COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Garcha v. 690174 B.C. Ltd.,*
2023 BCCA 376

Date: 20231011
Dockets: CA47444; CA47450; CA47805;
CA47806; CA47807; CA47808;
CA47809

Docket: CA47444

Between:

Daljit Singh Garcha and Jaswinder Kaur Garcha

Appellants/
Respondents on Cross-Appeal
(Plaintiffs)

And

**690174 B.C. Ltd., Panorama Parkview Homes Ltd.,
Jaswant Singh Sangha, Parmjit Kaur Sangha, Raveen Sangha,
Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills,
Balbir Kaur Dale, Grewal Management Ltd., and Jasprit Singh Grewal**

Respondents
(Defendants)

And

**Crowe MacKay & Company Ltd. in its capacity as trustee
in bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd.,
and 690174 B.C. Ltd.**

Respondent/
Appellant on Cross-Appeal
(Defendant)

- and -

Docket: CA47450

Between:

**0731431 B.C. Ltd., Daljit Singh Mattu,
Grewal Management Ltd., and Jasprit Singh Grewal**

Appellants/
Respondents on Cross-Appeal
(Plaintiffs)

And

Panorama Parkview Homes Ltd., 690174 B.C. Ltd., Jaswant Singh Sangha, Parmjit Kaur Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills and Balbir Kaur Dale

Respondents
(Defendants)

And

Crowe MacKay & Company Ltd. in its capacity as trustee in bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd., and 690174 B.C. Ltd.

Respondent/
Appellant on Cross-Appeal
(Defendant)

- and -

Docket: CA47805

IN THE MATTER OF THE BANKRUPTCY OF Jaswant Singh Sangha

Between:

Crowe MacKay & Company Ltd. in its capacity as trustee in bankruptcy of Jaswant Singh Sangha

Appellant/
Respondent on Cross-Appeal
(Defendant)

And

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

Respondents
(Plaintiffs)

And

Daljit Singh Garcha and Jaswinder Kaur Garcha

Respondents/
Appellants on Cross-Appeal
(Plaintiffs)

- and -

Docket: CA47806

IN THE MATTER OF THE BANKRUPTCY OF
Panorama Parkview Homes Ltd.

Between:

Crowe MacKay & Company Ltd. in its capacity as trustee
in bankruptcy of Panorama Parkview Homes Ltd.

Appellant/
Respondent on Cross-Appeal
(Defendant)

And

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

Respondents
(Plaintiffs)

And

Daljit Singh Garcha and Jaswinder Kaur Garcha

Respondents/
Appellants on Cross-Appeal
(Plaintiffs)

- and -

Docket: CA47807

IN THE MATTER OF THE BANKRUPTCY OF
690174 B.C. Ltd.

Between:

Crowe MacKay & Company Ltd. in its capacity as trustee
in bankruptcy of 690174 B.C. Ltd.

Appellant/
Respondent on Cross-Appeal
(Defendant)

And

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

Respondents
(Plaintiffs)

And

Daljit Singh Garcha and Jaswinder Kaur Garcha

Respondents/
Appellants on Cross-Appeal
(Plaintiffs)

- and -

Docket: CA47808

Between:

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

Respondents
(Plaintiffs)

And

Crowe MacKay & Company Ltd. in its capacity as trustee in bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd., and 690174 B.C. Ltd.

Appellant/
Respondent on Cross-Appeal
(Defendant)

And

Panorama Parkview Homes Ltd., 690174 B.C. Ltd., Jaswant Singh Sangha, Parmjit Kaur Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills, and Balbir Kaur Dale

Respondents
(Defendants)

- and -

Docket: CA47809

Between:

Daljit Singh Garcha and Jaswinder Kaur Garcha

Respondents
(Plaintiffs)

And

Crowe MacKay & Company Ltd. in its capacity as trustee in bankruptcy of Jaswant Singh Sangha, Panorama Parkview Homes Ltd., and 690174 B.C. Ltd.

Appellant/
Respondent on Cross-Appeal
(Defendant)

And

690174 B.C. Ltd., Panorama Parkview Homes Ltd., Jaswant Singh Sangha, Ranjit Singh Sangha, Svender Singh Sangha, Douglas William Wills, Balbir Kaur Dale, Grewal Management Ltd., and Jasprit Singh Grewal

Respondents
(Defendants)

And

Parmjit Kaur Sangha and Raveen Sangha

Respondents/
Appellants on Cross-Appeal
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Marchand

On appeal from: Orders of the Supreme Court of British Columbia, dated April 1, 2021 and October 1, 2021 (*0731431 B.C. Ltd. v. Panorama Parkview Homes Ltd.*, 2021 BCSC 607 and 2021 BCSC 1925, Vancouver Dockets S142529; S151275; B150826; B160405; B160406).

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Counsel for Fasken Martineau DuMoulin LLP:	M.A. Feder, K.C. K. Macdonald
Counsel for Daljit Singh Mattu and 0731431 B.C. Ltd.:	J.V. Payne
Appearing in person and on behalf of Balbir Kaur Dale:	D.W. Wills
Place and Date of Hearing:	Vancouver, British Columbia April 24–28, 2023
Place and Date of Judgment:	Vancouver, British Columbia October 11, 2023

Written Reasons of the Court

Summary:

These appeals and cross-appeals arise out of orders that were entered following a 102-day trial combining two civil actions and three appeals from notices of disallowance of bankruptcy claims. The trial resulted in two sets of reasons for judgment: 2021 BCSC 607 and 2021 BCSC 1925.

The trial judge resolved numerous factual and legal issues arising out of the 2007-2011 acquisition of five contiguous lots of land in Surrey and their development into residential subdivisions for the purpose of resale (the "Project"). The issues arose because of breaches of fiduciary duty by the Project's driving force, JS, and the subsequent bankruptcy of JS and his two companies: 690174 and Panorama.

The parties to the litigation included non-bankrupt investors who contributed funds to the acquisition of the five lots and/or development costs associated with the Project. Based on their contributions, these investors claimed an interest in approximately $13 million in net proceeds generated by the sale of subdivided lots.

In the First Set of Reasons, the judge determined who was entitled to share in the net sale proceeds and in what amounts (before payment of the Trustee's expenses and fees, including legal fees). In doing so, the judge rejected the Trustee's position that various investors were merely equity claimants rather than beneficial owners of the land that was subsequently subdivided and sold. These findings affected the priority of claims against the net sale proceeds.

In the Second Set of Reasons, the judge resolved a number of issues arising out of the First Set of Reasons, including determining the extent of remedies granted to the successful plaintiffs, clarifying the rights and obligations of various parties, and awarding costs. He also resolved a number of issues arising out of the administration of the bankruptcies.

Of significance, under s. 37 of the Bankruptcy and Insolvency Act [BIA], the judge ordered the Trustee and its counsel to repay substantial amounts previously paid to them in accordance with a Directions Motion Order and Term Payment Orders. At over $6,000,000, the fees and expenses charged by the Trustee and its counsel were approximately double the value of the bankrupts' estates and "simply too high".

Held: Appeals and cross-appeals dismissed. No appellant or cross-appellant has established reversible legal error or an otherwise proper basis for appellate interference with the judge's fact-intensive analyses, his application of legal principles, or the remedies he granted. The Court substantially agrees with the judge's reasons and endorses his resolution of the issues. A number of issues are, however, deserving of comment.

On the appeal and cross-appeal from orders made in the civil action brought by the Garchas: (1) based on the plain wording of the 2007 Joint Venture Agreement, the judge did not err in finding that its investor members (including the Garchas) acquired a beneficial interest in Lot 1, which was traceable to the eventual net sale

proceeds; (2) it was within the judge's purview to allow the Garchas to pursue equitable remedies despite their having taken out a default judgment on a promissory note provided to them by JS; and (3) the judge did not err in declining to award the Garchas a "full disgorgement proprietary remedy against the profits of the wrongdoers".

The Grewals abandoned their appeal in their civil action but the Trustee pursued its cross-appeal. In the Trustee's cross-appeal, the judge did not err in finding that M and R were equity claimants or in imposing retrospective remedial constructive trusts in their favour. In light of the judge's factual findings concerning the contributions of M and R to the acquisition of Lots 2–5, it was open to him to find that the "true nature or substance" of their claims was proprietary. Further, it was not unreasonable for the judge to apply constructive trusts as protective remedies. M and R had been wrongly deprived of their proprietary interests in the land assembly by the registration of title in the names of the 2011 Joint Venturers (and not them). Finally, the judge properly exercised his discretion to retrospectively impose remedial constructive trusts in favour of M and R.

In the bankruptcy appeals and cross-appeals, the judge did not err in interpreting the Directions Motion Order or Term Payment Orders. The Directions Motion Order granted the Trustee lawful authority to use funds which had been found to be beneficially owned by the 2007 Joint Venturers to pay litigation costs. However, the Term Payment Orders only granted the Trustee authority to use trust funds for ongoing expenses on an interim basis, subject to further court review. The Term Payment Orders did not authorize the Trustee to retain funds which had been found to be beneficially owned by the 2007 Joint Venturers, and use them for final payment of general administrative costs.

The judge also did not err in his assessment of the conduct of the Trustee. The judge was in a uniquely privileged position to make findings regarding the conduct of the Trustee and its effect on the proceedings and the trust claimants.

The Garchas and Grewals were "aggrieved persons" entitled to bring the application under s. 37. The judge's adjustments were fair and resulted in the Trustee and its counsel recovering substantial, though reduced, fees and the 2007 Joint Venturers recovering most of their share of the net sale proceeds.

The judge's orders would not impair bankruptcy proceedings by discouraging trustees from taking on contentious bankruptcies because their entitlement to expenses and fees would depend on final success. The effectiveness of a trustee's efforts in administering a bankrupt estate is a relevant consideration with respect to appropriate remuneration. The greater risk to the efficacy of bankruptcy proceedings would arise from tolerating excessively expensive administration of the sort the judge found occurred in this case.

Table of Contents	Paragraph Range

Reasons of the Court:

1. INTRODUCTION

[1] This case involves multiple appeals and cross-appeals of orders that were entered following a trial in the British Columbia Supreme Court that combined two civil actions and three appeals from notices of disallowance of bankruptcy claims. The bankruptcy appeals were treated as *de novo* claims.

[2] At the trial, the judge resolved numerous factual and legal issues arising out of the 2007–2011 acquisition of five contiguous lots of land in Surrey and their development into residential subdivisions for the purpose of resale (the "Project"). The issues arose because of breaches of fiduciary duty by the Project's driving force, Jaswant Singh Sangha ("Jaswant"), and the subsequent bankruptcy of Jaswant and his two companies: 690174 B.C. Ltd. ("690174") and Panorama Parkview Homes Ltd. ("Panorama").

[3] The parties to the litigation included non-bankrupt investors who contributed funds to the acquisition of the five lots of land and/or development costs associated with the Project. Based on their contributions, these investors claimed an interest in approximately $13 million in net proceeds of sale generated by the sale of subdivided lots. When Jaswant, 690174, and Panorama were assigned into bankruptcy, their primary assets consisted of unsold subdivided lots arising out of the Project: 2017 BCSC 2064 at para. 3.

[4] There are similarities in names between many of the parties. In his reasons, the judge referred to some of them by their first names. These reasons will do the same, intending no disrespect.

