

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mayer v. Osborne Contracting Ltd.*,  
2010 BCSC 1249

Date: 20100902  
Docket: S097716  
Registry: Vancouver

Between:

**Mhinder Singh Mayer**

Plaintiff

And

**Osborne Contracting Ltd., Osborne Industries Ltd., Holman Transport Ltd.,  
Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd., Timberland  
Investment Ltd., Gina Mayer, Rita Webb, Richard Ravinder Mayer, Anuradha  
Mayer, Archer Holdings Ltd., (Incorporation No. BC0812178), Custom Pumping  
Ltd., R & G Equipment Ltd., formerly known as R. & G. Equipment Rentals Ltd.,  
and R. and G. Equipment Rentals Ltd., Aqua Pod Ltd., Island Aggregates Ltd.,  
Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New  
Concrete Concepts Ltd. and Front Street Projects Ltd.**

Defendants

Before: The Honourable Mr. Justice Walker

**Reasons for Judgment**

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**Introduction**

[1] Twelve defendants apply to have the action brought against them by the plaintiff, Mhinder Singh Mayer, dismissed pursuant to Rule 18A. Those defendants are Richard Mayer, Rita Webb, Gina Mayer, and the following companies owned by them: Archer Holdings Ltd., Custom Pumping Ltd., R & G Equipment Ltd., Aqua Pod Ltd., Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., Bastion Project Management Ltd., New Concrete Concepts Ltd., and Front Street Projects Ltd.

[2] This action is one of 16 related actions that I am case managing. All of them arise, in one way or another, from a conflict between Mhinder Mayer and his brother, Bhora Mayer, and Bhora Mayer's wife and two children. That conflict concerns significant corporate and real estate ventures and holdings in British Columbia, primarily on Vancouver Island.

[3] Gina Mayer is Bhora Mayer's wife; Richard Mayer is his son and Rita Mayer is his daughter.

[4] Mhinder Mayer claims that shares of the applicant companies and certain real property registered in the names of his nephew, niece, and sister-in-law are held in trust for him. The nature of the trust claims advanced by Mhinder Mayer varies with each asset. Some claims are based upon an alleged express trust said to be evidenced by documents called "Acknowledgments". Other trust claims are said to arise as a result of business dealings between himself, Bhora, and the personal applicants, in which case Mhinder Mayer seeks recovery based upon a resulting trust or constructive trust, and in some instances, both.

[5] To prove an express trust, three elements or "certainties" must be shown:

- (a) certainty of intention to create the trust;
- (b) certainty of the subject matter of the trust (so that it can be ascertained); and

- (c) certainty of the objects or beneficiaries of the trust, such that the trust obligations can be performed properly.

See: *Mansbridge and Roulston (In the Matter of)*, 2004 BCSC 1605; *Parsons v. Cook*, 2004 NLSCTD 79, 238 Nfld. & P.E.I.R. 16; and Eileen E. Gillese & Martha Milczynski, *The Law of Trusts*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2005) at 83-45.

[6] A resulting trust is an equitable remedy. It arises when title to property is in one party's name, but that party is a fiduciary or gave no value for the property. In either case, that party is obliged to return the property to the original owner since the law presumes bargains, not gifts: *Pecore v. Pecore*, 2007 SCC 17, paras. 20, 24, and 25.

[7] The presumption of a resulting trust is rebuttable. When a transfer is challenged, the onus falls upon the transferee to demonstrate that a gift was intended: *Pecore* at para. 24; Donovan M.W. Waters, *Waters' Law of Trusts in Canada* (Toronto: Thomson Carswell, 2005) at 375; and Gillese & Milczynski at 110.

[8] It is inherent in the nature of the resulting trust claim that the impugned transfer, although not necessarily any subsequent disposition of the asset transferred, is made with the knowledge of the transferor.

[9] A constructive trust is an equitable remedy imposed by law in cases where the defendant cannot in good conscience keep the property for himself alone. It is imposed without regard to intention. It is imposed to remedy unjust enrichment and corresponding deprivation. The constructive trust has also been recognized as a remedy for wrongful acts such as fraud and breach of duty of loyalty: *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, at paras. 23, 28, 34, and 43; *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *BMF Trading v. Abraxis Holdings Ltd.*, 2002 BCSC 590, paras. 87 - 90; and *Tracy v. Instalogs Financial Solutions (B.C.) Ltd.*, 2010 BCCA 357.

[10] The constructive trust is one of several remedies available in the law of restitution, and will only be imposed in appropriate circumstances. It is a proprietary remedy that is granted only where there is a reason to recognize or create a

property right. The focus of the inquiry is upon the reasons for recognizing a right of property in the plaintiff, not the reasons for denying it to the defendant, although the moral quality of a defendant's act may be a factor that is considered when determining whether a proprietary remedy is available: *Lac Minerals v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

[11] A constructive trust remedy will be awarded when monetary damages are inadequate and where there is a direct link between the contribution that founds the action and the property in which the constructive trust is claimed: *Peter v. Beblow*, [1993] 1 S.C.R. 980; and *Tracy*. While one option is to require the person with legal title to hold the beneficial interest in the property as a trustee for another person(s), the court may order an accounting remedy, which requires the constructive trustee to account for the improper profit to the beneficiary in dollar terms: *Hussey v. Palmer*, [1972] 3 All E.R. 744 (C.A.); and *Pettkus v. Becker*.

[12] In these reasons, I refer to Mhinder Mayer's claims for a remedy based on a resulting trust or constructive trust as "resulting trust claims" and "constructive trust claims".

[13] Mhinder Mayer claims a resulting trust in respect of transfers of assets belonging to a trust in which he is a member with his brothers (the "Brothers' Trust"). According to Mhinder Mayer, those transfers were made with his knowledge to Bhora Mayer and members of his family for no or inadequate consideration. Mhinder Mayer claims a constructive trust in respect of inappropriate transfers of assets belonging to the Brothers' Trust, without his knowledge, to Bhora Mayer and members of his family for no or inadequate consideration.

[14] Rita Webb and Gina Mayer, and the corporate defendants whose shares they own, seek to dismiss Mhinder Mayer's trust claims on the basis that they are barred by a settlement agreement he signed on June 8, 2006, in another lawsuit.

[15] Richard Mayer, and the corporate defendants whose shares he owns, join in the application brought by Rita Webb and Gina Mayer and their respective

companies, but in addition, seek dismissal of the whole of Mhinder Mayer's action on the basis that he has subverted the administration of justice (a position ultimately joined in by Rita Webb and Gina Mayer).

[16] Mhinder Mayer also advances non-trust claims (e.g., for derivative relief, an accounting, and recovery of debt) against the applicants. The applicants' position is that those claims are an abuse of process because they are duplicate claims advanced against the defendants in other related proceedings.

**Issues**

[17] Several issues present themselves for consideration on this Rule 18A application:

- (a) Are Mhinder Mayer's claims against the applicants suitable for disposition on a Rule 18A application?
- (b) If they are, should I decline to determine the application on the basis that a decision on this application would embarrass some or all of the related actions?
- (c) Do the provisions of a settlement agreement that Mhinder Mayer signed on June 8, 2006 bar him from making any or all of his claims against the applicants?
- (d) Does the entry of a consent dismissal order in a prior action involving most of the assets in this action bar Mhinder Mayer from pursuing his trust claims against the applicants?
- (e) Does Mhinder Mayer lack clean hands, and if so, should that disentitle him from any or all of the equitable relief he seeks from this Court? and
- (f) Should any or all of Mhinder Mayer's claims against the applicants be dismissed because of an abuse of process?



**Positions of the Parties**

[18] Although there are conflicts in the evidence, the applicants submit that:

- (a) Mhinder Mayer has no claim that will succeed against them at trial;
- (b) determination of their Rule 18A application does not depend on a weighing of contradictory or conflicting evidence between the applicants and Mhinder Mayer;
- (c) Mhinder Mayer's evidence given in this action to support his claims against the applicants is so inconsistent that he has advanced different theories of his case, such that his claims against them should be dismissed;
- (d) Mhinder Mayer's evidence is so lacking in credibility that it ought to be given no weight and ought not to be relied upon;
- (e) even when considered in the absence of conflicting evidence given by others, Mhinder Mayer's own conduct and evidence is dispositive of this application;
- (f) Mhinder Mayer's claims against the applicants are grounded in equity; for Mhinder Mayer to succeed against the applicants, he must rely upon a fraud he perpetrated in a prior action that concerns the subject matter of this action;
- (g) this Court ought not to sanction Mhinder Mayer's conduct in this and the prior action as he has abused the process of this Court;
- (h) Mhinder Mayer's claims against the applicants are barred by virtue of his signature on a settlement agreement in a prior action;
- (i) the entry of a (with prejudice) consent dismissal order in that prior action means his claims are barred by the principles of *res judicata* and issue estoppel; and

- (j) Mhinder Mayer’s non-trust claims are an abuse of process because they are advanced against the defendants in other related proceedings.

[19] Mhinder Mayer denies the allegations made by the applicants. His position is that:

- (a) the Rule 18A application is premature since examinations for discovery of the applicants have not been conducted and some of the evidence that will assist him in proving his case against them is wholly within the knowledge of the applicants;
- (b) this application is inappropriate in light of the circumstances giving rise to this complex multi-party litigation, which span at least 34 years;
- (c) he does not lack clean hands;
- (d) in any event, the clean hands doctrine does not apply in this case; and
- (e) neither the settlement agreement that Mhinder Mayer signed in the prior action nor the consent dismissal order bar his claims in this case.

[20] The applicants’ response is that there is no evidence that Mhinder Mayer could possibly elicit or hope to elicit from examinations for discovery that would advance his case against them. They also argue that Mhinder Mayer’s lack of clean hands is manifest to such an extent that his entire claim against them must be dismissed.

**The First Issue: Are Mhinder Mayer’s Claims Suitable for Disposition on this Rule 18A Application?**

[21] The Court may grant judgment on a summary trial application brought pursuant to Rule 18(5), now *Supreme Court Civil Rules*, Rule 9-7, in favour of any party, either upon an issue or generally, unless the Court is unable “on the whole of the evidence” before it on the application, to find the facts necessary to decide the issues of fact or law, or, the court is of the opinion that it would be “unjust to decide

the issues on the application”: *Orangeville Raceway Ltd. v. Wood Gundy* (1995), 6 B.C.L.R. (3d) 391, 59 B.C.A.C. 241, at paras. 30 to 34 and 43; and *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199 (C.A.).

[22] Judgment may be granted on a summary trial application where there are conflicting affidavits, when the Court is able to make the necessary findings of fact on conflicting evidence: *Placer Development Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.), cited in *Inspiration Management*, at para 42.

[23] In this case, my decision does not follow upon a weighing of conflicting affidavit evidence between the parties.

[24] Examination of Mhinder Mayer’s own evidence and prior conduct without weighing conflicting evidence from various affiants (including the personal applicants), leads me to conclude that Mhinder Mayer’s claims based on express and resulting trust as well as most of his constructive trust claims prior to June 8, 2006, are suitable for summary determination. I am satisfied that determination of the relief sought on this application, insofar as it concerns the trust claims, does not involve litigation in slices.

[25] Mhinder Mayer has failed, on his own evidence, to prove his express trust claims. I have also determined that he should be barred from asserting any resulting trust claims and nearly all of his constructive trust claims for transactions that occurred prior to June 8, 2006.

[26] Given my findings, which I go on to set out in these reasons for judgment, there is no further evidence that Mhinder Mayer could seek to obtain from the applicants that could assist him in proving his express or resulting trust claims, and most of his constructive trust claims prior to June 8, 2006.

[27] The pleadings filed on behalf of Mhinder Mayer also show that many of his non-trust claims are duplicate claims he has advanced in other related litigation. The

pleadings need to be reconciled. Mhinder Mayer's duplicate claims made in this action should be stayed pending rationalization of the pleadings.

**The Remaining Issues**

[28] In the next two sections of these reasons, I set out the nature of Mhinder Mayer's trust claims as well as the relevant and considerable factual background required to determine the remaining issues. That discussion also shows the basis upon which I am able to determine the suitability of this application for summary disposition.

[29] A glossary of defined terms is attached as Appendix "A" to assist the reader.

**The Companies and Properties Alleged to be Impressed with Trusts in favour of Mhinder Mayer**

[30] During the course of submissions, I was advised by counsel for Mhinder Mayer of the particulars of his trust claims asserted over assets owned by the personal applicants. Nine companies and 14 real properties are involved. Certificates of Pending Litigation ("CPLs") have been filed against title to six of the properties. Details are set out in the next four paragraphs.

[31] The shares of the companies and the addresses of the properties owned by Richard Mayer that Mhinder Mayer claims are held in trust for him are set out below together with the nature of the trust claim alleged:

- (a) Island Aggregates Ltd., which is the product of the amalgamation of Island Aggregates Ltd. (formerly known as Nanaimo Concrete Ltd.), and Island Pumping Ltd. ("Island Aggregates") - express trust;
- (b) Mack Sales & Service of Nanaimo Ltd. ("Mack Sales") - express trust;
- (c) Bastion Project Management Ltd. ("Bastion") - express trust;

- (d) New Concrete Concepts Ltd. (“New Concrete Concepts”) - resulting trust and according to Mhinder Mayer’s counsel, possibly constructive trust;
- (e) 244 Fry Street, Nanaimo, B.C. - express trust, CPL filed; and
- (f) 1581 Prairie Avenue, Port Coquitlam - resulting and constructive trusts.

[32] The shares of companies registered in the name of Rita Webb for which Mhinder Mayer claims are held in trust are set out below, with the nature of the trust claim alleged:

- (a) Archer Holdings Ltd. (“Archer Holdings”), which is the product of various amalgamations of different companies bearing the names Archer Holdings Ltd., Malo Enterprises Ltd., Mayne Island Concrete Ltd., and Ladysmith Holdings Ltd. (formerly Wee Tree Lumber Ltd.) - express and resulting trusts;
- (b) Custom Pumping Ltd. (“Custom Pumping”) - express trust;
- (c) Front Street Properties (“Front Street Properties”), formerly known as Nanaimo Waterfront Centre Ltd., and before that, Nanaimo Conference Centre Inc., and before that, 622589 B.C. Ltd. - resulting trust alleged and according to Mhinder Mayer’s counsel, possibly constructive trust;
- (d) 2530 - 207 Dingwall Street, North Cowichan - express trust, CPL filed;
- (e) 102- 3880 Shelbourne Street, Saanich - express trust, CPL filed;
- (f) 1813 Northfield Road, Nanaimo - express trust; and
- (g) 1737 Northfield Road, Nanaimo - express trust.

[33] The shares of the companies owned by and the addresses of the properties registered in the name of Gina Mayer which Mhinder Mayer claims are held in trust for him are set out below, with the nature of the trust claim alleged:

- (a) R & G Equipment Ltd., formerly known as R. & G. Equipment Rentals (“R & G Equipment”) - resulting and constructive trusts;
- (b) Aqua Pod Ltd. (“Aqua Pod”) - resulting and constructive trusts;
- (c) 2503 and 2504 -154 Promenade Drive, Nanaimo (acquired by Rita Webb but transferred to Gina Mayer) - constructive trust, CPL filed against both strata lots which are treated as one legal property;
- (d) 360 Rainbow Road, Saltspring Island - constructive trust, CPL filed; and
- (e) 1662 Maple Bay Road, Duncan - resulting and constructive trusts.

