to which to compare Mr. Ross' approach to practice. Both were dependent on Mr. Ross for work. The combination of inexperience and financial dependency in the legal profession has the potential to put required professional and ethical standards at risk. Mindfulness of that risk, and diligence in the face of it, is required. However, I was impressed with the forthrightness of both of their evidence, which was plausible, logical, and which largely aligned with the documentary evidence and the evidence of the other witnesses I find to have been credible and reliable. They made

reasonable concessions and were candid about what they did and did not remember. They were each certain about certain facts that I find merit significant weight, which I will address later in these Reasons. I find them both to be credible witnesses who gave reliable evidence.

[106] Ms. Gable worked for Mr. Ross for many years and was loyal to him throughout that time. As was the case for Mr. McRae and Ms. Sparling, Mr. Ross' actions placed Ms. Gable in a very difficult situation. I accept her evidence, which aligned with the evidence of Mr. McRae and others, that Mr. Ross was a demanding and intimidating person. Ms. Gable acknowledged, albeit somewhat reluctantly, that as time passed she grew to suspect that Mr. Ross had acted inappropriately, for his own purposes and without Mr. Takoski's knowledge, in relation to $100,000 Mr. Takoski provided to RossLaw. While I do not condone her view at the time that it was not her place to do anything about her suspicions, her understanding appears to have been the product of her misplaced loyalty to Mr. Ross and intimidation by him.

[107] Mr. Ross is not a credible witness. His testimony was punctuated by long pauses at critical junctures. There were internal inconsistences in his testimony. His answers to many of the questions put to him, even during his direct evidence, were unresponsive and turned to lengthy descriptions of the efforts he had put into organizing the TL and PKS deals and his future plans for them rather than the information that had been requested. He testified about what he "believed" without providing any facts to ground that belief, even after being warned by the Court numerous times that such evidence would be given little or no weight. His testimony on key points, including what he told the Individual Plaintiffs, and when he did so, lacked detail, was filled with conclusions rather than facts, and was general to the point of vagueness, more so during his cross-examination than during his direct. In contrast, his testimony about what would have been an innocuous exchange with Ms. Gable, about the circumstances surrounding the receipt of Matthew Takoski's $100,000, contained significant detail, despite the fact that, according to his version of events, the nature of that exchange was of no great importance at the time, since an undocumented loan from a client was not something memorable to him, and the

fact that no concerns about Mr. Takoski's "missing" $100,000 were raised with him until more than six months after the money had been provided to RossLaw.

[108] Mr. Ross refused to make reasonable concessions, such as knowing that if RossLaw's bank balance exceeded its $5,000 overdraft protection (which it frequently did), there was a risk cheques would not be honoured. Mr. Ross' testimony about the financial circumstances of RossLaw was internally inconsistent and his memory selective, I find intentionally so. He contradicted himself many times in trying to explain documents that revealed RossLaw had negative cash balances in 2011 and 2012. He testified RossLaw would not write cheques that would not clear, which was untrue. His evidence was inconsistent with other documents I also find to be reliable. Mr. Ross refused to provide financial and other documents I find he knew were relevant to this action.

[109] The Court warned Mr. Ross numerous times that evidence from him about other people's states of mind, without providing the factual foundation for his belief, was not admissible. He continued to testify about what he believed others thought, without providing the facts upon which he based his view.

[110] Mr. Ross is not an unintelligent man. I do not believe he was unaware of the ethical and professional obligations imposed on him by the Law Society of British Columbia. Despite his intelligence, Mr. Ross' answers were frequently implausible and illogical.

[111] Mr. Ross was present in the courtroom throughout the entirety of the Plaintiffs' case. He took extensive notes during the testimony of all of the Plaintiffs' witnesses.

[112] I find Mr. Ross was intentionally careful with his language, giving answers that were so vague and so equivocal that often no clear answer emerged. During cross-examination I observed that trying to get a straight answer from him was like trying to grasp a cloud.

[113] Ms. Ross is also not a credible witness. Her testimony suffered from many of the same frailties as the testimony of Mr. Ross, including a memory I find was intentionally selective. In addition, there were inconsistencies between her trial testimony and the testimony she gave at her examination for discovery. Further, Ms. Ross testified the personal financial statement(s) she prepared, on which I find she knew the TL and PKS lenders would rely, was accurate. It was not. Her reasons for believing it was accurate were implausible. I will return to the personal financial statements of Ms. Ross later in these Reasons.

[114] With one exception, by the end of her cross-examination I had concluded I could not rely on Ms. Ross' testimony as being truthful. The exception is that where Ms. Ross made admissions adverse to the Defendants' interests, including, but not limited to, her admissions that at the time the TL transaction closed: (i) she could not afford to pay her required financial contribution, (ii) she did not pay the required contribution, and (iii) she did not tell any of the Individual Plaintiffs she had not paid that contribution, I believe those admissions.

[115] As a result, where there are conflicts, I prefer the testimony of any of the other witnesses, or the documentary evidence, over the evidence of either Mr. Ross or Ms. Ross.

[116] I wish to comment on another body of evidence that is relevant to my reliability and credibility analysis. There were "minutes" of many of the TL and PKS investor meetings, but there was no process or practice whereby the minutes were approved at the subsequent meetings. The Defendants' relied heavily on these minutes as part of their case and in their closing argument. However, the content of the minutes was influenced by Mr. Ross and, importantly, by Mr. Ross' desire to avoid references in the minutes to conflicts surrounding his actions and inactions. The minutes are helpful to identify the timing of some discussions but I find they are not reliable in all cases as an accurate account of what transpired or what was said, particularly where the inclusion or omission favours the Defendants.

IV. THE TL AND PKS INVESTMENTS

[117] I begin with an overview of the TL and PKS investment transactions.

A. The role of Andrew Hashmi

[118] Andrew Hashmi was born in Scotland in 1960 and qualified as a chartered accountant in Glasgow in 1985. He came to know the Rosses through Mr. Ross' parents, who were cousins of his mother-in-law. In 2000, Andrew and his wife, Marie Queen, now deceased, spent three months in Victoria and lived with the Rosses during that time. The four became good friends. Mr. Hashmi and his wife later moved to Victoria.

[119] Mr. Ross asked Mr. Hashmi to provide accounting support as Mr. Ross structured and implemented the TL and PKS transactions. Mr. Hashmi's role was to track the global amounts of money coming in and the global debt on each of the TL and PKS transactions and set up the cash flow operations. Mr. Hashmi did not know how much each investor was contributing and he was not responsible for monitoring whether investors made their individual contributions. Mr. Hashmi was not involved in developing or tracking the structure of either the TL or the PKS acquisitions.

B. The role of Kim Johnson

[120] Mr. Johnson was retained by Mr. Ross in connection with the TL and PKS transactions. Mr. Johnson took his instructions exclusively from Mr. Ross. Mr. Johnson's retainer was limited to receiving investors' money and tracking their equity. As described by Mr. Johnson, his role was to "provide an account which the money flowed through" to the vendor.

[121] As was the case with Mr. Hashmi, Mr. Johnson was not involved in documenting the structure of the TL or the PKS transaction. Mr. Ross did not give Mr. Johnson any document or information showing the relationship between the investors, or any list setting out what each investor was to pay on either project. Mr. Johnson relied on Mr. Ross to ensure there was sufficient money to be able to close; it was not his role to track who was obligated to pay what. As a result,

Mr. Johnson had no way to know if any of the investors did not make their required contributions before closing on either transaction. Mr. Ross was “the choir master”, with Mr. Johnson reporting to Mr. Ross on what amounts had been received from which investors. Only Mr. Ross knew which investors were required to pay what amount. Mr. Ross never disclosed to Mr. Johnson that any investor had not paid the amount required.

[122] The Individual Plaintiffs were not Mr. Johnson’s clients. Contrary to the July 3, 2012 Sidney Update document, which Mr. Ross instructed his staff to forward to the Individual Plaintiffs, Mr. Johnson had never been asked to, and did not provide “independent advise [sic] for the newly incorporated purchasing companies”.

C. Peter Saunders

[123] The TL investment opportunity was brought to Mr. Ross by Peter Saunders. Mr. Saunders is a Victoria businessman who testified as part of the Plaintiffs’ case. At the time of trial Mr. Saunders was semi-retired but continued to hold business interests in three liquor stores and a corner store.

[124] Mr. Saunders met Mr. Ross in 2007. Mr. Ross did various legal work for him, including drafting his family trust and assisting him with various liquor stores Mr. Saunders had purchased. The company records offices for Mr. Saunders’ companies were maintained at RossLaw.

[125] Mr. Ross was unaware of the TL opportunity when Mr. Saunders brought it to him sometime in 2010 or early 2011. Mr. Ross asked Mr. Saunders to get the financial statements and forward them to him, which Mr. Saunders did. Mr. Ross did not communicate with Mr. Saunders about the potential TL investment again until June 1, 2012. Instead, Mr. Ross reached out to the vendor, Conmac Enterprises Ltd., and began to negotiate with them directly without Mr. Saunders’ involvement or knowledge.

[126] Mr. Ross had been expressing interest in, and working towards negotiating the purchase of the TL Assets since at least October 17, 2011. On

November 22, 2011, Mr. Ross signed a letter of intent for the purchase of the TL Assets on behalf of 0720405 B.C. Ltd. (“405 BC”) for a purchase price of $16,700,000 (the “Signed LOI”). The Rosses owned and controlled 405 BC.

[127] Under the Signed LOI, the vendor and Mr. Ross (for 405 BC) agreed to proceed to promptly negotiate a formal purchase agreement and use reasonable efforts to execute that formal agreement at least 90 days prior to what was an anticipated March 12, 2012 closing date. The Signed LOI contemplated a $50,000 deposit upon execution of the formal agreement, with the deposit to be increased to $200,000 following the removal of conditions, at which time the deposit would become non-refundable.

[128] On May 29, 2012, Mr. Ross signed the TL Purchase Agreement on behalf of 818 BC (rather than 405 BC). Under the TL Purchase Agreement, for an aggregate purchase price of $16,620,000.00, 818 BC acquired the TL Assets.

[129] The TL Purchase Agreement required a $50,000 deposit to be paid within four business days of signing, $25,000 of which was non-refundable. A further $200,000 deposit was required to be provided within four business days of 818 BC satisfying or waiving 818 BC’s financing conditions, which had to be done no later than July 31, 2012. After 818 BC satisfied or waived the financing and other conditions (e.g., environmental review, franchise approvals), the entire $300,000 deposit was non-refundable. The TL closing date was August 31, 2012.

D. Mr. Ross’ presentation of the TL and PKS deals

[130] Beginning in late 2011 and early 2012, Mr. Ross began to approach some of the Individual Plaintiffs about participating in the TL and PKS investments with him. Mr. Ross promoted the TL and PKS investments to all of the Individual Plaintiffs as pooled investments, with each individual investor contributing a set amount of money, directly or through an investment vehicle, for each investment unit they acquired (an “Investment Share”), and all investors being treated equally. A half Investment Share was an option. The balance of the purchase price was to be financed.

[131] Mr. Ross told the Individual Plaintiffs that the investors would all be high-net-worth individuals for whom he had done tax planning work. He told them there were investors lined up to have the option of investing, and that only a fortunate few were being invited to participate. Mr. Ross told the Individual Plaintiffs this because he knew those facts were important to the them and that these representations would increase their trust and confidence in the TL and PKS investments and their belief that the money they invested would be secure. In turn, this would increase the likelihood they would want to participate.

[132] Mr. Ross described the structure of the deals only in a preliminary way, at a very high level; there was no discussion of the specific debt, equity distribution or structure of the transactions.

[133] Initially Mr. Ross told the Individual Plaintiffs that the cost of each TL Investment Share and each PKS Investment Share would be $600,000.

[134] At a meeting on May 30, 2012, Mr. Ross asked the Kwaris, the Hsus, and the Pengs to commit to the TL and PKS deals. At that meeting, Cecilia Kwari asked Mr. Ross whether his involvement would be that of an equal investor and whether he would have “skin in the game”, which Mr. Ross knew meant whether he was contributing his own money. Mr. Ross replied in the affirmative. At that meeting, Mr. Ross did not mention any intention or plan for him to obtain his Investment Shares in either the TL or PKS transactions without any financial contribution, an arrangement the parties referred to as “Founders’ Shares” in their testimony.

[135] Also on May 30, 2012, after the meeting, John Kwari sent an email to Mr. Ross advising that the Kwari Family Plaintiffs were interested in two Investment Shares in each of TL and PKS, and that Maria Kwari and Cyrus Ren were interested only in the TL deal and would take one Investment Share. The Kwari family then left for a family holiday out of the country.

[136] Mr. Ross’ presentation of the TL and PKS deals to the Jessons, Poons, and Ms. McDonald, mirrored his presentation to the Kwari Family Plaintiffs, Maria Kwari

and Cyrus Ren, and the Hsu and Peng Families: pooled investments, high-net-worth investors who were his clients, each individual investor would contribute a set amount of money, directly or through an investment vehicle, for each Investment Share, and be treated equally. There was no mention of Founders' Shares for the Rosses.

[137] At no time before the TL deal or the PKS deal closed did Mr. Ross disclose to any of the Individual Plaintiffs that (i) he, through 405 BC, had already previously optioned the TL Assets through an agreement with the then owners and incurred associated costs associated with the transaction, (ii) both deals were subject to financing, or (iii) walking away from the investments was an option.

[138] As the TL and PKS investments proceeded towards closing, there were meetings of the Individual Plaintiffs with respect to the TL and PKS transactions. At these meetings, there were no written documents describing the deals but rather Mr. Ross would provide information verbally and make notes on a whiteboard or a flipchart. By the next meeting Mr. Ross would have discarded any flipchart or whiteboard notes.

E. Mr. Ross' Founders' Shares

[139] There was no "one day" where the idea of Mr. Ross receiving Founders' Shares in TL and PKS, in exchange for providing legal services in relation to the TL and PKS transactions or at all, was presented collectively to the Individual Plaintiffs. Instead, each investor or investor group discovered this new development differently.

1. The Kwari, Peng and Hsu Families learn of the Founders' Shares

[140] On June 4, 2012, the Peng family and the Hsu family communicated their commitment to the PKS Parkside transaction and agreed to provide their $100,000 deposits in the coming days, as Mr. Ross had instructed. The Kwaris had given their commitment on May 30, 2012.

[141] Also on June 4, 2012, Mr. Ross caused Mr. McRae to send an email to John Kwari and David Hsu attaching a memo about PKS (the "June 4 PKS Memo"), which described the "general structure" of the purchase which would vary as it was "fine tuned". The June 4 PKS Memo included the following statement, without any accompanying explanation:

> There will be twelve shares[1] issued in each of the corporations, two founders shares held by Ross Investco and twelve shares issued to 12 investor corporations for $600,000.00 each aggregating $7,200,000.00.
>
> [Emphasis added.]

[142] The June 4 PKS Memo was the first reference to any Founders' Shares.

[143] On June 5, 2012, in reaction to the June 4 PKS Memo, John Kwari wrote to Mr. McRae asking how the "founders shares and investors shares interact", questioning what "Ross Investco" was, and asking whether each corporation would be split into twelve or fourteen parts.

[144] Mr. Ross caused and directed Mr. McRae to reply. That reply, in its entirety was as follows (the "First June 5 Email"):

> Ross Investco is Lindsay's family's numbered company. Parkside will be split in to 14 parts (with 12 investors each contributing $600k) and Sidney will be split into 12 parts (with 10 investors each contributing $600k).

[145] The First June 5 Email was the first disclosure of any information suggesting the possibility that Mr. Ross would not be contributing financially for his TL and PKS Investment Shares.

[146] After receiving the First June 5 Email, Mr. Kwari sent a further inquiry to Mr. Ross. Mr. Ross did not respond. Instead, he caused and directed Mr. McRae to respond on his behalf (the "Second June 5 Email"). Mr. Kwari's further inquiry, and Mr. Ross' response (via Mr. McRae) were as follows:

[1] The "shares" referenced in the June 4 PKS Memo refer to are what I have defined in these Reasons as Investment Shares.

> Based on Alex's response, I have a few questions about the share structure that I'm hoping you can provide some clarity around:
>
> 1. My current understanding is that the 2 founders shares for each deal will have equal ownership to the regular investor shares but will not contribute any cash to the deals? Is that correct?
>
> Yes.
>
> 2. Will the founders shares have any different rights to the regular shares? If so, what are they?
>
> No, however there will be two separate classes of preferred shares to ensure that the investors' PUC is $600k per share and on a sale it is reflected as $600k, whereas the founders shares will be taxable from a nominal PUC.
>
> 3. Are you contributing to the deal by buying investors shares in addition to the founders shares? That was my initial impression based on our discussions.
>
> Perhaps, depending on how the investors shares are subscribed. One possibility that Lindsay is anxious to have Peter Saunders involved in Sidney and if he is only do a ? share then Lindsay will contribute the other?.
>
> 4. For the two deals, how many shares have been spoken for?
>
> a. Parkside: 2.5 shares are remaining (accounting for the Kwari group at 4 shares and assuming Skyline commits formally)
>
> b. Sidney: 1.5 shares are remaining (accounting for the Kwari group at 5 shares)
>
> 5. When do you require the $100 K deposit for Parkside? I know the other family's are providing their deposits today.
>
> a. Parkside: by Thursday or Friday of this week. We confirm it is $100k per share
>
> b. Sidney: within a similar timeframe. We confirm it is $50k per share.
>
> Both deals are fully committed excepting the remaining shares that are being held for the most suitable investor (with engineering and construction expertise). If a suitable investor is not found there are others who have expressed strong interest from an investment perspective.
>
> [Mr. Ross' responses underlined for clarity.]

[147] Prior to the Second June 5 Email, there had been no previous discussion between Mr. Ross or anyone on his behalf, and the Kwaris, the Hsus, or the Pengs (collectively, the "Three Families") about Founders' Shares, or about Mr. Ross'

Investment Shares (or the corporate shares to be distributed to Mr. Ross' investment vehicles) being any different from the Investment Shares of the other investors on either deal. Up until that time Mr. Ross had presented to the Three Families that each investor's interests would be the same and Mr. Ross would be investing his own money in the deals.

[148] John Kwari shared the Second June 5 Email with the Hsu and Peng families as they were close. The Three Families were "caught off guard" by the Founders' Shares revelation. Mr. Ross did not tell the Three Families that not continuing with the TL or PKS investments was an option in light of the new and significant information about Founders' Shares.

[149] On June 6, 2012, while still away out of the country on holiday with his family, John Kwari wrote to Mr. McRae and Mr. Ross, copying David Hsu who was communicating for the Hsu and Peng families. In his email he asked Mr. Ross what was driving the timelines for deposit, which Mr. Ross had directed be provided that week for both deals, and asked whether the deposits could wait until the Kwaris were back in town the following Monday. John Kwari told Mr. Ross:

> To be frank, I think we were all caught off guard by the founders shares (as a substantial deal fee) and the fact that the investor group would not include a cash investment by a Ross Investment company since we were all under the impression that this would be the case. This changes the optics of the deal for me fairly significantly and we should have discussed this when we all met on Wednesday. Can we discuss this on Monday morning?
>
> I've cc'ed David on this e-mail since he's co-ordinating things on behalf of the Hsu's and Peng's.

[150] The Kwari Family Plaintiffs viewed their word that they would proceed—given on May 30, 2012—as having committed them to participate in the investments. Mr. Ross pushed on with the TL deal, intentionally nurturing their feeling of commitment. For example, despite Mr. Kwari's June 6 email, on the same date Mr. Ross caused an email to be sent to John Kwari and David Hsu, as well as Mr. Jesson and Mr. Saunders, attaching a TL memorandum, the executed TL Purchase Agreement, a PKS memorandum, and an executed PKS offer to purchase agreement, which Mr. Ross had signed on behalf of 772 BC on June 2, 2012, as

well as a TL appraisal document. These documents added to the understanding of the Three Families that they were committed to move forward with the TL and PKS deals and had no means of exit. Mr. Ross did not advise them otherwise.

[151] Mr. Kwari met with Mr. Ross shortly after his return from holiday to discuss the TL and the PKS investments and the idea of Mr. Ross receiving Founders' Shares in both investments (the "Post-Vacation Meeting"). During the first part of the Post-Vacation Meeting, Mr. Ross talked about the long history between himself and the Kwari family, and how Mr. Ross would never mislead them. Mr. Ross suggested Mr. Kwari's lack of awareness of the Founders' Shares was the result of a "miscommunication".

[152] There had been no miscommunication. While Founders' Shares may have been, as Mr. Ross testified "in the back of [his] mind", he had not disclosed anything about Founders' Shares to John Kwari before the First June 5 Email. The TL and PKS deals Mr. Ross had presented did not include Founders' Shares. Although Mr. Ross testified he "believed the topic [of Founders' Shares] would have come up", he was unable to point to or provide specifics of any communication, by him or anyone else on his behalf, conveying to any of the Individual Plaintiffs that the Rosses would be receiving Founders' Shares, prior to the First and Second June 5 Emails. Further, the First and Second June 5 Emails had not been sent to all of the Individual Plaintiffs.

[153] During the second part of the Post-Vacation Meeting, Mr. Ross provided a two-pronged justification for his receiving Founders' Shares: first, that Mr. Ross had found the TL deal (he did not mention Mr. Saunders) which would result in certain savings, and second, that Mr. Ross would be "covering the legal". Mr. Ross did not mention any exclusions to the legal costs that he would be covering. Given Mr. Kwari and Mr. Ross were discussing both the TL and the PKS deals, and Mr. Ross' Founders' Shares were going to be in both the TL and PKS investments, and the fact that Mr. Ross did not say anything at that meeting that suggested he was only talking about covering the legal in relation to one of the deals, Mr. Kwari

understood Mr. Ross' contribution for his Founders' Shares on both deals would be justified by him covering the legal costs associated with both transactions.

[154] At the end of the Post-Vacation Meeting, Mr. Kwari still trusted Mr. Ross and was confident Mr. Ross would not act to the detriment of him and members of his family.

[155] Following the Post-Vacation Meeting, the Three Families met with Mr. Ross (the "Mid-June Meeting"). The conversation was not neutral; Mr. Ross was trying to convince the investors to move forward with the TL and PKS investments.

[156] At the Mid-June Meeting, Mr. Ross repeated what he had said to John Kwari earlier—that the Three Families must have misunderstood about the Founders' Shares—and told them Founders' Shares had always been the intention. Again, there had been no miscommunication or misunderstanding on the part of the Three Families. Mr. Ross had not mentioned the ide of Founders' Shares to the Three Families to that point, save for the First and Second June 5 Emails. Mr. Ross also repeated the same two-prong justification for his Founders' Shares at the Mid-June Meeting – covering the legal on both deals.

[157] At the Mid-June Meeting, Cecilia told Mr. Ross "I do not want any more surprises".

[158] The Three Families relied on Mr. Ross' opinion and advice in assessing whether Mr. Ross' covering of legal fees on each of the two deals provided "good value" for a $1.2 million investment in each transaction (since Mr. Ross was to receive two Investment Shares as Founders' Shares), such that it would align with the Investment Share price ($600,000 at that point) that each other investor was contributing.

[159] Relying on his advice in that regard, and on the understanding that Mr. Ross would be covering all of the legal costs on both transactions, and because of the longstanding relationship with, and trust in, Mr. Ross, the Three Families made the decision to continue on with their respective participation in the TL and PKS deals.

The Founders' Share arrangement Mr. Ross and the Three Families discussed was not reduced to writing.

2. Mr. Takoski learns of the Founders' Shares

[160] When Mr. Ross first discussed the TL and PKS investments with Mr. Takoski, Mr. Ross said he would be a participating investor and did not mention his participation would be without any financial contribution.

[161] Some time later, Mr. Ross asked whether Mr. Takoski thought it would be fair for Mr. Ross to acquire his Investment Shares in the TL and PKS deals based on non-monetary contributions he would be making to the transactions. Mr. Ross told Mr. Takoski that because he had "found the [TL] deal" and would be doing the negotiations, this meant a savings of commercial real estate fees which he estimated to be $550,000–$600,000. Mr. Ross also told Mr. Takoski that he would be doing "all the legal work". Mr. Takoski understood "all the legal work" to mean all the legal work in perpetuity, based Mr. Ross' hourly billing rate of $450, and the need to reach a $2.4 million equity position for his two Investment Shares in both the TL and PKS investments in order to provide parity in value contributed to the investments by the cash contributing investors. Mr. Ross did not mention to Mr. Takoski any exceptions to the legal work he would be covering, including any exception for disbursements or for the time RossLaw staff worked on either file. The fact that Mr. Ross was asking Mr. Takoski for his opinion about such an arrangement, left Mr. Takoski with the impression that no decision had yet been made with respect to Mr. Ross relying on non-monetary consideration for payment of his Investment Shares. Mr. Takoski did not agree to a Founders' Share arrangement during that conversation.