[5] As helpfully explained in a decision to settle transcripts in the appeals (2022 BCCA 178 at para. 5), the non-bankrupt investors acquired their asserted interests through distinct, but overlapping means:

> a) [An] October 2007 Joint Venture Agreement entered into by, amongst others … Daljit Singh Garcha and Jaswinder Kaur Garcha (the "Garchas"), and 690174. This agreement provided certain rights

> to acquire and subdivide a portion of the Project known colloquially as "Lot 1".
>
> b) [An] October 2010 Joint Venture Agreement between Panorama and companies owned by a friend of Jaswant, Daljit Singh Mattu, and [Mr. Mattu's] friend, Rajpreet. This agreement provided certain rights to build homes on and sell lots created by the Project.
>
> c) [A] November 2010 Joint Venture Agreement between Jaswant, 690174, Panorama, Jaswant's family friends known as Wills and Dale, Jaswant's wife Parmjit, brother Ranjit, and nephew Svender. The 2010 agreement allowed for the subdivision and sale of all five lots on the Project.
>
> d) [A] June 2011 Joint Venture Agreement which was the same as the 2010 agreement, but added Jasprit Singh Grewal and his company, Grewal Management Ltd. (the "Grewals"), to the November 2010 agreement.
>
> e) Oral Agreements that were entered into by the Grewals, Mr. Mattu and Rajpreet, which they allege modified or superseded these written agreements.
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> [Emphasis in original.]

[6] The two civil actions were commenced by Daljit Singh Garcha and Jaswinder Kaur Garcha (the "Garchas") and Jasprit Singh Grewal and Grewal Management Ltd. (the "Grewals"), respectively:

> a) [In the Garcha action] the Garchas sued Jaswant, 690174, Panorama, Parmjit, Jaswant's daughter (Raveen), Ranjit, Svender, Wills and Dale, the Grewals, their company, and the trustee in bankruptcy of Sangha, Panorama and 690174. They sought to advance their entitlement to an interest in the Project, including claims against certain members of the 2011 joint venture for knowing assistance and knowing receipt of proceeds of the Project to which the 2007 joint venturers were entitled.
>
> b) [In the Grewal action] the Grewals, Mr. Mattu, Rajpreet and their respective companies sued Panorama, 690174, Jaswant, Parmjit, Ranjit, Svender [Wills and Dale] and the trustee to establish the validity of their claims pursuant to the June 2011 joint venture agreement and the various oral agreements by way of constructive trust.
>
> [2022 BCCA 178 at para. 6, emphasis in original.]

[7] The trustee in bankruptcy, Crowe MacKay & Company Ltd. (the "Trustee"), is a defendant in the Garcha and Grewal actions by virtue of a Supreme Court order that issued in June 2018 (the "Directions Motion Order"). The reasons underlying that order are indexed as 2018 BCSC 1049.

[8] The Trustee applied for leave to defend the civil actions. Leave was granted; the Garchas and the Grewals were directed to add the Trustee as a defendant in their actions; and the Trustee filed responses on behalf of 690174 and Panorama. The Directions Motion Order stated that:

> The fees, disbursements and taxes (the "Fees") of the Trustee and Fasken associated with the trials of the [Garcha and Grewal] Actions and the trial of the [disallowance] Appeals may be billed monthly by them and paid monthly pro rata from the Vendor Trust Accounts maintained for the Bankrupts in trust with Fasken and Fasken is hereby authorized to pay the Fees of the Trustee and Fasken in acting for the Trustee in the trials of the Actions and the Appeal[s] on a monthly basis provided bills are disclosed to the creditors and claimants in the Bankruptcies 7 days before any payment and subject to the obligation of the Trustee and Fasken to subsequently have those Fees assessed by the Registrar of this Court.

[9] The amount of expenses and fees withdrawn and retained by the Trustee and its legal counsel, Fasken Martineau DuMoulin LLP ("Fasken"), was raised as an issue at the trial.

[10] The three bankruptcy appeals challenged disallowances of claims made against Jaswant, 690174, and Panorama by plaintiffs in the civil actions. The Trustee took the position that these claims were equity claims and consequently, that the bankrupts' creditors had priority.

[11] The trial proceeded in two parts and consumed a cumulative 102 days of court time. There were multiple parties, a voluminous record, and a significant number of issues to determine in the context of a complicated and oftentimes unclear transactional history. The judge described many of the issues as "hotly disputed": 2021 BCSC 607 at para. 6. The Project's accounts were in a "chaotic state" and "deplorable": at paras. 604, 612. Some of the key transactions were in writing. Others were not. Many were inconsistent with one another.

[12] It is apparent from his reasons, and from the submissions before us, that the 102 days were necessitated, in part, because of intransigent positions taken by some of the parties.

[13] The judge carefully navigated his way through the evidence and the relevant analytical frameworks. He resolved the equitable claims before him in what he considered to be a principled and fair manner, with a view to the five proceedings as a whole and the undisputed reality of a limited pool of funds for distribution.

[14] It is within this overarching context that several parties have brought appeals and cross-appeals. They ask that a number of the Supreme Court orders be set aside. The disputes between the parties have been ongoing for some time. The Grewal and Garcha actions were filed in April 2014 and February 2015, respectively. Jaswant voluntarily assigned into bankruptcy in August 2015. His companies, 690174 and Panorama, were assigned into bankruptcy approximately eight months later. Given the length of time it has taken to achieve resolution and the financial and personal toll of the litigation, the appellants and cross-appellants do not wish to have this matter remitted for a new trial. Rather, they ask that this Court rectify any established errors and make different findings and orders based on the record.

[15] For the reasons that follow, we have concluded that no appellant or cross-appellant has established reversible legal error or an otherwise proper basis for appellate interference with the judge's fact-intensive analyses, his application of legal principles, or the remedies he granted.

[16] Accordingly, the appeals and cross-appeals are dismissed.

2. STANDARDS OF REVIEW

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

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

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

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

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

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

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

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

3. FUNCTIONAL AND CONTEXTUAL APPROACH

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

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

[26] The trial produced two sets of comprehensive reasons.

[27] A first judgment, released April 1, 2021, divided the net sale proceeds of the subdivided lots in accordance with the interests and entitlements that were found to exist specific to the land assembly that formed the basis for the Project: 2021 BCSC 607 (the "First Set of Reasons").

[28] A second judgment, released October 1, 2021, provided an accounting and granted other remedies, including a remedy specific to expenses and fees that were charged, withdrawn, and retained by the Trustee and Fasken in administering the bankrupts' estates and defending the related litigation: 2021 BCSC 1925 (the "Second Set of Reasons").

[29] The two sets of reasons are lengthy: 639 and 235 paragraphs, respectively. In assessing the merits of the appeals and cross-appeals, we have applied a functional and contextual approach to both sets of reasons, at all times mindful of the well-established principle that:

> [19] [A] judge need not expound on matters that are well settled, uncontroversial or understood and accepted by the parties. <u>This applies to both the law and the evidence</u> …
>
> …
>
> [45] … it has repeatedly been held that "[t]rial judges are presumed to know the law with which they work day in and day out": *R. v. Burns*, [1994] 1 S.C.R. 656, at p. 664, where the Court rejected the notion of a positive duty on trial judges to demonstrate that they have appreciated every aspect of the relevant evidence. The trial judge is not required to recite pages of "boilerplate" or review well-settled authorities in detail, and failure to do so is not an error of law …
>
> [*R. v. R.E.M.*, 2008 SCC 51, emphasis added.]

[30] Some of the submissions on appeal alleged errors in principle on the basis of ambiguous wording in the judge's reasons, the absence of an express reference to a particular piece of evidence or a particular part of the factual matrix, or the judge's failure to set out and discuss each component of a legal test and each factor considered by him in the application of that test. Respectfully, these submissions did not account for the functional and contextual approach to appellate review.

4. FACTUAL FINDINGS IN THE SUPREME COURT

[31] With these overarching principles in mind, we turn to the factual findings of the judge.

[32] The parties filed an agreed statement of facts at the trial. The judge made additional findings of fact. It is not necessary to detail all of the findings in these reasons. They are too numerous. Instead, it will suffice to list the factual findings that we consider most germane to the resolution of the appeals and cross-appeals.

[33] In the First Set of Reasons, the judge made findings of fact about the acquisition of the five lots that formed the land assembly, were subdivided into individual lots, and generated the net sale proceeds held in trust by the Trustee and Fasken.

[34] These findings include:

- Jaswant began to pursue the Project in or about 2006 (at para. 65).
- The Project was a "joint enterprise" in which Jaswant and Parmjit were both engaged. In all Project matters, Parmjit was "content to allow Jaswant to make all decisions with respect to the business and to benefit from those decisions" (at para. 303).
- In December 2006 and March 2007, the Garchas invested a cumulative $392,000 towards the purchase of Lot 1 (at para. 69).
- Lot 1 was purchased in April 2007 (at para. 71).

- In October 2007, the Garchas signed a 2007 Joint Venture Agreement with 690174 and a number of other investors, pursuant to which Lot 1 was to be subdivided into residential lots for the purpose of resale. 690174 held legal title to Lot 1 as a bare trustee for the 2007 Joint Venturers. The Garchas and the other 2007 Joint Venturers held an undivided beneficial interest in 22 subdivided lots in Lot 1 as tenants in common, in the "ratio of their respective proportionate shares" (at paras. 74–76).
- Jaswant and 690174 undertook responsibility for managing the development of Lot 1. Jaswant made all development decisions "without consulting with the other 2007 Joint Venturers or obtaining any prior approval for his decisions" (at para. 79).
- Lot 2 was purchased in April 2007 and registered in the names of Jaswant, Parmjit, Ranjit, and Svender (at para. 86).
- Lot 3 was purchased in June 2008 and registered in the names of Jaswant and Parmjit (at para. 88).
- Lot 4 was purchased in August 2008 and registered in the names of Wills, Dale, and Jaswant (at para. 89).
- In 2007 and 2008, Daljit Singh Mattu ("Mattu") contributed $1,062,041.45 to the Project (at para. 456). These funds "were advanced as an investment in the Project" and "made a material contribution to the acquisition of Lots 2 to 4" (at paras. 137–138, emphasis added). By virtue of his contributions, Mattu "acquired a beneficial interest in the Project" (at para. 468, emphasis added).
- In October 2010, a company owned by Rajpreet, a company owned by Mattu, and Panorama signed a joint venture agreement (the "October 2010 Joint Venture Agreement"). The purpose of this joint venture was to acquire certain subdivided lots involved in the Project, build homes on them, and then sell the lots (at para. 143). Subsequent to this agreement and in accordance with its terms, Rajpreet's company provided Panorama with $200,000 for the

purpose of pursuing the objects of the October 2010 Joint Venture (at paras. 143–145).