[34] In addition, some of the properties over which Mhinder Mayer asserts a trust claim are owned by two or more of the applicants or some of their companies:

- (a) 309 -150 Promenade Drive, Nanaimo is owned by all three applicants - resulting and constructive trusts, CPL filed;
- (b) 965 Loftus Road, Nanaimo, is owned by Island Aggregates - constructive trust;
- (c) 265 Fry Street, Nanaimo is owned by Bastion - constructive trust;
- (d) 1125 Farquhar Street, Nanaimo, is owned by Bastion - constructive trust; and
- (e) 101 - 2731 Jacklin Road, Victoria, is owned by Custom Pumping - constructive trust.

**Facts**

***The Brothers’ Trust***

[35] Mhinder Mayer and Bhora Mayer, along with their three brothers, Bhagwan, Welbier, and Bhim, were signatories to written documents dated March 20, 1966,

January 12, 1978, and February 8, 1984. Those documents evidence a trust arrangement amongst the five brothers, which is referred to in this and the related actions as the Brothers' Trust.

[36] The Brothers' Trust was set up for the five brothers to be equal beneficiaries and trustees of certain assets.

[37] A document dated for reference March 20, 1966, is the foundation document for the Brothers' Trust. Although only two pages in length, it contains sufficient detail to deal with the scope of the trust, what constitutes trust property as opposed to personal property belonging to each brother, and payment to a brother upon exit from the Brothers' Trust.

[38] The provisions of the Brothers' Trust document dated March 20, 1966, provide:

- (a) Mayer Bros. Contracting Ltd. was incorporated in 1965, having as its directors and shareholders, Bhagwan and Bhora Mayer;
- (b) the interests of Welbier, Mhinder, and Bhim Mayer are held in trust until they "are of age to become [a] signatory" and they have joined the business on a fulltime basis;
- (c) all "ventures" engaged shall be owned equally by all five brothers until such time as the agreement is altered or cancelled;
- (d) "[a]ny property or properties, except personal homes, held by any one or more of the brothers shall be considered [to be] held in trust as being equally owned by all five brothers";
- (e) the financial needs of the brothers vary; thus, equalization of drawings shall not be considered until such time as mutually agreed upon;
- (f) there shall be no question of position or effort as each brother agrees to "do his part towards equal benefit";

- (g) if any brother engages in a venture or acquires a business or property for his personal benefit, he must obtain a release from the Brothers' Trust;
- (h) any brother seeking to exit the Brothers' Trust must sell and transfer his "position, shares and properties" to the other brothers at "original value and/or purchase price";
- (i) payments to the departing brother may be spread out over five years;
- (j) the Brothers' Trust agreement may not be assigned; and
- (k) the Brothers' Trust agreement is binding on each brother's heirs.

[39] On January 12, 1978, the Mayer brothers signed a further document in order to amend the 1966 trust document. Recitals "B" and "C" to that document describe the manner in which properties held for the Brothers' Trust had been purchased and the brothers' intention to avoid unnecessary limitations or restraints upon their ability to deal with trust property.

[40] Those Recitals state:

B. In pursuance of the Trust Agreement the Brothers have acquired many properties and carry on business through various companies and in many cases the formal registrations of title or ownership of properties and shares have been placed in the names of one or some of the Brothers as a matter of convenience rather than in the names of all.

C. Bhagwan is being divorced by his wife and the Brothers do not wish to have any of the properties subject to any unnecessary restraints or limitations, and in particular, do not want Bhagwan's wife to have any power to frustrate or delay any sale, mortgaging or development of real property beneficially owned by the Brothers pursuant to the Trust Agreement.

[41] As a result, the 1978 document provided that Bhagwan would forthwith register all properties and interests in properties set out in an attached schedule to his brothers Welbier and Mhinder Mayer, to hold in trust for all of the brothers.



[42] The third document affecting the Brothers' Trust is dated February 8, 1984; in it, the Mayer brothers amended the trust's exit provisions to provide for the death of a brother.

[43] Membership in the Brothers' Trust changed in 1985, when Welbier Mayer died in a motor vehicle accident. Bhim Mayer left the trust in 1987, and brought a law suit in which he settled his claim to an interest in the Brother's Trust. Between 1987 and 1991, only three Mayer brothers held a beneficial interest in the Brothers' Trust: Bhagwan, Bhora, and Mhinder.

[44] Between 1966 and 1991, the Mayer brothers arranged for the incorporation of the following companies:

- (a) Osborne Contracting Ltd.;
- (b) Osborne Industries Ltd.;
- (d) Gulf Coast Materials Ltd.;
- (e) Mayer Truck & Equipment Ltd.;
- (f) Timberland Investment Ltd.; and
- (f) Holman Transport Ltd.

Bhora and Mhinder Mayer agree that those companies belong to the Brothers' Trust. They are referred to in this and the related actions as the "Osborne Group of Companies" (and also described in some pleadings as the "Identified Trust Companies").

[45] Bhora and Mhinder Mayer are not in agreement regarding ownership of the following companies, which are referred to as the "Disputed Trust Companies":

- (a) Arrowsmith Concrete Ltd., which changed its name to Mid-Isle Holdings Ltd.;

- (b) C.A.R. Aviation Ltd.;
- (c) Chemainus Ventures Ltd; and
- (d) Island Structures Ltd.

[46] Bhora Mayer's claim against Mhinder Mayer, advanced in action VA S073324 ("Bhora Mayer Action"), is that the Disputed Trust Companies belong to the Brothers' Trust. Mhinder Mayer disagrees; he asserts that those companies are personal to him and do not belong to the Brothers' Trust.

[47] In 1991, a dispute arose between Bhagwan Mayer, on the one hand, and Bhora and Mhinder Mayer, on the other. Bhagwan Mayer decided that he no longer wanted to work for the Osborne Group of Companies, and demanded a share of assets held by the Brothers' Trust. Bhora and Mhinder Mayer held the view that their brother had left the Brothers' Trust, and was, therefore, only entitled to his share of the value of trust assets at the time of their incorporation or acquisition for or by the Brothers' Trust, according to the provisions of the 1966 trust document.

*The Bhagwan Mayer Action*

[48] On December 12, 2001, Bhagwan Mayer commenced a lawsuit in this Court against his two brothers, as well as a number of other parties, including Richard Mayer, Rita Webb (then Rita Mayer), and Gina Mayer (VA S017022). He advanced a number of claims in that action ("Bhagwan Mayer Action"), including claims that his nephew, niece, and sister-in-law held real property and corporate shares and assets that belonged to the Brothers' Trust. He alleged that Bhora and Mhinder Mayer had improperly, and secretly, transferred trust property to Richard Mayer, Rita Webb, and Gina Mayer for no or inadequate consideration. His claims were based upon the terms of the Brothers' Trust. Bhagwan Mayer sought numerous equitable remedies, including constructive trust remedies, remedies for unjust enrichment, tracing and accounting remedies; he also sought damages.

[49] In his statement of claim, Bhagwan Mayer identified, so far as he had knowledge, assets he claimed were impressed with a trust. That list included many of the corporate applicants and 11 of the 14 properties in issue in this action.

[50] In order to evaluate whether any or all of the claims made by Mhinder Mayer against the applicants should be dismissed, it is essential to set out the relevant background to Bhagwan Mayer's claim against Bhora Mayer, Mhinder Mayer, and the applicants. The specific allegations made by Bhagwan Mayer that are relevant to this Rule 18A application are well described in numerous paragraphs contained in his amended statement of claim filed on March 6, 2003.

[51] Bhagwan Mayer's allegations in respect of the terms of the Brothers' Trust are described in the following paragraphs of his statement of claim:

30. The Plaintiff Bhagwan and the Defendants Bhora and Mhinder, are brothers and are the only remaining trustees and beneficiaries of a trust.
31. Bhora and Mhinder are the only directors and officers of the Defendants Osborne Contracting Ltd., Osborne Industries Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd., Holman Transport Ltd. and Timberland Investments Ltd.
- ...
47. In or about 1966, Bhagwan and Bhora as the directors and shareholders of Mayer Brothers Contracting Ltd. agreed to put their business and property holdings into a trust (the "Trust"), for the benefit of the five Mayer brothers: Bhagwan, Bhora, Mhinder, Welbier and Bhim (collectively, the "Brothers").
48. Bhagwan and Bhora were the original trustees. Mhinder, Welbier and Bhim became trustees upon attaining the age of majority.
49. In or about 1978, the Brothers confirmed the Trust in writing. The principal terms of the Trust were as follows:
  - (a) All ventures engaged in by the Brothers are to be owned equally by all the Brothers until such time as the Trust is altered or cancelled;
  - (b) Any property or properties (except personal homes) held by any one or more of the Brothers are to be considered held in trust as being equally owned by all of the Brothers;
  - (c) The property of the Trust could be drawn on by the Brothers and on the premise that the financial needs of the Brothers would vary, equalization of drawings was not to be considered until such a time as mutually agreed upon;

- (d) Each Brother agreed that neither position or amount of contribution to the Trust will affect the amount of any draws from the Trust;
  - (e) Each Brother agreed to do his part toward equal benefit for all Brothers;
  - (f) If any venture, acquisition of business or property is engaged in by any one of the Brothers for his personal benefit, he is to obtain a release from the other Brothers for the purpose of his venture;
  - (g) If a brother wished to leave the Trust he was to sell and transfer his position, shares and properties to the other Brothers at the original value, and/or purchase price and the payment of that price and any inequity of personal drawings could be made by the other brothers over a five year period; and
  - (h) A Brother's interest in the Trust can not be assigned to anyone, and is binding on the Brothers' heirs.
50. The Trust was modified by agreement of all Brothers in writing on or about February 8, 1984 (the "1984 Amendment") to:
- (a) remove the clause stating that the financial needs of the Brothers would vary and equalization of drawings was not to be considered until such time as mutually agreed upon; and
  - (b) remove the clause concerning a Brother wishing to leave the Trust and replacing it with the following clause:  

IF A BROTHER WISHES TO LEAVE THE TRUST he must sell and transfer his shares in the Brothers' Companies and his interest in all the properties to the other Brothers at the original value and/or his share of the purchase price. UPON THE DEATH OF ANY OF THE BROTHERS, the shares held by him in the Brothers' Companies shall be transferred forthwith to the surviving Brothers to this Trust. The total monetary consideration shall be the original value of the shares at the time of incorporation of the Companies. If, however, this clause be nullified due to ambiguity or illegality, then, as a second option the transfer of the shares shall be at their fair market value. FURTHER, upon the death of any of the Brothers, his interest in the properties acquired to date and any properties acquired after the date of this Agreement, shall be transferred forthwith to the surviving Brothers to this Trust. The monetary consideration shall be the total of that Brother's interest times the purchase price or fair market value of the properties less his share of the total encumbrances thereon.
51. It was an express or implied term of the Trust and, in any event, a duty of the trustees that all decisions with respect to the assets of the Trust, whatever those assets might be from time to time, would be taken by the Brothers unanimously.

52. It was an express or implied term of the Trust that all the Brothers would be entitled at all times to full disclosure from the other Brothers with respect to the business activities of the Trust, and also to inspect all the records and accounts of the Trust.

...

59. The Trust consists of real property, corporate shares, corporate assets and other assets (collectively the "Trust Assets").

[52] The nature of the business operations of the Brothers' Trust were described in the following paragraphs of that statement of claim:

62. Prior to the incorporation of Mayer Brothers Contracting Ltd. and, until 1993, Bhagwan directed the expansion of the business to include industrial construction, road paving, pre-cast concrete building construction, aggregates, ready-mix concrete, concrete block, manufacturing, concrete pumping, heavy transport and land development.

63. On or about April 4, 1974 Mayer Brothers Contracting Ltd., was renamed Osborne Contracting Ltd. ("Osborne Contracting").

64. The ready-mix concrete operations of Osborne Contracting operated through a division called Mayco-Mix, a name which was registered on March 17, 1976 ("Mayco-Mix").

65. As the business expanded, various other companies were incorporated in order to carry on that business, including, without limitation:

1	Osborne Industries Ltd., incorporated November 13, 1968
2	Mayer Truck & Equipment Ltd., incorporated July 10, 1969
3	Gulf Coast Materials Ltd., incorporated June 23, 1970 ("Gulf Coast")
4	Holman Transport Ltd., incorporated March 15, 1974
5	Timberland Investments Ltd., incorporated May 5, 1981
6	Spruston, incorporated October 20, 1981 ("Spruston")
7	C.A.R., incorporated October 8, 1987

66. The shares and assets of the Osborne Group are Trust Assets.

...

72. At all times the Trust Properties were and continue to be Trust Assets.

73. At all material times Bhora and Mhinder knew and continue to know that the Trust Properties are Trust Assets.

[53] Bhagwan Mayer’s claims concerning transfer of assets belonging to the Brothers’ Trust to Richard Mayer, Rita Webb, and Gina Mayer are described in his amended statement of claim. To provide context for the clean hands and abuse of process issues, I have set out Bhagwan Mayer’s allegations that concern the transfer of trust assets to Richard Mayer, Rita Webb, and Gina Mayer:

77. From in or about December of 1988 until in or about February of 1990, Bhagwan, Bhora and Mhinder (the “Remaining Brothers”) reorganized the structure of the business operations of the Osborne Group (the “Business Reorganization”).
78. Pursuant to the Business Reorganization the Remaining Brothers incorporated a number of companies including Custom Pumping, R & G Island Aggregates, Bastion and Mid-Isle (the “Related Companies”).
79. Pursuant to the Business Reorganization the Remaining Brothers transferred various assets from the Osborne Group, including the Mayco-Mix division, the concrete block, concrete pumping, pre-cast concrete and land acquisition operations to one or more of the Related Companies.
80. At all material times the Related Companies, Bhora, Mhinder, Gina, Richard, and Rita knew that the assets transferred as part of the Business Reorganization were Trust Assets and were and are held in trust for the Remaining Brothers as beneficiaries of the Trust.
81. In the alternative, at all material times the Related Companies, Bhora, Mhinder, Gina, Richard and Rita knew that the assets transferred as part of the Business Reorganization were and are held in trust for the Osborne Group.
82. In summary and without limitation, Bhagwan claims that he is a trustee and beneficiary of the Trust; he is entitled to all Trust documents; he is entitled to an accounting as to all dealings of the Trust; he is entitled to a tracing with respect to Trust Assets, and he is entitled to damages for breaches of trust by Bhora, Mhinder and the participation in such breaches of trust by the other Defendants.
83. Bhagwan’s claims of breach of trust by Bhora and Mhinder relate to their breaches of their duties as trustees to Bhagwan, both as trustee and beneficiary, and their knowing participation in the transfer of various Trust Assets to third parties including the other Defendants, for their own benefits, or for the benefit of those third parties.
84. Bhagwan’s claims against Defendants other than Bhora and Mhinder relate to their knowing receipt and use of Trust Assets in breach of trust for their own benefit, or for the benefit of Bhora and Mhinder.
- ...
97. In or about 1998, Bhora and Mhinder, substituted the Tilbury-Osborne Agreement with an agreement which showed the names Mid-Isle and Island Aggregates (then Arrowsmith Concrete Ltd. and Nanaimo

Concrete Ltd. respectively), instead of Osborne Contracting and Gulf Coast (the “Substituted Agreement”).

98. Between August 2000 and April 2001, Bhora, Mhinder, Richard, Rita, Island Aggregates, Mid-Isle, and Ladysmith Holdings Ltd., pursuant to the Substituted Agreement, negotiated and concluded an agreement with Lehigh (the “Lehigh Agreement”) pursuant to which Trust Assets were sold to Lehigh.

99. Some of the Trust Assets sold to Lehigh under the Lehigh Agreement were real property. In order to facilitate that sale, on or about January 5, 2001, Bhora and Mhinder caused title to 920, 924 and 933 Chatsworth Rd., Nanaimo, B.C., PID: 024-148-491 (the “Chatsworth Property”) to be transferred from Osborne Contracting to Mid-Isle.