[162] Mr. Ross did not suggest to Mr. Takoski that his legal expertise alone, without the performance of legal services, was justification for Mr. Ross to receive Founders' Shares. Nor would such expertise have provided any justification, given other investors also had expertise—including business operations acumen and Mr. Takoski's own lengthy history in the hospitality industry—which they were

bringing to the table without receiving any “credit”. The experience and expertise of the other investors was acknowledged in a June 4, 2012 memo describing the PKS investment “participating group” as having been “selected based upon experience, ability to be involved in accounting, business management and consistent financial objectives”. In other words, each of the investors was represented as bringing some expertise to bear for the success of the investment, not just Mr. Ross.

[163] Mr. Takoski only became aware that Mr. Ross was receiving Founders’ Shares around the time the TL transaction closed. Mr. Takoski understood the justification for Mr. Ross’ Founders’ Shares was that Mr. Ross would be “covering the legal”, as Mr. Ross had canvassed with him, and which Mr. Takoski understood meant in perpetuity. Mr. Ross’ Founders’ Shares in TL and PKS were acceptable to Mr. Takoski on that basis. The Founders’ Share arrangement Mr. Ross and Mr. Takoski discussed was not reduced to writing.

3. The Littles learn of the Founders’ Shares

[164] Mr. Little learned about Mr. Ross’ TL Founders’ Shares from Mr. Takoski, and also learned from Mr. Takoski of the stated justification, being Mr. Ross’ provision of legal services. At a meeting of the PKS investors around the time of the TL close, Mr. Little had a conversation with Mr. Ross about his obtaining Founders’ Shares for PKS in exchange for covering the legal costs. Although Mr. Little struggled with the sufficiency of the legal costs as justifying the value of the Founders’ Shares, Mr. Little felt he had to accept the arrangements given he was coming to the investments late.

4. Ms. Donald learns of the Founders’ Shares

[165] It was only very close to the TL closing that Ms. Donald learned, either from Mr. Ross or from Mr. Hashmi, that Mr. Ross did not plan to contribute cash for what Ms. Donald then understood was Mr. Ross’ single TL Investment Share, and that his Investment Share would be received as a free Founders’ Share.

[166] Mr. Ross justified receiving a single TL Founders' Share to Ms. Donald through his finding of the TL deal, which meant no realtor fee, and his coverage of the legal costs associated with the TL transaction. Ms. Donald testified, and I find, it was "absolutely incorrect" that the only justification offered by Mr. Ross was his legal knowledge that he was bringing to the table in general, or his legal work performed to date. Mr. Ross did not say there would be any exceptions to what would fall within the scope of the legal work he would be covering: for example, that "covering the legal" did not include disbursements or legal work done by others at RossLaw. Ms. Donald was confident in her recollection that Mr. Ross told her he would be contributing legal services on the TL deal in exchange for his Founders' Share, and not the PKS deal, because she had quickly decided she would not be participating in the PKS investment. Her conversations with Mr. Ross were only about the TL investment transaction.

[167] A week before the TL closing, and after she had provided her $325,000[2] deposit through Larkdowne Consulting Ltd. for her one half Investment Share and the TL purchase financing had been put in place, Ms. Donald learned that Mr. Ross was in fact receiving two Investment Shares free as Founders' Shares, instead of one, as Mr. Ross had previously advised her. Feeling like she had no power to object, or any alternative options, Ms. Donald reluctantly decided to proceed, on the understanding that Mr. Ross' Founders' Shares would be in exchange for his providing all the legal services in relation to TL as he had told her. The Founders' Share arrangement Mr. Ross and Ms. Donald discussed was not reduced to writing.

5. Mr. Ross never told the Poons about the Founders' Shares

[168] Mr. Ross never told the Poons that the Rosses were receiving, or had received, Founders' Shares in the TL and PKS investments in lieu of any financial contribution. The Poons were unaware of that fact until after the close of PKS.

[2] By this point in time the Investment Share price had increased, which is addressed later in these Reasons.

6. Mr. Ross never told the Jessons about the Founders' Shares

[169] Mr. Ross never told the Jessons that the Rosses were receiving, or had received, Founders' Shares in the TL and PKS investments in lieu of any financial contribution. The Jessons were unaware of that fact until after the close of PKS.

7. The Evolution of Mr. Ross' narrative regarding his Founders' Shares

[170] There was an evolution of Mr. Ross' narrative respecting his participation in the TL and PKS deals. At first, he represented that he was investing his own cash in both deals. Later, when the Founders' Shares were discovered by some of the investors, Mr. Ross attempted to suggest there had been a miscommunication and that Founders' Shares had always been part of the plan. When some of the Individual Plaintiffs raised concerns with his receiving Founders' Shares, Mr. Ross added a justification for his Founders' Shares, by explaining there would be savings on brokers fees on the TL transaction and because he had brought the TL investment to them, and because he would "cover the legal" on both transactions. As I address later in these Reasons, when the TL Secret Billings and the PKS Secret Billings (as herein defined) were discovered by the Individual Plaintiffs after the PKS transaction had closed, Mr. Ross' narrative changed again, to be that there had been exceptions to the legal costs he had agreed to cover.

[171] Nothing with respect to the basis for Mr. Ross receiving Founders' Shares was ever put in writing.

F. Mr. Saunders' $50,000

[172] On June 1, 2012, Mr. Ross contacted Mr. Saunders and told him he had been able to work out a deal involving TL and that he was looking for investors. Mr. Ross asked Mr. Saunders if he wanted to participate, gave him some rough numbers, and told Mr. Saunders he required $50,000 from Mr. Saunders right away, that day if possible. Mr. Saunders brought Mr. Ross the requested $50,000 that day, on the understanding was that the money would be held in trust until Mr. Saunders had

received and evaluated the paperwork supporting the transaction and had decided whether to participate in the TL investment. Before accepting Mr. Saunders' money, Mr. Ross did not disclose to Mr. Saunders that Mr. Ross intended to structure the TL transaction in such a way that Mr. Ross would obtain Founders' Shares.

[173] After learning that Mr. Ross intended to receive Founders' Shares for the TL transaction, and that Mr. Ross was not willing to allow Mr. Saunders to participate on the same basis, even though Mr. Saunders had found the deal, Mr. Saunders decided he would not participate in the TL investment. Mr. Saunders asked for a refund of his $50,000.

[174] Mr. Saunders contacted Mr. Ross' office and asked for a refund of his trust money, and was told it would be forthcoming. A week passed and Mr. Saunders had still not received his $50,000 back. Another week passed and he made a further inquiry. Mr. Saunders did not receive his trust money back until four weeks after he had provided it, around July 20, 2012.

[175] Mr. Ross used the $50,000 Mr. Saunders had provided him in trust to provide a non-refundable deposit on the TL purchase, without advising Mr. Saunders he was going to do so, without any notice that the deposit was non-refundable, and without Mr. Saunders' permission. Mr. Ross did not disclose to the Individual Plaintiffs that he had used money received from an uncommitted investor to pay the TL acquisition deposit, a portion of which was non-refundable.

[176] Mr. Saunders' expertise with liquor store investments was well known to a number of the Individual Plaintiffs to whom Mr. Ross presented and promoted the TL investment, including Ms. Donald. Mr. Ross promoted Mr. Saunders' experience and participation in the TL transaction because he was aware those facts would increase the Individual Plaintiffs' confidence in the TL investment.

[177] When Mr. Saunders decided not to participate in the TL investment, he also told Mr. Hashmi to remove him from the potential TL investors' group email. On Mr. Ross' instructions, that was not done. As late as August 23, 2012, Mr. Saunders

continued to be listed on the TL investors' group email used by RossLaw on Mr. Ross' instructions in order to create the appearance to the Individual Plaintiffs that Mr. Saunders was continuing to participate in the TL investment.

[178] I find Mr. Ross gave those instructions in order to conceal from the Individual Plaintiffs the fact that Mr. Saunders was not going to invest in TL, because he was aware Mr. Saunders' participation was a material fact for them. Mr. Ross was concerned that if the Individual Plaintiffs learned of this development it could jeopardize his ability to finance and close the TL transaction to which he had committed himself via the TL Purchase Agreement.

G. The TL Investment Share price is increased

[179] In August 2012, as the TL closing was quickly approaching, Mr. Ross advised the Individual Plaintiffs that one investor had dropped out, with the result that there was a $600,000 shortfall in the cash deposit for the TL transaction. Nothing was presented in writing to the Individual Plaintiffs about what that additional contribution amount would be before a meeting was held to discuss the issue. At the meeting, Mr. Ross presented two options: try to attract another investor, or increase the price for each Investment Share by $50,000 to cover the shortfall. If any calculations had been done, they had been done by Mr. Ross, and the Individual Plaintiffs had no means whereby to verify their accuracy. Mr. Ross did not present walking away from the TL transaction as an option. As explained by several of the Individual Plaintiffs, they understood it was "too late to go back" and that "they had to figure out how to go forward". Mr. Ross did not advise them differently.

[180] At the meeting, as part of the discussion, Mr. Ross acknowledged he would also have to pay the extra $50,000 per Investment Share for his two TL Founders' Shares to make up the contribution that the TL investor shortage had created. Based on that representation, the two options presented to them, and the late date at which Mr. Ross conveyed the information about a TL investor purportedly dropping out, which made it impossible to vet an additional investor, the Individual Plaintiffs decided to eliminate one Investment Share and "pick up the slack" by contributing an

additional $50,000 per each of the remaining Investment Shares. Since Mr. Ross was participating in the TL investment with his two Investment Shares (via his two TL Founders' Shares), this decision meant the Rosses were required to pay $100,000 prior to closing in order to fulfil their financial obligations associated with participating in the TL investment, which Mr. Ross acknowledged.

[181] I find no TL investor "dropped out". Instead, Mr. Ross had not been able to secure all the investors he had previously represented to the Individual Plaintiffs would be participating, notably Mr. Peter Saunders.

[182] Mr. Ross did not tell the Individual Plaintiffs that Peter Saunders' money had been returned to him, at Peter Saunders' request, four days before Mr. Ross had accepted financing from CIBC.

H. The PKS Investment Share price is increased

[183] On May 23, 2012, Mr. Ross, on behalf of 405 BC as purchaser, signed an offer to purchase the PKS Assets for $25,000,000 from Grant Thornton Limited as the Court-appointed receiver. The offer was conditional on Court approval and on 405 BC obtaining $19,000,000 in financing within 60 days of the offer being accepted. The offer to purchase required an initial deposit of $250,000 be paid within 48 hours of the offer's acceptance and an additional deposit of $2,250,000 on the removal of conditions.

[184] Based on feedback Mr. Ross received from representatives of Grant Thornton, on June 2, 2012, this time on behalf of 772 BC as purchaser, Mr. Ross signed a second offer to purchase the PKS Assets, which was accepted. When financing was not in place by the required date, the offer lapsed. At the request of Mr. Ross the deposit was not returned, pending negotiation of a further PKS purchase agreement.

[185] On September 14, 2012, Mr. Ross caused a memo to be sent to the PKS Plaintiffs advising them the PKS Investment Share price had been increased from $600,000 to $670,000, resulting in an aggregate cash contribution of $8,040,000

towards the purchase, with an additional $17,000,000 in financing to be provided by the British Columbia Investment Management Corporation (“bcIMC”), for total financing commitment of just over $25,000,000. The reason for the increase in the PKS Investment Share price was not explained in the memo. No calculations explaining the increase were provided.

[186] However, in late November 2012, a further offer to purchase the PKS Assets was signed by Mr. Ross on behalf of 772 BC, and accepted by Grant Thornton on December 7, 2012. The November 2012 offer had a reduced purchase price of $23,000,000. The $23,000,000 figure became the final purchase price for the PKS Assets.

[187] Nonetheless, on December 24, 2012, Mr. Ross caused Ms. Sparling to send an email to the PKS Plaintiffs attaching the executed PKS purchase documents, setting out the “funds that will be required to close” from each of them, and advising that those funds were due by January 15, 2013 (the “Christmas Eve Email”). The Christmas Eve Email advised that Dr. Amson’s participation was “not contemplated” and that the memo “would need to be updated pending his participation”. The “due on closing” document was the very last page of the 120 pages of attachments to the Christmas Eve Email and reflected yet a further increase in the PKS Investment Share price, this time to $741,880.33. Again, the basis for the amount of the PKS Investment Share increase was not explained and no calculations were provided.

[188] The amounts due document in the Christmas Eve Email noted that MWW had not yet paid any money towards the PKS investment and that it owed $105,982.90. Again, the basis of that amount, and why MWW would not be paying the entire PKS Investment Share increase over the original $600,000 price (which would have meant an obligation of almost $300,000) was not explained. At a meeting in January or February 2013, Mr. Ross told the PKS Plaintiffs that prior to the closing, several anticipated investors had not come forward and that this had resulted in a shortfall and the resulting price increase referenced in the Christmas Eve Email, which needed to be carried by the other PKS investors, increasing each of their

contributions. Mr. Ross never advised the PKS Plaintiffs prior to the PKS closing that they had any other option.

[189] What followed the Christmas Eve Email was a scramble on the part of the PKS Plaintiffs. The revelation that the number of investors in PKS might be changing, and the further increase in the Investment Share price was a source of significant concern.

I. Mr. Ross failed to prepare shareholders' agreements as promised in advance of the TL and PKS closings

[190] As part of the legal services on both the TL and the PKS transactions, Mr. Ross was supposed to, and told the Individual Plaintiffs that he would, prepare shareholders' agreements. Mr. Johnson had no involvement in the drafting of any potential shareholders' agreement related to either TL or PKS, nor was he asked to present any potential shareholders' agreement to the investors on either project.

[191] Mr. Ross never explained to the Individual Plaintiffs either before the close of the TL transaction or the close of PKS, why it was so important that these agreements be in place before the deals closed, or the potential problems that could flow from not having shareholders' agreements in place.

[192] No shareholders' agreement was put in front of the Individuals Plaintiffs until a first draft was circulated just before closing, with no explanation or advice, which did not permit the most of the Individual Plaintiffs sufficient time to review it. Mr. Little tried to review that first draft, and replied with "a number of corrections" but Mr. Ross never replied. The TL transaction closed without a shareholders' agreement in place.

[193] Mr. Ross did not even prepare a draft of a shareholders' agreement on PKS. Although a June 4 PKS memo advised that "there will be a shareholders agreement executed by all parties which will have a form much like the one attached", no shareholders' agreement was attached to that memo.

[194] Later, Mr. Ross was unwilling to sign a shareholders' agreement on either transaction. The absence of shareholders' agreements on TL and PKS has been disadvantageous for the Plaintiffs but advantageous for the Defendants.

V. LAWYER-CLIENT RELATIONSHIPS

[195] The lawyer-client relationship is presumptively fiduciary in nature. Lawyers have a duty of undivided loyalty to their clients during the course of the lawyer's retainer: *R. v. Fleetham*, 2009 BCCA 379 at para. 38. The hallmark of a fiduciary relationship is that one party is dependent on, or in the power of, the other. Fiduciary obligations imposed on lawyers are a recognition that (i) the lawyer has the ability to exercise discretion and power, (ii) the lawyer can unilaterally exercise that discretion and power in a way that affects the client's legal interests, and (iii) an overlap exists between the client's vulnerability to the exercise of the lawyer's discretion and power and their concurrent need to repose their trust and confidence in their legal advisor: *Frame v. Smith*, [1987] 2 S.C.R. 99, 1987 CanLII 74 at para. 60. The vulnerability that is inherent in the nature of the lawyer-client relationship is an important focus of the analysis where the fiduciary obligations of lawyers are at issue: *Galambos v. Perez*, 2009 SCC 48 at para. 68.

[196] The agreement between solicitor and client respecting services, whether it is in writing or oral, is typically referred to as a "retainer": *Stewart v. Canadian Broadcasting Corp*., 150 D.L.R. (4th) 24, 1997 CanLII 12318 (O.N.S.C.) at para. 47. When a lawyer is retained by a client, the scope of the retainer is governed by contract but the solicitor-client relationship is overlaid with fiduciary responsibilities imposed as a matter of law, which may exceed the parties' contractual bargain: *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at paras. 34–35. The fiduciary duties owed by a lawyer to their client are parameters within which the lawyer performs the work for which they have been retained; they are terms of the retainer contract.

[197] The law distinguishes between former clients and current clients. A lawyer's main duty to a former client is to refrain from misusing confidential information. That aspect of the lawyer's duty of loyalty—the duty of confidentiality—continues after the

retainer ends: *Fleetham* at para. 38. Other aspects of a lawyer's duty of loyalty may, in very limited circumstances, also continue after the retainer ends: *Sandhu v. Mangat*, 2018 BCCA 454 at para. 33.

[198] With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation: *Canadian Pacific Railway v. McKercher LLP*, 2013 SCC 39 at para. 23. Not every legal claim arising out of a fiduciary relationship, including that between a solicitor and client, will give rise to a claim for a breach of fiduciary duty. A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary: *Galambos* at paras. 36–37. The obligations of a fiduciary must be assessed in the context of the contract giving rise to those duties: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 141.

[199] Where, as here, it is alleged a lawyer acted while in a conflict of interest, the first question is what duty the lawyer owed to the client alleging the conflict; the second question is whether the lawyer owed a duty to another client, or held a personal interest, that conflicted with the first duty: *Strother* at para. 132. The starting point for the analysis is determining what the lawyer and client have agreed the lawyer will do and on what terms, examining the written retainer agreement where one exists or, if not, the oral terms of the retainer agreement: *Strother* at para. 134. The same is true where other breaches of a lawyer's fiduciary duty are alleged. Therefore, a threshold question in determining the extent of the fiduciary duties Mr. Ross owed to the Plaintiffs in relation to the TL and PKS acquisitions is whether he was retained by the Individual Plaintiffs in respect of those transactions. Mr. Ross argues he was not. The Individual Plaintiffs argue that he was.

A. Applicable legal principles governing the formation of solicitor-client relationships

[200] A lawyer-client relationship may be established without formality: *Milverton Capital Corp. v. Thermo Tech Technologies Inc.,* 2002 BCSC 773 at para. 74, citing

with approval *Jeffers v. Calico Compression Systems*, 2002 ABQB 72 at para. 8. In *Milverton*, Justice Neilson adopted the following indicia at para. 74 from *Jeffers* as being relevant to the issue of whether a solicitor-client relationship exists, noting not all indicia had to be present:

(a) a contract or retainer;
(b) a file opened by the lawyer;
(c) meetings between the lawyer and the party;
(d) correspondence between the lawyer and the party;
(e) a bill rendered by the lawyer to the party;
(f) a bill paid by the party;
(g) instructions given by the party to the lawyer;
(h) the lawyer acting on the instructions given;
(i) statements made by the lawyer that the lawyer is acting for the party;
(j) a reasonable expectation by the party about the lawyer's role;
(k) legal advice given; and
(l) legal documents created for the party.

[201] Where a lawyer fails to take steps to set out the scope of the services for which they have been retained in a written retainer, the scope of the retainer may be left ambiguous. When the scope of the retainer is unclear, the Court "should not strain to resolve the ambiguities in favour of the lawyer over the client": *Strother* at para. 40.

[202] The overarching question is whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party: *Law Society of BC v. Spears*, 2017 LSBC 29 at para. 43.

B. Analysis and conclusion

[203] Based on their interactions with Mr. Ross, the Individual Plaintiffs understood Mr. Ross was their lawyer for these transactions. From an objective standpoint, a reasonable person in the position of the Individual Plaintiffs, with knowledge of all the surrounding facts, would have formed the same conclusion.

[204] Prior to the TL and PKS transactions, Mr. Ross had been in a solicitor-client relationship with each of Individual Plaintiffs. Mr. Ross continued to actively represent several of the Individual Plaintiffs during the time period beginning when Mr. Ross began engaging with each of the Individual Plaintiffs about the TL and PKS investments and ending shortly after the PKS transaction closed (the "Relevant Period"). As a result of the work Mr. Ross did for the Individual Plaintiffs, he was aware of all of their assets and their financial situations.

[205] Mr. Ross was also in a solicitor-client relationship with several of the Individual Plaintiffs' holding companies during the Relevant Period based on his ongoing active representation of them through the preparation of their annual corporate returns. Those relationships are important facts because they are the context within which the relationships between the Individual Plaintiffs and Mr. Ross relative to the TL and PKS transactions were formed.

[206] Mr. Ross held numerous meetings with the Individual Plaintiffs about the TL and PKS transactions. He directed RossLaw statements of account for work done on TL and PKS, for the benefit of the Individual Plaintiffs, to be paid from trust funds that the Individual Plaintiffs had provided. He created legal documents for the Individual Plaintiffs, their holding companies, and their family trusts. He gave them legal advice about how to structure the TL and PKS transactions. Mr. Ross promised some of the Individual Plaintiffs that he would forego legal fees on the TL and PKS transactions in exchange for his Founders' Shares. If the Individual Plaintiffs were not obliged to pay RossLaw legal fees for the TL and PKS transactions, that representation would have held no financial value for them.

[207] I agree with view expressed by the presiding Hearing Committee in *Law Society of Alberta v. Wilson*, 2016 ABLS 51 at para. 101:

> In the context of the formation of a solicitor-client relationship, the obligation for sorting out the relationship is also the lawyer's. When a non-lawyer is meeting with a lawyer, the non-lawyer generally brings to that meeting a non-lawyer's understanding of privilege, confidentiality, and retainers. The lawyer is expected to have knowledge of privilege, confidentiality, retainers, conflicts and ethical obligations existing under the Code of Conduct. The lawyer must be responsible for appreciating the significance of information he or she

> receives, which might be characterized as confidential or is related to a current or pending controversy or dispute. The lawyer, not the non-lawyer, has a positive obligation to clarify the scope of the relationship which is established with every person the lawyer meets.

[208] Where a pre-existing solicitor-client relationship exists, in my opinion it is even more important that the responsibility for clarifying any limitation in the scope of the relationship fall to the lawyer. Mr. Ross failed to do so.

[209] Mr. Ross argues the Individual Plaintiffs were told he was not acting for them in relation to the TL and PKS transactions, and relies on "independent legal advice" disclaimers to support his position. The inclusion of a statement that "each of you are required to obtain independent legal and accounting advice" and that RossJohnson "will represent the corporate group [which was not defined] but none of the individual shareholders [also not defined] for this transaction" was buried at the bottom of a few documents sent along with a multitude of others, attached to emails sent by an articled student. Moreover, not all of the Individual Plaintiffs received the emails, and it was not brought to the attention of those who did. Overall, Mr. Ross' attempt at a disclaimer was woefully insufficient in the context of all of the circumstances to effectively communicate to the Individual Plaintiffs that he was not acting as their lawyer on the TL and PKS transactions. His testimony that, in his mind, he meant he was only representing the TL Purchasing Companies and the PKS Purchasing Companies, does not alter my conclusion since this was never effectively communicated to the Individual Plaintiffs.

[210] The lawyer-client relationship is presumptively fiduciary in nature and the lawyer bears the burden of rebuttal: *DeJesus v. Sharif*, 2010 BCCA 121 at para. 53; *Galambos* at para. 36. Mr. Ross has not rebutted the presumption that his relationship with the Individual Plaintiffs in relation to the TL and PKS transactions was that of a lawyer and client and fiduciary in nature. Mr. Ross was the lawyer representing the Individual Plaintiffs in the TL transaction and the PKS Plaintiffs in the PKS transaction. At trial he did not dispute he was acting for the TL Purchasing Companies and the PKS Purchasing Companies.

[211] A reasonable person in the position of the Individual Plaintiffs with knowledge of all the facts would reasonably form the belief that Mr. Ross was acting for them. I find the Individual Plaintiffs retained Mr. Ross, at his invitation, as their solicitor to (i) acquire their respective ownership interests in the TL and PKS acquisitions, (ii) structure those acquisitions in a manner that minimized tax liability, in a way that was equal for all investors, and (iii) protect their legal interests in the course of doing so. Mr. Ross was also in a solicitor-client relationship with the TL Purchasing Companies and the PKS Purchasing Companies. The relationship between all of the Plaintiffs and Mr. Ross was that of lawyer and client.

[212] Mr. Ross had expertise in the areas for which his services had been retained by the Individual Plaintiffs. Although the Individual Plaintiffs were successful business people, they were not knowledgeable about tax planning and complex corporate transactions. The Individual Plaintiffs relied on Mr. Ross' knowledge and placed their trust in him to look after their interests in the structuring and implementation TL and PKS acquisitions. Mr. Ross used his knowledge of the Individual Plaintiffs' financial means, gained through his previous legal representation of them, as the basis for approaching them about the TL and PKS transactions. Mr. Ross leveraged that information and the trust and confidence the Individual Plaintiffs had placed in him to secure their participation in the TL and PKS investments. Mr. Ross further encouraged the Individual Plaintiffs' participation by telling them his other wealthy clients, for whom he had done tax planning, would also be investing. Mr. Ross was aware of the vulnerability created by the degree to which the Individual Plaintiffs relied on his expertise and their expectation of his candour in relation to the TL and PKS transactions.