- In November 2010, 690174, Panorama, Jaswant, Wills and Dale, Parmjit, Ranjit, and Svender executed a joint venture agreement (the "November 2010 Joint Venture Agreement") (at para. 91).
- Under this agreement, each of the November 2010 Joint Venturers became the beneficial owner of their proportionate share of all of the lots involved in the Project, which included Lot 1 (at para. 92). Jaswant and 690174 agreed that "Lot 1 would henceforth become part of the assets of that joint venture" (at para. 259).
- At the time of the November 2010 Joint Venture Agreement, "690174 was not the beneficial owner of Lot 1" (at para. 261). It had previously acknowledged that it held title in Lot 1 as a bare trustee for the 2007 Joint Venturers (at para. 156).
- Panorama had also agreed that it would hold title to certain of the subdivided lots from Lot 1 as bare trustee for the October 2010 Joint Venturers and Jaswant had agreed with Mattu that the latter's financial contributions would constitute an investment in the Project (at para. 156). Mattu was not a signatory to the November 2010 Joint Venture Agreement.
- When they entered into the November 2010 Joint Venture Agreement, Panorama, Parmjit, Ranjit, and Svender had actual notice of the terms of the 2007 Joint Venture Agreement, or were wilfully blind to them (at para. 294).
- Panorama, through Jaswant, had actual knowledge of breaches of fiduciary duty by Jaswant and 690174. Panorama received a benefit from the incorporation of Lot 1 into the Project (at para. 324).
- Wills and Dale did not have knowledge of the terms of the 2007 Joint Venture Agreement or any facts that suggested 690174 was not the beneficial owner of the whole of Lot 1 (at para. 306). They had a registered interest in Lot 4; however, they made no financial contribution to the purchase of that lot (at

para. 307), and they held their interest as a nominee for Jaswant or 690174 (at para. 316).

- The November 2010 Joint Venture Agreement contemplated Panorama's acquisition of Lot 5 (at para. 100).
- In December 2010, Rajpreet (or his company) provided a bank draft to Panorama for $300,000 and "sometime later", another $300,000 in cash (at para. 147). These funds were provided as "an investment in the Project" (at para. 148).
- It was understood that these "investment[s] would entitle [Rajpreet] to a beneficial ownership interest in the Project based on his contribution" (at para. 148, emphasis added). This oral agreement "had all of the essential elements of a joint venture", the "object of which was to acquire and subdivide Lots 1 to 5 and sell those lots" (at paras. 440–441).
- Lot 5 was purchased in June 2011. The Grewals paid $1,687,556.50 towards this purchase (at para. 111).
- At least $260,000 of the funds obtained from Rajpreet was also put towards the purchase of Lot 5 (at para. 150).
- A "substantial portion of the funds advanced by Rajpreet made a direct contribution that was vital to the success of the Project, including paying the deposit for the purchase of Lot 5" (at para. 155, emphasis added).
- In June 2011, the Grewals and the November 2010 Joint Venturers executed a joint venture agreement (the "2011 Joint Venture Agreement") (at para. 113).
- Title to all of the subdivided lots was then registered in the name of one or more of the 2011 Joint Venturers (at para. 269). The 2011 Joint Venture Agreement provided that the "registered interest in each lot was held by the registered owner or owners of that lot in trust for all of the members of the 2011 Joint Venture in accordance with their proportionate shares set out in that agreement" (at para. 187).

- Raveen was appointed a trustee by the 2011 Joint Venturers and "played an active role" in subdividing the five lots (at paras. 185, 329–330). However, there is "no evidence that she received any benefit from her involvement" (at para. 329).
- Neither the Grewals nor Raveen had actual knowledge of the terms of the 2007 Joint Venture Agreement or were wilfully blind to them (at paras. 318-319, 330).
- Ultimately, 81 subdivided lots were created under the Project (at para. 186).
- In April 2014, the Grewals, Mattu, Rajpreet, and their companies commenced a civil action against the bankrupts, Parmjit, Ranjit, Svender, Wills, and Dale (at para. 190). Later, the Trustee brought a successful application to be added as a defendant to this action (at para. 36).
- In July 2014, Jaswant provided a demand promissory note from 690174 to Mr. Garcha as a "lender" in the amount of $484,252 (at para. 191). The note stated that the $484,252 "represented the amount paid to 690174 as the lender's contribution to the 2007 Joint Venture" (at para. 191).
- In February 2015, the Garchas commenced a civil action against the bankrupts, Parmjit, Raveen, Ranjit, Svender, Wills, Dale, and the Grewals. Subsequently, the Trustee was also added as a defendant to this action (at para. 193).
- The July 2014 promissory note was pleaded in the Garchas' action and they took default judgment on the note in March 2015 (at paras. 193–194).
- Jaswant made a voluntary assignment in bankruptcy in August 2015 (at para. 197).
- The Trustee was appointed that same month (at para. 197).
- In April 2016, 690174 and Panorama were assigned into bankruptcy (at para. 198).
- The Trustee was also appointed in both of these bankruptcies (at para. 198).

- The Garchas attempted to register the March 2015 default judgment against 690174's interests in the Project. However, the enforcement proceedings were stayed upon 690174's bankruptcy (at para. 339).
- In May 2016, a sales process order was issued by the British Columbia Supreme Court, resulting in all net sale proceeds of the subdivided lots that were developed under the Project being placed in trust with the Trustee's legal counsel, Fasken, for the benefit of the 2011 Joint Venturers (at para. 199).
- All of the subdivided lots were sold by October 28, 2016 (at para. 200).

[35] In the First Set of Reasons, the judge made it clear that he found Jaswant to be "a most unsatisfactory witness" (at para. 48). He went on to find that:

- 690174 and Jaswant functioned as fiduciaries in relation to the 2007 Joint Venturers based on the terms of that joint venture agreement and Jaswant's *de facto* control (at para. 237).
- 690174 and Jaswant breached their fiduciary duties to the 2007 Joint Venturers by: (1) permitting financial charges that arose from outside dealings to be registered against Lot 1 to provide security for obligations incurred by 690174; (2) purporting to transfer the beneficial ownership of Lot 1 to the members of the November 2010 and 2011 Joint Venture Agreements; (3) entering into a land swap agreement involving Lot 1 without the consent of the 2007 Joint Venturers; and (4) executing a mortgage over Lot 1 to secure financing that was then used to the exclusive benefit of parties other than the 2007 Joint Venturers (at para. 248).
- There is no evidence that the Garchas or any other 2007 Joint Venturer "gave their fully informed consent to the actions of 690174 and Jaswant" (at para. 282).
- The breaches of fiduciary duty were dishonest (at para. 252).

- Jaswant and 690174 put the beneficial ownership of Lot 1 at risk and received benefits from Lot 1 that they had no right to obtain (para. 249). Registering title to the subdivided lots in the names of the 2011 Joint Venturers permitted the Project to be completed for the sole benefit of those parties (at paras. 270–271).
- Jaswant obtained the use of Mattu's and Rajpreet's funds "in circumstances which imposed an *ad hoc* fiduciary duty on him to use them for the specific purposes of securing them an interest in the Project" (at para. 473).
- He then breached that duty. Lots 1–5 were registered in the names of the 2011 Joint Venturers, which deprived Mattu and Rajpreet of the right to share in Project proceeds (at para. 500).
- The members of the 2011 Joint Venture, including 690174 and its 28.5% interest, "did not contribute sufficient funds to finance the acquisition and development costs of the Project. That deficiency was made up in large part by the funds contributed by Mr. Mattu and Rajpreet" (at para. 615).

[36] In the Second Set of Reasons, the judge found that:

- The net sale proceeds of the subdivided lots held in trust in the bankruptcy proceedings amounted to $12,983,124.54 (at paras. 11–12).
- The parties' proportionate share of the net sale proceeds was:

2007 Joint Venturers (not 690174)	21.91%
Parmjit	9.0494%
Ranjit/Svender	6.033%
Wills/Dale	6.033%
Grewals	12.0%
Panorama	12.0%

Jaswant	15.0823%
Mattu	9.00%
Rajpreet	6.80%

- The net monetary value of these proportionate shares, before payment of the Trustee's expenses and fees, including legal fees, amounted to:

Garchas	$891,682
690174	$577,976
Panorama	$1,287,725
Jaswant	$1,182,609
Parmjit	$687,336
Ranjit/Svender	$894,520
Wills/Dale	$765,475
Grewals	$1,698,706
Mattu	$1,829,632
Rajpreet	$1,382,389

- The portion of the net sale proceeds available for division among the bankrupts' creditors was $3,048,310, which represented the combined value of the bankrupts' proportionate shares (at para. 99).

- As at April 21, 2021, the Trustee had withdrawn $5,995,943 in expenses and fees, including legal fees, from the funds held in trust by Fasken (at para. 100).

- Of that amount, $4,942,062 had been assessed and approved for withdrawal by court order (at para. 100).

- The majority of the funds withdrawn by the Trustee came from 690174's vendor trust account. The judge ultimately found that 690174 held 21/23 of its share of the net sale proceeds in that account for the 2007 Joint Venturers (at para. 101).

- The Trustee had charged the interests of the 2007 Joint Venturers with approximately 52% of the administrative costs of the bankruptcies (at para. 172).

- The total amount withdrawn by the Trustee is twice the value of the estates of Jaswant, 69014, and Panorama (at para. 206).

[37] The findings specific to the Trustee and Fasken's withdrawal and retention of expenses and fees were necessitated, at least in part, by the fact that prior to the second part of the trial plaintiffs in the Garcha and Grewal actions raised concerns about the amount of those expenses and fees and the source of their payment: Second Set of Reasons at para. 4. They subsequently brought applications for a remedy under s. 37 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B–3 [*BIA*], seeking to have the Trustee and Fasken "repay some portion of the amounts that they [had] received": at para. 108.

[38] In resolving the latter applications, the judge found in the Second Set of Reasons that:

- The Directions Motion Order permitted the Trustee and Fasken to bill their expenses and fees "associated with the trials of the Actions and the trial of the Appeals" monthly, and authorized Fasken to pay them monthly *pro rata* from the vendor trust accounts held in the names of 690174, Panorama, and Jaswant, subject to the terms specified (at paras. 145, 163, 165).

- However, the payment orders that approved the Trustee's expenses and fees ("Term Payment Orders"), "were much more limited in scope" and were intended to provide the Trustee with "interim funding" only (at para. 146).

- Except as expressly permitted by the Directions Motion Order, pursuant to these orders the amounts approved, withdrawn, and retained by the Trustee and Fasken were subject to further review by the trial court as to the amount of remuneration and ultimate responsibility for their payment (at paras. 142, 144–147).

- The Trustee did not act impartially and in keeping with its duties as an officer of the court (at para. 187).

- The Trustee failed to consider the financial consequences of its conduct on the creditors and the parties advancing trust claims (at para. 187).

- The Trustee failed to keep the judge informed "of the consequences of its actions" on the creditors and trust claimants (at para. 187).

- The Trustee "lost sight of its role as an officer of the court and instead adopted an aggressively adversarial role in the litigation" (at para. 195).

- This conduct "made a material contribution to the expense and complexity of the proceedings" (at para. 195).

- The position taken towards the Garchas' claims and "the resources expended in opposing it were both unreasonable and based on unsound legal analysis" (at para. 199).

- The Trustee adopted positions in response to the claims advanced by the Garchas, Mattu, and Rajpreet "without having any reasonable basis for believing they were correct" (at para. 204).

- The Trustee's expenses and fees were "too high given the resources" of the bankrupts (at para. 207).

5. COMMENTS ON FACTUAL FINDINGS

[39] Our recitation of the factual findings from the First and Second Set of Reasons is not exhaustive. It reveals, however, the highly fact-intensive nature of the trial.

[40] In submissions before us, we were told that if the trial judgment is allowed to stand, it will prove highly problematic for future cases raising similar legal issues. We disagree.

[41] The judge's factual findings played both a central and a critical role in his analysis of the case.

[42] His application of legal principles and the remedies he granted specific to the net sale proceeds from the subdivided lots were directly informed by and responsive to his determination that the Garchas, Mattu, and Rajpreet acquired beneficial proprietary interests in one or more of Lots 1–5 that were then subdivided and generated the net sale proceeds.