...

102. In addition, pursuant to the Lehigh Agreement, in or about April of 2001, Bhora, Mhinder, Richard, Rita, Mid-Isle, Island Aggregates and Ladysmith Holdings sold the bulk of the Osborne Group’s concrete operations on Vancouver Island to Lehigh, including Mayco-Mix and the associated gravel operations. This sale constituted substantially the whole of the undertaking of the Osborne Group.

...

104. At all material times the Defendants Bhora, Mhinder, Richard, Rita, Mid-Isle, Island Aggregates and Ladysmith Holdings knew that the Chatsworth Property and other assets sold to Lehigh were Trust Assets.

...

109. In or about January of 1993, Bhagwan became aware that [Marc] Furnemont, Bhora and Mhinder transferred \$140,000.00 from Spruston to Custom Pumping, for the benefit of Custom Pumping and Rita in exchange for a promissory note. Repayment of these funds was not secured in any way.

...

111. Custom Pumping, Rita, Furnemont, Bhora and Mhinder were all aware at all times that the shares and assets of Spruston were Trust Assets.

...

127. Prior to October 1996, Osborne Contracting was the registered owner of title to a Trust Property at 1125 Farquhar St., Nanaimo, British Columbia, PID: 001-223-623 (the “Farquhar Property”).

128. On or about October 7, 1996 Bhora and Mhinder caused the title to the Farquhar Property to be transferred to Bastion, for the benefit of themselves, Bastion and Richard (the “Farquhar Property Transfer”).

129. At all material times, Bhora, Mhinder, Bastion and Richard knew that the Farquhar Property was a Trust Asset.

130. At no time was Bhagwan consulted or given notice with respect to the Farquhar Property Transfer.
131. Between 1992 and 2001, Bhora, Mhinder, Furnemont, Rita, Richard, Gina, Lorri Ann, Kelly Ann, Spruston, Malo, Ladysmith Holdings, Chemainus Ventures and the Related Companies used Trust Assets to acquire further real properties for the benefit of one or more of them. These properties are therefore Trust Assets. ...
132. Bhagwan was not consulted or given notice with respect to the use of Trust Assets to purchase the Additional Trust Properties.
133. From in or about 1990 until in or about 2001, Bhora and Mhinder, with the participation of the other Defendants, used Trust Assets to incorporate and operate companies and to acquire the shares and assets of companies without notice to or consent from Bhagwan, including, but not limited to:
  - (a) the incorporation of Mack and the acquisition of a Mack Truck dealership in the name of Richard and Mack;
  - (b) the incorporation of NCC for the purposes of negotiating with the City of Nanaimo with respect to the development of the Nanaimo Conference Centre;
  - (c) the incorporation and operation of Malo;
  - (d) the incorporation and operation of B.C. Concrete Fencing;
  - (e) the incorporation and operation of Ladysmith Holdings;
  - (f) the incorporation and operation of Chemainus Ventures; and
  - (g) the incorporation and acquisition of other companies and corporate assets as may become known to the Plaintiff.
- ...
138. Bhora and Mhinder are in breach of their duties as trustees of the Trust and are jointly and severally liable for such breaches. Specifically, they have breached their duties as trustees by denying Bhagwan's status as a trustee and beneficiary of the Trust and excluding him from decisions or actions with respect to the Trust Assets. These breaches include but are not limited to, failing to consult or obtain the consent of Bhagwan to each of the following decisions or actions:
  - (a) replacement of the Tilbury-Osborne Agreement with the Substituted Agreement;
  - (b) entry into the Lehigh Agreement;
  - (c) the transfer of Trust Assets under the Lehigh Agreement;
  - (d) the transfer of the Chatsworth Property from Osborne Contracting to Mid-Isle.
  - (e) the transfer of the Chatsworth Property from Mid-Isle to Lehigh;



- (f) the transfer of \$140,000.00 from Spruston to Custom Pumping;
- (g) the incorporation and operation of NCC;
- (h) the transfer of Spruston's other assets, including but not limited to the transfer of Spruston's assets to, inter alia, NCC and Malo, for the benefit of NCC, Malo, Furnemont and Lorri-Anne;
- (i) allowing Spruston to be removed from the corporate registry;
- (j) encumbering the Trust Properties in the manner described above for their personal benefit and for the benefit of one or more of the other Defendants;
- ...
- (m) the transfer of the Farquhar Property to Bastion for the benefit of Bastion and Richard;
- (n) acquiring the Additional Trust Properties;
- (o) removal of Bhagwan as a director and officer of each of the Osborne Group companies in which Bhagwan held such a position;
- (p) the incorporation of Mack and the acquisition of a Mack Truck dealership;
- (q) the incorporation and operation of Malo;
- (r) the incorporation and operation of B.C. Concrete Fencing;
- (s) the incorporation and operation of Ladysmith Holdings; and
- (t) the incorporation and operation of Chemainus Ventures.

[54] Bhagwan Mayer's allegations were denied by all of the numerous defendants in that action, including Bhora and Mhinder Mayer and the personal applicants. Bhora and Mhinder Mayer took the position that Bhagwan Mayer had left the Brothers' Trust in August 1991, and ceased to be a beneficiary of that trust as of that time.

[55] Mhinder Mayer specifically denied that any of the impugned assets owned by Richard Mayer, Rita Webb, and Gina Mayer were, or had ever been, assets of the Brothers' Trust, and denied that they had been involved in inappropriate transactions with companies owned by the Brothers' Trust. He denied that certain impugned transactions lacked any, or adequate, consideration.

[56] The essence of Mhinder Mayer’s defence, insofar as it relates to the issues arising on this application, is captured in the following paragraphs of the statement of defence filed on his behalf (as well as on behalf of Bhora Mayer) in the Bhagwan Mayer Action. In summary, he claimed that none of the impugned assets belonged to the Brothers’ Trust, and that all of the impugned transactions were conducted in the ordinary course of business:

7. In addition to the written terms of the Trust, the Trust was governed by the following terms, either express or alternatively implied, agreed to orally or by conduct or otherwise agreed to orally:

...

- (e) any properties belonging to or corporate entities commenced and operated by the spouses and children of the Plaintiff, Bhora and Mhinder were not assets of the Trust.

....

15. In answer to paragraph 73 of the Statement of Claim, the Defendants deny that Bhora or Mhinder incorporated Custom Pumping Ltd., R & G Equipment Rentals Ltd., Island Aggregates Ltd., or Bastion Project Management Ltd. and further deny that the shares or assets of these companies are or at any time have been assets of the Trust.

16. In further answer to paragraph 73 of the Statement of Claim, it was expressly agreed by the trustees of the Trust that Mid-Isle Holdings Ltd. and any of its assets would be excluded from the Trust.

17. In further answer to paragraph 73 of the Statement of Claim, the Plaintiff expressly agreed to the incorporation of the companies set out therein and to their exclusion from the Trust.

...

24. Further, or in the alternative, the transactions and conduct alleged to constitute a breach of trust, including, but not limited to, those set out in paragraph 133 of the Statement of Claim, were made in the ordinary course of business of Osborne Contracting Ltd., Osborne Industries Ltd., Mayer Truck & Equipment Ltd., Gulf Coast Materials Ltd., Holman Transport Ltd., and Timberland Investments Ltd., and did not require the approval of the trustees of the Trust.

...

28. In the further alternative and in further answer to subparagraphs 133(g), (p), (q), (r), (s) and (t) of the Statement of Claim, if, after August 1991, the approval of the Plaintiff was required in respect of the affairs of the Trust, which is not admitted but expressly denied, then the Defendants deny that Bhora or Mhinder breached their duty as trustees by allowing Mack Sales & Service of Nanaimo Ltd., Malo Enterprises Ltd., Custom Pumping Ltd., Ladysmith Holdings Ltd. and Chemainus Ventures Ltd. to be incorporated as the shares and assets of these companies are not and were never assets of

the Trust and these companies are not operated by or for the benefit of any trustee or beneficiary of the Trust.

[57] In their statement of defence, Richard Mayer, Rita Webb, and Gina Mayer denied that they improperly received or used any assets of the Brothers' Trust or that any assets of that trust were used in connection with the incorporation, acquisition, or operation of any of their companies.

*Settlement of the Bhagwan Mayer Action*

[58] The Bhagwan Mayer Action was settled in early June 2006. I was advised that the case settled after approximately two weeks of trial. The parties signed a settlement agreement dated June 8, 2006 ("Bhagwan Mayer Settlement Agreement").

[59] The parties to that agreement include the following members of the Mayer family: Bhagwan Mayer; Bhora Mayer; Mhinder Mayer; Richard Mayer; Rita Webb; Gina Mayer; and Kelly Mayer (Mhinder Mayer's wife).

[60] The Osborne Group of Companies and the companies owned by Richard Mayer, Rita Webb, and Gina Mayer were also parties to the Bhagwan Mayer Settlement Agreement. Marc Furnemont, a certified general accountant employed to provide financial and accounting services for the Osborne Group of Companies, as well as his wife, were also parties to the agreement. Mr. Furnemont was a defendant in the Bhagwan Mayer Action. He is also a party in this and some of the related actions.

[61] Richard Mayer, Rita Webb, and Gina Mayer as well as the companies that they own were, along with others, defined in the Bhagwan Mayer Settlement Agreement as "Secondary Defendants".

[62] Certain recitals and terms of the Bhagwan Mayer Settlement Agreement bear directly on the issues raised on this application.

[63] The recitals specifically refer to the dispute concerning Bhagwan Mayer’s purported interest in the real property or businesses owned by the Secondary Defendants:

- A. Bhagwan Mayer, Bhora Mayer and Mhinder Mayer were actively involved in a joint business venture between 1966 and 1991;
- B. A number of the Osborne Defendants were the corporate vehicles utilized in the business ventures of Bhagwan Mayer, Bhora Mayer and Mhinder Mayer jointly;
- C. A Dispute has arisen between Bhagwan Mayer on the one hand, and Bhora Mayer, Mhinder Mayer, the rest of the Osborne Defendants and the Secondary Defendants on the other hand concerning any interest Bhagwan Mayer has in any property or business owned or carried on by the Osborne and/or Secondary Defendants; and
- D. The parties have reached an agreement in full and final settlement of any and all claims which Bhagwan Mayer may have against the Osborne and/or Secondary Defendants and of any and all claims the Osborne and/or Secondary Defendants may have against Bhagwan Mayer.

[64] The Bhagwan Mayer Settlement Agreement defined the word “Action” contained in the Agreement to mean:

“Action” means British Columbia Supreme Court Action No. S017022 between Bhagwan Mayer, as Plaintiff, and the Osborne Defendants and the Secondary Defendants, as Defendants.

[65] The terms of the Bhagwan Mayer Settlement Agreement required Bhora and Mhinder Mayer, as well as the Osborne Group of Companies, to pay Bhagwan Mayer the sum of \$1.175 million less “all appropriate statutory deductions”. In return, Bhagwan Mayer renounced “all alleged legal and beneficial interest in the trust assets/properties claimed in the Action”.

[66] All parties to the Bhagwan Mayer Settlement Agreement, which included Bhagwan Mayer, Bhora Mayer, Mhinder Mayer, Richard Mayer, Rita Webb, and Gina Mayer, agreed to enter into “broad” mutual releases:

- 6. All parties will enter into broad Mutual Releases with Bhagwan Mayer, releasing all claims between Bhagwan Mayer and the Osborne and/or Secondary Defendants in the form attached or other such mutually agreeable form. The releases will be held by counsel for the applicable parties on

counsels' undertakings not to provide the releases to their clients until Bhagwan Mayer has received payment of the \$1.175 million.

[67] The parties to the Bhagwan Mayer Settlement Agreement also agreed to "irrevocably instruct" their respective counsel to endorse a consent dismissal order dismissing all proceedings in the lawsuit, with costs to any party, "for all purposes and effects as if pronounced by the court after a full trial of the proceedings on the merits".

[68] The Bhagwan Mayer Settlement Agreement also contained two clauses that are very important to this application. They concern *any* properties and businesses "legally owned" or carried on by any of the Secondary Defendants, which included Richard Mayer, Rita Webb, and Gina Mayer:

4. The Osborne Defendants and Bhagwan Mayer agree that none of Bhagwan Mayer, Bhora Mayer, Mhinder Mayer and the Osborne Defendants, or any of them, have any beneficial interest in any of the property or businesses legally owned or carried on by any of the Secondary Defendants.
5. Bhagwan Mayer and the Secondary Defendants agree that none of Bhagwan Mayer and the Secondary Defendants, or any of them, have any beneficial interest in any of the property or businesses legally owned or carried on by the Osborne Defendants.

[69] The Consent Dismissal Order was entered on October 11, 2006. The Bhagwan Mayer Action was dismissed as if it had been heard at trial on the merits.

[70] Two releases were prepared and signed, one by Bhagwan Mayer, and the other by Bhora Mayer, Mhinder Mayer, and the Secondary Defendants (which included the corporations whose shares are owned by the applicants). Both releases were broad in scope, such that the releasees were released generally, including the issues raised in the pleadings in the Bhagwan Mayer Action. In both documents, the releasors instructed their counsel to cause the Bhagwan Mayer Action to be dismissed, with prejudice, and without costs.

[71] I was advised by counsel that no release document was signed between Bhora and Mhinder Mayer and the secondary defendants. Mhinder Mayer submits

that as a result, neither the release documents nor the Bhagwan Mayer Settlement Agreement capture his claim against the applicants.

[72] While it is not a release *inter se* Mhinder Mayer and the applicants, a term contained in the Release signed by Mhinder Mayer, Bhora Mayer, Richard Mayer, Rita Webb, and Gina Mayer, captures Bhagwan Mayer’s allegations concerning the applicants’ assets because it refers to the Bhagwan Mayer Settlement Agreement and the claims made in the Bhagwan Mayer Action:

IT IS FURTHER UNDERSTOOD AND AGREED that the RELEASORS hereby confirm that this RELEASE, the Settlement Agreement and the other releases and documentation contemplated in the Settlement Agreement contain the entire agreement between the parties hereto in relation to the Matters and the terms of this RELEASE are contractual, and not merely a recital.

[73] The definition of “Matters” contained in the release includes allegations that the applicants hold assets in trust for Mhinder Mayer. The definition reads:

...any and all claims raised, or that might by amendment, counterclaim, third party proceeding, or otherwise be raised, in Supreme Court of British Columbia Action No. S017022 or Supreme Court of British Columbia Action No. S02165.

The two action numbers refer to the Bhagwan Mayer Action and a related action concerning Spruston Aggregates Ltd.

[74] Mhinder Mayer signed that release as part of his settlement with Bhagwan Mayer.

*Cohabitation Agreement*

[75] Mhinder Mayer entered into a cohabitation agreement (“Cohabitation Agreement”) with his current wife, Kelly Mayer, on August 19, 1996. It is relevant to the issues raised on the application.

[76] Recital “D” states that Mhinder Mayer has “existing property and assets, various business interests, and rights and equities, pursuant to family and other trusts, including those detailed in Schedule “A”. The recital also sets out his “wish” to

“maintain his existing assets as his separate assets in future, without disruption or claims arising from his relationship, or cohabitation with Kelly, including any future marriage to Kelly”.

[77] The Cohabitation Agreement lists real estate and corporate assets (shares) personally owned by Mhinder Mayer, as well as ownership of shares in seven “incorporated companies” held by the Brothers’ Trust. Included in that list are his shares in companies owned by the Brothers’ Trust:

Shares in seven incorporated companies, which are held in trust, pursuant to a signed Trust Agreement between Mhinder and his brothers that pools assets to generate income for the trust members, so long as they continue to be members of the trust, being shares in the Osborne Group of Companies, which is comprised of the following:

...