[213] The Individual Plaintiffs felt confident that, as their lawyer, Mr. Ross would not take advantage of them. Mr. Ross was aware of their reliance, trust, and confidence. Using his expertise, and the confidence and trust the Individual Plaintiffs placed in him, Mr. Ross created an environment wherein he was able to conceal decisions that significantly and adversely affected the Individual Plaintiffs' legal interests.

VI. THE NATURE AND EXTENT OF A LAWYER'S FIDUCIARY DUTY

[214] The courts have inherent supervisory jurisdiction over both proceedings and, also, lawyers—with the latter being officers of the court whose conduct in legal proceedings may affect the administration of justice: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1245, 1990 CanLII 32. In the course of their supervisory function, the courts develop the fiduciary principles for the proper administration of justice, which also govern lawyers in their duties to clients: *MacDonald* at 1245; *McKercher* at para. 14.

[215] Provincial legislatures have conferred on law societies the power to establish regulations for their member lawyers, who have throughout much of Canada's history been a self-governing profession[3]: *MacDonald Estate* at 1244. Law societies are responsible for the good governance of the legal profession and, in pursuit of that goal, establish general rules applicable to all members of the profession to (i) ensure ethical conduct, (ii) protect the public, and (iii) provide for the discipline of lawyers who breach the standards of conduct a law society has adopted: *McKercher* at para. 15. These rules must be taken as expressing the collective views of the profession as to the appropriate standards to which the profession should adhere: *MacDonald Estate* at 1244.

[216] In their respective roles, law societies and the courts "may properly have regard for the other's views", yet "[l]aw societies are not prevented from adopting stricter rules than those applied by the courts" and courts are not "bound by the letter of law society rules": *McKercher* at para. 16. However, as Chief Justice McLachlin observed in *McKercher* at para. 16, citing the Supreme Court of Canada's earlier decision in *MacDonald Estate* at 1246, "an expression of a professional standard in a code of ethics ... should be considered an important statement of public policy".

[3] The trial of this action and the events at issue occurred before the introduction of Bill 21, *Legal Professions Act*, S.B.C. 2024, c. 26 which amended the *Legal Profession Act*, S.B.C. 1998, c. 9 including its governance structure, and which received Royal Assent on May 16, 2024.

[217] During the Relevant Period, the practice of law in British Columbia was regulated, and the lawyers who practiced were governed, in accordance with the *Legal Profession Act,* S.B.C. 1998, c. 9 [*LPA*] as it existed during that period. The *LPA* continued the Law Society of British Columbia ("LSBC"): s. 2(1). The object and duty of the LSBC is to uphold and protect the public interest in the administration of justice, including by regulating the practice of law, ensuring the independence, integrity, honour and competence of lawyers, and establishing standards for the professional responsibility and competence of lawyers: *LPA*, s. 3. A central feature of that duty is to ensure that lawyers can identify and maintain the highest standards of ethical conduct. A special ethical responsibility comes with membership in the legal profession.

[218] At the time of trial, the benchers governed and administered the affairs of LSBC. Benchers, who are both appointed and elected by members of the legal profession, had the authority to make rules, including for the governing of lawyers, law firms, and articled students and to set standards of practice for lawyers: *LPA*, ss. 11(1), 27(1)(a).

[219] Under that latter authority of providing guidance to British Columbia lawyers, the benchers adopted the *Professional Conduct Handbook* (the "*Handbook*"), which was in force until December 31, 2012. Thus, the *Handbook* was in force when Mr. Ross began presenting the TL and PKS acquisitions to the Individual Plaintiffs in 2011 and 2012 and when the solicitor-client relationship between Mr. Ross and the Plaintiffs, relevant to the TL and PKS transactions, began.

[220] Effective January 1, 2013, the *Handbook* was replaced as the governing document concerning professional responsibility for British Columbia lawyers by the *Code of Professional Conduct of British Columbia* (the "*Code*"). The *Code* largely followed the Federation of Law Societies' *Model Code of Professional Conduct*, which was widely adopted across Canada, with such modification as the LSBC Benchers considered appropriate for guiding legal practice in British Columbia. The

Code was in force and governed Mr. Ross' conduct during the latter part of the Relevant Period.

[221] The obligations identified in the *Handbook*, and later the *Code*, were and are the minimum standards of professional conduct expected of lawyers by the LSBC.

[222] Chapter 1 of the *Handbook* contained the Canons of Legal Ethics which set out various duties of lawyers. It opened with the following words:

> These Canons of Legal Ethics are a general guide, and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned.
>
> A lawyer is a minister of justice, an officer of the courts, a client's advocate, and a member of an ancient, honourable and learned profession.
>
> In these several capacities it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

[223] The Canons described various duties owed by a lawyer to their client, including that:

> (8) A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client's moneys and trust property only as authorized by the client, and not co-mingle it with that of the lawyer.
>
> …
>
> (10) … A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere moneymaking business.

[224] The *Code* maintained these Canons and duties: *Code*, Chapter 2, Rule 2.1-3(h), (j).

[225] A lawyer, and the firm with which they are associated, owes the client a duty to act loyally for the client in performing as agreed in the retainer: *Strother* at para. 135. The duty of loyalty has three salient dimensions: (i) a duty to avoid conflicting interests; (ii) a duty of commitment to the client's cause; and (iii) a duty of candour: *McKercher* at para. 19, citing *R. v. Neil*, 2002 SCC 70 at para. 19.

VII. THE LAWYER'S DUTY TO AVOID CONFLICTS OF INTEREST

A. Applicable legal principles governing conflict of interests

[226] A fundamental duty of a lawyer is to act in the best interest of their client to the exclusion of all other adverse interests, except those duly disclosed by the lawyer and willingly accepted by the client: *Strother* at para. 1.

[227] A lawyer must be able to provide their client with complete and undivided loyalty, dedication, full disclosure, and good faith, and their ability to do so may be jeopardized if their judgment or actions either are, or appear to be, at risk of being clouded, where more than only their client's interest is being represented: *Ramrakha v. Zinner,* 1994 ABCA 341 at para. 70.

[228] One element of the duty of loyalty is the avoidance of conflicts of interest: *Strother* at para. 35. Lawyers must avoid situations where they have, or may develop, a conflict of interests: *Ramrakha* at para. 70. Two primary types of prejudice can arise from a lawyer's conflict of interest: prejudice arising from the lawyer's misuse of confidential information obtained from a client; and prejudice arising where the lawyer's representation of their client is made subordinate to the lawyer's own interests, or those of another client or third person: *McKercher* at para. 23. The latter raises concerns that the lawyer will "soft peddle" their representation of a client in order to serve their own interests, those of another client, or those of a third person: *McKercher* at para. 23.

[229] A conflict of interest is an interest that gives rise to a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's duties to another current client, a former client, a third person, or the lawyer's own interests: *Neil* at para. 31; *Code*, Chapter 1, Rule 1.1-1.

[230] Chapter 7 of the *Handbook* addressed this very issue in its "Conflicts of Interest Between Lawyer and Client" section. Chapter 7 began with the following:

> The purpose of this Chapter is to state the general principles that should guide a lawyer's conduct when the lawyer is invited to act both as legal advisor and business associate.

> Generally speaking, a lawyer may act as legal advisor or as business associate, but not both.

[231] Where a lawyer's personal financial interest in a transaction in which they are acting for a client is established, it is the lawyer who bears the burden of demonstrating the absence of any material adverse effect on the client's interest in receiving proper and timely legal advice: *Strother* at para. 61, citing *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36.

[232] Chapter 7 of the *Handbook* articulated several specific rules which governed the conduct of lawyers in relation to conflicts of interest with clients:

> **Direct or indirect financial interest**
>
> 1. Except as otherwise permitted by the *Handbook*, a lawyer must not perform any legal services for a client if:
>
> > (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
> >
> > (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer's professional judgement.
>
> **Financial or membership interest in the client**
>
> 2. A lawyer must not perform any legal services for a client with whom or in which the lawyer or anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a financial or membership interest that would reasonably be expected to affect the lawyer's professional judgement.
>
> **Transaction with a client**
>
> 3. A lawyer must not purchase anything from or sell anything to a client of the lawyer's firm unless the transaction is clearly severable from any legal work performed by the lawyer or by another lawyer in the firm for the client, and either:
>
> > (a) the transaction is of a routine nature to and in the ordinary course of business of the client, or
> >
> > (b) the client is independently represented in all aspects of the transaction.

> **Client loan, credit or guarantee**
>
> 4. Unless the transaction is of a routine nature to and in the ordinary course of business of the client, a lawyer must not borrow money or obtain credit from a client of the lawyer's firm, or obtain a benefit from any security or guarantee given by such a client.

[233] The *Code* maintained these Rules and expanded upon them: *Code*, Chapter 3, Rule 3.4.

B. Analysis and conclusion

1. Mr. Ross was in conflict of interest for both transactions

[234] Mr. Ross acted for the Plaintiffs while he was in a conflict of interest. Mr. Ross owed a fiduciary duty to each of the Plaintiffs in relation to the TL and PKS transactions to avoid conflicts of interest. He breached that duty by acting as the lawyer for the Plaintiffs in connection with the TL and PKS transactions in which he, his wife and her holding company MWW, and his family trusts, had direct and indirect financial interests.

[235] Mr. Ross' financial interest in the TL and PKS acquisitions, while in a solicitor-client relationship with the Individual Plaintiffs in those same transactions, created a substantial risk that his representation of the Individual Plaintiffs would be materially and adversely affected by his own personal financial interests: *Neil* at para. 31. His personal financial interest was in conflict with his duty to his clients. The conflict of interest placed Mr. Ross in a situation where was not able to, and did not, provide independent advice to the Plaintiffs, who were entitled to candid and complete advice from a lawyer whose interests were not in conflict. Loyalty includes putting a client's business ahead of the lawyer's business: *Neil* at para. 24.

[236] Mr. Ross was bound to undertake the work for which he had been retained with complete loyalty in accordance with his fiduciary obligation and could not acquire a personal interest that might conflict with his duties to the Plaintiffs: *Strother* at para. 143.

[237] Mr. Ross did not disclose he was in a conflict of interest arising from the fact that if the TL and PKS deals did not close he would receive no financial benefit given there was no compensation clause which entitled him to be paid for his efforts related to the transactions.

[238] The Individual Plaintiffs knew Mr. Ross was participating in the TL and PKS investments. But, Mr. Ross did not tell the Individual Plaintiffs it would be improper for him to provide legal advice to them given his financial interest in the two transactions, nor did he explain that his loyalty might be divided since he was involved in the two investments himself.

2. Independent legal advice

[239] Where a lawyer seeks to discharge their burden of establishing there was full and informed consent to the lawyer's acting despite a conflict of interest, they must establish that they fulfilled their duty to advise the client of the existence of the conflict when it arose, and that the client had an opportunity to obtain independent legal advice: *Neil* at para. 29; *Strother* at para. 21; *Indutech Canada Limited v. Gibbs Pipe Distributors Ltd*., 2011 ABQB 38 at para. 396, aff'd 2013 ABCA 111.

[240] A meaningful opportunity to obtain independent legal advice requires the client being in a position where they can seek and obtain independent legal advice, which in turn necessitates the client having sufficient information to enable an independent legal advisor to discharge their duty to provide independent legal advice upon which the client can rely: see also *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2011 BCSC 1067 at para. 113, aff'd 2013 BCCA 145, leave to appeal to SCC ref'd, 35398 (17 October 2013); citing *Gibbs v. Daniel* (1862), 66 E.R. 595, 4 Giff. 1 (Eng. Ch.).

[241] Mr. Ross testified he was generally aware of the ethical and professional obligations imposed on him by the LSBC with respect to conflicts of interest, but that he felt he had satisfied them based on two things: first, because RossLaw was acting to structure the deals but there was "independent counsel" (meaning

Mr. Johnson) on each closing; and second because “we advised [the Individual Plaintiffs] to get independent legal advice”.

[242] First, there was no other lawyer acted on either the TL or the PKS closing. Mr. Johnson’s role was limited to receiving and forwarding monies for the two transactions. Second, the nature of the RossLaw/JohnsonLaw arrangement, which included shared software programs and passwords, space, and staff, meant RossLaw and JohnsonLaw were not independent of each other.

[243] Third, Mr. Ross did not effectively communicate to the Individual Plaintiffs that independent legal advice was recommended. Mr. Ross did not provide credible evidence about any such communications. He provided no detail about who gave that recommendation or what was communicated. A generic tag line at the end of a few emails and documents sent by an articled student or a junior associate is wholly insufficient.

[244] Further, Mr. Ross did not explain to the Individual Plaintiffs why independent legal advice was needed. There is no meaningful acknowledgment by Mr. Ross of his conflict of interest, or effective communication of that conflict to the Individual Plaintiffs. Mr. Ross did not tell the Individual Plaintiffs that independent legal advice was needed, or the reasons independent legal advice was necessary. For example, although Ms. Donald testified she had not seen any reference to obtaining independent legal advice, she said that even if she had seen a brief and cryptic reference such as the one that appeared in some of the documents sent out by RossLaw staff, she would not have gone to see any other lawyer because she understood Mr. Ross was representing her. In her words, she believed “Lindsay was on my team”. Mr. Takoski believed that Mr. Ross was acting as his lawyer on the TL and PKS transactions and, on that basis, felt he was “in good hands”. The other Individual Plaintiffs were under the same understanding. Mr. Ross did nothing to dispel the Individual Plaintiffs’ understanding that he was their lawyer and was fully and unreservedly loyal to them.

[245] Finally, the Individual Plaintiffs did not have a meaningful opportunity to obtain independent legal advice with respect to the TL and PKS transactions. Mr. Ross did not provide the Individual Plaintiffs with documents relating to the TL and PKS transactions in a way that would have permitted them to obtain independent legal advice about the structure Mr. Ross had devised or its implementation. Many of the critical documents relating to both the TL and the PKS transactions were provided very late—described by some of the Individual Plaintiffs as at the eleventh hour—which rendered it impossible to obtain independent legal advice before closing. The documents were put in front of them to sign as they were coming off the RossLaw printer in a flurry. There was no effective communication about what class, rights or number of shares in the different TL Purchasing Companies or PKS Purchasing Companies the Individual Plaintiffs, their holding companies, or their family trusts would be receiving. While some of the Individual Plaintiffs were shown some drawings of "circles and triangles" on a whiteboard or flipchart, their meaning was not explained in a way that the Individual Plaintiffs could understand, nor was it information they could take away with them in order to seek independent legal advice, and in any event the structures were constantly in a state of flux. The early versions of documents involving the potential structure of the TL and PKS transactions were provisional, subject to variation, and not yet "fine tuned", with Mr. Ross advising there would be "more details of the investment structure shortly".

[246] Mr. Ross has failed to establish he fulfilled his duty to advise the Individual Plaintiffs of the existence the conflict he was in when it arose, or that the Individual Plaintiffs had an opportunity to obtain independent legal advice. The Individual Plaintiffs did not give their full and informed consent for Mr. Ross to act despite being in a conflict of interest.

3. Mr. Ross promoted his own personal interests

[247] A fiduciary is prohibited from using their position for undisclosed personal gain: *Ramrakha* at para. 106. However, in structuring and implementing the TL and PKS deals, Mr. Ross caused superior preference shares to be issued to and for the benefit of the Ross Entities compared to those issued to the Individual Plaintiffs.

[248] In the TL transaction, the Individual Plaintiffs received 3rd preference shares in TL Purchasing Companies, redeemable at par value, i.e., the amount of cash they had contributed. In contrast, the 2012RossTrust received 2nd preference shares in 797 BC and 800 BC, redeemable in preference to the cash contributing investors at a par value of $1.2 million. MWW received 3rd preference shares redeemable at a par value of $100,000, even though, as I address later in these Reasons, no cash had been contributed by the Rosses for their TL Investment Shares. The PKS transaction was similarly structured in relation to the PKS Purchasing Companies.

[249] Mr. Ross did not advise the Individual Plaintiffs that the Ross Entities would or had received superior preference shares. The Individual Plaintiffs were not aware of, and did not consent to, the Rosses receiving superior preference shares in the TL and PKS transactions.

[250] Mr. Ross' issuance of superior preference shares was contrary to the representation made to John Kwari in the Second June 5 Email, that the Rosses' Investment Share would not lead to the Rosses receiving shares with any different rights compared to the shares the cash contributing investors would receive. Mr. Kwari shared that information with the Three Families, and they had relied on that information in their decision to invest. I find Mr. Ross was probably aware that Mr. Kwari would pass on the information to the Three Families. Mr. Ross never told Mr. Kwari the information he had directed Mr. McRae to convey to Mr. Kwari in that Second June 5 Email was incorrect at the time it was communicated, or had subsequently changed, nor did he disclose the share rights differences to any of the Individual Plaintiffs prior to the TL or PKS closings. Mr. Ross acknowledged there were options other than assigning the Ross Entities higher preference shares.

[251] Further, in structuring and implementing the PKS deal, Mr. Ross allocated the most valuable strata lots to the Ross Entities. Mr. Ross denied he had any knowledge of the unit allocation. I have already expressed my finding that Mr. Ross is not a credible witness. Mr. Ross testified that the allocation of PKS units was done by Ms. Sparling, and that he was not involved "because of a conflict of interest",

although he conceded on cross-examination he had observed and approved the assignment documents created. First, I would observe that the use of an articled student, employed by a law firm, working under the supervision of a lawyer or lawyers of that firm, is not independent from that firm and would not cure a conflict of interest. Second, Ms. Sparling's evidence, which I accept, was that she worked with Mr. Ross on the allocation of the PKS strata lots and the preparation of the notice of assignment schedule. Third, Mr. Ross testified he learned "after-the-fact" that Ms. Sparling had simply allocated the units in order of their unit number, which is how they appeared on the overall assignment list. But that pattern was disrupted. The pattern varied in a way that favoured the Rosses via the strata lots allocated and assigned to the defendant 429 BC. When the deviation in the sequential assignment of the PKS units was drawn to Ms. Sparling's attention during cross-examination, she testified, and I find, she had no knowledge of that deviation and was not the one who implemented the deviation. Ms. Sparling had no motive to make the deviation.

[252] I find Mr. Ross was aware that the Ross Entities were allocated the most valuable strata lots and was responsible for that happening. Mr. Ross did not advise the Individual Plaintiffs that the Ross Entities would receive the more valuable strata lots. The Individual Plaintiffs were not aware of, and did not consent to, the Ross Entities receiving the most valuable strata lots.

[253] There are other ways that Mr. Ross structured the PKS transaction in such a way as to prefer his own interests. Of all of the PKS Companies, 429 BC was the only company structured in a way that left it controlled by one participant group, and that was the Rosses. Mr. Ross did not advise the Individual Plaintiffs that the Rosses' interests, unlike any of the Individual Plaintiffs, would control one of the PKS Companies (that being 429 BC). The PKS Plaintiffs were not aware of, and did not consent to, the Rosses controlling one of the PKS Companies.

[254] In all of those respects, Mr. Ross repeatedly placed himself in a conflict of interest by putting his own interests ahead of his clients, thereby breaching his

fiduciary duty to the Individual Plaintiffs: *Williams v. Crate*, 2023 ONSC 4470 at para. 89.

[255] The Individual Plaintiffs did not fully and informedly consent to Mr. Ross acting for them in the TL and PKS transactions despite the conflict of interest arising from his financial interest in those deals. The Individual Plaintiffs' full and informed consent was particularly crucial given the superior benefits he arranged for himself in the course of the work he was to perform for them in relation to the TL and PKS transactions. He did not advise the Individual Plaintiffs of the existence of the various conflicts as they arose, nor did they have a meaningful opportunity to obtain independent legal advice.

VIII. THE DUTY OF DISCLOSURE

A. Applicable legal principles

[256] In a lawyer-client relationship, the client is reposing confidence in the solicitor and the solicitor is obliged to make full disclosure to the client to enable them to make proper decisions in respect of the matter for which they has been retained: *Jacks v. Davis*, 141 D.L.R. (3d) 355, 1982 CanLII 485 (O.N.C.A.) at para. 16.

[257] As part of the duty of loyalty, a lawyer owes a duty of candour to the client which requires them to disclose any factors relevant to the lawyer's ability to provide effective representation: *McKercher* at para. 45. The lawyer must not keep the client in the dark about matters they know to be relevant to the retainer: *Strother* at para. 55; *McKercher* at para. 45. When advising a client, the lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter: *Code*, Chapter 3, Rule 3.2-2.

[258] Courts have traditionally imposed a high duty of disclosure on solicitors who have placed themselves in a position of conflict: *Commerce Capital Trust Co. v. Berk*, 57 DLR (4th) 759 at 762, 1989 CanLII 4338 (O.N.C.A.); *Ramrakha* at para. 75. In such a situation (i.e., of potential conflict), where a client is a person with whom

the lawyer has had a long-standing relationship, whether personal or professional, scrupulous behaviour is of particular importance: *Commerce Capital* at 762.

[259] As a fiduciary, a lawyer has a duty to disclose all material facts and information, and conflicts of interest to their client: *Sharbern* at para. 8; *Hutchison v. Moore*, 2021 BCCA 301 at para. 103. Where a fiduciary has put themselves in a position where their own interests or those of others may conflict with their duty to their principal, they are required to disclose all material information regarding the transaction in order to obtain their principal's informed consent as to their acting despite the conflict: *Sharbern* at para. 148; *Hutchinson* at para. 104. A breach of fiduciary duty occurs when the lawyer fails to disclose facts that were material or that placed them in a conflict of interest to which their client did not consent: *Sharbern* at para. 148.

1. The materiality assessment

[260] The question of materiality is to be viewed objectively. The issue is whether a reasonable solicitor would consider the information material to its client’s decision, and where, as here, the legal advice is being provided to a client in the investment context, information is material if there is a substantial likelihood it would have been considered important by a reasonable investor in making their decision to invest: *Sharbern* at para. 61; *Commerce Capital* at 764–765; *Hutchison* at paras. 110, 126. An omitted fact is material if its disclosure would have been viewed by the reasonable investor as having significantly altered the total mix of information made available and it would have assumed actual, significance in a reasonable investor’s deliberations: *Sharbern* at para. 61. Given that materiality is determined objectively, the subjective views of the lawyer do not inform the analysis: *Sharbern* at para. 51.

[261] Materiality involves the application of a legal standard to particular facts. It is a fact-specific inquiry which is to be determined on a case-by-case basis in light of all of the relevant considerations and from the surrounding circumstances forming the total mix of information made available to investors: *Sharbern* at para. 61.

[262] In carrying out a materiality assessment, a court must first look at the information disclosed to the client at the time they made their investment decision. The next step is to consider the omitted fact or information against the backdrop of what was disclosed and determine whether the omitted information would be considered as significantly altering the total mix of information made available: *Sharbern* at para. 59. As part of this second step, a court may consider contextual evidence which helps to explain, interpret, or place the omitted information in a broader factual setting, provided it is viewed in the context of the disclosed information. Another type of relevant evidence is evidence of concurrent or subsequent conduct or events that would shed light on potential or actual behaviour of persons in the same or similar situations ("behaviour evidence"). Beyond this behaviour evidence, evidence of common knowledge or, depending upon the circumstances, knowledge specific to particular investors is also admissible: *Sharbern* at paras. 59–60.

[263] The plaintiffs have the burden of proving materiality: *Sharbern* at para. 69.

[264] Insofar as undisclosed material facts placed Mr. Ross in a conflict of interest, as the fiduciary he would bear the onus of establishing there was nonetheless full and informed consent for him to act despite that conflict: *Sharbern* at para. 149.

B. Analysis and conclusion

[265] Given my finding that Mr. Ross acted while in a conflict of interest, I turn to consider whether Mr. Ross had an obligation to disclose certain facts to the Plaintiffs because they were material, and whether he failed to do so.

[266] I find Mr. Ross failed to disclose material facts to the Individual Plaintiffs during the Relevant Period. In doing so he breached the fiduciary duty of candour which he owed to the Individual Plaintiffs as their lawyer on the TL and PKS transactions. Mr. Ross concealed material facts from the Individual Plaintiffs, including material facts related to the structuring of the TL and PKS transactions, to which I have already referred in my analysis of Mr. Ross' conflict of interests. Those were not the only material facts he intentionally failed to disclose.