[43] His assessment of the Trustee's conduct followed a lengthy trial. It was informed by an intimate familiarity with the evidentiary record, the positions advanced in the litigation, and the justifications offered. His decision to grant a remedy under s. 37 of the *BIA* was contextually informed, attuned to the demands of fairness, and tailored to the particular circumstances of the case, including the specific nature of the court orders that allowed for and approved various payments to the Trustee.

[44] We interpret the First and Second Set of Reasons differently than the Trustee and other of the parties before us. Contrary to their characterization of the case, we are satisfied that the judge's application of legal principles and the remedies he granted reflect a concrete finding that each of the Garchas, Mattu, and Rajpreet invested in the purchase of one or more of the five lots of land that were developed pursuant to the Project, not in the Project as a standalone business or some other form of independent entity. Future reference to and reliance upon the First and

Second Set of Reasons will necessarily have to account for these findings—namely, non-relinquished proprietary interests in land that was subsequently developed, subdivided, sold, and ultimately took the form of net sale proceeds.

6. ORDERS IN THE SUPREME COURT

[45] The trial resulted in a cumulative ten companion orders.

[46] It is not necessary to set out the entirety of their content. For present purposes, it will suffice to highlight the parts of the orders that received the greatest attention in submissions before us:

- The Garchas' claims against Jaswant, 690174, and Panorama are express trust claims, not equity claims under s. 140.1 of the *BIA*, or the common law.
- As members of the 2007 Joint Venture Agreement, the Garchas are entitled to their proportionate share of the assets that formed the basis for the 2007 Joint Venture (Lot 1).
- Of the 28.5% share of the net sale proceeds allocated to 690174 in the 2011 Joint Venture Agreement, 21/23 is held in trust for the 2007 Joint Venturers. The Garchas are entitled to 7/23 of the 21/23 share, subject to adjustment for any orders in favour of Mattu and Rajpreet (whose beneficial interests were found to have higher priority).
- The default judgment taken by the Garchas on the July 2014 promissory note is not a bar to their claims.
- Panorama, Parmjit, Ranjit, and Svender are jointly and severally liable to the Garchas for knowing assistance and knowing receipt.
- Wills and Dale hold their interests in the net sale proceeds generated by the Project subject to the Garchas' proprietary claims.

- The Garchas are entitled to judgment against Parmjit, Ranjit, Svender, Wills, and Dale for any shortfall in their recovery, based on the ratio of these latter parties' respective entitlements to the net sale proceeds.

- The Garchas are entitled to a remedy under s. 37 of the *BIA.* The amount of expenses and fees that the Trustee and Fasken are entitled to retain from the net sale proceeds, to the end of trial, is limited to $4,048,310. This sum is comprised of Panorama, Jaswant, and 690174's entitlements and $1,000,000 from the 2007 Joint Venturers' entitlement. It is subject to further review under ss. 151 and 152 of the *BIA*.

- The Trustee and Fasken are entitled to retain $1,000,000 of the funds already taken from the 2007 Joint Venturers' share of the net sale proceeds. However, they must refund any amount withdrawn in excess of that $1,000,000. In doing so, the Trustee and Fasken may use any funds remaining in trust to the credit of the estates of Jaswant and Panorama.

- In their action, the Garchas are awarded Scale C costs against Parmjit, Ranjit, Svender, Wills, Dale, and the Trustee in its personal capacity, jointly and severally.

- Raveen is awarded Scale C costs against the Garchas. However, these costs are payable by Parmjit.

- The claims of Mattu, Rajpreet, and their companies are not equity claims under s. 140.1 of the *BIA*. Mattu and Rajpreet are entitled to a retrospective remedial constructive trust and their trust interests are to be charged against the interests of all of the 2011 Joint Venturers, including the 28.5% interest of 690174.

- Mattu and Rajpreet are also entitled to a remedy under s. 37 of the *BIA*. The amount of expenses and fees that the Trustee and Fasken are entitled to retain from the net sale proceeds to the end of trial is limited to $4,048,310, subject to further review under ss. 151 and 152 of the *BIA*.

- In their actions, Mattu and Rajpreet are awarded costs against Parmjit, Ranjit, Svender, Wills, Dale, and the Trustee in its personal capacity, jointly and severally.

- The Garchas', Mattu's, and Rajpreet's bankruptcy appeals from notices of disallowance are allowed. In each of these appeals, costs are awarded against the Trustee, personally.

7. APPEALS

[47] A total of 17 appeals and cross-appeals were initially filed from the ten Supreme Court orders: 2022 BCCA 178 at para. 11. Since then, a number of these appeals have been abandoned. The remaining appeals and cross-appeals, and the errors alleged, are addressed below.

[48] Fasken applied to be added as a respondent to the appeals. That application was granted: 2022 BCCA 158 at para. 61.

8. DISCUSSION

8.1 General Comments

[49] Overall, we are satisfied that none of the appellants or cross-appellants have demonstrated palpable and overriding error with the judge's assessment of credibility or his factual findings.

[50] We are also satisfied that none of the appellants or cross-appellants have established reversible legal error, procedural unfairness, or a proper and substantiated appellate basis for interfering with the judge's exercises of discretion.

[51] We agree with the judge on his articulation of the legal principles that governed the issues before him. We also agree with his application of those principles to his factual findings, which have not been displaced on appeal, and with the results.

[52] Because of these conclusions, we do not consider it necessary to analyze and discuss each of the substantive issues raised on appeal.

[53] Instead, we endorse the judge's resolution of those issues as set out in his reasons for judgment and the reasoning he brought to bear. Where we consider it necessary to address a particular issue, or to clarify a finding or application of legal principle, we do so below.

[54] If a ground of appeal or cross-appeal is not addressed, it is because we are in substantial agreement with the judge's reasons and we are content to allow those reasons to speak for themselves.

8.2 Specific Issues

[55] In addressing specific issues, we consider it appropriate to deal with each of the appeals and cross-appeals, in turn. For some issues, such as the granting of remedies under s. 37 of the *BIA*, our analysis will be more in-depth than for others. This reflects the complexity of the particular issue and/or unusual features of the case.

8.2.1 Garcha Action (CA47444)

[56] The Garchas appealed from the orders made in their civil action. The Trustee cross-appealed.

[57] In their factum, the Garchas allege the judge made a number of errors. They contend he erroneously: (1) deprived them of meaningful proprietary remedies, including a "full prophylactic disgorgement" award; (2) failed to attach their remedies to net sale proceeds that are held by knowing assistants or knowing recipients; (3) declined to find that Wills and Dale were knowing assistants or knowing

recipients; (4) declined to hold that Raveen was a trustee *de son tort*, knowing assistant, or knowing recipient; (5) held that their award was subject to the retrospective remedial constructive trusts of Mattu and Rajpreet; and (6) denied a claim for punitive damages.

[58] In its cross-appeal factum, the Trustee also alleges a number of errors. It says the judge: (1) erroneously held that the Garchas' claims were not equity claims; (2) failed to recognize that after the Garchas took default judgment on the July 2014 promissory note, they no longer had proprietary rights to trace into the net sale proceeds; (3) erroneously allowed the Garchas to amend their notice of civil claim after they closed their case; and (4) erroneously declined to order the Garchas to contribute towards expenses arising under the 2007 Joint Venture Agreement.

[59] At the hearing of the appeal, the majority of submissions made on behalf of the Garchas and the Trustee focused on three main issues: the nature of the Garchas' claims; whether those claims had been extinguished by the July 2014 default judgment; and if not, the scope of the Garchas' remedial entitlement.

Nature of the Claim

[60] The proper characterization of the Garchas' claims (as well as the claims advanced by Mattu and Rajpreet), carried considerable significance in this case. This is because s. 67(1)(a) of the *BIA* expressly exempts "property held by the bankrupt in trust for any other person" from division among the bankrupt's creditors.

[61] In *B.C. v. Henfrey Samson Belair*, [1989] 2 S.C.R. 24 (S.C.C.), the effect of s. 67(1)(a) was described this way by the majority:

> Taking the words in their ordinary sense, they connote a situation where there is property which can be identified as being held in trust. That property is to be removed from other assets in the hands of the bankrupt before distribution under the *Bankruptcy Act* because, in equity, it belongs to another person. The intention of Parliament in enacting [what is now s. 67(1)(a)] … was to permit removal of property which can be specifically identified as not belonging to the bankrupt under general principles of trust law from the distribution scheme established by the *Bankruptcy Act*.
>
> [Emphasis added.]

[62] In their final arguments at the trial, all defendants in the Garcha action (as well as the parties to the Grewal action), conceded that the 2007 Joint Venture Agreement was a valid and binding agreement: First Set of Reasons at para. 213.

[63] However, they contended that the 2007 Joint Venture Agreement did not provide a proper foundation for a trust claim. As a result, from their perspective, s. 67(1)(a) of the *BIA* had no application.

[64] Based on the plain wording of the 2007 Joint Venture Agreement (see paras. 33–34, above), and in the context of the record, we find it was open to the judge to conclude that the 2007 Joint Venture Agreement rendered its investor members the "beneficial owner of their proportionate share" of Lot 1: First Set of Reasons at para. 224, emphasis added. In other words, they each acquired a beneficial proprietary interest in Lot 1. We agree with the judge that this was "the only reasonable interpretation of the 2007 [Joint Venture Agreement]", and that the "existence of the trust in favour of the 2007 Joint Venturers would have been obvious to anyone who read the 2007 [Joint Venture Agreement]": at paras. 224, 291.

[65] Accordingly, we also conclude it was open to the judge to find that the proprietary interests of the Garchas were traceable into 690174's proportionate share of the assets developed under the 2011 Joint Venture and as such, do not form part of the assets of 690174 that are divisible among its creditors: at paras. 236, 278. Importantly, as noted above, the judge found as a fact that 690174 originally held legal title to Lot 1 in trust for the 2007 Joint Venturers.

[66] By "traceable", we mean the evidence reasonably supported an ascertainable link between the Garchas' beneficial interests in Lot 1; the folding of Lot 1 into subsequent agreements involving the land assembly that formed the subject matter of the Project; the subdivision of Lot 1; and the net proceeds generated by the sale of the subdivided Lots 1–5.

[67] In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 SCC 15 [*B.M.P.*], the Supreme Court of Canada described tracing as "… an identification process. The common law rule is that the claimant must demonstrate that the assets being sought in the hands of the recipient are either the very assets in which the claimant asserts a proprietary right or a substitute for them": at para. 75.

[68] In *Waters' Law of Trusts in Canada* (5th ed.), the authors illustrate how tracing works:

> The paradigm case of traceable proceeds is a clean substitution. With $10,000 of trust money, the trustee in breach of trust buys an estate in land. The estate is the traceable proceeds of the trust property. There is a factual inquiry into what was actually done with the original property. The traceable proceeds, being the exchange products acquired with the trust property, become themselves trust property. There is no limit to the number of exchanges through which one might trace. In general, intention is not relevant. Whether the trustee wanted the estate in land to be held in trust or held personally is beside the point. Because it was acquired in exchange for trust property, it is itself trust property, if the beneficiaries so elect.
>
> [Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021), at 26.III, emphasis added.]