[78] The Cohabitation Agreement states that the shares in those companies would increase the value of the Brothers’ Trust, when taken with that trust’s real estate holdings, “up to 15 million dollars”.

[79] The applicants point to the value attributed to the Brothers’ Trust by Mhinder Mayer in the Cohabitation Agreement and contrast it to the amount paid to Bhagwan Mayer under the Bhagwan Mayer Settlement Agreement, i.e., \$1.175 million. The applicants also say that Mhinder Mayer’s examination for discovery evidence given in that action, as well as his failure to produce certain documents on which he now says prove the existence of an express trust, contributed to the low amount paid to Bhagwan Mayer. I make no finding in that regard.

[80] For the purpose of this application, however, it is noteworthy that the Cohabitation Agreement does not refer to any purported trust agreements made between Mhinder Mayer and Richard Mayer, Rita Webb, or Gina Mayer.

*Mhinder Mayer’s Examination for Discovery Evidence given in the Bhagwan Mayer Action*

[81] During the hearing of the Rule 18A application, counsel for the applicants drew my attention to certain evidence given by Mhinder Mayer during his

examination for discovery conducted by counsel on behalf of Bhagwan Mayer on August 23, 2005. During that examination, Mhinder Mayer was asked questions about some of the companies owned by Richard Mayer, Rita Webb, and Gina Mayer in issue in the Bhagwan Mayer Action.

[82] The applicants place considerable reliance on the evidence given by Mhinder Mayer during that examination for discovery. They say that Mhinder Mayer was very clear in his evidence and his denial of the allegations advanced by Bhagwan Mayer. The applicants also say that the evidence given by Mhinder Mayer during that examination for discovery is inconsistent with the position he has taken in this litigation and is inconsistent with the evidence he has deposed to in the affidavits filed on his behalf prior to the time the hearing of their Rule 18A application got under way.

[83] I agree with the applicants. The effect of Mhinder Mayer's examination for discovery evidence is clear: he denied having an interest in any of the assets owned by the applicants, whether corporate or real property, and maintained that the impugned transactions were of a commercial nature carried out in the ordinary course of business. In addition, Mhinder Mayer's pleadings filed in this and other litigation are inconsistent. I find that he has not provided a credible explanation for those inconsistencies.

[84] In the paragraphs that follow, I have set out extracts from Mhinder Mayer's examination for discovery evidence where he is questioned about Nanaimo Concrete Ltd. (Island Aggregates), Bastion, R & G Equipment, Custom Pumping, and Wee Tree Lumber Ltd. (Archer Holdings). Those extracts show that Mhinder Mayer's evidence was not limited to, nor confined to the specific question that was asked of him.

[85] Mhinder Mayer's explanation for his discovery evidence is set out in a subsequent section of these reasons.



[86] The shares of Island Aggregates are owned by Richard Mayer. During the course of his examination for discovery, on August 23, 2005, Mhinder Mayer volunteered information concerning the ownership of Nanaimo Concrete in response to a question asked about Mr. Furnemont’s relationship with that company:

- Q And Mark Furnemont was the accountant for Nanaimo Concrete; is that right?
- A I do not own Nanaimo Concrete. I can assume that he is, but that’s all I can do.
- Q Okay. You don’t know, is that what you’re saying?
- A I can assume, that’s all. I don’t know.

[87] During his examination for discovery in the Bhagwan Mayer Action, Mhinder Mayer explained the circumstances in which Richard Mayer obtained Nanaimo Concrete and purchased the property in which he carried on its business. Mhinder Mayer’s evidence was that when Nanaimo Concrete was incorporated in 1988, a ready-mix plant was being operated by Mayco (a company which was wholly owned by Osborne Contracting Ltd.) at 265 Fry Street (“Fry Street Property”). The following extract illustrates Mhinder Mayer’s lengthy account to explain to the questioner, that as a result of labour difficulties, a decision was made by his two brothers, Bhagwan and Bhora Mayer, and himself, to sell the Fry Street Property to Richard Mayer:

- Q Now, at some point a numbered company that became Bastion Projects purchased a portion of the Fry Street property; is that right, are you aware of that?
- A Yes.
- Q Do you remember when you would have first learned that Bastion purchased this property?
- A Yes.
- Q All right. When-was it when you first learned?
- A Just before they purchased it.
- Q All right. How did you learn that Bastion was going to purchase this property?
- A Because Rick told me he was going to buy it.
- ...
- Q Was he working at the Nanaimo Mayco-Mix plant at that time?

- A He owned it.
- Q He owned the Nanaimo Mayco-Mix plant?
- A He's always owned it, since the day it was incorporated, he's owned Nanaimo Concrete, yes.
- Q So let me just back up. In the early 1980s, late 1970s, when the Mayco ready-mix plant was set up in Nanaimo, it was a division of Osborne Contracting, right?
- A Yes.
- Q Sometime in late 1988 a company that became Nanaimo Concrete was incorporated. Do you remember that?
- A Yes. In '88 Nanaimo Concrete, which belonged to Richard Mayer, was incorporated.
- Q Okay. Before Nanaimo Concrete was incorporated, the Mayco ready-mix plant in Nanaimo was wholly owned by Osborne Contracting; is that right?
- A Yes.
- Q ... At sometime, I take it, in 1988, there was a discussion about Richard establishing Nanaimo Concrete, is that right, a discussion amongst the brothers?
- A Yes.
- Q Allright. Do you remember when that would have first been discussed, that is the company owned by Richard or Richard establishing a company that became Nanaimo Concrete, when was that first talked about?
- A We went through some union problems.
- Q All right.
- A Okay. And this is Osborne Contracting.
- Q Yes.
- A And because of that we, meaning Bhora, Bhagwan and myself, decided that, look it -- and it was actually there was a Bhagwan push on this, because he said "Look it, let's get out of the labour stuff, I don't want labour problems anymore, okay, so let somebody else have it. If we do find somebody that wanted to do it, let them do it." And I can remember at the time that Bhagwan said "None of my kids want to do it. Does anybody want to do it?" And I think Bhora talked to his son Ricky, who was at that time working for Mayer Truck & Equipment in Crofton in the shop and said "Go do that." And Ricky said "Fine." He wanted to do it and he would spend his full time there. He didn't want to go to college, he wanted to do that. So that's how Nanaimo Concrete was set up, Ricky took it, and that was his business, and he had the -- he did not own the land.

...

Q Yes.

A We went through a whole year to try to get that decertification.

Q Yes.

A And that was a nightmare for us as Osborne Contracting..

Q Yes.

A It was such a nightmare that they sent down the fellow Teamsters, okay, and put a picket across our gate, and I'm walking in the gate, and the guy is going "Don't you walk in there, there is a picket out here, and if you walk in there you will be black-listed for the rest of your life." And I said "I beg your pardon, I live in here. This is my house." And the guy says "Is it his house?" And one of the drivers from the other company said "Yeah, he does live there." "Oh, well, I can't stop you from going to your house." We went through that nightmare, we wanted out of it. I was fed up with Teamsters. We did get out of it, it took us a year, but you know what, there was a lot of problems like that, that us as brothers said "We're out of this business, we don't want it, let somebody else do it."

...

Q All right. So there was a conversation with Bhagwan in which he said "We should get out of this and we should get someone to run it," is that what he said?

A It was a decision from Bhagwan and Bhora that "This place is not going to be run by us," okay. Now, fair enough, I was at the time choked about it, because I was choked -- it gets wearing, all right, and I said "Fine," okay. So what happened was is that it was told to me that "Look it, if you sell it to Ricky, you guys, let him go out there, let him work hard, he's going to be young, he is a lot younger than us, and he can go out and fight those battles, and it will be a new face on the block and you don't have to do that, and we will get paid for it."

...

Q There was a discussion about the Nanaimo operation being run by a company owned by Richard Mayer; that was the discussion, right?

A The discussion was that Rick would set up his own company as Nanaimo Concrete, and he would run the ready mix, and he would pay royalties plus rent to Osborne Contracting. And that was -- that was before it happened, that's before '88, so it might have been '87, and that's what did happen.

Q Okay. Now, were you involved, you personally, involved in any of the arrangements between Osborne Contracting and Nanaimo Concrete?

A I didn't do the paperwork, because I never have, and nor did I do the signing of those papers, okay, whatever that -- but I knew about it, I knew that's what's happening.

...

Q And until Nanaimo Concrete became involved, you were in charge of -- you described it, all of the day-to-day operations of the Nanaimo Concrete plant, right?

A Yes.

Q So was there a day when that changed?

A Yes.

Q Or did it happen over weeks and months or ..

A No, it changed on a day.

Q On a particular day?

A Yeah, yeah. Because everybody -- all the personnel were informed that they do not now -- they will not now be working for Osborne Contracting.

Q Who informed them of that?

A I did.

Q All right. Do you remember what the day was?

A No.

Q Do you remember what time of year it was?

A No. There were a couple guys that were upset and they said "Well, what's that going to do for us? And I said, "You know what, Ricky owns it, he's right here, okay, and from the day you started here, he's going to honour that day that you started here. So if you worked for Osborne for five years, okay, now you're five years into Nanaimo Concrete." And that settled everybody down. And I said "To top it all off," I said, "you guys, just in case you think there is something that is no good," I said "I'm going to stay on and help Rick for as long as you require me." And everybody was happy with that.

Q So I'm trying to picture this meeting. Did you call all the employees into the yard, into an office, how did this come about?

A I don't know.

Q But it was you who told them, right?

A Oh, yeah, oh, yeah. Rick was there too.

[88] Turning next to Bastion, its shares are registered in the name of Richard Mayer. During his examination for discovery, Mhinder Mayer said that Bastion was owned by Richard Mayer:

Q Now, you had the conversation with Bhagwan and Bhora about this property [Fry Street], and your understanding was that Osborne Contracting didn't have enough money, right?

A It didn't.

Q And you at least became aware that, at some point after the conversation with Bhagwan, a part of the property is purchased by a company which comes to be called Bastion Project Management, I think it is; is that right?

A Yes.

Q And you understood that that company was owned -- the sole shareholder of that company was Richard; is that right?

A Yes, it is.

[89] When Mhinder Mayer was asked if he had “ever heard” of Custom Concrete Pumping, he responded that it belonged to Rita Webb (then Mayer):

Q I’m going to turn to another company now. It started off as a numbered company, but it became Custom Concrete Pumping. Have you ever heard of that company?

A Yes.

Q What do you know about that one?

A It belongs to my niece, Rita Mayer.

[90] Mhinder Mayer was also asked about Wee Tree Lumber Ltd. (“Wee Tree”), now Archer Holdings. The company’s shares are registered in the name of Rita Webb. In response to a question asking what he knew about Wee Tree, Mhinder Mayer responded that it belonged to his niece:

Q All right. What do you know about -- I have to get its full name. I believe it’s called Wee Tree Lumber Limited. Does that sound familiar to you?

A Wee Tree, I only know Wee Tree.

Q Wee Tree, all right. What do you know about a company called Wee Tree?

A It belonged to Rita Mayer.

[91] Mhinder Mayer was also asked for his knowledge about Wee Tree’s business operations and how Rita Webb was involved in establishing a company that ran a batch-plant operation in Ladysmith, British Columbia:

Q What did it do?

A Sold ready mix.

Q Out of Ladysmith; is that right?

- A Yes.
- Q It was a batch concrete plant in Ladysmith; is that right?
- A As far as I know.
- Q Did you have any involvement with Wee Tree Lumber in Ladysmith?
- A Not really. A little bit maybe, but very little. If Ricky asked me to stop by there and look at it, I might have done that, and that's about it.
- Q Do you have any personal knowledge of how it is that Rita Mayer came to establish a company that ran a batch-plant company -- batch plant in Ladysmith?
- A I think Ricky asked her to do it.
- Q And you say that. Do you remember having conversations with Richard Mayer about that?
- A I can't say. It wasn't a company that I owned.
- ...
- Q All right. Now, do you remember having any involvement in assisting Rita in setting up the plant?
- A I might have done something for her if she asked me, yes.
- Q Again, you're saying you might have. I would have thought if you -- let me put it this way: You've been to the site, the batch plant; is that right?
- A Yes.

[92] The shares of R & G Equipment are wholly owned by Gina Mayer. Mhinder Mayer was also asked about his knowledge of R & G Equipment. In response to the general question - when did he first have "any knowledge of R & G Equipment?" – he responded:

- A I have no idea when the date was or the time. I know it was a company that was set up by Gina Mayer, and I think actually I thought, and I could be wrong on this, that the R & G was Gina and Rita Mayer, but I could be wrong, I don't know when the time was.

[93] The questioner persisted; in response, Mr. Mayer not only said it was a company that he did not own, but went on to say that the shares of that company were not owned by the Mayer brothers, including Bhagwan Mayer:

- Q Do you remember whether R & G Equipment was before or after Nanaimo Concrete was set up and the relationship with Nanaimo Concrete established?

- A Timing-wise I am not sure at all, because it's not a company that I own.
- Q All right. Now, I understand that you don't own it, and the shares weren't owned by any of the Mayer Brothers or of Bhagwan himself, right, that's your understanding?
- A We don't own that company, yes.
- Q But you must have had some dealings with R & G Equipment in your role working for Gulf Coast Materials, Arrowsmith, Nanaimo Concrete; is that right
- A Over the years, yes.
- Q What was your understanding of the dealings with R & G?
- A We rented equipment. If there was equipment available, if they had it. We would rent it, if they had it.
- Q Do you remember having any discussions with Bhora or Bhagwan at the time or before R & G Equipment was incorporated or established about R & G Equipment?
- A No.
- ...
- Q All right. So you're -- if I've got this right, your understanding of R & G was it was just another company out there that happened to be owned by Gina that you would deal with if they had the right price; is that what you're saying?
- A It's not my company.

*Subsequent Dispute between Bhora Mayer and Mhinder Mayer - The Bhora Mayer Action*

[94] Following the settlement of the Bhagwan Mayer Action, a dispute arose between Bhora Mayer and Mhinder Mayer concerning the Disputed Trust Companies. Ultimately, on May 15, 2007, Bhora Mayer commenced the Bhora Mayer Action seeking a declaration as to an undivided one-half interest in assets he claimed were owned by the Brothers' Trust. In his amending pleading, Bhora Mayer complained, *inter alia*, that Mhinder Mayer:

- (a) refused to provide an accounting in relation to monies paid, loaned, or otherwise transferred to Mhinder Mayer from certain companies owned by the Brothers' Trust;
- (b) falsified corporate records;

- (c) conferred benefits on himself through the use of corporate assets and resources;
- (d) put the safety of employees and customers of businesses owned by the Brothers' Trust at risk through his conduct;
- (e) failed or refused to make the books and records of those companies available to Bhora Mayer for inspection;
- (f) exercised control over those companies for his own personal benefit and not for the plaintiffs' benefit, and in a manner that was not consistent with Bhora Mayer's interests;
- (g) appropriated and diverted to those companies, or caused them to appropriate and divert, trust assets to improper purposes and for Mhinder Mayer's personal benefit; and
- (h) has acted in a manner that is consistent only with having left the Brothers' Trust and renouncing his interest in that trust and trust assets thereby.

[95] The Bhora Mayer Action is one of the actions I am case managing. Mhinder Mayer is actively defending the action and has also filed a counterclaim adding Mark Furnemont as a defendant.