[267] During the Relevant Period, Mr. Ross cultivated and portrayed an image of wealth to the Individual Plaintiffs. He showed off a fleet of impressive boats and fancy cars which Mr. Takoski likened to the collections of the Kennedy family and Jay Leno and which Mr. Ross presented as belonging to him. He took clients to “his” cottage at Stirling Arm on Vancouver Island, presenting it as belonging to him and his wife Joanne. There was no outward indication suggesting financial weakness or vulnerability of either him or Joanne. This presentation of financial stability and security was important to the Individual Plaintiffs and they relied on it in deciding to participate in the TL and PKS investments because it increased their confidence that their investment in the TL and PKS transactions would be secure.

[268] During the Relevant Period, Mr. Ross also concealed that he, RossLaw, and Ms. Ross were all insolvent. During the Relevant Period, the Ross Entities did not have enough money to pay their debts as they became due. The Rosses’ insolvency continued after the close of the TL and PKS transactions.

[269] Mr. Ross also failed to disclose to the Individual Plaintiffs Ms. Ross’ dishonest acts of which he was aware, and his secret use of trust funds provided by the Individual Plaintiffs to satisfy statements of account prepared by him or at his direction, without their knowledge or approval, for legal work he had promised several of the Individual Plaintiffs would be done at no charge to them. Those facts were material because there was a substantial likelihood they would have been considered important by a reasonable investor in making their decision to invest and a reasonable solicitor would have considered the information material to their client for that reason.

[270] What follows is a chronology of some of the circumstances which demonstrate the insolvency of the Ross Entities as well as some background facts that provide necessary context.

1. Circumstances demonstrating the Rosses' insolvency during the Relevant Period

a) Mr. Ross borrows from Dr. Draper for JFK Trail

[271] For approximately 25 years Dr. Draper used Mr. Ross exclusively for legal advice, personally, for his numbered company which he used for real estate transactions, and for his dental professional company. Mr. Ross' office served as the company records offices for both of Dr. Draper's companies until Dr. Draper transferred his business to another firm in 2015.

[272] In late 2011, with Mr. Ross acting as his lawyer, Dr. Draper sold a condominium property he owned in Maui for $675,000 USD. After the sale, knowing the amount of proceeds Dr. Draper had received from the sale in U.S. currency, Mr. Ross suggested the two purchase a two-acre property in Palm Springs together which Mr. Ross said was ideal for subdivision ("JFK Trail"). The JFK Trail investment was to involve Mr. Ross and Dr. Draper each contributing $375,000 USD towards the purchase as equal partners, with each paying $100,000 USD as a deposit. Dr. Draper agreed.

[273] JFK Trail was purchased through DRRS Holdings LLC. Dr. Draper knew nothing about that company, never saw any issued shares, or was aware of any directors appointed. Dr. Draper did not receive anything in writing from Mr. Ross prior to when payment for JFK Trail was required.

[274] Dr. Draper understood that Mr. Ross had paid his $100,000 USD deposit for JFK Trail from his own funds. In fact, only $9,990 USD of the $100,000 USD deposit had been paid by the Rosses (by Joanne Ross). The remaining $94,982 USD had been received from JessonHoldCo which had forwarded $95,000 USD to Glen Oaks Escrow, at Mr. Ross' request, on March 5, 2012. Despite Mr. Ross' evidence to the contrary, I find Mr. Jesson did not provide that $95,000 USD in exchange for Mr. Ross paying Mr. Jesson's one quarter share contribution for an investment in Duncan, B.C., which I address later in these Reasons.

[275] Prior to Dr. Draper providing his half of the JFK Trail purchase money, Mr. Ross told Dr. Draper he could not pay his half. Although Mr. Ross told Dr. Draper this was because he was away from Victoria on holiday, that was not the reason. The Rosses did not have the financial ability to pay the JFK Trail obligation when it was due. Mr. Ross asked Dr. Draper if he would pay the full $550,000 USD needed to close, and told Dr. Draper he would forward his share ($275,000 USD) when he was back in Victoria. This loan was not documented. Dr. Draper agreed but told Mr. Ross he needed to be repaid before May 31, 2012, being the closing date for his purchase of a condo in Whistler, a transaction on which Mr. Ross was acting for Dr. Draper. The loan was intended by Dr. Draper, and presented by Mr. Ross, to be for a very short term. There was no agreement between Dr. Draper and the Rosses that the Rosses would not repay Dr. Draper until after JFK Trail had been subdivided and subdivision proceeds had been realized, or to change the arrangement so that respective contributions of Dr. Draper and the Rosses would remain unequal. The purchase of JFK Trail closed on March 12, 2012.

[276] Dr. Draper made several requests to Mr. Ross to be repaid and their contributions equalized. Mr. Ross did not respond to Dr. Draper's communications. When Dr. Draper would go into Mr. Ross' office to see about the repayment, he was told Mr. Ross was not available.

[277] When Dr. Draper's Whistler condo purchase was set to close on May 31, 2012, he conveyed to Mr. Ross and to Ms. Gable that he needed to be repaid as he needed $100,000 in order to close on that purchase. After that close, when Dr. Draper saw the statement of adjustments for the Whistler condo purchase, he observed that $100,000 had been received from RossLaw, without explanation to him. The statement of adjustments did not identify the source of the money further.

b) Mr. Ross asks Mr. Takoski for $100,000 as "good faith" money

[278] On May 31, 2012, Mr. Ross spoke to Mr. Takoski and told him he needed to have some "good faith money" in the trust account in order to demonstrate to lenders and vendors that the potential investors for the TL and or PKS transactions

were serious, had credibility, and were in good standing as negotiations were unfolding. Mr. Ross asked Mr. Takoski to provide $100,000, which Mr. Ross said would only be needed “short term” and would be returned to him quickly. Mr. Takoski recalled being “glad to help” and pleased that Mr. Ross “needed me”. Mr. Takoski’s bank provided him with the bank draft payable to RossLaw. En route to RossLaw, Mr. Takoski realized the draft did not include the words “in trust”. Mr. Takoski called Mr. Ross to ask whether that would be a problem, or whether the $100,000 of good faith money could be deposited into trust without the words “in trust” appearing on the draft. Mr. Ross advised Mr. Takoski there was no problem and the $100,000 could be deposited into trust without that notation.

[279] On that same date, Mr. Takoski attended at the RossLaw offices and was told Mr. Ross was not available. Mr. Takoski provided Ms. Gable the $100,000 bank draft to be placed in trust. Mr. Takoski did not receive a receipt that day for the $100,000 he provided.

[280] Ms. Gable confirmed that on May 31, 2012, Mr. Takoski came in to the offices with a bank draft for $100,000 and told her this was money Mr. Ross was expecting and left. At no time before Mr. Takoski provided the $100,000 was there was any discussion, or agreement, between Mr. Ross and Mr. Takoski that the $100,000 was a loan to Mr. Ross or to RossLaw.

[281] The $100,000 Mr. Takoski provided on May 31, 2012 was not a loan. When Mr. Takoski provided the bank draft to Ms. Gable he did not say the money was a loan. Ms. Gable assumed the money was for TL or PKS, given it was a large sum, even though she noted it was payable to RossLaw with no “in trust” notation. When Mr. Ross came out of his office, he told Ms. Gable the $100,000 was not for either of the TL or PKS deals, but rather that it was a loan from Mr. Takoski to him. In the receipt book, Ms. Gable wrote Dr. Draper’s name and file number, but then scribbled it out. Mr. Takoski’s $100,000 was deposited into RossLaw’s general account on the same day and used to close Dr. Draper’s Whistler condo purchase.

[282] Only much later did Mr. Takoski learn for the first time Mr. Ross was suggesting the $100,000 Mr. Takoski had provided on May 31, 2012, had been advanced as a loan to RossLaw. Although Mr. Takoski could not recall exactly when he learned Mr. Ross was alleging the $100,000 had been a loan, he thought it was probably after in the context of the complaint he had made about Mr. Ross to LSBC, which he did not do until some time after January 2015.

[283] Mr. Ross used the $100,000 Mr. Takoski provided on May 31, 2012 to contribute that same amount towards Dr. Draper's Whistler condo purchase on the same day, as repayment of part of the debt the Rosses owed to Dr. Draper. Mr. Ross did not tell Mr. Takoski his $100,000 would be used for that purpose and Mr. Takoski did not consent to that use.

[284] Mr. Takoski called RossLaw several times asking when he would be receiving the return of his short-term, good faith $100,000. Mr. Ross could not afford to return Mr. Takoski's $100,000 until June 21, 2012.

c) Mr. Ross used the Poons' trust money to repay Mr. Takoski

[285] In early June 2012, Mr. Ross met with the Poons and presented the PKS investment to them by giving them some promotional brochure material. Mr. Ross did not tell them anything about the structure of the PKS transaction. The Poons only had enough money to purchase one $600,000 Investment Share in the PKS investment.

[286] A few days after that meeting, Mr. Ross called Mr. Poon to meet again. This time, Mr. Ross presented the TL deal to Mr. Poon. Mr. Ross told Mr. Poon that members of the Kwari family were going to be investors in both the TL and the PKS investments. This information gave Mr. Poon confidence in the investment since he was familiar with the Kwari family through his co-ownership of a pharmacy with Maria, which Mr. Ross knew. Mr. Ross told Mr. Poon the investors in the TL and PKS transactions would all be the same, implying that if the Poons wanted in for one investment, they had to be in for both.

[287] However, the Poons could not afford both investments. Mr. Ross told Mr. Poon he could use RRSPs to finance the Poons' participation in the PKS investment, and could therefore use the money they had to invest in the TL transaction. Based on that advice, Mr. Poon decided to use the money he had intended to use for the PKS transaction for the TL investment instead, since it would be closing first.

[288] Mr. Ross told Mr. Poon to provide deposit monies for the TL and PKS transactions to JohnsonLaw. Mr. Poon provided those deposits on time via a bank draft dated June 13, 2012, in the amount of $150,000 payable to JohnsonLaw in trust; $50,000 was credited to the TL transaction and $100,000 was credited to the PKS investment, however this was not done until June 20, 2012, and his receipt was incorrectly dated to reflect that the money had been provided June 21, 2012. At that time, the only money in the PKS trust account was Mr. Poon's. On June 21, 2012, on Mr. Ross' instructions, Mr. Johnson returned Mr. Takoski's $100,000 good faith money, by taking the money from the PKS trust account.

[289] Mr. Ross had used the Poons' trust money to repay Mr. Takoski's $100,000 good faith money.

[290] After the Poons had committed to participating in both transactions, they were advised by their bank that RRSPs could not be used to fund an investment like PKS. This caused severe financial hardship for the Poons who had to secure a line of credit against their family home.

d) The Rosses' continued inability to fully repay Dr. Draper for JFK Trail

[291] I return to Dr. Draper's loan to Mr. Ross for JFK Trail. After the close of the Whistler condo purchase, significant monies owed by Mr. Ross to Dr. Draper remained outstanding. Dr. Draper continued to make multiple requests to be repaid for his excess contribution towards JFK Trail. In response, Mr. Ross would tell Dr. Draper he was lucky he had been permitted to invest. Dr. Draper relied on Mr. Ross for updates about the project.

[292] Years passed. In the interim there were ongoing costs for engineers and other professional disbursements incurred for JFK Trail property totalling approximately $25,000 USD that Mr. Ross asked Dr. Draper to pay. Mr. Ross could not afford to cover those costs. Dr. Draper agreed to advance further funds by covering those expenses. Again, there was no agreement between Dr. Draper and the Rosses that the Rosses would not repay Dr. Draper until after JFK Trail had been subdivided and the subdivision proceeds realized, or to change the arrangement so that respective contributions of Dr. Draper and the Rosses would remain unequal.

[293] By June 2015, Dr. Draper had still not been repaid. Dr. Draper fired Mr. Ross and hired new legal counsel to negotiate an end to the relationship and the return of Dr. Draper's JFK Trail money. Mr. Ross agreed to pay Dr. Draper $625,000 CAD (deemed to be $500,000 USD) to acquire Dr. Draper's interest in JFK Trail (the "JFK Trail Settlement Agreement"). The negotiated JFK Trail Settlement Agreement did not include a non-disclosure term. When Mr. Ross executed a release in favour of Dr. Draper, it did not contain any non-disclosure clause. However, the form of release presented to Dr. Draper for his execution contained a non-disclosure clause, to which the parties had not agreed. The non-disclosure clause could have perpetuated Mr. Ross' concealment of his unpaid debt to Dr. Draper during the Relevant Period. I need not make a finding about Mr. Ross' intention to do so.

e) Mr. Ross borrows from Don McKnight's Windfall

[294] In 2012, Mr. McKnight's law office space was located at 888 Fort Street, on the same floor as RossLaw. Although the space was divided into legal offices, there was some shared work space, including a boardroom. Mr. McKnight had accumulated a significant fund of uninvested capital in his company, Windfall Holdings Inc. ("Windfall"), through his legal practice.

[295] In late March or early April 2012, Mr. Ross asked Mr. McKnight to loan him $200,000. Mr. Ross told Mr. McKnight he would only need the loan for one or two months. After Mr. McKnight discussed the request with his wife, he agreed to loan

Mr. Ross the $200,000. Although the McKnights wanted to use that money to purchase a home, they had not yet found one and given the short term nature of the loan Mr. Ross had proposed, they were content to lend him the money as he had requested. The loan was to be repaid within one or two months and earn interest at an agreed 10% annual rate. Mr. Ross asked Mr. McKnight to advance the loan by paying the funds to JohnsonLaw in trust. Mr. McKnight provided a $200,000 cheque from Windfall's account on April 13, 2012 to JohnsonLaw in trust. Mr. McKnight did not ask Mr. Ross to sign a promissory note, at least not initially, because the loan was to be repaid so quickly.

[296] A day or two after the $200,000 advance, also in April 2012, Mr. Ross approached Mr. McKnight (through Mr. McKnight's wife who worked as his legal assistant) to borrow a further $25,000. Again, Mr. McKnight and his wife agreed. On April 16, 2012, Mr. McKnight signed a cheque from Windfall for $25,000.00 payable to JohnsonLaw in trust. I will refer to Mr. Ross' $200,000 and $25,000 loans from Windfall collectively as the "Windfall Loans".

[297] Several months passed. The Windfall Loans became due. Mr. Ross did not repay the Windfall Loans because he could not afford to do so. Mr. McKnight began asking Mr. Ross for a promissory note, initially in jest, but as time passed he began to press Mr. Ross seriously, asking Mr. Ross for a promissory note at least five times. No repayment or promissory note was forthcoming. This act of insolvency corresponded to the time period during which Mr. Ross began approaching some of the Individual Plaintiffs about the TL and PKS transactions.

[298] Because Mr. Knight did not want to offend Mr. Ross, and since he and his wife had not yet found a home they wished to purchase, he did not take legal steps to recover the Windfall Loans at that time. However, Mr. McKnight persistently pursued the outstanding balance from Mr. Ross, including through emails which went largely unanswered. Repayment of the Windfall Loans was becoming a pressing matter for Mr. McKnight because he and his wife wished to have something to show the bank to evidence they had a source for the down payment. Up until

July 7, 2013, The Rosses had been financially unable to repay any of the Windfall Loans. On July 7, 2013, the Rosses repaid $200,000 of the Windfall Loans which was all they could afford.

[299] On February 4, 2014, Mr. Ross advised Mr. McKnight “I can get you ten [I infer and find this meant $10,000] now and I’m trying to get the balance organised”. Mr. McKnight received $10,000 from Mr. Ross shortly thereafter, but a significant outstanding balance on the Windfall Loans remained. On February 5, 2014, Mr. Ross told Mr. McKnight “one or two more days”. A week passed with no further payment. In March 2014, Mr. Ross paid a further $10,000, but again, a significant outstanding balance remained.

[300] Finally, on June 28, 2014, Mr. McKnight advised Mr. Ross he would issue a notice of civil claim if the balance of the Windfall Loans (approximately $35,000) was not repaid by July 7, 2014.

[301] On July 7, 2014, Mr. Ross proposed to provide Mr. McKnight with six postdated cheques to retire the balance advising that was “the best [he could] do right now”. Mr. McKnight agreed to accept Mr. Ross’ monthly repayment proposal. There were “some problems” with some of the cheques but Mr. McKnight could not recall the details.

[302] Mr. Ross did not fully repay the remainder of the 2012 Windfall Loans until January 2015, almost two and a half years after the funds had been advanced.

[303] The $225,000 Windfall Loans were due to be repaid, with interest, within two months, which would have been mid-June of 2012. Mr. Ross did not have the financial ability to repay the $225,000 Windfall Loans when they were due. As a result of the Ross Entities’ collective insolvency, Mr. Ross was unable to repay the Windfall Loans until January 2015.

f) Mr. Ross' use, and delayed repayment, of Dr. Amson's $150,000

[304] On June 12, 2012, Mr. Ross invited Dr. Amson to a meeting at the Parkside building. Dr. Amson described the meeting as "seeming urgent". At the meeting, which Mr. Hashmi also attended, Mr. Ross promoted the PKS deal. There was no discussion about the TL deal at that meeting.

[305] Mr. Ross told Dr. Amson the PKS investment participants would all be equal, that the investors were wealthy individuals, and that he would be participating in the PKS investment himself. Mr. Ross did not tell Dr. Amson he would be obtaining his share of the investment without any financial contribution. It became apparent to Dr. Amson that Mr. Ross "needed money that day" and "finally [Dr. Amson] said okay".

[306] At the request of Mr. Ross, Dr. Amson provided a cheque for $150,000 to secure the right to invest in PKS if he decided to do so. There was no paperwork. Dr. Amson expressly asked for the right to have the money returned to him if he decided not to proceed after speaking with his accountant, to which Mr. Ross verbally agreed. Mr. Ross did not tell Dr. Amson his money would only be refunded if another investor took his place on the PKS deal.

[307] After the meeting at the Parkside building, Dr. Amson was sent some material on both the PKS and the TL deals. When Dr. Amson's accountant reviewed the investment material that was sent to him he asked several probing questions which revealed Mr. Ross would be participating without any financial investment. For Dr. Amson, that was a "red flag". Dr. Amson decided he was not interested in participating in the PKS transaction and during the summer of 2012 asked for the return of his $150,000. In response to Dr. Amson's requests, Mr. Ross encouraged him to invest the money in the TL venture instead. Dr. Amson was not interested in the TL project and told that to both Mr. Ross and Andrew Hashmi.

[308] Mr. Ross was "very persistent" and continued to suggest to Dr. Amson that he should invest in the TL and / or the PKS investments. Despite Dr. Amson wanting to

avoid disappointing Mr. Ross because of their longstanding relationship, Dr. Amson was clear with Mr. Ross he did not want to participate in either project. Despite being told Dr. Amson was "out", Mr. Ross caused Dr. Amson to be listed as a participant on communications sent to the PKS investors, as if he had committed to participate, which he had never done.

[309] I find Mr. Ross continued to knowingly represent to the PKS Plaintiffs that Dr. Amson was participating in the PKS investment into December 2012, to encourage their ongoing confidence in the soundness of the PKS investment in an effort to maintain their involvement and secure for himself the financial benefits associated with the PKS deal proceeding. I find he did so in order to conceal from the other investors that Dr. Amson was not going to invest in PKS because he was aware Dr. Amson's participation was a material fact for the investors. Mr. Ross was concerned that if they learned of this development it could jeopardize his ability to finance and close the PKS transaction which he was counting on in order to obtain financial benefits for the Ross Entities.

[310] By March 2013, Dr. Amson's $150,000 had still not been refunded to him despite Dr. Amson's numerous requests made to both Andrew Hashmi and Mr. Ross. Finally in the spring of 2013, Dr. Amson met with Mr. Ross and once again requested the return of his money, and reiterated he had been asking for the money to be returned since the summer of 2012 when he had told Mr. Ross he would not be participating in the PKS deal. Dr. Amson did not do or say anything to express to Mr. Ross any agreement to invest in the PKS or the TL deals after the summer of 2012 when he had asked for a return of his $150,000.

[311] Although Dr. Amson's money was due to be returned to him upon his request made in the summer of 2012, Mr. Ross did not return Dr. Amson's $150,000 until March 2013.

g) The Ross Entities fail to make their required TL contribution on closing and fail to disclose that fact

[312] Money for the Rosses was tight around the time of the TL close. Ms. Ross was "hopeful" the Rosses would be able to find the money in time but was not sure if they could. At her discovery, Ms. Ross testified she did not know MWW's $100,000 contribution for the TL investment had to be paid before the date the TL transaction closed. At trial, she would not concede that answer was false, despite her giving contradictory testimony that she did in fact know MWW was required to make a $100,000 payment ($50,000 for each of the Rosses' Investment Shares) before TL closed.

[313] The Rosses knew they were required to pay $100,000 on or before the TL closing, and knew they had not paid as required. The Rosses did not have sufficient money to pay their $100,000 TL contribution when the TL transaction closed.

[314] At no time before the TL closing did either of the Rosses tell the Individual Plaintiffs they could not afford to pay. By the time PKS closed, the Rosses still had not told the Individual Plaintiffs they could not afford to pay, and had not paid.

[315] Mr. Ross testified the Rosses had not paid because he "was busy with the closing and TL did not need the money in its accounts" and they "did not think it was an urgent issue". First, that explanation is nonsensical and any experienced corporate lawyer would know that to be the case. Second, I find the Rosses did not pay because they could not afford to do so. There was no agreement between the Rosses and the Individual Plaintiffs that the Rosses could receive Founders' Shares without paying their required financial contribution before TL closed.

[316] Despite the fact that the Rosses had not paid their required contribution for TL before TL's closing, on September 1, 2012, Mr. Ross signed subscription agreements on behalf of 797 BC and 800 BC (as the issuer of the shares) acknowledging receipt of payment for the shares from MWW. Mr. Ross testified he had "not put his mind to" the fact that he was making false declarations by doing so. I reject that evidence. When Mr. Ross signed the subscription agreements, he knew

that the money for the 797 BC and 800 BC shares had not been received from MWW and was aware he was making false declarations to the contrary.

h) The Rosses and RossLaw were unable to meet their tax and payroll obligations during the Relevant Period

[317] Mr. Ross testified RossLaw could always meet its financial obligations as they became due during the Relevant Period. That is not true.

[318] For 2011, RossLaw owed almost $70,000 in income tax, which grew to over $115,000 for 2012. In addition, in 2011 LAC Ross owed over $75,000 for HST, which grew to over $100,000 for 2012. Those debts were in addition to RossLaw's loans payable in 2012, which exceeded $115,000. These amounts were outstanding during the Relevant Period.

[319] The Rosses also had personal outstanding income tax obligations due during the Relevant Period. Mr. Ross owed over $50,000 for 2011, over $65,000 for 2012, and over $70,000 for 2013. Ms. Ross owed over $30,000 in 2011 and over $20,000 for 2013. Mr. Ross did not disclose these facts to any of the Individual Plaintiffs.

[320] Moreover, in 2012 and 2013 RossLaw was having financial difficulties. In both years, payroll cheques from RossLaw bounced more than once. RossLaw also bounced at least one cheque for monies payable to the Receiver General. Ms. Gable, I infer out of loyalty to Mr. Ross although probably also to avoid incurring service fees, developed the practice of waiting to cash her paycheque when the firm's general balance was insufficient to cover payroll. If she had not done so, RossLaw would have bounced even more payroll cheques. Mr. Ross did not disclose these facts to any of the Individual Plaintiffs.

i) The York Road deal and the Abbott Advances and Loans

[321] Trent Abbott, an insurance adjuster, provided evidence by way of affidavit as part of the Plaintiffs' case and was cross-examined. During the trial I ruled that certain parts of Mr. Abbott's affidavit were not admissible and I have not considered them in forming my conclusions.

[322] Mr. Abbott was a tenant at 888 Fort Street. Mr. Ross was Mr. Abbott's landlord through 405 BC, which provided property management services for 888 Fort Street Ltd. Mr. Ross was also Mr. Abbott's lawyer for various legal matters.

[323] Mr. Abbott and Mr. Ross had an arrangement whereby if Mr. Ross referred clients to Mr. Abbott, the latter would pay the former a referral fee. In December 2010 and in November 2011, Mr. Ross asked Mr. Abbott to lend him money ($21,660 and $20,700 respectively) as advances against referral commissions (collectively, the "Abbott Advances"). The Abbott Advances were advanced by Mr. Abbott paying those funds to a third party to whom Mr. Ross advised he owed the money for various reasons. Mr. Abbott believed Mr. Ross would earn back those commissions promptly and so agreed to make the advances. The loans were not reduced to writing.