[69] Tracing is an "evidentiary process" and "possible if identification is possible": *B.M.P.* at para. 79. The fundamental question to ask is whether that which is sought by the claimant is ascertainable as "the product of, or substitute for, the original thing": *B.M.P.* at para. 86, citing *Banque Belge pour l'Étranger v. Hambrouck*, [1921] 1 K.B. 321 (C.A.) at 335. See also, *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9 at para. 99.

[70] Contrary to the Trustee's submission, the direct and circumstantial evidence in this case did allow for a finding, based on inferential reasoning or otherwise, that the property in which the Garchas held a beneficial interest (Lot 1), formed part of the land assembly that was later subdivided, sold, and replaced by the net sale proceeds held in trust in the bankruptcy proceedings. It was not a perfect record given the poor accounting and the intermingling of five lots of land, their sale proceeds, and contributions to development costs. However, we cannot say on the evidence as a whole that the judge's conclusion in favour of traceability was clearly

wrong. The parties to the appeal have not identified a palpable and overriding error in this regard.

[71] "[T]racing is impossible only when the means of ascertainment fail": *B.M.P.* at para. 79, emphasis added. Whether this has occurred is primarily a "difficulty of fact and not of law": *B.M.P.* at para. 79, citing *Taylor v. Plumer* (1815), 3 M. & S. 562, 34 E.R. 721 at 726. See also, *Carillion Canada Holdings Inc. (Re)*, 2021 ONCA 468 at paras. 12–13.

[72] Given the factual findings about the folding of Lot 1 into the November 2010 and 2011 Joint Venture Agreements, the judge's conclusion in favour of identification and traceability was consistent with this Court's decision in *Ruwenzori Enterprises Ltd. v. Walji*, 2006 BCCA 448. In that case, Justice Hall, writing for the Court, held that there is "no principled reason why a person whose monies were in part used to buy an asset cannot obtain a proportional proprietary interest in the asset", even where the monies for the asset came from a mixed fund: at paras. 42–44, emphasis added. See also *Li v. Li*, 2021 BCCA 39 at para. 48.

Default Judgment

[73] The Trustee argued at the trial, and before us, that if the 2007 Joint Venturers held a proprietary interest in Lot 1, that interest was extinguished by subsequent developments that occurred before Jaswant's bankruptcy: First Set of Reasons at para. 214. Specific to the Garchas, those developments included their election to take default judgment on the July 2014 promissory note.

[74] The Trustee submitted that once the Garchas elected to take default judgment, they were barred from advancing a trust claim because all of their causes of action had merged in the default judgment. In advancing this position, the Trustee cited authorities such as *H.Y. Louie Co. Limited v. Bowick*, 2015 BCCA 256, in which the majority noted at para. 88 that: "When a creditor takes judgment, the cause of action arising from its claims is merged in the judgment".

[75] The judge acknowledged the doctrines of election and merger (at paras. 348, 351), and their potential applicability to the case. He also accepted that the Garchas "are not entitled to recover twice for the [respondents'] wrongdoing": at para. 366. However, on the facts, he found that election and merger did not bar the Garchas' equitable claims and he rejected the Trustee's position.

[76] In doing so, the judge reviewed the Garchas' pleadings, which included a "claim for equitable remedies flowing from the breaches of fiduciary duty" by Jaswant and 690174: at para. 337. He found that the claim specific to the promissory note was a separate cause of action and had not been pleaded "as an alternative to the claims based on breach of equitable duties": at para. 337. The promissory note was "made well after the breaches of fiduciary duty" and "either claim could have been advanced independently of the other, that is, without relying on any of the facts giving rise to the other claim": at para. 350. The remedies sought by the Garchas were "cumulative": at para. 357.

[77] The judge also reviewed the factual circumstances surrounding the presentation of the promissory note. "[T]here was no evidence that the Promissory Note was given or accepted in full satisfaction of the Garchas' claims": at para. 351. The judge found, as a fact, that the Garchas "did not intend to forego their claim for equitable relief over the property of which they have been wrongfully deprived": at para. 364. Moreover, Jaswant and 690174 stood in a fiduciary role to the Garchas at the time the note was provided. When the Garchas took default judgment, the "facts relating to Jaswant's conduct, the degree to which funds had been mixed by Jaswant, and the numerous inconsistent agreements that the Jaswant-controlled parties had entered into had not been fully explored": at para. 378.

[78] In this context, the judge was satisfied that even if it could be said that the claim grounded in the promissory note and the claims for equitable remedies arose out of the same cause of action because of the interconnectedness of their underlying facts, it was in the interests of justice to allow the action for breach of

fiduciary duties to be determined on the merits: at paras. 354, 368. He found it would be unfair to deny the Garchas a remedy on the basis of the default judgment and he exercised his discretion accordingly: at paras. 375, 380–381. "From the outset of [the] proceedings the Garchas have asserted a beneficial interest in the proceeds of the sale of Lot 1": at paras. 375, 379, emphasis added. The promissory note was limited to the Garchas' initial contribution to Lot 1. It did not extend to any profit arising from the subsequent subdivision and sale of Lot 1 (as contemplated by the 2007 Joint Venture Agreement), or, importantly, remedies that were available to the Garchas for breaches of fiduciary duty that occurred after execution of the 2007 Joint Venture Agreement and which were themselves actionable.

[79] In our view, the approach taken by the judge to the default judgment, and to his exercise of discretion, is consistent with *Ladner v. Ladner*, 2004 BCCA 366, in which Justice Huddart, writing for the Court, held:

> [47] It seems right that a factual situation that gives a person a cause of action … should be the subject of only one action, unless the dictates of fairness and justice require a second action …
>
> [Internal references omitted; emphasis added.]

[80] On the record before him, it was open to the judge to find that the Garchas' proprietary claims are properly characterized as trust claims and that the net sale proceeds to which those claims attach are exempt from division under s. 67(1)(a) of the *BIA*: at para. 553.

Disgorgement Remedy

[81] This brings us to the third of the issues we consider necessary to address in relation to the Garcha action: the scope of the remedy awarded.

[82] The Garchas say the judge erred in limiting their award to a "proportionate share of 690174's 28.5% interest in the 2011 Joint Venture": First Set of Reasons at paras. 284, 332, 587–588. They argue that the judge awarded them the equivalent of contract damages when, at law, they were entitled to a "full disgorgement proprietary remedy against the profits of the wrongdoers".

[83] The judge understood, from this latter claim, that the Garchas were seeking a "share of the gross proceeds from the Project arising out of the lots attributable to Lots 2 to 5 which would otherwise be payable to the other 2011 Joint Venturers": at para. 585. He found that in making this claim, the Garchas were "overreaching" and that their requested remedy not only exceeded what they were entitled to, but would lead to an unfair result: at para. 586.

[84] From his perspective, the award he made would "compensate them adequately": at para. 586. His intention was to provide an award that allowed the Garchas to "recover the full amount of their loss": Second Set of Reasons at para. 25. In other words, he considered them entitled to recover their initial contribution to the acquisition of Lot 1 and their proportionate share of proceeds from the sale of Lot 1's subdivided lots as contemplated by the 2007 Joint Venture Agreement. The judge declined to adjust the Garchas' entitlement "to account for their under-contribution to the carrying costs of the Lot 1 Acquisition Mortgage" (which the Trustee calculated as $174,962.49): First Set of Reasons at paras. 596-597. This finding, in the exercise of the judge's discretion, necessarily worked to their benefit. The judge determined that to award the Garchas more than this "would be unfair to the other parties who have contributed to the success of the Project and would in effect unjustly enrich the Garchas": at para. 592.

[85] In our view, the judge's remedial resolution of the Garchas' civil claim was open to him. He retained the discretion to select the equitable remedy that he considered most appropriate in the context of the case, as a whole, and to limit the Garchas' recovery.

[86] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, the Supreme Court of Canada described an "accounting of profits and disgorgement" as "equitable remedies" (at para. 50), and reaffirmed that equitable remedies are <u>always</u> subject to the discretion of the court: at para. 74. In *Wang v. Wang*, 2020 BCCA 15 at para. 59, this Court described the discretion to select a suitable equitable remedy as "large".

In *Kerr v. Baranow*, 2011 SCC 10, Justice Cromwell, writing on behalf of the Supreme Court of Canada, held that:

> [70] Maintaining a strict remedial dichotomy is inconsistent with the Court's approach to equitable remedies in general, and to its development of remedies for unjust enrichment in particular.
>
> [71] The Court has often emphasized the flexibility of equitable remedies and the need to fashion remedies that respond to various situations in principled and realistic ways. So, for example, when speaking of equitable compensation for breach of confidence, Binnie J. affirmed that "the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation": *Cadbury Schweppes Inc. v. FBI Foods Ltd*., [1999] 1 S.C.R. 142, at para. 61. At para. 24, he noted the broad approach to equitable remedies for breach of confidence taken by the Court in *Lac Minerals*. In doing so, he cited this statement with approval: ". . . the remedy that follows [once liability is established] should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization" (from J. D. Davies, "Duties of Confidence and Loyalty", [1990] *L.M.C.L.Q.* 4, at p. 5). Similarly, in the context of the constructive trust, McLachlin J. (as she then was) noted that "[e]quitable remedies are flexible; their award is based on what is just in all the circumstances of the case": *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at para. 34.
>
> [Emphasis added.]

[87] The authority of a judge to flexibly and fairly fashion an equitable remedy in a manner responsive to the individualized circumstances of the case, resonates here, especially in the context of a limited pool for distribution and countervailing claims.

[88] In determining the Garchas' award for deprivation of their proprietary interests as 2007 Joint Venturers, the judge looked to *Foskett v. McKeown*, [2000] 3 All E.R. 97.

[89] Similar to this case, funds provided for the purchase of lots of land in *Foskett* were wrongly used by the party who held those funds in trust. A portion of the funds was used to pay the premiums of a life insurance policy to the benefit of the wrongdoer's children. Ultimately, the court held that the insurance proceeds should be distributed on a *pro rata* basis, proportionate to the respective contributions of the parties who claimed an interest. This included the land purchasers, who had an equitable proprietary interest that could be traced into the proceeds. Although

Foskett involved a different factual matrix, we do not consider it unreasonable for the judge to have taken guidance from its analytical approach.

Conclusion on Appeals in Garcha Action

[90] Neither the Garchas nor the Trustee have persuaded us that in resolving the Garchas' action, the judge made palpable and overriding errors of fact, committed reversible legal error, or reached a discretionary decision that is so clearly wrong that permitting it to stand would result in an injustice: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

[91] Accordingly, we dismiss this appeal and cross-appeal.

8.2.2 Grewal Action (CA47450)

[92] As with the Garchas, the Grewals appealed from the orders that emerged from the trial of their civil action. The Trustee cross-appealed.

[93] The Grewals subsequently abandoned their appeals on May 6, 2022. The cross-appeal remained and the Trustee became the appellant.

[94] In its factum, the Trustee alleges that the judge erred in: (1) failing to find that Mattu and Rajpreet were equity claimants; and (2) imposing retrospective remedial constructive trusts in favour of Mattu and Rajpreet.

[95] The judge found on the evidence that the financial contributions of Mattu and Rajpreet "made a material contribution to the acquisition of Lots 2 to 4 and to the payment of Project expenses": First Set of Reasons at paras. 138, 487, emphasis added. He also found that Rajpreet contributed financially to the acquisition of Lot 5: at paras. 145, 150, 155. Based on these findings, he concluded that Mattu and Rajpreet held beneficial ownership interests in the subdivided lots that were developed under the Project: at paras. 488–489, 576, 610, 612, 614–615.