[96] In his amended statement of defence filed September 19, 2008, Mhinder Mayer alleges, *inter alia*, that Bhora Mayer had, in breach of trust of his fiduciary duties, appropriated, diverted, and/or encumbered assets of certain companies belonging to the Brothers' Trust to "Bhora Mayer and/or his family members" without the "consent or the properly informed consent of Mhinder Mayer". He also alleges that Bhora Mayer had entered into "unfavourable contracts" on behalf of certain trust companies owned by the Brothers' Trust with Richard Mayer, Rita Webb, and Gina Mayer.



[97] There are no allegations made in Mhinder Mayer's statement of defence or counterclaim, that Richard Mayer, Rita Webb, or Gina Mayer hold any assets in trust for Mhinder Mayer.

[98] In his statement of defence, Mhinder Mayer also relies on the provisions of the Bhagwan Mayer Settlement Agreement in defending Bhora Mayer's action. His statement of defence pleads that the Brothers' Trust has been modified by that document:

6. In answer to paragraph 7 of the Statement of Claim, the Defendant says that the terms of the Trust are not restricted to the contents of the Trust Documents, but have been modified from time to time, including by a document titled the Settlement Agreement dated June 8, 2006.

[99] A further amended statement of defence and counterclaim was filed on behalf of Mhinder Mayer on March 18, 2010. That pleading alleges that:

- (a) at all material times, Richard Mayer, Rita Webb, and Gina Mayer "were the directing minds of, shareholders in, and directors of" each of their enumerated companies;
- (b) those individuals were fully aware of the terms of the Brothers' Trust;
- (c) to avoid claims by the Brothers' Trust, Bhora and Gina Mayer agreed to acquire properties beneficially that they would register in their joint names or in Gina Mayer's name, and further, that those properties are assets of the Brothers' Trust;
- (d) Gina Mayer has received rental income that belongs to the Brothers' Trust;
- (e) Gina Mayer has misappropriated funds belonging to the Brothers' Trust for her own use;
- (f) following Bhagwan Mayer's departure from the Brothers' Trust, Bhora Mayer has transferred "large amounts of money" to Richard Mayer, Rita Webb, and Gina Mayer for no consideration or at gross

undervalue, without Mhinder Mayer's knowledge or informed consent;  
and

- (g) Bhora Mayer has also diverted assets of the Brothers' Trust to members of his family for improper purposes and further, has entered into unfavourable or clandestine contracts with them.

[100] In his prayer for relief, Mhinder Mayer seeks relief predicated on the terms of the Brothers' Trust for which he has a 50 percent interest in its assets. In addition to damages, Mhinder Mayer seeks a declaration that he is entitled to a beneficial interest in one-half of the impugned properties, an accounting of the profits made by Bhora Mayer in breach of trust, an accounting of monies owed to the Brothers' Trust, and an order that Bhora Mayer be removed as a trustee of the Brothers' Trust.

*Mhinder Mayer's proceedings brought by Petition*

[101] Mhinder Mayer has also sought relief in two separate petitions for what he says is misconduct by Bhora Mayer in the disposition of corporate assets belonging to businesses owned by the Brothers' Trust.

[102] The original petition ("Original Petition") was issued on behalf of Mhinder Mayer on December 18, 2007, against Bhora Mayer, Osborne Contracting Ltd., and Island Aggregates. Mhinder Mayer sought leave to commence an action in the name of Osborne Contracting Ltd. against Island Aggregates, for repayment of unauthorized loans from Osborne Contracting Ltd., and against Bhora Mayer for general, special, and punitive damages for breach of fiduciary duty. The Vancouver Registry file number is S-078623.

[103] In the statement of facts upon which the Original Petition is based, Mhinder Mayer alleges:

5. The sole shareholder of Island Aggregates is Richard Mayer ("Ricky Mayer"), the son of Bhora Mayer.
6. Increasingly, in the past year, the petitioner and Bhora Mayer have not been able to work cooperatively together in the management and operation of Osborne Contracting, to the extent that the petitioner has been excluded from the management and operation of Osborne Contracting.

7. On March 9, 2007, the petitioner demanded that Osborne Contracting make no payments out of the ordinary course of business without his prior approval.

8. On or about March 16, 2007, Osborne Contracting made a loan to Island Aggregates in the amount of \$300,000 (the "Unauthorized Loan") without the knowledge and/or approval of the petitioner ....

....

11. On December 3, 2007, the petitioner, through his solicitor, requested that Osborne Contracting commence an action against Island Aggregates and Bhora Mayer to recover the unauthorized loan.

12. On December 4, 2007, Osborne Contracting, through its solicitor, refused to commence an action against Island Aggregates and Bhora Mayer.

[104] In his affidavit sworn December 13, 2007, filed in support of the Original Petition, Mhinder Mayer deposed that Island Aggregates is owned by Richard Mayer:

2. The intended Defendant, the Respondent Island Aggregates Ltd. ("Island Aggregates") is a company wholly owned by Richard Mayer ("Ricky Mayer"), the son of Bhora Mayer.

[105] The second petition was issued on behalf of Mhinder Mayer on May 15, 2009. It is referred to in this and the related litigation as the "Oppression Proceeding" (VA S-093607). The respondents are the Osborne Group of Companies and Bhora Mayer.

[106] The relief sought by Mhinder Mayer in the Oppression Proceeding includes:

- (a) a declaration that the affairs of the corporate respondents are or have been exercised in a manner oppressive to Mhinder Mayer;
- (b) a declaration that certain companies be liquidated;
- (c) an accounting of all monies due to Mhinder Mayer;
- (d) appointment of a receiver/monitor, or receiver/manager of certain companies; and

- (e) a direction that legal proceedings be commenced in the name of certain companies as this Court thinks fit.

[107] The statement of facts set out in support of the relief sought in the Oppression Proceeding contains allegations similar to those in Mhinder Mayer’s amended statement of defence filed in the Bhora Mayer Action. The petition asserts that Bhora Mayer “has appropriated and diverted” certain companies belonging to the Brothers’ Trust in order to dispose of certain assets of those companies for the personal benefit of Bhora Mayer and members of his family. The particulars state that Bhora Mayer entered into unfavourable contracts on behalf of those companies, or some of them, with Richard Mayer, Rita Webb, and Gina Mayer, or companies owned or controlled by them.

[108] Mhinder Mayer filed an amended petition in the Oppression Proceeding on October 8, 2009. It contains additional substantial allegations as well as particulars of the improvident transactions engaged in by Bhora Mayer with members of his family.

[109] The hearing of the Oppression Proceeding petition commenced before Satanove J. in February 2009. The application was adjourned because not all of those persons said to be the subject of the proposed relief were parties.

[110] Approximately 13 months later, on March 18, 2010, Mhinder Mayer filed an amended statement of defence in the Bhora Mayer Action. In it, Mhinder Mayer purports to “disavow” the relief sought in the Oppression Proceeding:

88 Mhinder Mayer has commenced Action No. S093607 (the “Oppression Proceeding”) against Bhora Mayer and the Identified Trust Companies. In this action he disavows any relief he claims in the Oppression Proceeding.

[111] No declaration is sought in either petition nor is any mention made that any of the assets held by Richard Mayer, Rita Webb, or Gina Mayer are held in trust for Mhinder Mayer.

*Mhinder Mayer's Claims against Richard Mayer, Rita Webb, and Gina Mayer Advanced in this Action*

[112] This action was commenced on October 20, 2009, naming the Osborne Group of Companies, Bhora Mayer, Richard Mayer, Rita Webb, and Gina Mayer, as well as certain companies owned by them, as defendants.

[113] A detailed review of the allegations made on behalf of Mhinder Mayer in his original and amended statement of claim, his original and amended particulars, and his reply, reveals inconsistencies in the nature of the trust claims he advances against the applicants. In addition, those pleadings as well as the particulars set out in his two petitions show that for at least two years, Mhinder Mayer sought derivative relief in order to pursue recovery against some of the companies owned by the applicants, and demonstrate that he did not assert an express trust or resulting trust claim against the personal applicants.

(a) *Mhinder Mayer's Original Statement of Claim*

[114] The allegations made in Mhinder Mayer's initial statement of claim dated October 19, 2009 (filed October 20), against his nephew, niece, and sister-in-law are summarized as follows:

- (a) Richard Mayer and Rita Webb hold assets in trust for Mhinder Mayer;
- (b) Gina Mayer and her husband, Bhora, agreed that either of them would acquire properties beneficially that they would register in their joint names, or in Gina Mayer's name, in order to avoid any claims by the Brothers' Trust;
- (c) Gina Mayer holds those properties in trust for the Brothers' Trust;
- (d) Gina Mayer is under a duty to account to Mhinder Mayer for rental income for properties rented on behalf of the Brothers' Trust;
- (e) Gina Mayer has misappropriated certain amounts of those rental proceeds for her own use;

- (f) Gina Mayer has intermingled rental income properly payable to the Brothers' Trust and rental income payable to Mhinder Mayer in the books of certain trust companies;
- (g) Gina Mayer has been paid fees in breach of trust;
- (h) large amounts of money and assets have been transferred by Bhora Mayer or by others at his direction to Richard Mayer, Rita Webb, and Gina Mayer, or certain companies owned by them, for no consideration or at gross undervalue, without Mhinder Mayer's knowledge or consent;
- (i) Bhora Mayer has appropriated and diverted certain assets of the Brothers' Trust to benefit members of his family, including Richard Mayer, Rita Webb, and Gina Mayer; and
- (j) at the direction of Richard Mayer, Bastion has breached its fiduciary duties to the Brothers' Trust and Mhinder Mayer by failing to take reasonable care to ensure that bookkeeping services provided by Bastion were honest and accurate, and by failing to warn Mhinder Mayer that he was not being treated honestly and fairly.

[115] As a result, Mhinder Mayer claims that Richard Mayer, Gina Mayer, and Rita Webb hold certain assets in trust for himself and Bhora Mayer as the two remaining beneficiaries of the Brothers' Trust. Some of the relief he seeks includes tracing and accounting orders, recovery of debt, and leave to commence actions in the name of the Osborne Group of Companies to recover monies due to them. Many of those non-trust claims are duplicate claims since they are advanced by Mhinder Mayer in separate proceedings.

(b) *Original Particulars*

[116] A demand was made of Mhinder Mayer to particularize the trust claims alleged in the statement of claim. Those particulars were delivered in a document

dated November 10, 2009. His particulars show that Mhinder Mayer relies on written documents entitled “Acknowledgments”. There is no mention of those documents being in error.

[117] In those particulars, Mhinder Mayer referred to three documents, each entitled “Acknolwedgment [sic] of Trust Agreement” and each dated December 24, 2001 (I refer to them separately as an “Acknowledgement”).

[118] In his particulars, Mhinder Mayer says that Richard Mayer, Rita Webb, and Gina Mayer each signed a separate Acknowledgement.

[119] With respect to the Acknowledgement signed by Richard Mayer, Mhinder Mayer’s particulars state:

1. By way of a document entitled “Acknowledgment of Trust Agreement between Richard Mayer, Bhora Mayer and Mhinder Mayer” dated December 24, 2001, Richard Ravinder Mayer (“Ricky Mayer”) confirmed that he held the common shares of: Old Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd. (“Ricky’s Trust Companies”) in trust for Bhora and Mhinder Mayer;
2. By that same Acknowledgment, Ricky Mayer also confirmed that even though he was the registered owner of numerous real estate properties, he was holding those properties (with the exception of his principal residence) in trust for Bhora and Mhinder Mayer. The identity of all those properties are peculiarly within his knowledge, and will be given in accordance with Rule 19(11.1) of the Rules of Court. Those properties include his interest in: ...

[120] Mhinder Mayer’s particulars state that the Acknowledgment signed by Rita Webb confirmed that she held the shares of Custom Pumping, Ladysmith Holdings Ltd., Mayne Island Concrete Ltd., and Archer Holdings Ltd. (prior to amalgamation), in trust for Bhora and Mhinder Mayer.

[121] The particulars also state that Richard Mayer and Rita Webb confirmed in their Acknowledgements that they were the registered owner of numerous real estate properties which they hold in trust. Some of the properties listed in the particulars and the nature of the trust claim advanced differs between the particulars and the oral submissions made during the hearing of the Rule 18A application. For example:

(a) *309-150 Promenade Drive, Nanaimo:*

The particulars state that Richard Mayer and Rita Webb hold title to the property in trust for Mhinder and Bhora Mayer pursuant to an express trust arising from their Acknowledgments. Yet, in submissions, I was advised that Mhinder Mayer's claim is based on a resulting and constructive trust.

(b) *2503 Promenade Drive, Nanaimo:*

The particulars state that Rita Webb holds title to the property in trust for Mhinder and Bhora Mayer pursuant to an express trust arising from her Acknowledgement. In submissions, however, I was advised that the claim is based on a constructive trust because Rita Webb transferred her interest in the property to Gina Mayer.

(c) *2504 Promenade Drive, Nanaimo:*

The particulars do not mention this property; in submissions, I was advised that the claim is based on a constructive trust because Rita transferred her interest to Gina Mayer.

[122] No particulars of any trust claim are given in relation to Gina Mayer.

[123] Mhinder Mayer also particularized sales of real property made by Richard Mayer and Rita Webb, alleged to have been in breach of trust.

[124] Mhinder Mayer states that Richard Mayer transferred title of the Prairie Avenue property to third party purchasers and has failed to account for the proceeds of sale.

[125] As against Rita Webb, he claims she transferred title to the properties located at 1813 and 1737 Northfield Road, Nanaimo, to third party purchasers on October 14, 2004 and May 31, 2005, respectively, and has failed to account for the purchase proceeds. The particulars also allege that Rita Webb caused Custom



Pumping to convey her interests in property located at 101-2731 Jacklin Road, Nanaimo, to third party purchasers and that she has failed to account for the proceeds. The date of that transfer is not set out.

(c) *Amended Particulars*

[126] Amended particulars were subsequently delivered on behalf of Mhinder Mayer. The original document is shown to be dated March 2010, without reference to a day. It was eventually dated May 10, 2010, and filed two days later.

[127] One of the amendments found in the amended particulars concerns the Acknowledgements. In the amended particulars, Mhinder Mayer refers - for the first time - to a “common understanding” that there were four (as opposed to two) beneficiaries of the trust by which Richard Mayer and Rita Webb hold assets for him. In addition to Bhora and Mhinder Mayer, the beneficiaries included Richard Mayer and Rita Webb. No mention is made of Gina Mayer:

6A Mhinder Mayer acknowledges that, notwithstanding the acknowledgements of trust outlined above, he was party to a common understanding of the parties that the beneficiaries of the trust would not be limited to Bhora Mayer and Mhinder Mayer but would also include Richard Mayer and Rita Webb.

[128] The word “trust” is not defined in the amended particulars or in the amended statement of claim.

[129] No new properties or assets were added to the amended particulars.

(d) *The Applicants’ Defence*

[130] Mhinder Mayer’s trust claims are denied by the applicants and Bhora Mayer. In their statements of defence (filed shortly after the original particulars were delivered), the applicants plead that by January 2002, which is within one month of the Acknowledgments having been signed, Mhinder Mayer agreed that they were of no force and effect. The applicants also plead that Mhinder Mayer expressly confirmed by his signature on the Bhagwan Mayer Settlement Agreement that he

had no beneficial interest in any of their assets and the businesses they operated, and accordingly, Mhinder Mayer is estopped from asserting his trust claims.

(e) *Mhinder Mayer's Reply to the Applicants' Statements of Defence*

[131] A reply to the statements of defence of Richard Mayer, Rita Webb, and Gina Mayer, was filed on behalf of Mhinder Mayer on March 23, 2010. Many of the allegations made in that document purport to answer the applicants' reliance on the Bhagwan Mayer Settlement Agreement.