[324] In the spring of 2012, Mr. Ross asked Mr. Abbott to become one of four equal investors in a property located at 5878 York Road in Duncan, B.C. ("York Road"). Mr. Ross told Mr. Abbott he would be investing himself, and that the other investors were all his clients who were "financially sound and had good reputations". Mr. Ross however did not participate directly but instead Ms. Ross participated through MWW. Mr. Abbott agreed to invest and participated through his investment company T & M Investments Ltd. The other investors were Mr. Ren, through his company Rusco Consulting Inc., and Mr. Jesson through JessonHoldCo. At no time was there any discussion or agreement that the four investors would not be making a financial contribution, or that their contributions would be unequal.

[325] The Rosses did not have the financial ability to pay their 25% contribution for York Road when that deal closed. Neither of the Rosses told Mr. Abbott their contribution from York Road was made using money Mr. Ross had borrowed from Don McKnight through Windfall Holdings Ltd. Mr. Abbott only learned that the Rosses' contribution for York Road had been made using the Windfall Loans after York Road had closed, when at the 888 Fort Street office space he overheard

Mr. McKnight discussing with Mr. Ross the need for Mr. Ross to repay the Windfall Loans, which Mr. McKnight was asserting was overdue.

[326] Around the time the York Road deal was to close in April 2012, Mr. Ross told Mr. Abbott that Mr. Jesson was short of funds. That was not true. It is correct that Mr. Jesson did not directly pay a contribution for his share in York Road. However, although Mr. Jesson as candid that his memory at trial in 2023 about the details of the financial arrangements for the 2012 York Road purchase was not clear given the passage of time, I am satisfied he did not make a direct contribution to York Road because he and Mr. Ross had agreed Mr. Ross would make Mr. Jesson's York Road contribution on his behalf, since JessonHoldCo had advanced $95,000 USD (which had been used by the Rosses for JFK Trail) and $105,000 CAD, both in March 2012.

[327] Mr. Ross asked Mr. Abbott to pay more than Mr. Abbott's quarter share of the York Road investment, which should have been slightly under $155,000. Mr. Abbott paid $15,000 of the required $20,000 deposit for York Road to RossLaw, plus his quarter investment, plus an additional $20,000, for a total contribution of $190,000. Mr. Ross assured Mr. Abbott those extra amounts would be equalized and that he would be compensated with some sort of interest adjustment later. At the request of Mr. Ross, Mr. Abbott also paid the 2012 property taxes for York Road, bringing his total investment to that point up to $205,127.07. Because York Road was being purchased with all equity and no mortgage, and given Mr. Ross' representations that all the investors were high net worth individuals, Mr. Abbott was not concerned that anyone would not be able to afford to equalize with him.

[328] Also around the time the York Road deal was to close, but before close, Mr. Ren paid his $155,000 contribution for York Road. A couple of days after Mr. Ren had paid his contribution, Mr. Ross also asked Mr. Ren to contribute between $52,000–$55,000 more. Mr. Ross told Mr. Ren this was because one of the other investors, Mr. Jesson, whom Mr. Ross told Mr. Ren was wealthy, was out of town and therefore could not come up with the money. Again, this was not true and

Mr. Ross knew it was not true. Mr. Ross told Mr. Ren this loan would only be temporary and that Mr. Jesson would repay Mr. Ren right away. On the basis of Mr. Ross' representation to Mr. Ren that the $55,000 was only needed in the short term to close the deal, Mr. Ren agreed.

[329] Mr. Ross did not make Mr. Jesson's York Road contribution with his own money. The Rosses did not have the financial ability to do so. Instead, Mr. Ross used money he had borrowed from Windfall, and excess contributions he had asked Mr. Ren and Mr. Abbott to make, to cover his own obligation to repay a debt owed to Mr. Jesson.

[330] Around May or June 2013, the York Road investing principals decided to obtain a mortgage on York Road, to retain $20,000 of the mortgage funds to cover the 2013 property taxes, and to distribute the remaining mortgage proceeds to reduce everyone's contributed equity to $100,000, equalizing each investor's contribution in the process. After York Road was mortgaged, Mr. Ren asked Mr. Ross for documentation showing his ownership interest in the York Road. At that point Mr. Ross became unresponsive.

[331] Mr. Abbott's shares of the mortgage proceeds were to have been $105,128.00. In the lead up to that process, Mr. Ross asked Mr. Abbott if he could borrow the proceeds Mr. Abbott and his company were to receive. Mr. Abbott knew that Mr. McKnight was pressing Mr. Ross for repayment of the Windfall Loans, and understood Mr. Ross intended to use Mr. Abbott's share of the mortgage proceeds and Ms. Ross' share of the mortgage proceeds to satisfy those debts. Mr. Abbott agreed to loan Mr. Ross $50,000.00 to be repaid within two weeks (the "Short-Term Abbott Loan") and a further $36,174.96 to be repaid within six months (the "Six-Month Abbott Loan"), with both loans bearing interest at prime plus 1% (collectively, "the Abbott Loans"). The Abbott Loans were not reduced to writing.

[332] Before the York Road mortgage proceeds were distributed, Mr. Ross told Mr. Abbott that Mr. Jesson's investment in York Road had been a "loan" from Windfall. When the York Road mortgage proceeds were received, Mr. Ross told

Mr. Abbott that Mr. Jesson's loan was to be repaid to Windfall with the mortgage proceeds. On the faith of Mr. Ross' assurance that Mr. Jesson was consenting to a "repayment" of his York Road contribution through Windfall, and without verifying the accuracy of that arrangement with Mr. Jesson directly, Mr. Abbott signed a direction to pay monies due to Mr. Jesson to Windfall. However, Mr. Jesson had not borrowed his contribution from Windfall. Rather, Mr. Ross had agreed to make Mr. Jesson's York Road contribution to set off Mr. Ross' debt to Mr. Jesson.

[333] Mr. Ross did not repay the Short-Term Abbott Loan by the end of June 2013 when it was due. Mr. Ross did not repay the Six-Month Abbott Loan by December 2013 when it was due. The Rosses could not afford to repay the Short-Term Abbott Loan or the Six-Month Abbott Loan at the times those debts became due. In December 2013, Mr. Ross paid $8,000.00 ($6,000 in principal of the $50,000 Short-Term Abbott Loan and $2,000 in interest) because that was all he could afford.

[334] By May 2014, Mr. Ross had still not repaid the Short-Term Abbott Loan or the Six-Month Abbott Loan. Mr. Ross gave Mr. Abbott promissory notes evidencing each of the Abbott Advances and the agreed rates of interest. On August 17, 2014, Mr. Abbott received $59,625 which Mr. Ross had received by surrendering an insurance policy. Given the Rosses' TL and PKS contributions had not yet paid by that date, Mr. Ross evidently preferred Mr. Abbott as a creditor over his financial obligations owed with respect to TL and PKS.

[335] A company of Mr. Paterson (Ms. Ross' father) had an office space at York Road. Mr. Ren developed concerns about fees being paid to Mr. Paterson for property management services, because Mr. Ross had told Mr. Ren those services would be provided in exchange for free rent. No rent from Mr. Paterson's company was appearing in the 754 BC's financial statements. Mr. Ren's inquiries directed to Mr. Paterson about the situation did not alleviate his concerns.

[336] The business relationship surrounding York Road began to break down and Mr. Ren took steps to sell York Road. In the course of those preparations, Mr. Ren obtained some records that Mr. Ross had not previously given to him. Mr. Ren

learned that at the closing of York Road purchase, there had been a residue of $7,907.20 remaining from the purchase funds (the "York Road Purchase Residue"). Mr. Ross instructed Mr. Johnson, whom Mr. Ross had retained for the closing of York Road, to deposit the York Road Purchase Residue to Mr. Ross' company 598380 BC Ltd. ("380 BC") on April 18, 2012, even though 380 BC was not an investor in York Road. The payment of the residue to 380 BC was made without the knowledge or consent of the other York Road investing principals (Mr. Ren, Mr. Jesson, and Mr. Abbott).

[337] Also in the course of preparing for the sale of York Road, Mr. Ren located two copies of the buyer's statement of adjustments for York Road—one from Les Feil and one from RossLaw—which were different, and that the amounts listed for the RossLaw legal services on the York Road purchase transaction did not match. The RossLaw version listed RossLaw fees of $2,235.36 and $965.03 for JohnsonLaw's statement of account. Mr. Feil's copy did not list any RossLaw fees and the JohnsonLaw fees were noted as only being $741.13.

[338] Mr. Ren also discovered that Mr. Ross had also prepared, unbeknownst to Mr. Ren, a trust agreement to govern the relationship between the four York Road investing holding companies, with a company—0928754 BC Ltd ("754 BC")—designated as trustee. Mr. Ren learned that 754 BC held legal title to York Road.

[339] The sale of York Road closed August 18, 2014. The sale price was $575,000. The net sale proceeds of $128,958.42 were received by 754 BC. After closing, Mr. Ren and Mr. Jesson learned there had been outstanding water and property tax bills. Mr. Ren had not been asked to pay the water bill at any time the investment had been held, in order to avoid any penalty. Fees had been paid to Mr. Paterson for property management services in relation to York Road.

[340] By September 2014, the York Road net sale proceeds had still not been distributed. Relations between Mr. Ross, Mr. Ren, and Mr. Jesson had become very strained. Mr. Ross also still owed Mr. Abbott $22,367 on the two promissory notes and there was a balance of $18,211 outstanding from the Abbott Loans, bringing

Mr. Ross' indebtedness to Mr. Abbott to $40,578. These outstanding amounts remained unpaid in August 2015. At that time, Mr. Abbott offered to freeze the accumulation of interest and to allow repayment of the Abbott Advances through by future referral business by Mr. Ross if Mr. Ross provided post-dated cheques to repay the outstanding promissory note balance of $22,665. Mr. Ross did not accept. Mr. Abbott's ongoing efforts to have Mr. Ross repay him were unsuccessful.

[341] Around July or August 2015, Mr. Hashmi told Mr. Abbott that the Rosses had sold their house and that Mr. Hashmi had sued Mr. Ross for money he was owed, that he had obtained an attachment of the sale proceeds of the Rosses' home, and that the Rosses were leaving the country for a year and were living at the Oak Bay Beach Hotel in Victoria in the interim. Because Mr. Ross had not been responding to Mr. Abbott's communications, on August 10, 2015, Mr. Abbott went to the Oak Bay Beach Hotel to confront Mr. Ross and try to secure repayment. Believing he would obtain nothing without a compromise settlement given the Rosses' insolvent financial circumstances, Mr. Abbott offered to compromise the $38,301.75 that he was owed together with interest to that date, for immediate payment that day of $25,356.00, agreeing to reduce that sum by forwarding $2,886.75 of it to Mr. Jesson on Mr. Ross' behalf.

[342] When the net sale proceeds of York Road were finally distributed, the York Road Purchase Residue was adjusted against MWW's interest.

j) Matthew Takoski's missing $100,000

[343] About two weeks after Mr. Takoski had provided the $100,000 good-faith money, on June 12, 2012 he provided a further $100,000 to Mr. Ross as a deposit on the PKS deal. Mr. Takoski testified he was not expecting to receive this money back. The $750,000 deposit provided on June 12, 2012 to Grant Thornton Limited, the receivers and vendors on PKS, included Mr. Takoski's June 12, 2012 $100,000 deposit. The payment of the $750,000 brought the JohnsonLaw PKS trust account balance to nil.

[344] When a document was circulated by RossLaw on August 23, 2012 setting out the Individual Plaintiffs' required contributions, the notation that the full $650,000 Investment Share amount was still required from Mr. Takoski did not cause him any concern; he simply assumed the $100,000 he had provided as a deposit for the deals on June 12, 2012 had been simply been allocated to the PKS deal. This was confirmed in an email Ms. Duarte sent to Mr. Takoski on August 24, 2012, based on information I find she could only have received from Mr. Ross. However, around March 11, 2013, Mr. Takoski learned there was a shortfall with respect to his $100,000 contribution for PKS.

[345] Mr. Takoski was very disturbed by the revelation. He contacted RossLaw. Ms. Gable assured Mr. Takoski that the information was not correct, and that she remembered Mr. Takoski paying his PKS contribution. However, when she looked she found that $100,000 was in fact missing.

[346] Mr. Takoski went to RossLaw and spoke to Mr. Ross about the situation. Mr. Ross told him he also remembered that Mr. Takoski had paid the $100,000 PKS deposit and told Mr. Takoski "we'll find it", which Mr. Takoski interpreted as meaning Mr. Ross did not know where the $100,000 was. Mr. Takoski was "mystified" because he could not understand how money everyone acknowledged had been provided could not be found.

[347] In April 2013, Mr. Hashmi was looking for the Mr. Takoski's missing $100,000 and spoke to Mr. Ross. Mr. Ross told Mr. Hashmi to check the TL account. Mr. Hashmi did so, but the missing $100,000 was not there. In May and June 2013, Mr. Hashmi communicated with Ms. Gable about Mr. Takoski's missing $100,000 and asked her to see if it had gone into the RossLaw general account. On June 11, 2013, Ms. Gable advised Mr. Hashmi the missing money was not in RossLaw's general account.

[348] Ms. Gable then spoke to Mr. Ross about Mr. Takoski's missing PKS $100,000, and explained to him that she remembered Mr. Takoski providing that $100,000 contribution. Mr. Ross told Ms. Gable that $100,000 from Mr. Takoski had

been a loan. Ms. Gable was receiving mixed information about the missing $100,000. Mr. Takoski was saying he had provided money for PKS, which had been her understanding, but Mr. Ross was telling her it had been a loan. Ms. Gable "started to wonder if something was wrong".

[349] The next day, on June 12, 2013, Mr. Ross called Mr. Hashmi and told him that Mr. Takoski's $100,000 was in the RossLaw general account and that Mr. Hashmi could get a cheque for it for PKS. Despite Mr. Ross' assurance that a cheque for the $100,000 would be forthcoming, it was not. Mr. Hashmi continued to try to obtain the cheque from Mr. Ross. On June 29, 2013 Mr. Hashmi received a bank draft from Ms. Ross for $100,000 to pay Mr. Takoski's PKS contribution.

[350] The RossLaw June 2013 general account bank reconciliation reflects a negative opening balance of $338.81 overdrawn, a growing overdrawn balance thereafter (with the negative balance climbing to as much as $17,389.62) until June 13, 2013, and more than 15 separate NSF fees. Its highest balance in June 2013 was only $32,798.92—not enough to include Mr. Takoski's $100,000. The RossLaw July 2013 general account bank reconciliation was not disclosed by the Defendants. There is no documentary evidence confirming Mr. Takoski's $100,000 had been in Mr. Ross' general account in June 2013 when Mr. Ross had told both Ms. Gable and Mr. Hashmi that it was.

[351] The July 2013 bank reconciliation for RossLaw's general account was never disclosed by the Defendants. There is no documentary evidence confirming that in July 2013 the RossLaw general bank account contained sufficient funds to satisfy the return of Mr. Takoski's $100,000 for PKS, or if it did, that established where the money came from.

[352] The evidence does not support a finding that Mr. Takoski loaned Mr. Ross the second $100,000. I find it was not a loan. Even if had been a loan, it would be further evidence of the Rosses' insolvency. Neither version—a loan or an unauthorized taking—was disclosed to the Individual Plaintiffs before PKS closed.

k) The Ross Entities are issued shares for the PKS transaction without having paid their required contribution

[353] Based on Mr. Ross' calculation, the Rosses were required to pay $105,982 for their PKS Investment Shares (based on the increase in the PKS Investment Share price, applied to their two Investment Shares) before PKS closed on March 5, 2013. The Rosses knew in advance of the PKS closing, that they did not have the money to satisfy their PKS obligations. Mr. Ross did not disclose that fact to the PKS Plaintiffs before the PKS transaction closed. On closing, the Rosses did not pay their required PKS contribution. Mr. Ross was aware of that fact and did not disclose that fact to the PKS Plaintiffs, before the PKS transaction closed or at all. The default was discovered by the Individual Plaintiffs in the course of their discovery of other financial defaults and defalcations by the Rosses.

l) Secret Billings and unpaid TL and PKS contributions are discovered after the close of PKS

[354] The house of cards that was the Rosses' financial situation was collapsing. After the close of PKS, the Individual Plaintiffs learned, for the first time, that the Rosses had defaulted on their TL and PKS financial obligations and that Mr. Ross had billed for legal services in connection to the TL and PKS transactions despite his representation to all of the Individual Plaintiffs except the Poons and the Jessons (the "Founders' Shares Plaintiffs") that he would not do so, as justification for his Founders' Shares. The facts leading to these discoveries are outlined below.

(1) Mr. Ross prepared and paid PKS Statements of Account from trust in secret

[355] Mr. Ross had retained Mr. Johnson and JohnsonLaw to receive money in trust from the TL and PKS investors and pay out trust money as authorized by Mr. Ross, including by releasing purchase funds to the vendors on each deal. The monies the Individual Plaintiffs provided for PKS should have been directed to JohnsonLaw. However, unknown to Mr. Johnson, Mr. Ross caused some money provided in trust for the PKS transaction to be deposited into the RossLaw PKS trust account instead. On January 18, 2013, at Mr. Ross' direction, $590,903 provided by Mr. Little via his company Arbutus RV for the PKS investment was deposited directly

into the RossLaw trust account. Mr. Ross did not direct that Mr. Little's money be transferred to JohnsonLaw's trust account. Mr. Ross used Mr. Little's PKS money for unauthorized purposes for his own benefit.

[356] At the end of January 2013, RossLaw's general account balance had a substantial deficit and could not satisfy its payroll obligations without some injection of cash. On January 31, 2013,[4] Mr. Ross caused statements of account (bills for legal services) to be prepared for each of 772 BC, 416 BC, 420 BC, 423 BC, 425 BC, 429 BC, 959502 B.C. Ltd., and 959504 B.C. Ltd., for RossLaw legal services and disbursements related to the incorporation of each company. Mr. Ross then caused those statements to be directed to himself on behalf of each of those companies (the "January 31, 2013 PKS RossLaw Statements of Account"). On the same date, Mr. Ross caused the January 31, 2013 PKS RossLaw Statements of Account to be paid using the RossLaw PKS trust monies received from Mr. Little. Payment of the January 31, 2013 PKS RossLaw Statements of Account, from PKS trust funds, was approved solely by Mr. Ross. This payment enabled the RossLaw payroll paycheques to clear. The January 31, 2013 PKS RossLaw Statements of Account did not include a breakdown of the legal services that explained how the lump sum fee for each of the January 31, 2013 PKS RossLaw Statements of Account had been determined.

[357] On February 13, 2013, RossLaw bounced a cheque for $72,305. Although Mr. Ross tried to downplay its importance to the solvency of RossLaw by suggesting it may have been a client's cheque that had been returned due to insufficient funds, that is not correct. It was an outgoing RossLaw cheque.

[358] On February 14, 2013, Mr. Ross caused a statement of account to be prepared for 772 BC for RossLaw legal services and disbursements totalling $112,000 related to the purchase of the PKS Assets, and caused that statement of account to be directed to himself (the "February 14, 2013 PKS RossLaw Statement

[4] The parties all agree the 2012 date on these statements of account was an error and that they were prepared on January 31, 2013.

of Account"). On the same date, Mr. Ross caused the February 14, 2013 PKS RossLaw Statement of Account to be paid using RossLaw PKS trust monies received from Mr. Little. Payment of the February 14, 2013 PKS RossLaw Statement of Account, from PKS trust funds, was approved solely by Mr. Ross. The February 14, 2013 PKS RossLaw Statement of Account did not include a breakdown of the legal services that explained how a $100,000 lump sum "fee" had been determined.

[359] Mr. Ross did not disclose the January 31, 2013 PKS RossLaw Statements of Account or the February 14, 2013 PKS RossLaw Statement of Account (collectively, the "Secret PKS Billings") to the PKS Plaintiffs or any of the Individual Plaintiffs at any time before PKS closed on March 5, 2013. Mr. Ross did not tell the PKS Plaintiffs or any of the Individual Plaintiffs that he had directed the Secret PKS Billings be paid with PKS trust money received from Craig Little. The PKS Plaintiffs never approved payment of the Secret PKS Billings with PKS trust money or otherwise.

(2) The March 13, 2013 pre-meeting email

[360] Around 1:30 p.m. on March 13, 2013, Mr. Hashmi sent an email to the PKS investors, including the Rosses, attaching various documents "for discussion" at the PKS investor meeting scheduled for 4:30 p.m. that afternoon. One of the attachments was an excel spreadsheet titled "copy of schedule of adjustments v3" (the "March 2013 Spreadsheet"). The March 2013 Spreadsheet listed the disbursements to date as part of the PKS. Included in the disbursements was RossLaw "legals and outlays" in the amount of $123,000. The spreadsheet also set out a description of "closing costs still to pay" which included RossLaw "legals estimated to be $100,000". The March 2013 Spreadsheet also referenced legal costs related to bcIMC and JohnsonLaw.

(3) The March 13, 2013 meeting of PKS investors

[361] The March 13, 2013 meeting of the PKS investors proceeded as scheduled. John and Cecilia Kwari, the Poons, the Pengs, Daniel Hsu on behalf of Mrs. Hsu,

and Matthew Takoski's wife Audrey, all attended in person, and the Littles and the Rosses attended by telephone. Mr. Hashmi was also present. At the meeting, Cecilia questioned the legal services costs. In response, Mr. Ross told those present there would have to be some administration and legal fees charged. As observed by Mr. Kwari, this new information was a "change in the narrative" by Mr. Ross. Nobody who attended the March 13, 2013 meeting had previously been told by Mr. Ross or anyone else that any legal fees had been charged and paid. Before the close of PKS there had been no discussion, much less agreement, with any of the Individual Plaintiffs about any legal fees being paid from trust and no discussion, much less agreement, with the Founders' Share Plaintiffs that legal fees were payable.

[362] Nothing was resolved with respect to any PKS legal fees at that meeting, but Mr. Ross told the PKS Plaintiffs he would have a breakdown of most of the legal and transaction costs by following week.

[363] Mr. Ross made no mention during the March 13, 2013 meeting about any other statements of account having been prepared and paid, including in relation to the TL transaction. However, after the formal part of the meeting had ended, the PKS Plaintiffs present also asked for a breakdown of any legal and transaction costs in relation to TL.

(4) The Secret TL Billings are discovered

[364] After the March 13, 2013 meeting the PKS Plaintiffs learned for the first time that Mr. Ross had also prepared statements of account in relation to the TL transaction, and paid them from trust. They did not learn this from Mr. Ross but instead from Mr. Hashmi.

[365] On March 18, 2013, Mr. Hashmi sent the Individual Plaintiffs an email enclosing copies of three statements of account for legal fees in relation to the TL transaction that had been paid from trust.

[366] On July 26, 2012, September 10, 2012, and August 31, 2012, Mr. Ross had caused RossLaw to prepare statements of account in the amounts of $8,040.54,

$59,866.06, and $5,241.08, respectively for legal services provided in relation to TL (collectively, the "Secret TL Billings"). Mr. Ross had directed the Secret TL Billings to himself at 888 Fort Street and directed Mr. Johnson to pay them using monies the Individual Plaintiffs had provided to Mr. Johnson in trust for the TL investment. Mr. Johnson paid the Secret TL Billings on the dates they were prepared. I wish to make clear that Mr. Johnson was not aware of any arrangement between the Founders' Share Plaintiffs and Mr. Ross that would have precluded such billings.

[367] None of the Secret TL Billings included a breakdown of the legal services explaining how the lump sum fee for each of statement of the Secret TL Billings had been determined, including the $52,000 lump sum fee in the September 10, 2012 statement of account.

[368] None of the Individual Plaintiffs had been told that the Secret TL Billings were going to be prepared, or had been prepared, and none of them consented to them being paid from trust. The Founders' Shares Plaintiffs who participated in the TL transaction considered the charging of any fees to be contrary to the agreement reached with Mr. Ross whereby Mr. Ross would receive Founders' Shares in TL in exchange for covering the legal.

[369] A further meeting PKS investors was arranged.

(5) The March 27, 2013 meeting of the PKS investors

[370] The PKS investors met on March 27, 2013 to discuss the Secret TL Billings and the Secret PKS Billings (collectively, the "Secret Billings"). Ms. Donald did not attend the March 27, 2013 meeting, since she was not an investor in PKS. Contrary to Mr. Ross' assurance at the March 13, 2013 meeting, no breakdown of the legal and transactions costs had yet been provided.

[371] The Founders' Shares Plaintiffs who participated in the PKS transaction were shocked when they were made aware that legal fees had been charged and paid, because (i) they had never been told there had been any legal fees or disbursements charged or paid to that point, and (ii) because Mr. Ross had told

them and, to their knowledge, all of the PKS Plaintiffs, that Mr. Ross would be covering the legal costs. The Founders' Shares Plaintiffs participating in the PKS transaction considered the charging of any fees to be contrary to the agreement reached with Mr. Ross whereby Mr. Ross would receive Founders' Shares in PKS in exchange for covering the legal.