[96] The judge also found that Jaswant stood in the role of an *ad hoc* fiduciary to Mattu and Rajpreet (at paras. 476, 478), and that he breached that duty. Lots 1–5 were registered in the names of the 2011 Joint Venturers, wrongfully depriving Mattu and Rajpreet of the right to share in the net sale proceeds, and the 2011 Joint Venturers "collectively received a corresponding benefit": at para. 500.

[97] The judge concluded that Mattu and Rajpreet were entitled to a remedial constructive trust because of Jaswant's wrongful conduct and on the basis of unjust enrichment: at paras. 480–484, 489. He was satisfied that the "fairest way to compensate them" was to impose a constructive trust over a portion of the Project's net sale proceeds: at para. 612. These claims were not equity claims to the property of the bankrupts: at para. 558. Rather, they were trust claims based on beneficial proprietary interests in the land assembly that formed the basis for the subdivided lots, and in respect of which Mattu and Rajpreet had been wrongfully deprived.

[98] Further, the judge was of the view it would be unfair to deprive Mattu and Rajpreet of their beneficial interest in the Project because doing so would result in the general body of creditors being unjustly enriched as a result of Jaswant's misconduct. Without the essential contributions of Mattu and Rajpreet, the Project would not have come to fruition and the creditors would have recovered little through the bankruptcy proceedings. As a result, the property to which the interests attached—the net sale proceeds from the sale of the subdivided lots—was exempt from division among the bankrupt's creditors pursuant to s. 67(1)(a) of the *BIA*: at paras. 561, 563, 575–577.

[99] The judge also found that Mattu's and Rajpreet's constructive trusts arose prior to the bankruptcies and were appropriately retrospective. The trust in favour of Mr. Mattu "arose when Jaswant used the funds he received from Mr. Mattu without ensuring that Mr. Mattu's proprietary interest in the Project was protected": at para. 568. The trust in favour of Rajpreet arose "at the latest when the 2011 Joint Venture was formed without expressly providing [Rajpreet] with an interest in it": at para. 567. With respect to the first $200,000 that Rajpreet's company provided to

Panorama, the trust arose when "Panorama and Jaswant used those funds as part of the deposit for the purchase of Lot 5": at para. 567.

[100] We are satisfied that in light of the factual findings made about the contributions of Mattu and Rajpreet to the acquisition of Lots 2–5, it was open to the judge to find that the "true nature or substance" of their claims was proprietary: *Bul River Mineral Corp. (Re)*, 2014 BCSC 1732 at para. 102.

[101] Moreover, it was not unreasonable for the judge to apply a constructive trust as a protective remedy. Mattu and Rajpreet had been wrongly deprived of their proprietary interests in the land assembly by the registration of title in the names of the 2011 Joint Venturers; the judge was satisfied those interests could be traced into the net proceeds from the sale of Lots 1–5; and he found it would be unjust if Mattu and Rajpreet were unable to reclaim their interests, to the benefit of the 2011 Joint Venturers and the general body of creditors: *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458 at para. 22. This included all three of the bankrupts.

[102] In *Ellingsen,* this Court held that in "weighing the equities" of a constructive claim in the context of a bankruptcy, "other creditors may have to be considered" to avoid the imposition of a remedy that "unfairly deprives other creditors of an asset to which they have any reasonable entitlement": at para. 37. Contrary to the Trustee's assertion, the judge turned his mind to this issue: at paras. 489–490.

[103] The next question is whether the judge erred in making the remedial constructive trusts retrospective. In our view, he did not.

[104] The Trustee's arguments turn principally on its submission that Mattu and Rajpreet were "equity-style risk investors" and it would be unfair and wrong to subordinate the claims of "blameless" unsecured creditors to the claims of Mattu and Rajpreet. But, as noted, the judge justifiably found that Mattu and Rajpreet were beneficial owners of the subdivided lots, not "equity-style risk investors".

[105] The judge cited three binding authorities for the proposition that in a bankruptcy proceeding the court has a discretion to determine whether a property interest arising under a constructive trust comes into existence at the time of judgment or when the unjust enrichment first arose: at paras. 564–566 citing *Ellingson* at para. 38; *BNSF Railway Company v. Teck Metals Ltd.*, 2016 BCCA 350 at para. 76; *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 at 91 (S.C.C.).

[106] Finally, the judge articulated sound reasons for exercising his discretion to retrospectively impose the remedial constructive trusts in favour of Mattu and Rajpreet.

Conclusion on Cross-Appeal in Grewal Action

[107] The Trustee has not persuaded us that in resolving the Grewal Action, the judge made palpable and overriding errors of fact, committed reversible legal error, or reached a discretionary decision that is so clearly wrong that permitting it to stand would result in an injustice.

[108] Accordingly, we dismiss the Trustee's cross-appeal.

8.2.3 Bankruptcy Appeals (CA47805–CA47809)

[109] The Trustee has filed a total of five appeals specific to the bankruptcy proceedings before the judge.

[110] In these appeals, the Trustee alleges in its factum that the judge erred by: (1) ordering under s. 37 of the *BIA* that approximately $2,000,000 in already-paid professional fees be refunded into an account for the 2007 Joint Venturers; (2) ordering that costs in the proceedings be paid by the Trustee personally; (3) granting the Garchas uplifted costs; and (4) concluding that he did not have jurisdiction to reapportion the entitlements of the non-bankrupt parties for the purpose of contributing to the Trustee's professional fees.

[111] Fasken supports the Trustee's appeals. In addition, it contends the judge acted unfairly in making declarations and orders directly against it.

[112] The Garchas have filed cross-appeals. In their factum, they say the judge erred by: (1) limiting the cumulative beneficial interest of the 2007 Joint Venturers to $2,675,046; (2) allowing the Trustee to charge $1,000,000 in expenses and fees against the beneficial interests of the 2007 Joint Venturers; and (3) not ordering special costs against the Trustee.

[113] Parmjit and Raveen have also filed a cross-appeal. They say the judge erred in ordering that Parmjit pay Raveen's costs to the Garchas.

[114] At the hearing of the appeal, counsels' submissions in the bankruptcy matters focused predominantly on three issues: the judge's findings about the Trustee's expenses and fees, including his interpretation of the Directions Motion Order and the Term Payment Orders; whether those expenses and fees should be paid from net sale proceeds that are subject to an express or remedial constructive trust; and whether the judge erred in ordering Parmjit to pay Raveen's costs.

[115] We will address the last of these issues first.

[116] We are satisfied it was open to the judge, in the exercise of his discretion, to order Parmjit to pay Raveen's costs to the Garchas, given the close family ties between them and the judge's finding that both Jaswant and Parmjit "utilized" Raveen and her company to facilitate the Project: Second Set of Reasons at paras. 58–60.

[117] The remaining two issues require greater attention.

Findings on Expenses and Fees

[118] As stated, the judge's findings on the Trustee's expenses and fees, including legal fees, were necessitated in part by the Garchas' and Grewals' concerns about the amount of those expenses and fees, and their application for a remedy under s. 37 of the *BIA*. The Trustee had withdrawn nearly $6 million for expenses and fees, of which nearly $5 million had been assessed by a registrar and approved by the court. The funds were withdrawn rateably based on the amounts of net sale

proceeds in the bankrupts' vendor trust accounts, as provided in the Directions Motion Order. Because the largest share was held in the account established in the name of 690174, most of the funds were withdrawn from that account.

[119] However, in the First Set of Reasons, the judge found that 690174 held 21/23 of its share of the net sale proceeds in trust for the 2007 Joint Venturers. Accordingly, the 2007 Joint Venturers' proportionate share was $2,675,046: Second Set of Reasons at paras. 102–102, 169.

[120] As noted, in the Second Set of Reasons, the judge found the bankrupts' share of the net sale proceeds divisible among their creditors was $3,048,310, of which $577,976 was 690174's property. Due to the combined effect of the rateable withdrawals and the finding of a trust, most of what 690174 held for the 2007 Joint Venturers was used to pay the Trustee and Fasken's accounts. As at April 2021, $790,485 remained in 690174's vendor trust account: at para. 102.

[121] In responding to the s. 37 application, the Trustee contended the judge had no jurisdiction to order repayment of expenses and fees that had been assessed by a registrar and paid pursuant to previous court orders. It submitted he should find that the Trustee and Fasken had a vested entitlement to retain the full amounts withdrawn, and set their total remuneration at $6,183,168, subject to a limited right to reapportion this amount among the bankrupt estates. For their part, the Garchas and the Grewals contended that the previous court orders provided for interim payments only, and were subject to final approval by the trial judge in light of the total circumstances. They submitted the judge should grant a remedial order under s. 37 requiring the Trustee and Fasken to repay some portion of the withdrawn funds they had received.

[122] The judge identified the threshold question as whether the Term Payment Orders were final as to amount and entitlement, or whether they were interim and subject to further review by the court. He concluded the assessments were interim and did not oust the court's jurisdiction to review and vary them. He found the purpose of the Term Payment Orders was to provide the Trustee with interim

funding to meet the ongoing expenses of administering the bankrupt estates and participating in the litigation, not to extinguish the plaintiffs' rights to disputed trust funds.

[123] The judge also concluded the Directions Motion Order authorized the Trustee to pay professional fees for the litigation in part from funds subject to undetermined trust claims pursuant to the principle explained in *Kingsway General Insurance Company v. Residential Warranty Company of Canada Inc.*, 2006 ABCA 293. After noting that approximately 52% of the total amount the Trustee withdrew was charged to 690174's vendor trust account (Second Set of Reasons at para. 170), he found the Trustee had "significantly overcharged" the 2007 Joint Venturers' interests for administrative costs of the bankruptcies: at para. 172. He did not consider it appropriate to determine the final amount of the Trustee's compensation on the s. 37 application. However, he addressed the source of payment of the expenses and fees and treated their magnitude as relevant to the exercise of his jurisdiction.

[124] In discussing his conclusions, the judge made these statements of particular concern:

> [165] The Trustee relied on the Directions Motion Order to justify the retention of all the funds it has withdrawn from the 690174 Vendor Trust Account. However, in my view, the Trustee has conflated the effect of the Term Payment Orders and the Directions Motion Order. There is no order of this court that authorizes the Trustee to use funds which have been found to be beneficially owned by non bankrupts to pay its general administrative expenses related to the Bankruptcies. The Directions Motion Order is expressly limited to the costs incurred by the Trustee in defending the Civil Actions and Bankruptcy Appeals. In addition the amount of those fees remains subject to a final assessment.
>
> [166] Despite this limitation the Trustee and Fasken seek to recover fees unrelated to the Civil Actions and Bankruptcy Appeals from funds held in trust for the 2007 Joint Venturers. I find that they have no entitlement to do so.
>
> [167] In *Residential Warranty* the Alberta Court of Appeal recognized the extraordinary and unusual nature of the order it upheld and stated that such an order should only be made in exceptional circumstances. Justice Bowden decided that such circumstances existed with respect to the payment of the expenses related to the litigation but made no such order with respect to the expenses of the Trustee incurred in administering the Bankrupt Estates.
>
> …

> [183] I have already decided that the Trustee exceeded its authority by using funds held in trust for non bankrupts to pay its administrative expenses. Utilizing trust funds to pay its administrative fees without lawful authority is an act that falls within the ambit of s. 37 of the *BIA* because it contravenes the scheme of distribution set out in the *BIA*.
>
> [Second Set of Reasons, emphasis added.]