[132] In his reply, Mhinder Mayer says:

- (a) the Bhagwan Mayer Settlement Agreement did not involve allegations or issues between himself and the applicants;
- (b) he and his brother, Bhora Mayer, were represented by common counsel;
- (c) he did not consider or investigate any of the claims that are the subject of this action prior to signing the Bhagwan Mayer Settlement Agreement;
- (d) by entering into that settlement agreement, he did not settle his claims against the applicants;
- (e) as trustees of his beneficial entitlements, the applicants were legally obliged to inform him of "all the facts bearing on his beneficial entitlement before seeking and obtaining from him a waiver of" that entitlement;
- (f) his claims concern the applicants' wrongful acts that occurred prior to June 8, 2006 and are not released by the Bhagwan Mayer Settlement Agreement; and
- (g) the Bhagwan Mayer Settlement Agreement does not affect wrongful acts committed after that date.

[133] Mhinder Mayer also alleged in his reply that he was induced to sign the Bhagwan Mayer Settlement Agreement by representations made by Richard Mayer and Rita Webb:

11. Further, or in the alternative, Mhinder Mayer was induced to sign the Bhagwan Agreement by the following representations made by Richard Mayer, on his own behalf and on behalf of [Island Aggregates, Bastion, Mack Sales, and R&G Equipment] and Rita Webb, acting on her own behalf and on behalf of [Front Street Projects]:

- (a) Referring to paragraph 4 of the Bhagwan Agreement, at a time when the Agreement had been tendered for signature and Mhinder Mayer had not yet agreed to sign it, Richard Mayer advised Mhinder Mayer in a telephone conversation that if he signed the Agreement, ‘you are not excluded from anything’, which was a reference to the businesses and properties referenced in paragraph 4;
- (b) Referring to paragraph 4, at a time when the Agreement had been tendered for signature and Mhinder Mayer had not yet agreed to sign it, Rita Webb advised Mhinder Mayer in a telephone conversation that if he signed the Agreement, ‘you are not out’, which was a reference to the businesses and properties referenced in paragraph 4, adding ‘you did it all’.

[134] As a result of those alleged representations, Mhinder Mayer asserts that Richard Mayer and Rita Webb as well as the companies represented by them, are estopped from relying on clause 4 of the Bhagwan Mayer Settlement Agreement to deny his beneficial interest in those companies. In doing so, he says that he relies on the equitable doctrine of promissory estoppel.

(f) *Mhinder Mayer’s Amended Statement of Claim*

[135] An amended statement of claim was filed on behalf of Mhinder Mayer on May 12, 2010, pursuant to an order that I made at the outset of the hearing on May 5, 2010. Those amendments concerned the alleged trust obligations of Richard Mayer and Rita Webb.

[136] In advancing his claim concerning the alleged trust obligations of the applicants, Mhinder Mayer’s amended statement of claim incorporates by reference a document entitled “Amended Particulars of Mhinder Mayer’s Trust Claims delivered under separate cover” (i.e., the document dated May 10, 2010). Further,

and by what is stated to be an alternative pleading, Mhinder Mayer's express trust claim is said to include four, not two beneficiaries.

[137] The claim against Richard Mayer is described in this way in the amended statement of claim:

82. In the circumstances set out above and the further circumstances described in the Amended Particulars of Mhinder Mayer's Trust Claims delivered under separate cover, at all material times Ricky Mayer held and holds Ricky Mayer's Companies in trust for Bhora Mayer and Mhinder Mayer or, in the alternative, for Bhora Mayer, Mhinder Mayer, Ricky Mayer and Rita Webb. Over time, Ricky Mayer has removed money and assets from those companies in breach of trust. Ricky Mayer is liable to account to Bhora Mayer, Mhinder Mayer and Rita Webb as the case may be for some or all of the money and assets he has received from those companies.

[underlining in original]

[138] The amended pleading concerning Rita Webb is to the same effect.

[139] In para. 86, Mhinder Mayer refers to particulars of the trust claims without setting them out. Instead, his pleading states:

Further particulars of the facts upon which he relies to assert his trust claims are provided "separately in the Amended Particulars of Mhinder Mayer's Trust Claims" (which is the document dated May 10, 2010).

### *The Acknowledgments*

[140] The Acknowledgments signed by Richard Mayer and Rita Webb are in evidence. They are dated December 24, 2001. They refer to assets which are described to be held in trust for two people: Bhora and Mhinder Mayer. The Acknowledgment signed by Gina Mayer was ripped up by Mhinder Mayer shortly after it was signed; it is not in evidence.

[141] Mhinder Mayer and the applicants do not agree about the reason the Acknowledgments were drafted and signed.

[142] Mhinder Mayer asserts the Acknowledgments were drafted to evidence a new family trust created amongst himself, Bhora Mayer, and the members of Bhora's family after Bhagwan Mayer left the Brothers' Trust in 1991. Although

Mhinder Mayer relies on the Acknowledgments as evidence of a new family trust to prove his express trust claims against Richard Mayer and Rita Webb, he does not rely on the validity of the content of the documents themselves insofar as the identity of the beneficiaries of that trust is concerned.

[143] The applicants depose that those documents were drawn and signed at Mhinder Mayer's request. They point to several reasons being given to them to sign, and say that none of them had anything to do with evidencing a trust arrangement or agreement. I have not, in determining the application, weighed the evidence of the parties regarding the purpose(s) of the Acknowledgments. I have, instead, considered only Mhinder Mayer's evidence, his pleadings, and his conduct.

[144] The Acknowledgment signed by Richard Mayer reads:

**ACKNOLWEDGMENT [sic] OF TRUST AGREEMENT BETWEEN  
RICHARD RAVINDER MAYER AND BHORA SINGH MAYER AND  
MHINDER SINGH MAYER**

I, Richard R. Mayer, of 2504-154 Promenade Drive, Nanaimo, BC, hereby confirm that I hold the common shares of Island Aggregates Ltd., Mack Sales & Service of Nanaimo Ltd., and Bastion Project Management Ltd. in trust for my father Bhora Singh Mayer and my uncle Mhinder Singh Mayer.

I also confirm that, even though I am registered as owner of the numerous real estate properties, I am also holding these properties (with the exception of my principal residence) in trust for my father Bhora Singh Mayer and my uncle Mhinder Singh Mayer.

The document is signed by Richard, Bhora, and Mhinder Mayer. Each of their signatures are shown to have been witnessed.

[145] The Acknowledgment signed by Rita Webb (and Bhora and Mhinder Mayer) is identical to the one signed by Richard Mayer, except that it refers to Custom Pumping Ltd., Ladysmith Holdings Ltd., Mayne Island Concrete Ltd., and 4512188 B.C. Ltd. It shows Ms. Webb (Mayer at that time) residing at 2504 -154 Promenade Drive, Nanaimo.

[146] The Acknowledgments signed by Richard Mayer and Rita Webb were not produced in the Bhagwan Mayer Action, nor was any disclosure made regarding them or Gina Mayer's Acknowledgment.

[147] The word "Acknowledgement" was misspelled in the documents: "Acknolwedgment". During submissions, emphasis was placed on that mistake by at least one of the applicants as evidence of hurried drafting showing lack of intent to create legal relations. I am not able to make that determination on this summary trial application.

*Mhinder Mayer's Affidavit Evidence Filed by the Commencement of the Applicants' Rule 18A Application*

(a) *The Express Trust*

[148] Mhinder Mayer relies, to a large degree, on the Acknowledgments to prove his express trust claim. On their face, the Acknowledgments purport to confirm those portions of Mhinder Mayer's original statement of claim and original particulars stating that the applicants' assets are held in trust for two beneficiaries (not four): himself and his brother, Bhora. In his second affidavit, sworn April 19, 2010, Mhinder Mayer deposes that the Acknowledgements are in error on their face since they refer to only two, and not four beneficiaries.

[149] According to Mhinder Mayer, a new family trust was created after Bhagwan Mayer left the Brothers' Trust in 1991. In paragraph 10 of his second affidavit, Mhinder Mayer describes his understanding of the trust arrangement:

After Bhagwan left the trust in 1991, the Identified Trust Companies and the Disputed Trust Companies transferred millions of dollars worth of value to Richard Mayer and Rita Webb and their companies. Throughout this period, my understanding was that Richard Mayer and Rita Webb held their interests in the Other Family Companies and their properties (except their personal residence in trust) for themselves, Bhora Mayer, and me. This is what I described in this affidavit as the Family Trust Arrangement.

[150] In paras. 11,15,16, and 18 of his second affidavit, Mhinder Mayer describes the circumstances leading up to the signing of the Acknowledgments:

11 For some years leading to 2001, I said to Mr. Furnemont and Bhora Mayer that the Family Trust Arrangement with Richard Mayer and Rita Webb should be documented. I did not press the matter. I do not recall mentioning my desire to document the Family Trust Arrangement during the last six months of 2001. If I mentioned documenting the Family Trust Arrangement at all during that time, i was certainly not pressing the issue any more that I had previously.

15 On the afternoon of December 24, 2001, without any discussion in advance, Mr. Furnemont came to me at Mack Trucks and presented me with Acknowledgments of Trust of Gina Mayer, Richard Mayer and Rita Webb already signed by everyone except me. At that time, he told me that he was going to prepare a similar acknowledgment of trust declaring that he held Malo Enterprises in trust for Bhora Mayer and me.

16 When Mr. Furnemont showed me the Acknowledgment of Trust I told him they did not reflect the true nature of the family Trust because they only referred to Bhora Mayer and me as beneficiaries of the trust. Mr. Furnemont said something like “this is a start” and “we can fix this up later”. I signed the documents and Mr. Furnemont witnessed my signature.

18 Apart from the general discussions I outlined above, I had no discussions with Bhora Mayer about the Acknowledgements of Trust before they were signed.

[151] In spite of the error in the Acknowledgments concerning the number of beneficiaries of the trust, he signed them on December 24, 2001.

[152] Mhinder Mayer readily agreed in early 2002 to exclude Gina Mayer from that new trust. His rationale is set out in para. 21 of his second affidavit:

Early in the New Year 2002, Gina Mayer asked me to return her Acknowledgment of Trust. At that time, I spoke with Bhora Mayer who said that all of Gina Mayer’s assets would come to Richard Mayer and Rita Webb anyway and that to keep family peace, I should humour Gina Mayer. Accordingly, I returned to Gina Mayer her signed Acknowledgment.

[153] Kelly Mayer, Mhinder Mayer’s wife, owns the shares of D & A Crushing Ltd. (“D & A Crushing”). She was asked to sign an Acknowledgement confirming that she held the shares of that company, as well as certain unidentified properties (with the exception of her personal residence) in trust for Mhinder and Bhora Mayer (“Kelly Mayer’s Acknowledgment”). She crossed out the section of the document referring to the properties, so that her acknowledgment was confined to D & A Crushing. Mhinder Mayer signed the document (as did Bhora Mayer). The document is dated January 24, 2001.

[154] Unlike his evidence concerning the Acknowledgments signed by the applicants, Mhinder Mayer does not depose that Kelly Mayer holds the shares of D & A Crushing in trust for the new family trust. Nor does he depose that Kelly Mayer's Acknowledgment is incorrect on its face in the sense that it refers to only two beneficiaries (himself and Bhora Mayer), as opposed to four. At paras. 19 and 20 of his second affidavit, he deposes:

19 At our meeting on Christmas Eve, Mr. Furnemont gave me a copy of a form of Acknowledgment of Trust by Kelly over the shares of D & A Crushing, and all of her properties, except her family residence. At that time, that Acknowledgment was already signed by Bhora Mayer, and his signature was witnessed by Mr. Furnemont. I gave the document to Kelly after Christmas and asked her to sign it. After considering it for some days, Kelly signed that Acknowledgment, crossing out the term concerning her properties. ...

20 When I presented the acknowledgment to Kelly for her signature, I did not tell her that others had signed similar acknowledgments. They had nothing to do with my request to Kelly that she acknowledge that her shares in D & A were held in trust for Bhora and me.

[155] To allow his wife to keep her interest in D & A Crushing, Mhinder Mayer said in his third affidavit, sworn April 24, 2010, that he "would gladly waive [his] beneficial interest in these shares".

[156] Bhora Mayer's position is that the shares held by Kelly Mayer in D & A Crushing do not belong to the Brothers' Trust.

[157] Mhinder Mayer's evidence that Kelly Mayer holds the shares in D & A Crushing in trust for himself and Bhora is inconsistent with an admission contained in his statement of defence filed in response to a claim brought by R & G Equipment against him and D & A Crushing, for payment for the unauthorized use of the former's equipment. In para. 3 of that statement of defence, Mhinder Mayer admitted that the shares are owned by Kelly Mayer in her own right:

Mhinder Mayer also admits the shares in D & A Crushing Ltd. are owned by Kelly Mayer. However, Kelly Mayer owns D & A Crushing Ltd. in her own right, and is the ultimate decision maker with respect to all aspects of its business.



[158] The same admission is made on behalf of D & A Crushing in its own statement of defence filed in R & G Equipment's action.

(b) *Resulting and Constructive Trust Claims*

[159] Mhinder Mayer does not distinguish between transactions for which he claims a resulting trust from those he claims a constructive trust remedy. His affidavit evidence describes transactions in a general way and with only some specific transactions. They include:

- (a) various services charged to the Identified and Disputed Trust Companies by Bastion;
- (b ) a \$300,000 loan from Osborne Contracting to Island Aggregates made on March 16, 2007;
- (b) "surreptitious" payments made at the direction of Bhora Mayer from assets of the Brothers' Trust to Mack Sales & Service;
- (c) payments made from assets of the Brothers' Trust to or for the benefit of Rita Webb for services and rent; and
- (d) payments made from assets of the Brothers' Trust to the applicants or for their benefit, for the sale of assets (including real property) at no or grossly inadequate consideration.

[160] In addition, Mhinder Mayer deposes that his own funds were paid to Richard Mayer and Rita Webb without his knowledge because of blank cheques he left in the care of Marc Furnemont. He deposes that \$247,000 was transferred to Rita Webb from his bank accounts between October 4, 1993 and September 11, 2003 and that \$129,000 was transferred to Richard Mayer between January 5, 1995 and April 26, 2000.

(c) *Non-disclosure of the Acknowledgments in the Bhagwan Mayer Action*

[161] Mhinder Mayer blames his failure to disclose the Acknowledgments in the Bhagwan Mayer Action on Bhora Mayer. In the course of providing evidence in his second affidavit concerning the “new family trust” he claims had been created in 1991, after Bhagwan Mayer left the Brothers’ Trust, Mhinder Mayer deposed:

32 Bhora Mayer told me that after 1991 (when, according to our belief, Bhagwan had left the Trust) a “new trust” had been created. I understood him to be referring to the Family Trust I have described. Bhora Mayer specifically told me that we should not disclose documents relating to the new trust. I did not discuss this with our lawyers.

(d) *The Bhagwan Mayer Settlement Agreement*

[162] Mhinder Mayer states that he signed the Bhagwan Mayer Settlement Agreement, and various preceding iterations, without meeting with his lawyer.

[163] His evidence is that Rita Webb telephoned him to advise that the action had been settled and that a settlement agreement was being faxed to him.

[164] Mhinder Mayer does not recall the number of versions of the Bhagwan Mayer Settlement Agreement that he signed. In his second affidavit, he deposed: “it is apparent to me from documents that have been shown to me since my examination for discovery in this action that I signed two versions of the agreement”.

[165] Mhinder Mayer now says that he knew the contents of clauses 4 and 5 of the Bhagwan Mayer Settlement Agreement (and the recitals to the same effect in the draft agreements) concerning the assets of the secondary defendants were false when he signed the document.