[372] At the March 27, 2013 meeting, the Founders' Shares Plaintiffs expressed to Mr. Ross their concern that any legal fees had been charged in relation to TL and PKS, given his promise to cover the legal costs as justification for his Founders' Shares; their concern was not merely about the quantum of fees, as Mr. Ross testified. They expressed additional concern that the Secret Billings had been paid without their knowledge or consent. There had been no previous agreement with the Founders' Shares Plaintiffs that any legal fees, such as JohnsonLaw fees or RossLaw fees for legal staff fees other than Mr. Ross, would be carved out of the Founders' Shares arrangement and billed.

[373] Mr. Poon and Mr. Jesson were perplexed and initially did not understand why there was any concern about Mr. Ross charging and being paid for the legal services he was providing. It was only in the context of the discussion about Mr. Ross charging legal fees that they learned—for the first time—Mr. Ross had received Founders' Shares. Mr. Ross had never mentioned such an arrangement to them. Such an arrangement was contrary to what Mr. Ross had presented to them as the TL and PKS deals. Mr. Ross had never told them that his plan was not to contribute cash and instead obtain Founders' Shares in the TL and PKS investments or that he had done so, in exchange for "covering the legal" or at all.

[374] The notes of the March 27, 2013 meeting noted "[i]t was agreed that a draft of the shareholder agreement would be presented and voted on but in the interim simple majority would be used". However, while several of the Individual Plaintiffs described this process as one that they often informally followed, there was no informed decision or agreement by the Individual Plaintiffs to adopt a majority rule process as the means of making final determinations respecting their legal rights.

The breadth of material information that had not yet been disclosed to them precluded the possibility of any valid and binding agreement to do so.

[375] None of the Individual Plaintiffs had approved payment of the Secret Billings, before PKS had closed or at all.

[376] Mr. Ross made no mention at the March 27, 2013 meeting about any further legal fees alleged to be owed.

(6) The April 8, 2013 Letter—further PKS legal fees are alleged to be owed

[377] On April 8, 2013, Mr. Ross wrote a letter and caused Ms. Gable to send it by email to John Kwari for the attention of the PKS Plaintiffs (the "April 8, 2013 Letter"), which in turn attached two documents described as "Parkside bills—already paid from trust" and "Parkside draft April 8, 2013 bills".

[378] Mr. Ross' April 8, 2013 Letter included the following:

> We enclose our draft Statements of Accounts covering professional services rendered and disbursements incurred on behalf of each of the above listed companies relating to the purchase of the Parkside Hotel. While these accounts include disbursements, we note that we have not yet included the fees as set out below as we are finalizing the allocation among the accounts. We confirm that the total amount of legal fees to be billed in connection with this transaction will be the amount of $211,500.00, plus disbursements and taxes...
>
> For certainty, the fees in the amount of $211,500.00 include amounts previously billed in connection with this transaction in relation to the incorporation fees for each company and the disbursements for 0928772 B.C. Ltd. The fees billed to 0928772 B.C. Ltd. for the purchase are higher as this company was the purchaser throughout the negotiations and a portion of this fee may be allocated among the other companies for equity.
>
> [Emphasis added.]

[379] Under the "anticipated allocation of fees and disbursements" heading, the April 8, 2013 Letter described the statement of account for "0959502 B.C. Ltd. (Parkside Management Ltd.)",[5] as including a $1,500 fee and $484 in disbursements, which were both included in the enclosed statement of account for

[5] This appears to have been a misstated reference to Parkside Hotel Management Ltd.

502 BC, however, the April 8, 2013 Letter also listed a $23,000 fee and $152.50 in disbursements for “management”, which was not explained, and did not appear on the statement of account.

[380] To that point there had been no mention of any unpaid TL or PKS contributions.

(7) The Rosses’ unpaid TL and PKS contributions are discovered

[381] On April 9, 2013, Mr. Little sent an email to Mr. Ross, copying the other Individual Plaintiffs, asking for further information as follows:

> Hi Lindsay,
>
> Can you do up a quick summary of your Equity Positions separately for both Sidney and Parkside (share value less funds injected) for circulation prior to the next Board Meeting. Also, copies of your personal guarantees on both investments. These should assist everyone in obtaining a clearer
>
> understanding of your equity position.
>
> Much Thanks!
>
> Craig

[382] Later that same day, Ms. Sparling responded, likely directed by Mr. Ross as was the practice, saying she would send the personal guarantees later and attaching outdated listings of the TL and PKS investors’ deposits and remaining obligations in relation to each deal. However, the information provided (incorrectly) reflected no financial obligation by the Rosses in relation to TL. Mr. Little inquired further of Ms. Sparling. The response came the next day, April 10, 2013.

[383] On April 10, 2013, Mr. Ross caused Mr. McRae to send an email to the PKS Plaintiffs, except Mr. Little, responding to Mr. Little’s request for further information about the Ross Entities’ Founders’ Shares in PKS (the “April 10, 2013 Email”). The April 10, 2013 Email includes the following information with respect to the Rosses’ “contributions” to both TL and PKS:

> Regarding the Ross equity contribution to Travelodge, you are correct in terms of splitting the additional unit. Based on the organizational chart, the same amount of those shares will be issued to Ross Holdco. This contribution has currently not been made but will be part of the $300,000 holdback when

> paid or released depending on what happens to the claims under the Purchase and Sale representations and warranties. Currently Kim Johnson is holding these shares in escrow and Holdco has issued a Promissory Note to the relevant companies.
>
> The equity memo as well as the equity contribution does not include this amount (if it did the equity would be increased to $5,950,000) nor does it subtract this amount.
>
> The $105,982.00 in Parkside will be offset against LAC Ross Law Corporation's fees and disbursements once released from Trust. These shares have been issued and are not in trust since it was expected that the account would have been dealt with on or shortly after closing. Mr. Johnson will be requested to have these shares held in trust until the account is finalized.
>
> [Emphasis added.]

[384] The April 10, 2013 Email was the first mention that the Rosses had not made either their $100,000 contribution for TL nor their $105,982 contribution for PKS, and was the first mention of any escrow agreement in relation to the Ross Entities' shares in the TL Purchasing Companies received through their participation in the TL investment.

[385] Mr. McRae's explanation for how the Rosses' unpaid TL obligation would be satisfied was not logical. The holdbacks would be released to the TL vendor, not the Rosses or the TL Purchasing Companies. Mr. Ross testified the illogical explanation was the result of Mr. McRae's miscommunication owing to his failure to understand the situation. That is not true. Mr. Ross was copied on the email and did not correct the misinformation which Mr. Ross testified was inadvertent. It was Mr. Ross' practice to stand behind his staff's shoulders and dictate emails. It is not plausible that Mr. Ross would have been so cavalier, about an issue as important as explaining why shares had been issued despite no payment having been made, that he would have allowed a junior associate to draft the explanation.

[386] Mr. McRae passed on exactly what Mr. Ross had told him to communicate. Mr. Ross had to offer some explanation for why his contribution had not been made, and this unfounded explanation is what he offered, probably hoping none of the Individual Plaintiffs would be savvy enough to understand the explanation made no

sense. The explanation conveyed by Mr. McRae at Mr. Ross' direction was an effort to justify, and conceal, the Rosses' default related to the TL transaction and Mr. Ross' failure to disclose that fact.

[387] There was a meeting of some of the investors on April 10, 2013. Ms. Donald was not present. At the April 10, 2013 meeting, Mr. Ross acknowledged the Rosses had not yet paid their required $100,000 TL contribution, even though the TL transaction had closed seven and a half months earlier on August 31, 2012, or their required $105,982 PKS contribution. At trial, Mr. Ross testified he did not disclose the fact that the Rosses had not paid their required PKS contribution before closing because he believed the contribution had been paid by the accounts receivable for legal fees that exceeded the subscription price. That evidence is implausible. The Ross' PKS contribution had not been paid by any accounts receivable. Mr. Ross knew that.

[388] Mr. Ross also told the Individual Plaintiffs present at the April 10, 2013 meeting that the Ross Entities' shares in the TL Purchasing Companies were being held in escrow by Mr. Johnson, and were covered by either loans or promissory notes from him.

(8) There was no escrow agreement

[389] There was no escrow agreement, either before the TL close or after. None of the Individual Plaintiffs had ever been asked to consent to an escrow agreement. Mr. Johnson did not draft, and was not asked by Mr. Ross or anyone on Mr. Ross' behalf to draft, any escrow agreement related to any TL or PKS shares.

[390] Mr. Ross testified he had signed loan documents and resolutions in support of the alleged escrow transaction. That is not true. There are signed loan agreements, but they list MWW as the lender and 797 BC and 800 BC as the borrowers, rather than the reverse. Further, although the documents are signed by the Rosses, they were not witnessed and the date of the signatures is not set out. Rather, the ostensible loan agreements for TL only note they are effective: August 31, 2012, being the date of the TL closing. There are also unsigned directors' resolutions for

MWW and 797 BC purporting to authorize 797 BC to enter into an escrow agreement with MWW respecting shares held by MWW, and two on demand promissory notes by MWW in favour of 797 BC (but not 800) each for $50,000. I find all of those documents were probably created after the Individual Plaintiffs discovered the Rosses' TL default. In any event, the documents did not satisfy the Rosses' required financial obligation for TL.

[391] Contrary to the testimony of Mr. Ross, I find he did not instruct Mr. McRae or Ms. Sparling to prepare a promissory note or any escrow agreement at any time before the Rosses' failure to pay their required TL contribution was discovered. While Mr. Ross may have asked either or both of Mr. McRae or Ms. Sparling to work on an escrow agreement, that was well after the TL close, after their non-payment had been discovered. Any request of this nature was a sham and a desperate effort by Mr. Ross to conceal his intentional default which he had failed to disclose, and to justify, minimize, and try to remedy that default after the fact.

[392] There was no conversation between Mr. Johnson and Ms. Ross about an escrow agreement and I reject Ms. Ross' evidence to the contrary. Her evidence on the issue at her examination for discovery and at trial was inconsistent. At her examination for discovery, Ms. Ross had testified she could not recall the details of any conversations before the close of TL about an escrow agreement, including with whom she had any such conversations, saying she simply "recall[ed] knowing about an escrow agreement". At trial she testified she had discussed an escrow agreement with Mr. McRae and Mr. Johnson. That evidence was not put to either Mr. McRae or Mr. Johnson. The existence of any escrow agreement and the timing of its creation was understood to be an issue. This is evidence that should have been put to those witnesses if Mr. Ross intended to give it. However, it is not because the Defendants breached the rule in *Brown v. Dunne,* 6 R. 67, 1893 CanLII 65 (H.L.) that I give her evidence about her alleged conversation with Mr. McRae and Mr. Johnson no weight. It is because of my broader finding that she is not a credible witness and the implausibility of her evidence about the conversation.

[393] Further, Ms. Ross' testimony at trial about the alleged escrow agreement was also internally inconsistent. She testified she was told by Mr. Ross, before the close of TL, that Mr. McRae and Mr. Johnson were preparing an escrow agreement, but later testified her first discussion with Mr. Ross about the escrow was after the close of TL. She testified she never followed up with either Mr. Johnson or Mr. McRae about any alleged escrow agreement

(9) The April 10, 2013 decision to permit satisfaction of the Rosses' PKS contribution by payment of legal fees

[394] At the April 10, 2013 meeting, in addition to questions about the Rosses' unpaid TL and PKS contributions, there were also questions about the legal fees Mr. Ross had already charged had paid. Mr. Ross advised those present (a representative of all of the Individual Plaintiffs, except Ms. Donald) that it had always been the intention to bill for RossLaw' staff time and said there would be more billing coming, and advised there were PKS related legal fees in the amount of $112,000 still outstanding. The Founders' Shares Plaintiffs who were present told Mr. Ross that was not what Mr. Ross had presented to them.

[395] Mr. Ross was very upset by the questions about the legal fees situation and about "being under the microscope". His response was a "big emotional outburst" marked by yelling, describing them as "ungrateful", and being angry about an unwillingness to pay his fees, which he asserted were owed. Mr. Ross told those present they could "buy him out if they were unhappy with the legal fees". Those present were shocked, taken aback and "bowled over" by Mr. Ross' comments and attitude. At one point Mr. Ross stormed out of the meeting, slamming the door in a "shocking display".

[396] Mr. Ross' behaviour at the April 10, 2013 meeting was bullying, intended to intimidate those present into agreeing, post TL and PKS closings, to condone the past payment of the Secret Billings and pay further PKS legal fees out of trust.

[397] At the April 10, 2013 meeting a decision was made that Mr. Ross' further $112,000 in PKS legal fees would be paid, conditional on that money being paid

used to satisfy the Rosses' unpaid PKS contribution. However, this decision was the result of Mr. Ross' strong-arming and bullying, and the pressure felt by those present in the situation in which they found themselves in. They felt "trapped", and like "they had no option". Mr. Ross had their money; they felt like they had no choice but to acquiesce.

[398] In fact, on April 16, 2013, Mr. Ross instructed payment be made to RossLaw for fees and disbursements totalling $140,289.50 (the "April 2013 PKS Billings"), not just the $112,000 in fees and disbursements for which Mr. Ross had sought payment approval at the April 10, 2013 meeting. In addition, although payment of the further $112,000 in RossLaw fees had been supported, payment was conditional on that amount being repaid to PKS to satisfy the Ross Entities' unpaid PKS contribution. However, no payment into the PKS trust account was made by Mr. Ross until April 24, 2013. Further, on that date the amount deposited was only $100,000, not the full $105,982 due. Mr. Ross did not provide copies of the statements of account supporting the April 2013 PKS Billings to the PKS Plaintiffs.

[399] On May 10, 2013, Mr. Hashmi asked for and received copies of RossLaw's statements of account supporting the April 2013 PKS Billings. These included legal bills for each of 416 BC, 420 BC, 423 BC, 425 BC, 429 BC, 772 BC, and Parkside Hotel Management Ltd. (502 BC). As he had done with the Secret Billings, Mr. Ross once again did not send the April 2013 PKS Billings to any of the PKS Plaintiffs, but instead directed them to himself at 888 Fort Street. The April 16, 2013 PKS Billings simply listed "our fees" followed by a lump sum amount and did not include a breakdown of the legal services that explained how the lump sum fee for each statement of account had been determined. While most of the April 2013 PKS Billings listed "our fees" as being $12,500, the statement of account of Parkside Hotel Management Ltd. was for "our fees" of $23,000. This is the same amount Mr. Ross had recorded as being for "management" fees for 502 BC in his April 8, 2013 Letter. The activities described in that statement of account, could only have been performed by Mr. Ross. If those activities were done, they were done by

Mr. Ross, which would be inconsistent with his representation to the PKS Plaintiffs that the April 2013 PKS Billings were for RossLaw staff time and not his own.

[400] No itemized breakdown of any of the Secret Billings or the April 2013 PKS Billings has ever been provided to the Individual Plaintiffs despite their requests.

(10) The reference to "closing costs" was not an authorization to pay PKS statements of account from trust without notice

[401] Mr. Ross testified that he never promised to cover the legal costs on TL and that he was authorized to pay the Secret PKS Billings from trust because he approved them as a director of the various companies and because, "in his mind", the reference to $500,000 for closing costs set out on an excel spreadsheet showing a draft PKS budget as at June 2012, included $200,000 for his legal fees (the "June 2012 Spreadsheet"). Mr. Ross "treated the bills as approved" and the $500,000 closing costs "budget", which in his mind included a $200,000 allocation for RossLaw legal fees, as a retainer to be drawn down.

[402] I reject the Defendants' argument for several reasons. I have found he did represent to the Founders' Shares Plaintiffs he would cover the legal costs of the TL transaction in exchange for his TL Founders' Shares. Further, Mr. Ross was not authorized to pay the Secret PKS Billings from trust for the reasons he put forward, or at all. First, Mr. Ross never told any of the PKS Plaintiffs the "closing costs" line item on the June 2012 Spreadsheet included any legal fees and the inclusion of legal fees is not evident from the description. Second, the evidence does not support a finding that all of the PKS Plaintiffs received the June 2012 Spreadsheet. Third, the "closing costs" figure was not updated as the PKS transaction went along. In addition, Mr. Ross could not provide any rationale basis for the purported $200,000 estimated legal fees he claimed had been budgeted as part of the $500,000 closing costs on the June 2012 Spreadsheet. Further, the $500,000 closing costs budget line item on the June 2012 Spreadsheet was only raised as a justification by Mr. Ross after the Secret PKS Billings and Mr. Ross' unpaid PKS contribution had been discovered by the PKS Plaintiffs. Finally, a generic line item in an excel budget

spreadsheet would be completely inadequate to constitute notice, let alone approval, of the Secret PKS Billings being paid from trust money. Finally, Mr. Ross' personal financial interest in the payment of the Secret PKS Billings meant he was in a conflict of interest and could not have approved them without the PKS Plaintiffs full and informed consent, which he did not have.

2. Mr. Ross breached his fiduciary duty of loyalty by failing to disclose the dishonest acts of Joanne Ross

a) Stirling Arm

[403] In 2003 Mr. Ross invited Mr. Hashmi and his wife, the late Marie Queen, to jointly purchase a cabin at Sproat Lake, on Vancouver Island, B.C. ("Sproat Lake"). Mr. Hashmi contributed $150,000 towards the purchase, and a small mortgage was taken out on the property. Mr. Hashmi and his family would spend time at Sproat Lake when they came from Scotland to Victoria, typically once or twice per year.

[404] In 2005, Mr. Ross proposed the original cabin be sold, and a new cottage jointly purchased. Mr. Ross told Mr. Hashmi there was a property that was to be subdivided, and that the Rosses and Mr. Hashmi would be buying the lot with the original house. Mr. Hashmi agreed to proceed with the second cottage purchase ("Stirling Arm"). Sproat Lake was sold, the mortgage was paid off, and Stirling Arm was purchased. Mr. Ross advised Mr. Hashmi that for Stirling Arm, Ms. Ross would be the purchaser, and that Mr. Ross would execute a deed of trust to protect Mr. Hashmi's family's interests. Mr. Hashmi trusted Mr. Ross' advice, and told him to go ahead.

[405] The trust agreement with respect to Stirling Arm, under which Mr. Hashmi and his wife were beneficiaries, made Ms. Ross trustee. The trust agreement was witnessed by Mr. Ross. Mr. Hashmi did not receive a copy of the trust agreement at the time.

[406] On June 17, 2005, Ms. Ross emailed Mr. Hashmi some of the financial details with respect to the purchase of Stirling Arm. Ms. Ross told Mr. Hashmi (i) the purchase price of Stirling Arm was $360,000, (ii) she and Mr. Ross had already paid

a $30,000 deposit, and (iii) the net proceeds from the sale of Sproat Lake were $288,000, after paying off the $246,000 mortgage and $6,000 to one of the purchasers' realtors. After applying the net sale proceeds of Sproat Lake to the purchase of Stirling Arm, Ms. Ross told Mr. Hashmi that each family was required to pay $21,000 to close, and that, accounting for one-half of the $30,000 deposit which Ms. Ross told Mr. Hashmi the Rosses had paid, and half of various other costs of improvement and taxes due on closing, each family needed to pay $54,750. Ms. Ross also advised Mr. Hashmi that "Lindsay is anticipating putting a mortgage on the proper [*sic*] for between $100,000 and $150,000", with $50,000 of the mortgage proceeds planned to be used for future renovations and improvements to the property, and that "the other $100,000 will be divided 50/50 to come back into our pockets; effectively replacing the 50,000 that we are each putting out now. We'll discuss it all later…". Mr. Ross subsequently told Mr. Hashmi there would be no need for a mortgage and that it would be a cash purchase. Much of that information was untrue.

[407] The purchaser's statement of adjustments, not received by Mr. Hashmi at the time Stirling Arm was purchased, reflects that, contrary to Ms. Ross' representations to Mr. Hashmi, the un-subdivided Stirling Arm property was what was purchased by Ms. Ross and McManus Development Planning Inc. for $775,000, and later subdivided and the other lot sold off, and that only a $7,000 deposit paid—not $30,000 as Ms. Ross had told Mr. Hashmi—and the purchase was financed in part by a $480,000 mortgage in favour of Accredit Mortgage Ltd. The remainder of the funds required to close on Stirling Arm ($306,170.57) were provided by way of a trust cheque from RossLaw.

[408] Stirling Arm was sold at the end of November 2012, for $682,500. This was in the lead up to the close of the PKS transaction. Mr. Hashmi was anticipating receiving one half of the sale proceeds. At closing he learned, for the first time, that Ms. Ross had taken out a mortgage (an HSBC mortgage of $221,425.91) and a line of credit (also with HSBC for $167,741), and secured both against Stirling Arm. The trust agreement required Mr. Hashmi and his wife's consent prior to any mortgage

being placed on Stirling Arm. Their consent was neither sought nor obtained. The mortgage and the line of credit were registered against Stirling Arm without their knowledge or consent and encumbered the entire property, not just the Rosses' beneficial half interest. The combined value of the mortgage and HSBC line of credit exceeded the value of the Rosses' half interest in Stirling Arm. The statement of trust monies regarding the sale of Stirling Arm also shows the proceeds of sale were used to pay $4,007 in overdue property taxes on Stirling Arm (the property taxes had been due since July). Ms. Ross had not told the Hashmis the property taxes were overdue. The remainder of the sale proceeds from Stirling Arm ($262,447.34) were paid to Ms. Ross.

[409] When Mr. Hashmi confronted Ms. Ross about the encumbrances registered against Stirling Arm, Ms. Ross told him that there had been an error and the Rosses' bank had registered the mortgage on Stirling Arm instead of another property. That statement was untrue and that Ms. Ross knew it was untrue.

[410] There is a clear reference to the Stirling Arm property (which is located in the Clayoquot District of Vancouver Island, B.C., and not Victoria, B.C.) noticeable on the face of the mortgage, which Ms. Ross would have had to overlook. In addition, the Rosses had sold their house in 2011. It is implausible that upon that sale she would not have noticed that a $220,000 mortgage she believed was registered against that property, was not. Further, only five months earlier, in June 2012, Ms. Ross had listed the debt owing against Stirling Arm as being $380,000 on a personal financial statement (to which I will return later in these Reasons), which aligns with the total of the line of credit and the mortgage, and reflects her knowledge that the mortgage was registered against Stirling Arm when she made that statement to Mr. Hashmi.

[411] In that same conversation, Ms. Ross also advised Mr. Hashmi that she needed to borrow $60,000 of his share of the sale proceeds, and so she could only afford to give him $200,000 of his share at that time. Ms. Ross assured Mr. Hashmi

that the Rosses would obtain a line of credit and that Mr. Hashmi would get his money back as soon as possible.

[412] Ms. Ross later told Mr. Hashmi the bank had refused them a line of credit, and that they were working on obtaining funds to pay Mr. Hashmi back and asked him to be patient.

[413] Mr. Hashmi subsequently heard from Mr. Abbott, or someone close to him, that Mr. Ross was thinking of doing a joint venture. Given the timing, this may have been York Road. Mr. Hashmi became concerned, wondering how he would be repaid if Mr. Ross was going to be getting involved in a joint venture developing another property.

[414] Mr. Hashmi did not think Ms. Ross' explanation that the mortgage came to be placed on Stirling Arm by accident made sense, so he sought and obtained documents through Dye and Durham. One of the documents he obtained was the mortgage that had been placed on Stirling Arm. It shows Ms. Ross receiving a $675,000 mortgage against Stirling Arm only a month after it had been purchased, even though Ms. Ross had told Mr. Hashmi Stirling Arm had been purchased with the proceeds of the sale of Sproat Lake and cash provided by Mr. Hashmi, and that no mortgage had been taken out. Mr. Ross had signed the mortgage as covenantor and so was aware of it.

[415] Mr. Hashmi was shocked that almost the entire value of Stirling Arm had been mortgaged by Ms. Ross as the trustee holding Stirling Arm for the benefit of Ms. Hashmi and his wife, with the knowledge of Mr. Ross, in circumstances when Mr. Ross, the lawyer who had drafted the governing trust agreement, knew it could not be mortgaged without Mr. Hashmi and his wife's consent.

[416] Mr. Hashmi's concern about the risk that the Rosses would be unable to repay him increased as time went on given the alignment of a number of circumstances: the borrowed Stirling Arm sale proceeds, the close of PKS, and

Mr. Takoski's missing $100,000. As Mr. Hashmi described it, the confluence of the Rosses' financial crises was "like a car crash hitting a train wreck".

[417] Then, in July of 2013, Mr. Hashmi also learned about financial irregularities involving 888 Fort Street Ltd., which was in default as a result of unpaid property taxes. I will return to 888 Fort Street Ltd. later in these Reasons.