[125] As set out above, the judge went on to find the Trustee did not act impartially and neutrally in administering the estates, failed to consider the financial consequences of its conduct, and took unreasonable legal positions. He concluded the total amount of expenses and fees charged was "simply too high given the resources of the Bankrupt Estates, the limited benefit of its involvement in the Civil Actions, and the frailty of the positions it advanced": at para. 207. He held the Trustee and Fasken were entitled to retain $4,048,310 of the withdrawn funds, comprised of the entirety of Panorama, Jaswant, and 690174's entitlements, and a $1,000,000 share of the 2007 Joint Venturers' entitlement. Among other things, he ordered the Trustee and Fasken to refund any amount in excess of $1,000,000 withdrawn from the 2007 Joint Venturers' share of the net sale proceeds: at para. 222.

Lawful Authority

[126] The Trustee contends the judge erred by finding that it used trust funds to pay administrative expenses and fees without lawful authority. In its submission, his statements in paras. 165 and 183 of the Second Set of Reasons suggest that when the Trustee withdrew the trust funds, there was no court order authorizing it to use them to pay administrative costs, which is incorrect and unfairly harmful to its reputation. In fact, according to the Trustee, the withdrawals and payments were all expressly authorized by binding court orders, none of which have been appealed or quashed, and the fees and expenses were all assessed and approved in the contemplated court process. In these circumstances, it submits, it is entitled to retain the amounts specified, subject to a limited right to vary allocation, but not to reduce except through the final assessment process contemplated in ss. 151–152 of the *BIA*.

[127] In advancing its submission, the Trustee concedes that the finding in the First Set of Reasons that 690174 held funds in trust for the 2007 Joint Venturers could preclude it from using such funds to pay administrative costs going forward. However, it argues the funds vested in the estates and were made available for its administration by court order in accordance with the principles discussed in *Residential Warranty.*

[128] The Trustee argues further that the judge misinterpreted the Term Payment Orders. On a plain reading, it says, those orders were final as to the amounts assessed and court-approved, and could not be attacked collaterally or treated as nullities. The Trustee submits the judge was not entitled to deprive it retroactively of its lawful authority to pay administrative fees and, in doing so, erroneously treated the Term Payment Orders as nullities. He also contravened the principle in *Re Chapman; Cocks v. Chapman*, [1896] 2 Ch. 763 at 777 (C.A.), namely, that a trustee's actions must be judged in light of the circumstances as they existed at the time of the impugned conduct.

[129] According to the Trustee, upholding such a retroactive deprivation of lawful authority would seriously impair bankruptcy proceedings because trustees must be able to rely on court orders to carry out their duties effectively. Moreover, upholding the deprivation would mean a trustee's entitlement to administrative fees depends on final success in litigation, which would discourage trustees from taking on highly contentious bankruptcies.

[130] Fasken supports the Trustee's position. It acknowledges the Term Payment Orders were interlocutory, but says they were nonetheless binding, subject to the express reservations they contained and appellate review. According to Fasken, the reservations in the Term Payment Orders concerned who was responsible for paying the specified amounts, not variation or refund of any amounts paid except upon taxation and assessment by a registrar. In its submission, the judge erred by "second-guessing" the Term Payment Orders and relying on extrinsic evidence to

determine the extent to which those orders finally determined what the Trustee and Fasken were entitled to receive.

[131] We do not accept these submissions.

[132] In *Residential Warranty*, the Court discussed the jurisdiction of a judge sitting in bankruptcy where, as here, a trustee seeks a charge for its fees on property that is subject to undetermined trust claims. The appellant, Kingsway General Insurance Company ("Kingsway"), had filed a proof of claim asserting that the entirety of the bankrupts' estates was subject to a trust in its favour. The trustee disallowed its trust claim and Kingsway appealed. While the appeal was pending, Kingsway applied for an order prohibiting the trustee from accessing any property in the estates for any purpose, including paying its past and future fees, pending the determination of its trust claim. However, the bankruptcy judge granted the charge sought by the trustee, on terms, through the exercise of inherent jurisdiction.

[133] On appeal, Kingsway asserted the claimed funds were not divisible property under s. 67(1) of the *BIA* and therefore use of the court's inherent jurisdiction to grant a charge on them was contrary to the *BIA*. The Court disagreed, noting that s. 67(1) addresses the division of the bankrupt's property among creditors, which "does not mean … that trust property does not fall within a trustee's administration": at para. 23. The Court also noted that inherent jurisdiction has been used where necessary to promote the objects of the *BIA* and accomplish the requirements of justice and practicality: at para. 21. It went on to emphasize such orders should only be granted sparingly, to achieve fairness and prevent abuse, and observed that trustees have been remunerated from trust property for their efforts in sorting out trust claims: at paras. 32, 37.

[134] The Court concluded that s. 183(1) of the *BIA* preserves the inherent jurisdiction of judges sitting in bankruptcy, thus empowering them to permit a trustee's fees to be paid from property subject to undetermined trust claims: at paras. 19, 41. This principle represents an exception to the general principle articulated in *Lefebvre (Trustee of); Tremblay (Trustee of)* 2004 SCC 63 that, unless

the *BIA* provides otherwise, a bankrupt estate and its trustee have no higher right against third parties than the bankrupt did before bankruptcy.

[135] As noted, the judge interpreted the Directions Motion Order as granting the Trustee lawful authority to use funds which had been found to be beneficially owned by the 2007 Joint Venturers to pay litigation costs in accordance with the *Residential Warranty* principle. However, he interpreted the Term Payment Orders as only granting the Trustee authority to use trust funds for ongoing expenses on an interim basis, subject to further court review as to the amount payable and who was responsible for payment. In other words, the judge found the Term Payment Orders did not authorize the Trustee to retain funds which had been found to be beneficially owned by the 2007 Joint Venturers and use them for final payment of general administrative costs.

[136] In our view, that is the import of the judge's statements in paras. 165 and 183 of the Second Set of Reasons, read together, generously, and in the context of his reasons as a whole. Although his words could have been clearer, he was not suggesting the Trustee acted without lawful authority when it initially withdrew and disbursed the funds to meet its ongoing administrative costs. His concern was its retention and use of the funds to finally recover professional fees unrelated to the litigation after he had found the 2007 Joint Venturers owned them beneficially: at para. 166.

[137] We see no error in the judge's interpretations of the Term Payment Orders or the Directions Motion Order. Given their language, the circumstances in which they were made, and the *Residential Warranty* principle, in our view those interpretations are correct. As Justice Smith explained in *Yu v. Jordan*, 2012 BCCA 367, the provisions of a court order are not to be interpreted in a vacuum. Rather, the correct approach "is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted": *Yu* at para. 53; *Sutherland v. Reeves*, 2014 BCCA 222 at para. 31. That was the approach adopted by the judge.

[138] It follows that the judge did not retroactively deprive the Trustee of its lawful authority to use trust funds which had been found to be beneficially owned by the 2007 Joint Venturers to pay general administrative expenses. The Trustee never had that lawful authority.

[139] As to the Trustee's submission that upholding the judge's order would impair bankruptcy proceedings by discouraging trustees from taking on contentious bankruptcies because their entitlement to expenses and fees would depend on final success, we are unpersuaded. The effectiveness of a trustee's efforts in administering a bankrupt estate is a relevant consideration with respect to appropriate remuneration: *Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.) at paras. 26–27. As Justice Farley stated in that case, if insolvency professionals engage in marginally valuable work with maximum intensity or achieve contextually dismal results, they "should surely expect that their overall fees would be cut, notwithstanding any prior court approval of hourly rates and, indeed, interim accounts": at para. 26. With that injunction in mind, we consider the greater risk to the efficacy of bankruptcy proceedings would arise from tolerating excessively expensive administration of the sort the judge found occurred in this case.

[140] We turn to those findings now.

Administration of the Bankrupt Estates

[141] The Trustee contends the judge erred by requiring it to act neutrally and impartially in fulfilling its duties. Citing *PricewaterhouseCoopers Inc. v. Perpetual Energy Inc.*, 2021 ABCA 16, it submits its primary duty was to defend the estates. The Trustee says requiring neutrality in the litigation was inconsistent with that duty, particularly given the authorization in the Directions Motion Order to defend the estates against trust claims which sought to remove all of the estates' assets. Emphasizing Justice Farley's remarks at paras. 7 and 28 of *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. S.C.), the Trustee submits in such circumstances trust claimants should expect a trustee

to play an active role and put up a fair fight, not simply acquiesce and hand over disputed funds.

[142] Furthermore, the Trustee contends the judge erred in finding that it defended the estates unreasonably by adopting “an aggressively adversarial role in the litigation” in light of the circumstances. In support of this submission, it emphasizes this was a highly contentious matter in which it faced extreme claims to beneficial ownership of the entirety of the estates. According to the Trustee, the length and complexity of the trial was attributable to the manner in which the plaintiffs prosecuted those extreme claims, not the manner in which it defended against them. Understood in that context, it says its arguments were not excessively long; nor were its positions unreasonable, albeit they did not succeed.

[143] Fasken supports the position of the Trustee. In addition, it emphasizes the judge was responsible for controlling the trial process as it unfolded. According to Fasken, the judge could have intervened sooner if he considered the conduct of the Trustee or Fasken improper or unreasonable, including the risk that their fees were becoming excessive. He did not. Fasken also notes there were other mechanisms of oversight in place for that purpose. Specifically, the Term Payment Orders were issued with notice to all parties, and ss. 151–152 of the *BIA* provided for further review of professional fees.

[144] We are not persuaded by these submissions.

[145] The judge did not find the Trustee acted improperly by actively defending the estates against the trust claims. He found the manner in which it conducted that defence was aggressively adversarial and inconsistent with its obligation to adopt an objective, dispassionate, and measured approach to carrying out its duties as an officer of the court. That is the only sense in which the judge required the Trustee to act “impartially” or “neutrally”. It is also the sense in which those terms are used to describe the role of a bankruptcy trustee in the jurisprudence: see, for example, *Confederation Treasury* at paras. 8, 14; *Residential Warranty* at para. 31;

PricewaterhouseCoopers Inc. at paras. 201–203. The judge did not err in using and applying these principles in this case.

[146] The judge found the Trustee lost sight of its role as an officer of the court in exhausting all of the bankrupt estates' assets and most of the 2007 Joint Venturers' interests when administering the estates and participating in the litigation. For example, he found it expended an inordinate amount in advancing meritless positions and spared no expense in pursuit of its adversarial role. He concluded the Trustee made a material contribution to the expense and complexity of the proceedings, and that its conduct frustrated the objectives of the *BIA* and deprived the 2007 Joint Venturers of their property. In characterizing the over $6,000,000 in charged expenses and fees (withdrawn and pending), as "simply too high" (at para. 207), he emphasized that amount was twice the value of the bankrupt estates and stated "[a] trustee is expected to exercise reasonable commercial judgment in carrying out the duties of its office": at para. 210. We agree with that statement.

[147] The judge went on to conclude that unless he intervened, subject to final taxation, the only entities who would benefit from the bankrupt estates were the Trustee and Fasken, who had also benefited from receipt of funds beneficially owned by the 2007 Joint Venturers. In his view, if not remedied, this "stark reality" would tend to bring the administration of justice into disrepute: at para. 211.