[166] Mhinder Mayer says that he signed the various drafts and final version of the Bhagwan Mayer Settlement Agreement based upon assurances given to him by Richard Mayer and Rita Webb:

39 My recollection is that Rita Webb called me to advise that the Bhagwan litigation had settled and to tell me that there was a settlement agreement being faxed to me. I looked at it and spoke with her again. The agreement contained two paragraphs that correspond to paragraphs 4 and 5 of the final signed agreement and I told her that I did not want to sign because paragraph 4 (or its equivalent) was not right. She told me that these

paragraphs came from the lawyers who said they had to put them in. I said that I did not want to sign.

40 Then I got a telephone call from my nephew, Ricky Mayer, who apparently had spoken with Rita and wanted me to sign the agreement. At first I said that I would not sign. We discussed the same paragraphs I had discussed with Rita. At some point in this or a later conversation that day, he said, ‘you are not excluded from anything’, which was a reference to the businesses and properties referenced in paragraph 4.

41 I received a further telephone call from Rita in which we discussed again these same paragraphs. She said that if I signed the Agreement, ‘you are not out’, which was a reference to the businesses and properties referenced in paragraph 4, adding “you did it all”.

*Cross Examination of Mhinder Mayer on this Application*

[167] During the hearing, oral submissions were made on behalf of Mhinder Mayer to explain his intention when giving evidence at examination for discovery in the Bhagwan Mayer Action, in the absence of any evidence in the record.

[168] Mhinder Mayer then sought to file a further affidavit to explain his discovery evidence in the Bhagwan Mayer Action. Even though this new (and fourth) affidavit dealt with other matters, such as the reason he did not disclose documents relating to the “new family trust” he says is evidenced by the Acknowledgements, I granted leave to Mr. Mayer to file that affidavit, sworn May 7, 2010, in the interests of justice, and over the objection of the applicants. As a condition of permitting the affidavit to be filed after the applicants had put in their case, and with the concurrence of Mhinder Mayer, I ordered cross examination of Mr. Mayer on his affidavit. The scope of cross examination was confined to the contents of Mhinder Mayer’s four affidavits.

[169] The evidence provided by Mhinder Mayer concerning his discovery evidence in the Bhagwan Mayer Action is set out in only one paragraph in his fourth affidavit:

6. Concerning my examination for discovery on August 23, 2005, I accept that I was asked all these questions and gave all these answers. I no longer recall my thinking that day, but I believe I gave the answers I did concerning the ownership of various companies thinking that the owner of any company meant the person who owned the shares.

[Emphasis added]

[170] The questions put to Mhinder Mayer during cross examination and re-examination took approximately three days. I had an opportunity to closely observe Mr. Mayer during that time. In terms of the trust claims Mhinder Mayer advances against the applicants, I found him to have been neither a credible nor reliable witness in most respects. The evidence Mhinder Mayer gave to explain his discovery evidence in the Bhagwan Mayer Action, the circumstances in which he signed the Bhagwan Mayer Settlement Agreement, his inconsistent pleadings, and his trust claims, was not credible. In many instances, Mhinder Mayer was an evasive witness; in others, I found that he answered questions that he thought were the most convenient for his case at the particular moment, regardless of his previous testimony or conduct. In the paragraphs that follow, I provide some illustrations in several different categories.

(a) *Express Trust Claim and the Acknowledgments*

[171] Mhinder Mayer distinguished the new family trust from the Brothers' Trust: its purpose, he said, was not to participate in the Brothers' Trust. Later, he qualified his evidence, stating that the new family trust was to be separate from the Brothers' Trust "more or less".

[172] Mhinder Mayer disagreed with any suggestion that his statement of defence filed in the Bhagwan Mayer Action as well as pleadings filed on his behalf in some of the related litigation are inconsistent with his claims that Richard Mayer and Rita Webb hold assets in trust for him.

[173] Mhinder Mayer was asked when the new family trust was formed.

[174] At one point when giving his evidence on discovery in the Bhagwan Mayer Action, he said the new family trust was created in the "1990s". During his examination for discovery in the Bhora Mayer Action, however, Mhinder Mayer said it was formed in 2000:

383 Q When was the new family trust formed?

A In around 2000. In around that area.

384 Q Who were the beneficiaries of the new family trust?

A It was supposed to be Bhora, myself, Ricky, Rita and Gina.

[175] On the first day of his cross examination in this application, Mhinder Mayer said that the new family trust “might” have been formed between 1992 and 1993, “a year or so after” Bhagwan Mayer left the Brothers’ Trust. Upon further questioning, Mhinder Mayer became more certain that it was created between 1992 and 1993.

[176] On the second day of his cross examination, and in light of his evidence given the day before, Mhinder Mayer was asked to clarify the date the new family trust was created. His answer lacks clarity:

Q So in the discovery we have 2000; then before, with Mr. Orris, you said it was 1992 or 1993. There’s a big spread; don’t you agree?

A In that time frame, I don’t know what I was thinking there at that point, but anyhow.

[177] He subsequently attempted to attribute his reference to the year 2000 as being connected to the date of the Acknowledgments. That answer was not credible since those documents were created a year later (December 24, 2001).

[178] The following exchange demonstrates the unreliability of Mhinder Mayer’s evidence in determining when the alleged new family trust was created:

A Well, I don’t know why I said 2000 there, and I don’t know what I was thinking, but the family trust started in 1990 -- well, after Bhagwan left, which is '91.

Q All right. So you tell me now this answer you gave under oath, “When was the new family trust formed,” “In or around 2000,” that was a false answer?

A I don’t think it’s completely false, not at all.

Q Well, it’s certainly not accurate, is it?

A It’s not --

Q From what you told me now?

A It’s not an exact date, no.

Q Well, in fact, it might be out by ten years?

A I don’t know if you want to say “ten years”; I don’t think so.

Q Well, if you’re saying it could be any time in the 1990s, then that answer you gave could be out by ten years?

- A Well, I think I've stated here it was after Bhagwan left in '91, and it was actually around '92, '93, and that's when the assets started flowing into the other companies.
- Q Sir, your answer here is "in around 2000". Now you're telling me it's sometime in the 1990s. So you're telling me, sir, that your answer there was out by as much as ten years?
- A No, because I don't think '93 is -- and in around 2000 is out by ten years.
- Q All right.
- A Unless I did something wrong in my math.
- Q Let's get the arithmetic straight. It's out by as much as seven years?
- A The way it looks like here, you could say that, yes.
- Q Well, not just I could say it. It is out by, what you now say, by at least seven years; is that right?
- A The way it's written down here, you could say that, yes.
- Q Well, that's the answer you gave, isn't it?
- A Don't know what I was thinking when I said that particular date at that point.

[179] Regardless of which version he has advanced, Mhinder Mayer was clear in his evidence in cross examination in this action that the new family trust was not created when the Acknowledgments were signed on December 24, 2001.

[180] Mhinder Mayer agreed that there were no notes, letters, or other forms of written communication regarding the creation of the new family trust. When pressed as to the circumstances leading to its creation, he said, "[t]here probably was a meeting" between family members, although he could not recall a location or time, let alone who was present (although later in his cross examination, he said that Richard Mayer and Rita Webb were "definitely" in attendance).

[181] During the course of his cross examination, Mhinder Mayer provided different accounts of the number of beneficiaries of the new family trust. At one point he said that Richard Mayer and Rita Webb held their assets in trust for two beneficiaries: Bhora Mayer and himself. Shortly thereafter, he gave different evidence, claiming that his nephew and niece held those assets for "our family trust", which he said included his niece and nephew as beneficiaries. When asked for the amount of his

interest in the new family trust, e.g., 25% or 50%, he responded that he had a share in the assets to the percentage of the people who were in that trust.

[182] Mhinder Mayer was unclear about the property to be included in the new family trust. At first he said it was to include “all companies” that Rita Webb and Bhora, Gina, and Richard Mayer “were part of”. He then clarified, explaining that the new family trust did not include companies owned by the Brothers’ Trust since the former comprised only new businesses on a “going forward” basis. Mhinder Mayer also said that Gina Mayer’s assets were not part of the new family trust because she said she did not wish to belong to it.

[183] Mhinder Mayer relied on the Acknowledgements as proof of the existence of the new family trust even though they refer only to Bhora and Mhinder Mayer as beneficiaries. He said that the documents are not accurate and should have included Richard Mayer, Rita Webb, and Gina Mayer as beneficiaries at the time they were drafted.

[184] Mhinder Mayer also said that the Acknowledgments are deficient in terms of the assets they list. For example, Richard Mayer’s Acknowledgment does not list New Concrete Concepts, and Rita Webb’s document fails to include Front Street Projects. Yet, Mhinder Mayer claims that both companies are part of the new family trust and that their shares are held in trust for him.

[185] Mhinder Mayer was asked about Kelly Mayer’s Acknowledgment concerning D & A Crushing. That company ran a crushing operation at a gravel pit owned by Osborne Contracting. By 2001, D & A Crushing owned a considerable amount of valuable equipment. It stopped operations in 2007, when the dispute between Mhinder and Bhora Mayer arose.

[186] Initially, Mhinder Mayer said that the shares in D & A Crushing were held in trust by Kelly for the new family trust. That evidence is inconsistent with the evidence he gave on his examination for discovery in this action on March 26, 2010. It is also inconsistent with the evidence he gave on May 22, 2008, when he was cross examined on his affidavit sworn in support of his first petition proceeding (seeking

leave to commence an action in the name of Osborne Contracting Ltd. against Island Aggregates, over a \$300,000 loan).

[187] At his examination for discovery in this action, held on March 26, 2010, Mhinder Mayer said that D & A Crushing was not part of the new family trust, and that its shares were being held in trust for himself and Bhora.

[188] During his cross examination on affidavit in the first petition proceeding, held on May 22, 2008, Mhinder Mayer said that Kelly Mayer owned the shares of D & A Crushing outright and denied having any trust agreement with his wife.

[189] On the last day of his cross examination on this application, Mhinder Mayer said that the shares in D & A Crushing were held in trust for himself and Bhora.

[190] He was questioned about his inconsistent accounts. His answer was most unsatisfactory:

A The examination for discovery is correct. I don't know what I -- this morning, something tweaked wrong on that and I wasn't thinking, because it's, you said that the shares of Rita were pulled out or something. I was thinking of something else, I don't know; I didn't hear the question correctly.

[191] In addition, and while being cross examined on this application, Mhinder Mayer agreed that the evidence he gave during cross examination on affidavit in the first petition proceeding, was false. This is what he said under oath on this application to explain away his prior evidence:

Q Will you turn to page 33 of the transcript, please. And if you look at the top of the page, you were asked these questions:

Q Thank you. D & A Crushing is a company that is, on the face of it, owned by your wife, Kelly, correct? She's the sole registered shareholder of D & A Crushing; is that correct?

A Yes.

Q Do you have a trust agreement with your wife whereby she holds her shares in trust for you?

A No.

You were asked those questions and you gave those answers?

A Yes, I did. But that is incorrect, and I don't know why I said no.



- Q I see. So that answer was false. You gave that answer under oath?
- A Yes, and I don't know why --
- Q It was false?
- A I don't know what the circumstances was there, why I gave that answer, but that is correct.

(b) *Mhinder Mayer's Discovery Evidence in the Bhagwan Mayer Action and Non-disclosure of the Acknowledgments*

[192] Even though Mhinder Mayer sought to blame his failure to disclose the existence of the new family trust and the Acknowledgments on advice he says he received from his brother, Bhora, Mhinder Mayer ultimately admitted that he knew if he had disclosed the existence of a new family trust or the Acknowledgments, Bhagwan Mayer would have sought to expand the scope of his claim against him, which would have increased the size of the claim and prolonged the case. He also knew that Bhagwan Mayer's lawyer would have asked him many more questions at discovery.

[193] I find that Mhinder Mayer knew that Bhagwan Mayer would have been very interested to know of his present trust claims against Richard Mayer, Rita Webb, and Gina Mayer. I am able to conclude from the evidence I have heard, that Mhinder Mayer knew the terms of the Brothers' Trust meant that any businesses or properties held in trust for him were also assets of the Brothers' Trust. I find that Mhinder Mayer also knew that Bhagwan Mayer's case against him and the secondary defendants was based on the terms of the Brothers' Trust.

[194] In cross examination on this application, Mhinder Mayer admitted that he knew Bhagwan Mayer would amend his claim if Mhinder Mayer disclosed that the secondary defendants were holding assets in trust for him:

- Q So are you denying that Bhagwan, you thought that Bhagwan would be interested to know about the acknowledgment of trust?
- A Oh, I'm sure he would be interested to know about it. But that would just make him amend his claim, and this thing would have gone on more and more and more, it would have clouded the issue more.

...

- Q You knew every well that if Bhagwan learned of the acknowledgment of trust, he would claim that you were holding your interest on trust for him, correct?
- A That could be correct if he had won the point that he had not left the trust, yes.
- Q Right. And his position was that he had not left the trust, correct?
- A That's what he was saying, but not what we were saying.
- ...
- Q But Bhagwan's claim was that he still was a beneficiary, right?
- A That is correct.
- Q And on Bhagwan's theory, had you had an interest in Bastion or any of the other companies, if he were correct on his theory, then he would have a share of your interest, correct?
- A He may have.
- Q And that's why you didn't want him to know about the acknowledgments of trust, correct?
- A I was told we did not have to show them, and we didn't.
- Q That's why you didn't show him or tell him about them, because you didn't want him to make a claim based on the acknowledgments, correct?
- A That is right. That is why everybody did not show Bhagwan them. Everybody had that document.
- ...
- Q You didn't tell your lawyer about it, did you?
- A I was told by Bhora not to.
- Q The question is, you didn't tell your lawyer, did you?
- A I did not.
- Q You knew that the lawyer was a professional in charge with following the court rules, correct?
- A Yes.
- Q He was the best person to determine whether something was relevant or not, wasn't he?
- A That is correct.
- Q You had a lawyer, you knew his phone number, correct?
- A We had -- we definitely had a lawyer, yes.
- Q You knew how to contact him?
- A I could have, yes.
- Q You chose not to?

A That is true.

[195] Mhinder Mayer also knew that Bhagwan Mayer would have been interested to know about his relationship with the secondary defendants, including Richard Mayer and Rita Webb. In an effort to explain why he volunteered evidence at his discovery in the Bhagwan Mayer Action concerning the ownership of the corporate secondary defendants, Mhinder Mayer said that his intention was to avoid divulging information to Bhagwan Mayer about the new family trust and the Acknowledgments. His intention was to either confine his answer to the specific question, or to volunteer information in the hope that the questioner would not ask crucial questions concerning his relationship with the secondary defendants, including the new family trust and the Acknowledgments.

[196] The following exchange, which took place during his cross examination during this application, concerned Richard Mayer's shares in Nanaimo Concrete. Mhinder Mayer's evidence not only shows his intention to withhold information during his examination for discovery in the Bhagwan Mayer Action, it provides an illustration of the nature of his prevarication when giving his evidence on this application:

Q And you knew that Mr. Grant was interested, as counsel for Bhagwan, in knowing your relationship to Nanaimo Concrete, correct?

A Yes.

Q And so when you say in your sworn evidence on that examination that Richard's always owned Nanaimo Concrete, you wanted to leave the impression with Bhagwan's lawyer that you had no involvement with Nanaimo Concrete, correct?

A No. I was just answering the question.

...

Q Why didn't you tell the lawyer that he held the shares in trust for you?

A He didn't ask me that question, and I was not going to divulge it.

...

Q I think the -- let me just start again. We were dealing with your evidence about Nanaimo Concrete on your examination for discovery, and is it not the case that you answered it in the way you did because you didn't want Bhagwan to know your relationship, or your true relationship with Nanaimo Concrete?