[418] Mr. Hashmi continued to have communications with Ms. Ross about being repaid his share of the Stirling Arm sale proceeds. In November 2014, the two agreed on the total amount outstanding from Ms. Ross to Mr. Hashmi. A promissory note was drafted evidencing the outstanding obligation of Ms. Ross, but Ms. Ross delayed signing it in an effort to "run out the clock" on the limitation period for bringing a civil action to recover the debt. Ms. Ross signed the promissory note acknowledging a $126,422.24 debt to Mr. Hashmi one day before the limitation period expired.

[419] The promissory note required Ms. Ross to pay the amount in full by June 30, 2015. She did not pay. Mr. Hashmi brought an action to recover on the promissory note and obtained default judgment. There was garnishment of various bank accounts, and Mr. Hashmi was able to capture some of the sale proceeds of the Rosses' house on Sea Point.

[420] The promissory note has never been paid. Ms. Ross' position, given in evidence at trial, is that the money owed under the promissory note is set off against other losses Ms. Ross alleges she sustained as outlined in the notice of civil claim filed by Ms. Ross in January 2022 in relation to another matter related to 888 Fort Street, which she had not pursued as at the time of trial.

[421] Some of the facts related to Stirling Arm occurred after the Relevant Period. However, her dishonest acts in relation to Stirling Arm predated the Relevant Period and were known to Mr. Ross, given he had signed both the trust agreement and the mortgage.

[422] Further, her act of insolvency in relation to Stirling Arm, in being unable to pay the debt to Mr. Hashmi, occurred during the Relevant Period. Mr. Ross was aware of that act of insolvency. The Rosses were spouses. The Ross Entities' finances were intermingled and treated as interchangeable. The Rosses organized, dealt with, and often attempted to delay or avoid payment of their financial obligations collectively.

[423] None of these facts were disclosed by Mr. Ross to the Individual Plaintiffs before the close of either the TL or the PKS transactions.

b) Fort Street

[424] In 2005, Mr. Ross advised Mr. Hashmi that he was putting together some investors, including his law associate Mr. Johnson, and one of his clients, Rick Balmer, to purchase the property located at 888 Fort Street in Victoria, B.C. Mr. Ross told Mr. Hashmi his father-in-law Mr. Paterson would manage the property. RossLaw had entered into a ten-year lease of the entire fourth floor of 888 Fort Street and the rest of the building was being leased by Grant Thornton. These facts played important role in Mr. Hashmi's decision to become an investor in the acquisition of 888 Fort Street.

[425] The financial plan for 888 Fort Street was to use the property's rental income to pay down the debt so that in ten years very little debt remained. The plan was predicated on all tenants paying their rent in full. As a result of the plan, Mr. Hashmi understood no incoming cash flow was expected for ten years, and so he was not expecting returns in the interim.

[426] Mr. Hashmi contributed $250,000 for a 20% interest. As part of the investment process, Mr. Ross advised Mr. Hashmi to put the investment in a family trust, with Ms. Ross as acting as trustee. At this point Mr. Hashmi was not yet resident in Canada. Mr. Hashmi did not understand the structure, and at the time did not get a copy of a co-ownership agreement which was put in place. Even though the investment had been described by Mr. Ross as an "annuity" type investment, there had been a cash call in 2009.

[427] Mr. Hashmi learned 888 Fort Street Ltd. was having some financial difficulties when Ms. Ross called him and told him cheques issued from 888 Fort Street Ltd.'s bank account had bounced. Mr. Hashmi gave Ms. Ross $50,000 as an injection of capital for 888 Fort Street Ltd. Ms. Ross and Mr. Ross signed cheques transferring money from 888 Fort Street Ltd. to RossLaw around the time the Rosses were renovating a home.

[428] The first meeting of the investors of 888 Fort Street Ltd. occurred in 2011, when they were advised by Mr. Ross there was not enough money to pay the property taxes. Mr. Hashmi could not understand why this annuity investment "needed another blood transfusion". Mr. Hashmi later learned the property taxes on 888 Fort Street had not been fully paid in 2011, or at all in 2012.

[429] At that meeting of the 888 Fort Street investors, Mr. Ross told Mr. Hashmi and others that, in his view, the RossLaw tenancy lease was not a true lease, but instead had only been entered into in order to provide a basis for 888 Fort Street Ltd. to secure a mortgage on the 888 Fort Street property. RossLaw had not been paying rent as required by the 888 Fort Street tenancy agreement.

[430] In February 2014 Mr. Hashmi engaged a lawyer to represent him and issues related to 888 Fort Street. A notice of civil claim was issued by 888 Fort Street Ltd. against the Rosses and RossLaw. Among the allegations were that Mr. Ross, a director of 888 Fort Street and under contract as its property manager, converted funds belonging to 888 Fort Street for his own use by paying personal expenses and expenses of RossLaw, including $86,365.90 for home improvements to the Rosses' homes on Sea Point Drive and at 498 Newport Avenue, in Victoria, B.C., furniture, exotic car repairs, personal investments, tenant improvements, Christmas expenses and cash withdrawals, and misdescribing those amounts as property expenditures of 888 Fort Street in the financial statements of 888 Fort Street.

[431] The 888 Fort Street litigation settled in November 2020, without any admission of liability. The settlement required the Rosses, RossLaw, and the estate of Rolf Paterson, to jointly pay $425,000 in the manner set out in the settlement

agreement, which included payment of $150,000 on closing and $275,000 by promissory note payable by December 31, 2021.

[432] The promissory note was signed, but it was not paid when it came due. Enforcement of the settlement agreement has become the subject of further litigation which was ongoing at the time of trial. Ms. Ross (alone) issued a notice of civil claim in January 2022, alleging certain acts which she claims entitles her to damages which she says she is entitled to set off against the money agreed to be paid under the settlement agreement. At the time of trial Ms. Ross had taken no steps to pursue that action.

[433] Some of the facts related to 888 Fort Street occurred after the Relevant Period. However, Ms. Ross' dishonest acts in using 888 Fort Street funds to pay for personal expenses of the Rosses, without the permission of the 888 Fort Street Ltd. investors, occurred during the Relevant Period and was known to Mr. Ross because of the Rosses' collaborative financial integration.

[434] None of these facts were disclosed by Mr. Ross to the Individual Plaintiffs before the close of either the TL or the PKS transactions.

c) Ms. Ross' personal financial statements were inaccurate and misleading

[435] Each of the participants in the TL and PKS investments, including the Individual Plaintiffs and Ms. Ross, were required to provide a personal financial statement ("PFS") as personal covenantors in the TL and PKS investments. The PFSs were to be provided to the lenders for each project. The accuracy of the PFSs submitted was important to the Individual Plaintiffs. The Individual Plaintiffs and the Rosses were aware that the representations contained in the PFSs would be relied on by the lenders in assessing the financial stability of the investors and the level of risk associated with the TL and PKS financing. The Individual Plaintiffs relied on the integrity of the lenders' assessments, including the accuracy of the PSFs on which those assessments relied, in making their decisions to invest in TL and PKS.

(1) The June 2012 PFS

[436] As part of the CIBC financing approval process for the TL deal, on June 27, 2012, Ms. Ross provided a PFS for (the "June 2012 PFS") signed by the Rosses. The June 2012 PFS was inaccurate and misleading. Mr. Ross was aware the June 2012 PFS was inaccurate and misleading. The Rosses' had collaboratively determined what amounts to be listed. They both signed it.

[437] The June 2012 PFS overstated the value of the Rosses' interest in various assets, understated the value of the Rosses' liabilities listed, and failed to list or account for significant additional liabilities. The following are some examples:

a) JFK Trail was listed as having a present value of $1,200,000 with a personal net asset value of $600,000. However, JFK Trail had been purchased for only $650,000 USD just three months earlier. Further, the Rosses had borrowed money from both Dr. Draper and Mr. Jesson for that deal, which was not otherwise listed on the June 2012 PFS;

b) York Road was listed as having a present value of $1,500,000 with a personal net asset value being $375,000. However, York Road had been purchased only two months earlier for only $613,500. When it sold in August 2014, the fair market value was $575,000. The evidence does not support a finding that York Road's value rose and fell again during the period in which the Rosses had an interest. I find it did not. Further, the Rosses had liabilities owing to Mr. Abbott, Mr. Ren, Mr. Jesson, and Windfall Holdings associated with that asset, which were not otherwise listed on the June 2012 PFS;

c) 1580 Cook Street ("Cook Street") was listed as having a present value of $1,500,000 with a personal net asset value being $750,000. However, Cook Street had been acquired for substantially less only a year earlier. When it sold in March 2015 the fair market value was only $1,100,000. The evidence does not support the finding that Cook Street's value

increased significantly between when it had been purchased and the date of the June 2012 PFS and then decreased again by the time it was sold;

d) the Rosses' home at 2961 Sea Point Drive was listed as having a present value of $3,000,000 with a personal net asset value being $1,650,000 due to a $1,350,000 mortgage. However, Sea Point had been acquired for only $2,300,000 in March 2011 and at the time of purchase the Rosses had a mortgage of $2,300,000 registered against the property. The Defendants also did not disclose any documents that support a finding that the mortgage balance had been reduced to $1,350,000. Their financial ability to reduce the mortgage to that amount between March 2011 and June 2012 does not align with the preponderance of evidence;

e) Stirling Arm was listed as having a present value of $800,000 with a personal net asset value being $420,000 due to a $380,000 mortgage and/or line of credit. However, Ms. Ross was a trustee holding 50% of Stirling Arm for the benefit of Mr. Hashmi and his wife. That fact is not set out on the June 2012 PFS. I note that Ms. Ross was aware she was only supposed to list her own (personal) net asset value, as she had done so for some assets listed on her June 2012 PFS. When Stirling Arm was sold in November 2012 (only five months after the June 2012 PFS), the fair market value was only $682,500. The evidence does not support a finding that Stirling Arm's value decreased significantly between the date of the June 2012 PFS and the date it sold;

f) the evidence does not support the finding the Rosses had "other investments" valued at anywhere close to $1,500,000 as listed on the June 2012 PFS;

g) the evidence does not support a finding that the value of her shares in RossLaw was $500,000, particularly given RossLaw's acts of insolvency in 2012, including its significant income tax and HST debts, and negative account balances;

h) the representation on the June 2012 PFS that the Rosses' combined annual income from all sources including affiliates was $500,000 is not supported by the evidence. Ms. Ross could not identity other companies or assets from which she derived income beyond her work at RossLaw and, at times, teaching. Only two weeks earlier the Rosses had submitted their 2011 income tax returns and declared total income of approximately $90,000 each.

[438] I find the June 2012 PFS overstated the value of the Rosses' assets and understated the value of their liabilities; the values were not grounded in fact.

[439] Mr. Ross signed the June 2012 PFS. Mr. Ross knew about all of these misleading inaccuracies in relation to the June 2012 PFS when it was submitted to CIBC because of the intertwining of the Ross Entities' finances and the Rosses' collaborative approach to their finances both in general and for the completion of June 2012 PFS in particular. Mr. Ross concealed the information that the June 2012 PFS was inaccurate and misleading because he knew that information would be material to the Individual Plaintiffs. He did so in an effort to increase the likelihood the TL financing would be approved and the Rosses would be able to financially benefit from the TL project.

(2) The April 2013 PFS

[440] As part of the financing approval process for the PKS deal, bcIMC asked that each investor provide a PFS before February 19, 2013. Ms. Ross did not provide a PFS before that date. bcIMC sent numerous follow up requests to RossLaw asking that Ms. Ross provide a PFS. RossLaw staff asked Ms. Ross on numerous occasions for her PFS to be provided prior to the PKS transaction closed. Despite all those requests, Ms. Ross did not do so.

[441] On April 18, 2013, after the PKS transaction had closed Ms. Ross submitted a PFS to bcIMC via RossLaw (the "April 2013 PFS").

[442] The April 2013 PFS was inaccurate and misleading. In addition to the inaccurate and misleading information in the June 2012 PFS, which remained, examples of additional misleading inaccuracies are as follows:

a) Stirling Arm had sold on November 30, 2012, but the asset remained listed on the April 2013 PFS;

b) in the course of the sale of Stirling Arm, Ms. Ross borrowed some of Mr. Hashmi's share of the sale proceeds. That liability was not listed or accounted for on the April 2013 PFS; and

c) the April 2013 PFS did not list or account for (i) the $100,000 the Rosses owed but had failed to pay as their TL contribution; or (ii) the $105,982 the Rosses owed but had failed to pay as their PKS contribution.

[443] Even though Ms. Ross was aware that her April 2013 PFS would be relied on by bcIMC, and consequently the Individual Plaintiffs, as the basis for assessing her personal financial condition as at the time it was presented, the April 2013 PFS was not an updated current statement of Ms. Ross' financial situation. The April 2013 PFS was in fact the June 2012 PFS document, except Ms. Ross changed the dates written on the two date lines. She endeavoured to conceal the fact that it was not an updated document and that she had simply redated it by dating the April 2013 PFS as having been signed in January, even though the redating was not done in January but was done on or about the date it was submitted, April 18, 2013. The date handwritten on the June 2012 PFS was "June 27, 2012", and the "J" in June crossed through the word "date" on the date line beside Mr. Ross' signature. This meant Ms. Ross could not cross out "June" and redate the document as April without drawing attention to the fact that the April 2013 PFS had been redated but not updated. I note as well that Ms. Ross chose to use a different handwriting style for the "J" in January on each of the date lines, in an effort to mimic the original two (different) writing styles of her and Mr. Ross.

[444] I find the April 2013 PFS overstated the value of the Rosses' assets and understated the value of their liabilities; the values were not grounded in fact.

[445] Mr. Ross knew a PFS from Ms. Ross was required by bcIMC for the PKS deal. Given the intertwined nature of the Ross Entities' finances, the Rosses' collaborative approach to their finances in general, Mr. Ross' knowledge that the Rosses were insolvent, RossLaw received the April 2013 PFS and passed it on to bcIMC, and my findings with respect to the Rosses' lack of credibility to which I have already referred, I find Mr. Ross was aware the April 2013 PFS was inaccurate and misleading. Mr. Ross concealed the information that the April 2013 PFS was inaccurate and misleading because he knew that information would be material to the Individual Plaintiffs. He did so in an effort to increase the likelihood the PKS financing would be approved and the Rosses would be able to financially benefit from the PKS project.

3. The non-disclosures were material

[446] The Individual Plaintiffs believed they could trust and rely on Mr. Ross, as their lawyer, to be loyal to them and protect their best interests. Mr. Ross did not disclose he was in a conflict of interest by representing the Plaintiffs in transactions in which he and persons related to him had a financial interest. He did not disclose his preference of his own financial interests over those of the Individual Plaintiffs over the course of the Relevant Period. Mr. Ross' conflict of interest, his preference of his own interests over those of the Individual Plaintiffs, and Mr. Ross' concealment of that conflict and those acts of preferring, were material to the Individual Plaintiffs.

[447] The Individual Plaintiffs were told the other investors were wealthy because financial stability of the co-investors was important. Mr. Ross did not disclose the insolvency of the Ross Entities. The degree to which the financial stability of the co-investors could be relied on was a material consideration for the Individual Plaintiffs in making their decision to invest. The insolvency of the Ross Entities, and Mr. Ross' concealment of that insolvency, were material to the Individual Plaintiffs.

[448] The ability of the Individual Plaintiffs to rely on the integrity and honesty of their co-investors was important, especially given the absence of any shareholders' agreement. Mr. Ross did not disclose the Secret Billings. Mr. Ross did not disclose the Ross Entities failed to pay their required TL and PKS contributions, or that the Ross Entities, at Mr. Ross' direction, had been issued shares in relation to the TL and PKS transactions despite their financial defalcations in relation to both transactions. Mr. Ross did not disclose Ms. Ross' dishonest acts. The Secret Billings, and Mr. Ross' concealment of them, the issuance of shares in relation to the TL and PKS transactions despite the failure of the Ross Entities to pay their required TL and PKS contributions, and Mr. Ross' concealment of those defalcations and facts, Ms. Ross' dishonest acts, and Mr. Ross' concealment of those dishonest acts, were all material to the Individual Plaintiffs.

[449] Viewed objectively, there is a substantial likelihood the undisclosed facts, including Mr. Ross' acts of concealment, individually and collectively, would have been considered important by a reasonable client investor in making their decision to invest, and a reasonable lawyer would have understood that to be the case.

[450] Nevertheless, Mr. Ross failed to disclose these material facts to the Individual Plaintiffs. In doing so, he breached the duty of candour he owed them.

4. Speculation about whether the Individual Plaintiffs would have proceeded with the TL and PKS transactions is insufficient

[451] Liability for breach of fiduciary duty is based on the nature of the alleged breach: *Commerce Capital* at 763. Nonetheless, in cases where there has been non-disclosure of material facts, as I have found here, it remains open to the solicitor to satisfy the burden of proving the client would have proceeded with the transaction despite the non-disclosure of material facts, but it has been observed that doing so would "undoubtedly be difficult": *Commerce Capital* at 763–764.

[452] Once the court has determined a fiduciary has breached their duty by non-disclosure of material facts, the court will not entertain speculative arguments by the

fiduciary to the effect that disclosure of the material facts would not have altered the client's decision to proceed with the transaction because some other factor was determinative (e.g., the valuation of the property or investment). The court will not "speculate" as to what course the client would have taken if disclosure had been made: *Hutchison* at para. 112; *London Loan & Savings Company of Canada v. Brickenden*, [1934] 3 D.L.R. 465 at 469, 1934 CanLII 280 as cited in *Commerce Capital* at 762–763.

[453] The Defendants' argument that the Individual Plaintiffs would have participated in the TL and PKS investments even if the undisclosed material facts had been disclosed is based on speculation. While some of the Individual Plaintiffs admitted they saw value in the property or the investment, the Defendants have failed to satisfy their burden to prove the Individual Plaintiffs would have made the decision to participate in either investment once advised of the Rosses' insolvency, the Secret Billings, the failure of the Ross Entities to pay their required TL and PKS contributions, Mr. Ross' direction to issue shares to the Ross Entities despite their non-payment, Mr. Ross' acts of dishonesty in financial matters—including in relation to those to whom she owed a fiduciary duty as a trustee—and Mr. Ross' willingness to conceal all these material facts from them. The evidence does not support such a finding in my view.

C. Mr. Ross also breached fiduciary duties arising out of his role as agent, joint venturor, promotor or co-director

[454] Given my conclusion with respect to Mr. Ross' breaches of fiduciary duties owed to the Individual Plaintiffs as their lawyer, it is not necessary for me to address the other bases of liability put forward by the Plaintiffs in any detail. I will simply note that even absent the solicitor-client relationship that existed between Mr. Ross and the Plaintiffs in this case, based on the facts as I have found them, including the relationship between the parties, I would nonetheless have found Mr. Ross owed fiduciary duties to the Individual Plaintiffs arising out of his role as their agent in relation to the TL and PKS transactions, his role as a promotor of the TL and PKS transactions to the Individual Plaintiffs, as a joint venturor with the Individual

Plaintiffs, and his role as a director for the companies in which the Individual Plaintiffs were shareholders, and breached those duties for the reasons I have outlined above.

IX. ROSSLAW IS VICARIOUSLY LIABLE FOR MR. ROSS' WRONGDOING

[455] I have found Mr. Ross breached his fiduciary duties to the Plaintiffs. The fulfilment of Mr. Ross' fiduciary duties were a term of the retainer contract.

[456] Vicarious liability imposes liability on a person for the misconduct of another because of the nature of the relationship between them: *Sambuev v. Handley*, 2021 BCSC 1499 at para. 18, citing *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 25. Vicarious liability does not require proof of blameworthiness, misconduct, or breach of duty on the part of the person held vicariously liable: *Sambuev* at para. 18. The Supreme Court of Canada in *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CanLII 692 at para. 10 held that the determination of whether an employer will be vicariously liable for the acts of its employees is based on the *Salmond* test (from Salmond and Heuston's treatise on torts: *Law of Torts,* 19th ed. (London: Sweet & Maxwell, 1987)), which holds employers responsible for:

> 1) employees' acts authorized by the employer; and
> 2) unauthorized acts that are so connected with authorized acts that they may be regarded as modes of doing an authorized act.

[457] The same analysis is applied where an individual tortfeasor is an agent of a corporate defendant.

[458] Mr. Ross was the directing mind of RossLaw and served as its agent. All those working at RossLaw were under Mr. Ross' supervision and acting on his instructions through RossLaw. Mr. Ross' knowledge and actions are those of RossLaw. Mr. Ross' breaches of fiduciary duty were committed in the ordinary course of his representation of the Plaintiffs on behalf of RossLaw.

[459] RossLaw is vicariously liable for Mr. Ross' breach of contract and his breaches of fiduciary duty.

X. REMEDY

[460] The Plaintiffs seek, and elected to pursue at the end of the trial, a remedial constructive trust and cancellation of the shares issued to the Defendants in relation to the TL and PKS transactions.

[461] With respect to the PKS transaction, the Plaintiffs seek a declaration that Mr. Ross and the estate of Rolf Paterson, as trustees for the RossTrust and the 2012RossTrust, and MWW, hold their respective interests in shares in 429 BC and 772 BC in trust for the PKS Plaintiffs and an order that the shares be cancelled and that the companies be at liberty to note that cancellation in their respective central securities registers with immediate effect (upon expiration of any appeal period, no appeal having been filed), whether or not the share certificates are surrendered or can be located.

[462] With respect to the TL transaction, the Plaintiffs seek a similar declaration: that Mr. Ross and the estate of Rolf Paterson, as trustees for the RossTrust and the 2012RossTrust, and MWW, hold their respective shares in 818 BC, 797 BC, and 800 BC in trust for the Individual Plaintiffs and an order that the shares be cancelled, and that those companies be at liberty to note that cancellation in their respective central securities registers with immediate effect (upon expiration of any appeal period, no appeal having been filed) whether or not the share certificates are surrendered or can be located.

[463] The Plaintiffs framed the remedy sought as being disgorgement. The Defendants did not argue disgorgement of shares is not an available remedy, but argued no disgorgement of shares was appropriate in this case.

A. Applicable legal principles

[464] A disgorgement of profits remedy has both a prophylactic purpose and a restitutionary purpose: *Wang v. Wang,* 2020 BCCA 15 at para. 56. The prophylactic

purpose is intended to preclude the fiduciary from being swayed by considerations of personal interest and works by appropriating, for the benefit of the person to whom the fiduciary duty is owed, any benefit or gain obtained or received by the fiduciary in circumstances where there existed a conflict of personal interest and fiduciary duty or a significant possibility of such conflict: *Strother* at para. 75. The need to deter fiduciary faithlessness and preserve the integrity of the fiduciary relationship is so important that equity requires the disgorgement of any profits received where a conflict, or a significant possibility of a conflict, existed between the fiduciary's duty and their personal interest in the pursuit or receipt of profits, even where the beneficiary has suffered no loss: *Strother* at para. 77; *Malak v. Hanna*, 2023 BCSC 1337 at paras. 278–279.

[465] Disgorgement of profits is a rare and extraordinary remedy for breach of contract and breach of fiduciary duty that will only arise in exceptional cases where more conventional remedies such as damages, specific performance, or an injunction, are inadequate: *Bao v. Welltrend United Consulting Inc.*, 2023 BCSC 1566 at para. 74 citing *Atlantic Lottery* at para. 59.

[466] A constructive trust is a proprietary remedy used in a wide variety of contexts to correct various wrongs "where good conscience so requires", including to remedy breaches of fiduciary duty: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 1997 CanLII 346 at paras. 19, 34. Where one party is found to have wronged another and that wrong requires a remedy in relation to property, that remedy can be granted by way of declaration and when such an order is made it creates a remedial constructive trust in favour of the party wronged: *BNSF Railway Company v. Teck Metals Ltd*., 2016 BCCA 350 at para. 20. A party seeking a remedial constructive trust must establish a substantial and direct link, causal connection or nexus between the claim and the property upon which the remedial constructive trust is to be impressed (*BNSF* at paras. 57, 60) and that a monetary award is inadequate, insufficient or inappropriate in the circumstances: *Kerr v. Baranow*, 2011 SCC 10 at para. 50.

B. Analysis

[467] Although the Plaintiffs argued that “disgorgement” was an appropriate remedy, they do not seek disgorgement of profits, the remedy considered by the Supreme Court of Canada in *Strother*. Rather they seek a remedial constrictive trust and surrender and cancellation of shares, as a means of ousting (disgorging) the benefits gained by the Defendants through Mr. Ross’ breach of his fiduciary duties.

[468] In my view, the Plaintiffs have established both requirements for a remedial constructive trust. There is a substantial and direct link, causal connection, and nexus between the actions underlying the Plaintiffs’ claim and the shares upon which the remedial constructive trust is to be impressed, and a monetary award is inadequate, insufficient, and inappropriate in the circumstances.