[148] The judge was in a uniquely privileged position to make these assessments. We see no reviewable error in his findings on the conduct of the Trustee and its effect on the proceedings and the trust claimants. Nor do we see error in his conclusion that the Trustee advanced legally unsound and unreasonable positions, namely, that the Garchas were equity creditors and that 690174 did not owe the 2007 Joint Venturers a fiduciary duty. On the contrary, we share that view.

[149] Finally, we do not criticize the judge for failing to intervene sooner. As he explained, the Trustee did not bring the court's attention to the impact financing the litigation was having on the interests of the creditors and trust claimants throughout

the proceedings. Consequently, the judge was unaware of the magnitude of the Trustee's charges against 690174's interest and their potential impact on the trust claimants until after he prepared the First Set of Reasons. When the trust claimants raised the status of the expenses and fees and the extent to which trust funds beneficially owned by non-bankrupt parties should be used to satisfy them, he directed them to file applications setting out the relief they sought to address the issue. He then dealt promptly with the matter in the Second Set of Reasons.

Section 37 of the BIA

[150] In the Trustee's submission, the Garchas and Grewals were the wrong parties applying at the wrong time in the wrong process to vary the Term Payment Orders. Specifically, it says a s. 37 application brought during a trial is not a proper process in which to inspect a trustee's conduct with respect to professional fees. Rather, it says a full inspection should only be performed by a registrar or the Office of the Superintendent of Bankruptcy at the trial's conclusion, as contemplated by the statutory scheme set out in ss. 151–152 of the *BIA*.

[151] The Trustee submits the judge recognized that a s. 37 application was neither the time nor the process in which to make a final determination on expenses and fees, but proceeded to make one by finding its fees were "simply too high" and effectively capping them. He also criticized it for failing to provide "any legal opinions supporting its position on the Garcha claim" in responding to the application: Second Set of Reasons at para. 210. However, the Trustee says that divulging that information would have amounted to a blatant violation of privilege. Moreover, the application placed it in a position of conflict of interest by requiring that it defend itself while also defending the bankrupt estates.

[152] Again, Fasken supports the Trustee's position. In addition, it submits by its plain language that s. 37 only gives the court jurisdiction to reverse or modify acts or decisions of the Trustee, not acts or decisions of its counsel. This is so, it says, even though the Term Payment Orders authorized payment to Fasken because those orders were made pursuant to the court's inherent jurisdiction, not s. 37.

[153] According to Fasken, the judge erred by making an order directly against it in proceedings in which it was not a party. It says if an order for repayment of expenses and fees was justified (which it was not), such an order could only be made against the Trustee. It emphasizes that, as its counsel, Fasken owed the Trustee a duty of loyalty and was obliged to represent the Trustee's interests, not its own, on the s. 37 application. In Fasken's submission, its own interests included significant reputational interests engaged by an order requiring it to repay a seven-figure sum and the implicit finding that it did "something wrong" in its representation of the Trustee.

[154] Citing *Walsh v. Muirhead*, 2020 BCCA 225 and *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, Fasken submits the judge violated the requirements of procedural fairness by making orders against it in a proceeding in which it was representing a party, but unrepresented itself and unable to protect its own interests.

[155] We do not accept these submissions.

[156] Section 37 of the *BIA* confers a broad discretionary power on a court to confirm, reverse, or modify an act or decision of a trustee in order to do justice, having regard to all the circumstances. The discretion is broad, but must be exercised judicially: *Hancock; Ex Parte Spraggett*, [1952] O.J. No. 430 at para. 19, 1952 CanLII 123 (C.A.). In deciding whether a trustee acted improperly or unreasonably, the court should review the impugned conduct in the context of all the circumstances as they existed when the act or decision was performed: *Re Cole* (1995), 32 C.B.R. (3d) 213 (B.C.S.C.) at para. 17.

[157] Section 37 permits any person aggrieved by any act or decision of a trustee to apply for relief without specifying who may be characterized as an aggrieved person: *American Bullion Minerals Ltd. (Re)*, 2007 BCSC 1083 at para. 22. Nor does it specify which acts or decisions of a trustee may be the subject of a s. 37 application or when a s. 37 application may be brought.

[158] The judge concluded the Trustee's actions in the litigation and administration of the estates were "acts" for purposes of s. 37, and that the Garchas and Grewals were "aggrieved persons" entitled to bring the application. In particular, the judge found the threshold requirements of s. 37 were met on the bases that "[the Garchas' and Grewals'] property rights have been directly affected by the Trustee's actions, which the Trustee justifies by virtue of orders made in the Bankruptcy proceedings": at para. 185. We see no error in these conclusions.

[159] Nor do we see error in the judge's exercise of discretion in limiting the amount of the 2007 Joint Venturers' entitlement the Trustee and Fasken could retain to do justice to all the parties, having regard to all the circumstances. The salient circumstances included the interim nature of the previous assessments and the other provisions of the Term Payment Orders and the Directions Motion Order. They also included the judge's findings on the parties' respective entitlements, the Trustee's conduct in the litigation, and its impact on the parties, the proceedings, and the administration of justice.

[160] As the Trustee notes, the judge did not consider it appropriate to determine the final amount of its and Fasken's compensation. We do not accept that he nevertheless impliedly made that determination by finding the expenses and fees charged were "too high" and limiting the amount of the 2007 Joint Venturers' entitlement the Trustee and Fasken could retain from the withdrawn funds. Characterizing the expenses and fees as "too high" did not constitute a full inspection of the Trustee's conduct regarding those fees or a final assessment of its entitlement to compensation. Nor did reallocating the source of payment and limiting access to the 2007 Joint Venturers' share of the proceeds to achieve fairness for all concerned.

[160] Further, the judge's observation that the Trustee failed to provide any supporting legal opinions on the application must be viewed in context. The judge made this observation when explaining why he considered the fees charged were "too high" given the available resources, the limited benefits of the Trustee's

involvement in the civil actions, and the frailty of its positions. In doing so, he noted the importance of a trustee exercising reasonable commercial judgment and the related need to conduct a risk-reward analysis. He also noted the absence of any evidence justifying the Trustee's position on the application, namely, that it and Fasken were entitled to retain the full $5,995,943 withdrawn and to apply for an increase.

[161] Specifically, the judge noted the Trustee had not proffered any evidence to justify its professional fees or the frail positions it took in the litigation. Instead, he stated, it relied entirely on its argument that it was entitled to retain the full amounts withdrawn based on the previous court orders and interim assessments. He then observed by way of example that the Trustee had not provided any opinions supporting its position on the Garcha claim. In making this observation, the judge was not requiring the Trustee to produce privileged legal opinions it had developed through the course of the proceedings. Rather, he was remarking on the absence of the sort of opinion evidence commonly adduced to justify professional fees. Considered in this context, in our view, his observation was unobjectionable.

[162] Moreover, we do not accept the judge erred by directly ordering Fasken to refund any amount withdrawn from the 2007 Joint Venturers' share of the proceeds in excess of the $1,000,000 limit. The Term Payment Orders authorized the Trustee to use trust funds to pay Fasken's fees on an interim basis only, and Fasken received those funds subject to review of the amounts payable and the payment source. After the judge made his trust finding and imposed the $1,000,000 limit, neither the Trustee nor Fasken was entitled to retain the 2007 Joint Venturers' funds in excess of the limit. In these circumstances, the judge was entitled to order both the Trustee and Fasken to return those funds. The funds were third-party property that each had received pursuant to court orders obtained by the Trustee and which neither remained authorized to possess and use.

[163] Understood this way, the judge's order cannot reasonably be interpreted as impugning Fasken's professional reputation. Nor is the order based on an implicit finding that Fasken conducted itself improperly in its representation of the Trustee. Rather, the order is based on the judge's findings on beneficial ownership of the funds and the Trustee's conduct in fulfilling its duties.

[164] Finally, we do not accept that the judge violated the requirements of procedural fairness in limiting Fasken's right to retain funds withdrawn and disbursed under the Term Payment Orders. The Notice of Application filed by the Garchas in support of a s. 37 remedy expressly sought orders requiring both Fasken and the Trustee to make repayment. If Fasken perceived a conflict of interest or need for independent representation, it could have dealt with the matter prior to the hearing of the application. However, it chose to continue acting for the Trustee and in that capacity, resisted the relief sought on the basis that the Trustee and itself were both entitled to retain all of the funds previously withdrawn.

[165] In our view, these circumstances are significantly different than those in *Walsh* and *Jodoin*, where the court made special costs orders directly against lawyers based on the manner in which they had represented their clients. Among their distinguishing features is that Fasken has not been ordered to pay anything to anyone from its own property, nor has it been found to have conducted itself improperly.

Payment of Expenses and Fees From Trust Property

[166] In explaining the remedy granted under s. 37, the judge noted the adjustments would roughly result in the Trustee and Fasken recovering 2/3 of their fees and the 2007 Joint Venturers recovering 2/3 of their share of the net proceeds: Second Set of Reasons at para. 223. In his view, this produced a fair result. In reaching this conclusion, he considered the complexity of the bankruptcies, the constructive role the Trustee played in completing the marketing of the Project and sales of lots, and the fact that the Trustee and Fasken had charged their normal hourly rate throughout the proceedings: at paras. 212, 220. He also noted that his

order would only result in a reduction of the hourly rates the Trustee and Fasken recovered, and that they enjoyed a substantial benefit from the interim payment process, which relieved them of the burden of carrying administration and litigation costs and provided security for payment of the amounts to which they would finally be entitled.

[167] In the Garchas' submission, the judge erred in allowing the Trustee to recover any expenses or fees whatsoever against the 2007 Joint Venturers' interest in light of its improper conduct. They claim they received no benefit from the Trustee's work, which they characterize as detrimental rather than helpful. In support of their submission, they cite authorities such as *Deacon Re*, [1986] O.J. No. 2163 (Ont. HC) and *Hammond (Re)*, [1995] B.C.J. No. 1322 (SC) for the proposition that trustees who fail to meet their duties under the *BIA* are not entitled to full compensation. When asked about the judge's findings that the Trustee played a constructive role in completing the Project, and that some of its work was used by all parties, counsel for the Garchas conceded that their argument was difficult to make in the appellate context.

[168] Counsel's concession was well founded. The Garchas' submission lacks merit.

[169] As discussed, the judge had jurisdiction to grant the remedy he did under s. 37 of the *BIA* and the *Residential Warranty* principle. We see no error in his factual findings with respect to the benefits of the Trustee's work for the 2007 Joint Venturers, and no basis upon which to interfere with his exercise of discretion under s. 37.

Conclusion on Appeals in Bankruptcy Matters

[170] Neither the appellants nor the cross-appellants have persuaded us in the bankruptcy matters that the judge made palpable and overriding errors of fact, committed reversible legal error, or exercised his discretion in a clearly wrong manner.

[171] Accordingly, we dismiss these appeals and cross-appeals, with thanks to counsel for their thorough submissions.

9. DISPOSITION

[172] For all of these reasons, the appeals and cross-appeals in CA47444, CA477450, and CA47805–CA47809 are dismissed.

[173] In the particular context of this case, we consider it appropriate to order that all appellants and cross-appellants bear their own costs of the appeal. Any party that was a pure respondent is entitled to their ordinary appeal costs on Scale A as against the unsuccessful appellant or cross-appellant, as the case may be, in accordance with the *Court of Appeal Rules*, B.C. Reg. 120/2022.

"The Honourable Justice Dickson"

"The Honourable Madam Justice DeWitt-Van Oosten"

"The Honourable Justice Marchand"