[469] The Defendants point to Justice Dietrich’s judgment in *7868073 Canada Ltd. v. 1841978 Ontario Inc.*, 2022 ONSC 4557 at para. 351, *Malak* at paras. 259–284, and *Atlantic Lottery v. Babstock*, 2020 SCC 19 at para. 155 (from the judgment of Justice Karakatsanis, dissenting in part) as support for the proposition that a causal link between the alleged breach and the profit retained by the fiduciary is required where disgorgement is sought. The same causal connection is required for a remedial constructive trust. However, that causal connection is present in this case. The Defendants obtained the shares in the TL Purchasing Companies and the PKS Purchasing Companies as a result of Mr. Ross’ breaches of his fiduciary duties owed to the Plaintiffs. The “disgorgement” by the means sought by the Plaintiffs is intended to, and in my view would, serve a prophylactic purpose and the requisite causation has been established: *Strother* at para. 77.

[470] Based on my findings with respect to Mr. Ross’ non-disclosures, I am satisfied Ms. Ross knowingly assisted Mr. Ross carry out acts that constituted breaches of his fiduciary duty, and that she had actual knowledge that Ross Entities received shares as a result of Mr. Ross’ non-disclosures. However, the Plaintiffs rely on the doctrine of knowing receipt in relation to Ms. Ross, which involves a lower threshold of knowledge: *Vancouver Coastal Health Authority v. Moscipan*, 2019

BCCA 17 at para. 60. At a minimum, Ms. Ross knowingly received, via the Ross Entities, shares obtained through Mr. Ross' breach of fiduciary duties. She had, at minimum, constructive knowledge of circumstances, as outlined in these Reasons, that would have put a reasonable person on notice or inquiry about the questionable provenance of the shares the Ross Entities received: *Vancouver Coastal Health Authority* at para. 29.

[471] As to the second criterion that must be established to enable the Court to declare a remedial constructive trust, in my view the circumstances are such that Plaintiffs' interests cannot be vindicated by other form of relief, such as damages, specific performance, or an injunction. They seek to have the Court remove the benefit Mr. Ross and the Ross Entities gained through Mr. Ross' breaches of fiduciary duty. They want to terminate the Defendants' rights as shareholders in the TL Companies and the PKS Companies and to remove their right to participate in any way in the TL and PKS ventures.

[472] Courts view breaches of fiduciary duties with the utmost seriousness. Deterrence flows from disgorgement: *Nova Chemicals Corp. v. Dow Chemical Co.*, 2022 SCC 43 at para. 47. Where shares are the benefit which the fiduciary has obtained through their breach, deterrence is served by the removal of that benefit through the application of a remedial constructive trust and disgorgement of the benefit received, whether effected through the relinquishment, cancellation or redistribution of the shares, or some other means.

[473] In my view their desire to pursue that relief is sound and the extraordinary remedy of disgorgement, by the means sought by the Plaintiffs—namely the surrender and cancellation of the Defendants' shares—is appropriate in this case.

C. Should the Plaintiffs be denied an equitable remedy because they came to court with unclean hands?

[474] The Defendants argue the Plaintiffs should be denied any equitable remedy because they have not come to court with clean hands. They argue that:

a) Contrary to the agreement to issue Founders' Shares, the Plaintiffs conspired to deprive the Rosses of their interest in the TL and PKS investments by way of a series of transactions that took place in 2015 (the "Reorganizations");

b) After carrying out the Reorganizations the Plaintiffs did not provide any information to the Rosses about the Reorganizations, or any information relating to the TL and PKS investments;

c) The Plaintiffs deprived the Rosses of their ability to participate in the TL and PKS investments by unilaterally waiving annual meetings and audited financial statements, contrary to the *Business Corporations Act*, S.B.C. 2002, c. 57.

[475] The Defendants argue it is the Plaintiffs' wrongdoing that is the source of the problems they seek to remedy through this civil action. The Defendants submit that rather than working with Mr. Ross to address issues regarding the TL or PKS structure, such as by entering into shareholders' agreements or "other documents" (which they do not define), the Plaintiffs instead chose to repudiate the original agreement to issue Founders' Shares, took what they could for themselves, and are now using this action to take the rest.

1. Applicable legal principles

[476] The equitable "clean hands doctrine" refers to the eighteenth century maxim "he who comes to equity must come with clean hands": *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 22. In order to justify refusal of relief on the basis of the doctrine, a defendant must establish such an immediate and necessary relation between the relief sought and the misconduct alleged that it would be unjust to grant that particular relief: *Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1249 at para. 243; rev'd on other grounds, 2012 BCCA 77 [*Mayer BCCA*] at para. 86.

[477] The doctrine is narrowly applied and does not involve an examination of a party's general morals or all aspects of their conduct: *Wang v. Wang*, 2020 BCCA 15 at paras. 46–47; *BMO Nesbitt Burns Inc. v. Wellington West Capital Inc.*, 77 O.R. (3d) 161, 2005 CanLII 30303 (C.A.) at para. 27, citing *Toronto (City) v. Polai*, [1970] 1 O.R. 483 at 493–494, 1969 CanLII 339 (C.A.), aff'd [1973] S.C.R. 38, 1972 CanLII

22. It is not even enough to establish the alleged misconduct is simply connected to the transaction at issue: *Mayer BCCA* at paras. 89–90. In the context of this maxim and its potential application, “direct and immediate” means that the person seeking equitable relief has to rely on the alleged misconduct to prove their claim: *Mayer BCCA* at paras. 86, 90; *DeJesus v. Sharif*, 2010 BCCA 121 at paras. 84–86; *Hrvoic v. Hrvoic*, 2023 ONCA 508 at para. 17; *Ryan in Trust v. Kaukab*, 2011 ONSC 6826 at paras. 194–196.

[478] In *DeJesus*, Chief Justice Finch addressed the applicability of the clean hands doctrine in the context of a claim brought against a realtor for breach of fiduciary duty. He found the “unclean” conduct alleged by the appellant defendant did not disentitle the respondent plaintiff to equitable relief in that case because “the plaintiff’s claim to equitable relief was established without reliance on her misconduct”: at para. 87. In his analysis at para. 85, Finch C.J. cited with approval *Snell's Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 32, which confirms that the clean hands doctrine does not involve a broad inquiry and should not be applied too widely:

> …‘Equity does not demand that its suitors shall have led blameless lives.' *What bars the claim is not a general depravity but one which has 'an immediate and necessary relation to the equity sued for*,' and is not balanced by any mitigating factors.
>
> [Italic emphasis in original.]

[479] The Supreme Court of Canada has affirmed the same principle: *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, 1993 CanLII 148 at 188–189.

2. Additional context

[480] Some additional factual context is necessary in considering the Defendants’ submission on this point.

a) PKS experiences heavy losses in fall of 2013

[481] In the fall of 2013 the PKS investment was experiencing heavy losses. To cover the losses, beginning in October 2013, the PKS investors, including the Rosses, were asked to contribute further money (the "Cash Calls"). The PKS investors, including the Rosses, verbally agreed to pay an October Cash Call of $10,000 per Investment Share, making the Rosses' Cash Call obligation $20,000. The Rosses provided that money on October 31, 2012. The Rosses did not request that $20,000 be allocated to their outstanding TL obligation instead.

[482] More Cash Calls followed. In November 2013, there was a Cash Call for $11,000 per Investment Share, making the Rosses' Cash Call obligation $22,000. The Rosses did not pay that Cash Call in full. Instead they paid only $11,000, and did not make that payment until mid-December of 2013. The Rosses did not request that $11,000 be allocated to their outstanding TL obligation instead.

[483] There were further Cash Calls, and the PKS Plaintiffs contributed significantly to them. With one exception the Rosses did not pay any of them, and offered no explanation at the time for not doing so.

[484] The result was that the Rosses had contributed only $100,000 (through PKS billings permitted after the meeting where he had bullied the PKS Plaintiffs) and $31,000 in Cash Calls, yet owned 20% of the PKS units and held none of the debt. In contrast, each of the other PKS investors had continued $741,000 per Investment Share initially, plus $540,000 in Cash Calls, and another $300,000 in Cash Calls for an internal refinancing that had to be undertaken in the spring of 2020.

b) The Ross Entities' remaining TL and PKS contributions remained unpaid

[485] The Rosses' TL and PKS contributions remained outstanding for years despite numerous demands that their required contributions be paid. On April 23, 2014, Ms. Ross emailed John Kwari, on behalf of her and Mr. Ross, acknowledged that the "outstanding $100,000 for the shares in [TL]", that had been due on TL closing in August 2012, had not yet been paid and advised the Rosses

were “committed to dealing with this” (by which I find she meant paying the outstanding balance) “before property taxes are due in July [2014]”. Despite that assurance, the Rosses did not pay the TL amount due by that time, but paid $50,000 on June 27, 2014.

[486] By letter dated July 2, 2014, the Plaintiffs demanded the Defendants make “full payment of the [$50,000] balance owing immediately”. The Plaintiffs made no demands to reverse payment of the Secret TL Billings or the Secret PKS Billings, in an effort to achieve an overall resolution of the situation. No further payment was made.

[487] The outstanding TL and PKS amounts remained unpaid as at the time of trial.

c) The Ross Entities would not acknowledge responsibility for any PKS financing debt

[488] In July 2014, Mr. Little explained to Mr. Ross the concern of the PKS Plaintiffs regarding a lack of protection for them under the current corporate structure in the absence of a shareholders’ agreement. Mr. Ross told Mr. Little he would go along with whatever the group wanted to do. Inter-company loan documents were prepared. All of the numbered companies signed except for 429 BC, which was controlled by the Ross Entities. Mr. Ross resiled from his agreement to join the PKS Plaintiffs in collectively acknowledging responsibility for PKS’ financing-related debt.

[489] At trial Mr. Ross testified there was already an “inter-company loan” that obligated 429 BC, the company the Rosses controlled, to contribute to 772 BC’s debt arising from the PKS lender financing, because the debt was reflected on 429 BC’s financial statements. However, corporate financial statements do not create legal obligations. At their highest they may constitute evidence of legal obligations that arise elsewhere or a basis for providing equitable relief. I was taken to no legal authority to support the view expressed by Mr. Ross. There had been no documents that created obligations that were legally binding on the holding companies. There is no loan document evidencing a debt obligation owed by 429 BC to 772 BC. There is

no document in which 429 BC has acknowledged any portion of 772 BC's financing debt.

d) The Rosses did not assist when PKS refinancing was required

[490] On October 18, 2019, bcIMC (then operating as QuadReal) gave notice they would not be renewing the mortgage as of March 1, 2020. The PKS investors scrambled. The assets of 429 BC (controlled by the Ross Entities) could not be pledged without Mr. Ross' consent. Mr. Ross failed to return the inter-company loan agreements provided to him. Some of the PKS investors, led by Mr. Little, were able to arrange for alternative financing, but for a lower principal amount. As a result, there was a further Cash Call of $300,000 per Investment Share to facilitate the replacement financing. Mr. Ross was not asked to, and did not, make any contribution in response to that Cash Call.

e) The 2015 TL and PKS Reorganizations

[491] By late September 2014, the Individual Plaintiffs had formed the opinion that the best interests of the TL Companies and the PKS Companies would be served by Mr. Ross voluntarily resigning his directorship in all of the companies associated with the TL and PKS investments.

[492] In 2015 the Individual Plaintiffs caused a restructuring to be undertaken. The Plaintiffs describe the restructuring as a "freeze". The Defendants characterize it as a dilution of the Defendants' interests.

[493] As part of the restructuring, the shareholder loans advanced by the Plaintiffs, including those made in the form of paying the significant Cash Calls on PKS in order to keep the investment afloat, were retired.

[494] The Defendants argue the Plaintiffs should have worked with Mr. Ross to address issues regarding the TL or PKS structure, such as by entering into shareholders' agreements or "other documents". However, Mr. Ross had already failed to prepare shareholders' agreements for TL and PKS as he had promised.

The evidence satisfies me the Plaintiffs remained willing to enter into shareholders' agreements, throughout the Relevant Period and for a substantial time thereafter; indeed, it was in their interests to do so. It was Mr. Ross who was the barrier. For over a year the Individual Plaintiffs were still hoping to work with Mr. Ross to resolve the situation.

[495] The Reorganizations were undertaken "as a last resort" in order to "avoid further damage". The Individual Plaintiffs had been "looking for a peaceful solution". Multiple demand letters calling for the payment of the Rosses' outstanding obligations had been sent. Promises by the Rosses to pay had been broken. Over a year had passed. The Rosses were given notice of the Reorganizations but had gone radio silent and "disappeared from the whole operation". The Individual Plaintiffs had "lost faith" in Mr. Ross' ability to serve the companies and the shareholders. The "feeling of unfairness was festering".

[496] Given Mr. Ross' actions and omissions, and his extensive breach of the duties he owed to the Plaintiffs, it was evident that he ought not to remain a corporate director—a fiduciary role which requires the individual to act in the best interests of the company and the shareholders they serve. As noted by Mr. Kwari, all trust in Mr. Ross had "evaporated". Their decision to undertake the Reorganizations, after having given Mr. Ross ample opportunity to remedy the situations he had created, was not unreasonable in my view.

3. Analysis and conclusion

[497] Mr. Ross has caused two oppression proceedings to be filed with respect to the Reorganizations—one with respect to TL and one with respect to PKS (the "Ross Oppression Proceedings"). No substantive steps have been taken to prosecute the Ross Oppression Proceedings or to pursue the remedies sought. The Defendants did not seek to have the Ross Oppression Proceedings heard and determined at the same time as the trial of this action. It would be inappropriate for me to make determinations on matters that will arise in the Ross Oppression Proceedings given that they are not before me for determination.

[498] However, given the governing legal principles I am nonetheless able to address the Defendants' clean hands argument.

a) The Plaintiffs do not need to rely on the Reorganizations to prove their claim

[499] The Plaintiffs do not need to rely on the Reorganizations to prove their claim. The Reorganizations were not the cause of Mr. Ross' breach of fiduciary duties and breach of contract. The Plaintiffs' causes of action against the Defendants are based purely on Mr. Ross' actions and omissions. The Reorganizations were undertaken years after the actions of Mr. Ross which ground the Plaintiffs' claim.

[500] The cases relied on by the Defendants are distinguishable from the facts before me. In each of them, the party seeking the equitable relief had been the cause of the oppressive situation about which they complained. That is not the case here.

[501] In *Cairney v. Golden Key Holdings Ltd. (No. 2),* 40 B.L.R. 289, 1988 CanLII 3295 (B.C.S.C.), the proceeding involved an oppression claim brought under the (then) *Company Act,* R.S.B.C. 1979, c. 59. The Court held that the petitioner was disentitled to relief for alleged oppressive conduct because of his own fraudulent conduct towards the respondent shareholder which was "the very ground, the very cause of the difficulty" into which the company had fallen: at paras. 9,14–15.

[502] Similarly, in *790668 Ontario Inc. v. D'Andrea Management Inc*, 2017 ONCA 1019 [*D'Andrea ONCA*], the Court of Appeal upheld a dismissal of the appellants' oppression claim based on the trial judge's conclusions that there had been no oppressive conduct. In the course of trial judgment, Justice Morissette found that two of the appellants had refused to agree to a discharge on a mortgage as a means of trying to leverage the renegotiation of a shareholder agreement in their favour, and that "as a result of [their] position", the actions the appellants alleged to have been oppressive had to be taken: *D'Andrea ONCA* at para. 13; *790668 Ontario Inc. v. D'Andrea Management Inc.*, 2016 ONSC 4657 at paras. 203, 205.

[503] If I am wrong in concluding that the Plaintiffs do not need to rely on the Reorganizations to prove their claim, I would nonetheless not have deprived the Plaintiffs of the equitable remedies they seek. In my view, the bad acts of Mr. Ross and Ms. Ross cannot be ignored even in this aspect of the analysis. When claims in equity are made, the Court will not reward those who come with unclean hands: *D'Andrea ONCA* at para. 14.

[504] In my view, equity is not a basis to deny the Plaintiffs the remedies they seek.

4. The increase in the TL and PKS Investment Share prices did not create severable interests in shares

[505] I turn to address a further argument advanced by the Defendants. The Rosses' view is that the corporate shares in the TL Purchasing Companies and the PKS Purchasing Companies that were distributed to each Individual Plaintiffs via their investment vehicles, are severable: Mr. Ross' Founders' Shares are, in their view, separate from what they describe as the "additional share" the investors agreed to split rather than find another investor for. The difference in this conception of the share structure is significant because the Defendants argue that even if the Rosses did not fully pay for that "additional share", the Founders' Shares were rightfully theirs, and the corporate shares in the TL Purchasing Companies and PKS Purchasing Companies that were distributed to the Ross Entities were properly allotted to them. The Defendants argue the Reorganizations stripped them of the benefit of those Founders' Shares, and was oppressive to the extent that it did so.

[506] The Investment Share increases were not a separate "slice" of the TL or PKS investment pie which all the Individual Plaintiffs were to make collectively; rather, the Individual Plaintiffs made the decision to simply increase the price of their initial slices in each transaction. Mr. Ross made no statement to the contrary to the Individual Plaintiffs at the time the decision was made to increase the Investment Share prices and there was no agreement between the Individual Plaintiffs and the Rosses to that effect. The Defendants did not satisfy their requisite financial obligations for either their TL or the PKS Founders' Shares.

5. Equity does not favour the Rosses receiving the benefit of money they paid or was credited to them

[507] The Defendants argue that if the Plaintiffs succeed, the financial contributions they made should be repaid. The Plaintiffs made that offer. It was not accepted. I am not inclined to order the $100,000 allocated to the Rosses' contribution post-closing be "repaid" to the Defendants. The Individual Plaintiffs permitted that amount to be credited to the Rosses as a result of Mr. Ross' screaming and bullying at a meeting that took place immediately after his default had been discovered. They were shocked, and understandably extremely anxious given the situation in which Mr. Ross had placed them. Their acquiescence was not free and voluntary. It was the only choice the Individual Plaintiffs were given. It was a Hobson's choice. I will not hold them to it.

[508] Further, the allocation was permitted based on Mr. Ross' representation that his firm had a specific amount of legal fees outstanding. I am not satisfied, based on the evidence, there was any basis for that representation. Mr. Ross could not recall any tabulation of staff time being done before the concerns about his legal fees were raised. He could not provide any specificity about where the figure for the amount of legal fees presented came from. Mr. McRae had not been instructed to, and did not, keep track of his time in any detail. Mr. Ross simply asked him, after PKS had closed, how much time Mr. McRae had spent on PKS "in general terms". Similarly, Mr. Ross and Ms. Sparling had a very general discussion about what magnitude or percentage of Ms. Sparling's time had been spent on the PKS deal, but she had not been asked to and did not add up the hours worked. Instead, Mr. Ross simply inquired how much time she "felt" like she had put into the transaction. There was no evidence that she, Mr. McRae or Ms. Gable were ever asked to review any statement of account or document setting out their time to confirm its accuracy.

[509] With respect to the $50,000 the Rosses provided towards the TL obligation around July 30, 2014, I am not prepared to order those monies to be returned to the Defendants. Mr. Ross' acts of dishonesty are simply so egregious, including billing for legal fees I have found he promised not to charge (and having the same

concerns with respect to the reliability of the amounts claimed as I have with the PKS billings), and then paying them from trust funds the Individual Plaintiffs had provided, and concealing those facts from them, I conclude it is not just and equitable for the Court to order the return of those funds and I will not do so.

[510] If the Plaintiffs wish to renew their offer to provide those monies to the Defendants, they are free to do so.

XI. COSTS

[511] The Plaintiffs seek costs against all Defendants jointly and severally, including Joanne Ross.

[512] With respect to costs against Ms. Ross, the Defendants argue such a cost order would be unusual, extraordinary, and akin to a claim for costs against a non-party, which are only made in circumstances of fraudulent conduct, abuse of process, or gross misconduct in the commencement or conduct of the litigation: *Lower v. Stasiuk*, 2013 BCCA 389 at para. 32, leave to appeal to SCC ref'd, 35604 (12 June 2014); *Lower BCCA* citing *Anchorage v. 465404 B.C. Inc*., 1999 BCCA 771.

[513] I reject the Defendants' argument for several reasons. First, the Court has an inherent jurisdiction to award costs, including special costs, against a non-party, albeit in limited circumstances. I acknowledge the imposition of costs against a non-party is unusual and exceptional: *Anchorage* at para. 21. See also *Oasis Hotel Ltd. v. Zurich Insurance Company*, 124 D.L.R. (3d) 455, 1981 CanLII 433 (B.C.C.A.) and *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724. In *Anchorage*, Justice Hall reviewed several authorities, including *Oasis*, and outlined four bases for making an award of costs against a non-party:

1) fraudulent conduct;
2) abuse of process;
3) gross misconduct in the commencement and/or conduct of the litigation; and

4) where the real litigant stays out of the action and offers up a "man of straw" to prosecute the claim.

[514] First, contrary to the Defendants' submissions, the list of situations where costs can be awarded against non-party is not closed. Special circumstances, which much be present to make an order of costs against a non-party, include those cited by Hall J. in *Anchorage*: *Perez* at para. 18. By using the non-exhaustive word "includes" to introduce the four examples of special circumstances, it is clear there is room for expansion of the list if additional special circumstances were encountered. In *International Hi-Tech* at para. 55, Justice Ballance came to the same conclusion that Hall J.'s list of specific circumstances in justifying costs against non-parties was not an exhaustive list. The imposition of costs is an exercise involving judicial discretion, to be undertaken in the context of the circumstances of each case, albeit according to fixed and well-established principles.

[515] Second, and to state the obvious, Ms. Ross is a party. She is not a "stranger to the litigation": *Kerr & Richard Sports Inc. v. Fulton*, 133 A.R. 382, 1992 CanLII 14183 (Q.B.) cited in *Anchorage* at para. 24. The Plaintiffs made Ms. Ross a party because she is someone affected by the relief sought, including the disgorgement of shares held by MWW, and based on her knowing receipt of those shares, which I have concluded they have established.

[516] I agree with counsel for the Plaintiffs that Ms. Ross "joined fully in the defence of this action" and had ample opportunity since the action was filed and served to seek legal advice as to how to proceed. Ms. Ross did not seek to be released as a defendant in the action. She did not seek to interplead the shares of MWW. She fully participated in the litigation. She consented, along with her company and the other Defendants, to various orders made in the course of the litigation, including the consent order of April 21, 2021 which provided future trial dates would be peremptory on the Defendants given the previously scheduled trial had been adjourned at their request. She consented to be examined for discovery. She, along with the other Defendants, applied to amend their response to civil claim.

[517] The Plaintiffs were the successful parties, are presumptively entitled to their costs of the proceeding at Scale B payable forthwith upon assessment: *Supreme Court Civil Rules,* R. 14-1(9). Subject to further submissions by the parties on the issue of costs, I order that Plaintiffs are entitled to one set of costs for the proceeding, against all of the Defendants on a joint and several basis, to be assessed by the Registrar if quantum is not agreed.

[518] If any party seeks to make submissions in favour of an alternative costs order, they are to submit written submissions, of less than five pages, within 30 days of these Reasons, with the opposing parties submitting any responding submissions within two weeks of their receipt, and final reply submissions being submitted one week later.

XII. SUMMARY AND CONCLUSION

[519] For the reasons I have outlined, I conclude that Mr. Ross breached the fiduciary duty of loyalty he owed to the Plaintiffs.

[520] I make the following orders:

a) With respect to the PKS transaction, I declare that Mr. Ross and the estate of Rolf Paterson, as trustees for the RossTrust and the 2012RossTrust, and MWW, hold their respective shares in 429 BC and 772 BC in trust for the PKS Plaintiffs. I order that those shares be surrendered by the Defendants forthwith and cancelled, and that the 429 BC and 772 BC are at liberty to note that cancellation in their respective central securities registers with immediate effect (upon expiration of any appeal period if no appeal has been filed), whether or not the share certificates are surrendered or can be located.

b) With respect to the TL transaction, I declare that Mr. Ross and the estate of Rolf Paterson, as trustees for the RossTrust and the 2012RossTrust, and MWW, hold their respective shares in 797 BC, 800 BC, and 818 BC, in trust for the Plaintiffs. I order that the shares be surrendered by the

Defendants forthwith and cancelled, and that 797 BC, 800 BC, and 818 BC be at liberty to note that cancellation in their respective central securities registers with immediate effect (upon expiration of any appeal period if no appeal has been filed) whether or not the share certificates are surrendered or can be located.

c) The Plaintiffs are entitled to one set of costs for the proceeding, against all of the Defendants, jointly and severally, to be assessed by the Registrar absent agreement on quantum.

[521] The Court is grateful to all counsel of record for the professionalism they demonstrated throughout the trial, and their very helpful submissions.

"V. Jackson J."