A No. I answered it, I answered the question that was asked.  
Q Is that so? Well, let's have a look at the question you were asked, sir...  
2411 Q Was he working at the Nanaimo Mayco-Mix plant at that time?

...

Okay. So the question you were asked was, was he working there, that is Richard, at the Nanaimo Mayco-Mix plant at that time; and what's your answer, sir?

A I said he owned the Nanaimo -- it was actually Nanaimo Concrete. He owned that company.

Q So you volunteered, "he owned it", right? You didn't answer the question?

A Well, good point, yeah.

Q And you used the word "owned", correct?

A Yes, because he owned it.

Q And then, question 2412, your answer is:

A He's always owned it, since the day it was incorporated, he's owned Nanaimo Concrete, yes.

So again, your words are "own" and "owned", correct?

A That is correct.

Q And you use that word to give the impression that you don't own that company, right?

A You could maybe say that, but all I was trying to say is that the company was in Ricky's name.

Q Well, you don't say that, do you?

A No, but that's what I -- I don't know what was going through my head at that day when I answered this question, but I presume that's what it was.

Q One thing we're sure of, sir, and you don't have to presume, is that you didn't want Bhagwan to know about the acknowledgments on that day, correct?

A I felt, as I was told, that he did not have to know about it; that is correct.

Q You didn't want him to know about it, correct?

A Again, I say I did not want to divulge that information; that is correct.

Q Because he would use it against you.

A I was told that I did not have to, because Bhagwan had left the trust.

Q You didn't want him to know about it because he would use it against you in his litigation, correct?

- A It may have prolonged the litigation; that is correct.
- ...
- Q Then there's another reference in this examination, sir, to Nanaimo Concrete...
- 2715 Q And Marc Furnemont was the accountant for Nanaimo Concrete; is that right?
- A I do not own Nanaimo Concrete. I can assume that he is, but that's all I can do.
- Q So again, sir, you're not answering the question there, are you? You're volunteering that you don't own Nanaimo Concrete; do you agree with that?
- A That is right. I don't own it, I do not own the shares in Nanaimo Concrete; that is true.
- Q But first of all, you're volunteering the answer that you don't "own Nanaimo Concrete", correct?
- A I guess so.
- Q And your intention by doing so is to distance yourself from Nanaimo Concrete, correct?
- A I don't know what my intention was that day, but that could well have been the intention that day, yes.

[Emphasis added]

[197] In another instance, when pressed about his discovery evidence concerning Custom Pumping, Mhinder Mayer said that he should not have said that the shares of that company "belonged" to Rita Webb. Despite his stated lack of recall about his intention when giving his discovery evidence, Mhinder Mayer's evidence was that he meant to say that the shares were owned by Rita Webb:

- Q ...So when you gave the answer to the question, "What do you know about that one," and you gave the answer, "It belongs to my niece, Rita Mayer," isn't it the case that you were trying to distance yourself from Concrete, Custom Concrete Pumping?
- A I answered it as it was, the company belongs to Rita. She owns the shares.
- ...
- Q And the word that you chose to use was "belongs", correct?
- A I may have missed the word, whatever, I meant to say, or I -- that the company is owned by Rita. I presume it's the same.

- Q You were meaning to leave the impression with Bhagwan and his lawyer that Rita and only Rita owned Custom Pumping or had any interest in it, right?
- A That Rita owned the shares of Custom Pumping; that is correct.
- Q You wanted to leave the impression that only Rita had any involvement in the ownership of Custom Pumping, correct?
- A Yes. She was the owner of Custom Concrete Pumping, correct.
- Q You knew that Bhagwan and his lawyer would take from your answer that you had no connection with Custom Pumping, right?
- A Well, I don't know what they would have taken. I just answered.

[198] During cross examination on this application, Mhinder Mayer sought to justify his discovery evidence in the Bhagwan Mayer Action on the basis that he was referring to legal ownership as opposed to beneficial ownership of shares. His evidence is belied by the discovery evidence he gave in relation to Wee Tree Lumber (Archer Holdings). Mr. Mayer was asked at discovery in the Bhagwan Mayer Action, "What do you know about a company called Wee Tree?" He responded, "It belonged to Rita Mayer".

[199] He was also asked if he had any knowledge of the circumstances in which Rita Webb became involved with Wee Tree. His discovery evidence in the Bhagwan Mayer Action makes plain his continued efforts to distance himself in that discovery from assets owned by the applicants, when asked a question that is not confined to ownership:

- Q Do you have any personal knowledge of how it is that Rita Mayer came to establish a company that ran a batch-plant company -- batch plant in Ladysmith?
- A I think Ricky asked her to do it?
- Q And you say that. Do you remember having conversations with Richard Mayer about that?
- A I can't say. It wasn't a company that I owned.

[200] Gina Mayer currently owns the shares of R & G Equipment, and did so when Mhinder Mayer was examined for discovery in the Bhagwan Mayer Action in August 2005. According to Mhinder Mayer, she ceased to be a member of the new family trust in 2002. His evidence at discovery was identical to his evidence

concerning companies belonging to Richard Mayer and Rita Webb: “It’s not a company that I own”. Even so, during cross examination on this application, Mhinder Mayer sought to explain that the shares of R & G Equipment are held in trust for him. The following exchange shows his tortured response:

- Q So in August of 2005, when you gave this answer, “That’s not a company that I own,” that in fact was the truth, right?
- A That is the truth. Yet, my understanding is that that company would come over to Ricky, and it would be in the trust.
- Q But Gina, in August of 2005, wasn’t holding any shares of R & G in trust for you or anybody else, as far as you knew, correct?
- A Gina wasn’t, no.
- Q And she held all the shares in R & G, as far as you knew?
- A Yeah, as far as I knew; but I didn’t know for sure. She may have transferred them.
- Q I know. Because it’s not a company that you owned, correct?
- A It’s not a company that I had the shares of, yes.
- Q Right. But you see, sir, if you compare the answer pertaining to R & G, “it’s because it’s not a company that I own”, you compare it to, at page 463, “I do not own Nanaimo Concrete”. You see, it’s sort of the same answer about Nanaimo Concrete; wouldn’t you agree with me?
- A If you want to say it that way, I guess.
- Q I guess.
- A I guess.

[201] That Mhinder Mayer acted in his own self interest is also demonstrated by his failure to disclose the Acknowledgement signed by his wife, Kelly, who was also a defendant in the Bhagwan Mayer Action. He knew that if he made disclosure of that document, Bhagwan Mayer might have tried to claim an interest in D & A Crushing.

[202] Mhinder Mayer sought to justify his failure to disclose the existence of the new family trust and the Acknowledgments on the basis that Bhagwan Mayer had left the Brothers’ Trust in 1991. Yet, Mhinder Mayer knew that Bhagwan Mayer’s position in that action was that, aside from personal residences, he had an interest in all of Mhinder and Bhora Mayer’s assets, as well as those owned by the applicants and Kelly Mayer, because they belonged to the Brothers’ Trust.

[203] Mhinder Mayer was asked at his discovery in the Bhagwan Mayer Action to locate and produce a trust agreement signed by the applicants, including drafts. The question, left outstanding following his discovery, was subsequently confirmed in written form by counsel for Bhagwan Mayer. It read:

Re paragraph 80 of the statement of claim, attempt to locate a trust agreement signed by Richard, Rita or Gina relating to their holding companies in trust for Bhagwan, Bhora and Mhinder; ask Don Orchard to see whether he can produce from his files any trust agreements, whether signed or in draft form, involving Richard, Rita or Gina holding assets in trust for Mhinder, Bhora and Bhagwan.

[204] Mhinder Mayer's response, provided in written form, stated:

Mr. Mayer has not been able to locate any such document and is not aware of any such document existing. Mr. Orchard advises he does not have any documents of this kind.

[205] Mhinder Mayer was asked to explain his failure to disclose the Acknowledgments or to reveal the alleged family trust generally. He gave numerous responses throughout his cross examination, including: "I was just following orders in what I disclosed" and "I did what I was told". On other occasions, when it was clear that he had run out of explanations to offer, Mhinder Mayer said: "I answered the question that was asked"; "I can't remember back what I was thinking in 2005"; "I no longer recall my thinking that day"; and "maybe I didn't listen completely to the question". Eventually, when asked if he was being deceitful in the Bhagwan Mayer Action, he replied: "I don't think so".

(c) *The Bhagwan Mayer Settlement Agreement and the Alleged Representations made by Richard Mayer and Rita Webb*

[206] The wording of clauses 4 and 5 of the Bhagwan Mayer Settlement Agreement appeared in several drafts of the document, albeit as recitals. The wording was moved to the body of that agreement when the final version was prepared. On this application, Mhinder Mayer claims that from the outset, he knew that the statements contained in both clauses were false. His evidence on this application is that he signed the document knowing its contents of those two clauses were false.



[207] Mhinder Mayer also knew when he signed the Bhagwan Mayer Settlement Agreement that clause 4 represented the position he took in the Bhagwan Mayer Action. He agreed in cross examination on this application that there was no doubt as to the meaning of clause 4: “I don’t have any interest in Richard Mayer’s, Rita Webb’s, or Gina Mayer’s companies”.

[208] He previously testified, on cross examination on affidavit on May 22, 2008:

Q And so in signing this agreement, you understood that you were representing to your brother, Bhagwan that you had no beneficial interest in any of those companies, correct?

MR. GREGORY: That’s not a representation.

MR. TURNER:

Q Sorry, you were agreeing that you had no beneficial interest in any of those companies, correct?

A That’s what took me four hours on the phone. -

Q Because you knew that was false?

A I knew it was false, yes.

Q And so you entered into this settlement agreement knowing that it was false?

A Yes.

[209] Mhinder Mayer also knows that clause 4 is inconsistent with the position he is currently advancing in his claim against Richard Mayer and Rita Webb. Yet, he relies on the Bhagwan Mayer Settlement Agreement in his counterclaim filed in the Bhora Mayer Action. In para. 5 of that document, he has pleaded that the terms of the Brothers’ Trust have been modified by that settlement agreement.

[210] Mhinder Mayer’s evidence is that he only signed the Bhagwan Mayer Settlement Agreement because he was assured by Richard Mayer and Rita Webb that in doing so, his position in the new family trust would not be affected.

[211] The reply filed on behalf of Mhinder Mayer in this action, raising the promissory estoppel defence, pleads specific words, framed in quotations, which he alleges were used by his nephew and niece, words he says he relied upon when signing the document. They are set out in para. 11 of the Reply, and reproduced in para. 133 of these reasons for judgment:

- (a) as against Richard Mayer - 'you are not excluded from anything';
- (b) as against Rita Webb - 'you are not out' and 'you did it all'.

[212] When pressed during cross examination on this application for specifics of his conversations with them, Mhinder Mayer admitted he could not recall the "exact words". Ultimately, he conceded he could only recall "the basic concept of the conversation", "the context of it", or "the gist of it".

### **Determination**

#### **Express Trust Claim - credibility and reliability of Mhinder Mayer's evidence**

[213] Various pleadings and particulars filed or served on behalf of Mhinder Mayer in this action advance inconsistent versions of the new family trust. Some of the pleadings and particulars in this action are wholly inconsistent with Mhinder Mayer's statement of defence filed and discovery evidence given in the Bhagwan Mayer Action, and with some of the pleadings filed on his behalf in the related actions.

[214] It is clear from his statement of defence and discovery evidence in the Bhagwan Mayer Action, that Mhinder Mayer took the position that no relationship existed between himself and the personal applicants. He confirmed that position when he signed the Bhagwan Mayer Settlement Agreement.

[215] Mhinder Mayer's pleadings have evolved in this action insofar as express trust claims are concerned. The first mention of an express trust was made in the original particulars; it was formally pleaded in the amended statement of claim filed on the first day of the hearing. Even then, the terms of the alleged new family trust, insofar as the beneficiaries are concerned, is pleaded and described in the amended particulars in an inconsistent manner. The number of beneficiaries of the alleged new family trust and their respective interests are fundamental to Mhinder Mayer's claim because they affect his purported right to a share in trust assets.

[216] During argument, Mhinder Mayer sought to excuse the apparent inconsistency in the pleading on the basis that it is expressed in the alternative. With respect, I cannot agree. Framing the number of beneficiaries in the alternative fails to satisfy one of the three certainties required to prove an express trust. In addition, I

do not agree with Mhinder Mayer's characterization of that inconsistency as an election between alternative remedies. In my opinion, the pleading expresses two inconsistent versions of the purported terms of the new family trust and his corresponding beneficial ownership. The pleading is not a statement of alternative remedies, but of rights: *Westerlee Development Ltd. v. Adanac Customs Brokers Ltd.*, (1995) 100 B.C.L.R. (2d) 280, 32 C.P.C. (3d) 353 (S.C.); and *Bratsch Inc. v. LeBrooy*, [1991] B.C.J. No. 3290, 3 C.P.C. (3d) 192.

[217] Mhinder Mayer signed the Bhagwan Mayer Settlement Agreement confirming there was no such trust relationship. The document is clear on its face. I find that: the meaning of clauses 4 and 5 were clear to Mhinder Mayer when he signed the document; they remain clear to him today; and Mhinder Mayer knew the document was intended to be relied upon by Bhagwan Mayer at the time he signed it.

[218] I find Mhinder Mayer's evidence concerning his trust claims, including the alleged new family trust, the Acknowledgements, the alleged representations made by Richard Mayer and Rita Webb (relied on in his evidence to invoke the doctrine of promissory estoppel), and his discovery evidence in the Bhagwan Mayer Action, lacking in credibility. In a number of instances (e.g., the promissory estoppel representations), I found his evidence so vague as to be unreliable. I observed numerous instances where Mhinder Mayer appeared to make up the answers as he went along, giving an answer that he thought would be expedient and helpful to his case at that particular moment, without regard for his previous testimony given moments, hours, or the day before, or without regard for his past conduct and the strength of relevant objective evidence. I find that Mhinder Mayer demonstrated a disregard for truth when giving his evidence in cross examination on this application.

[219] I also reject Mhinder Mayer's submission to explain away his discovery evidence given in the Bhagwan Mayer Action: that the difference between the oath taken at examination for discovery and the oath taken at trial permits a witness to give evidence he believes to be true at discovery in such a way as to misdirect the questioner in the hope of "dodging a bullet", and to avoid being asked a question the witness does not wish to be asked.

[220] The oath taken at trial calls for the witness to give the “whole truth” whereas the oath taken at examination for discovery calls for the witness to “tell the truth”. While witnesses are not expected to volunteer information at examination for discovery, they must not mislead the questioner or tell half-truths. At examination for discovery, a witness must provide truthful information that is responsive to the question. It is more than the literal words that are used; the meaning actually conveyed in the answer to the question must be truthful. When information is volunteered, it must be truthful as well: *Mooney v. Orr*, [1995] B.C.J. No. 1094, 55 A.C.W.S. (3d) 291; (S.C.); *R v. Farris* (1965), 50 D.L.R. (2d) 689, [1995] 3 C.C.C. 245 (Ont. C.A.); and *Ingham v. McKenzie*, 2009 WASC, 351.

[221] I reject as repugnant Mhinder Mayer’s submission that an evasive witness is commonplace at examination for discovery, so that expecting an honest witness at discovery sets the bar too high.

[222] Mhinder Mayer now says that when he signed that settlement agreement, he knew it was false. If Mhinder Mayer’s evidence that Richard Mayer and Rita Webb hold assets in trust for him pursuant to a new family trust is truthful, then there is no doubt in my mind that when Mhinder Mayer gave his discovery evidence in the Bhagwan Mayer Action:

- (a) he volunteered information, often unrelated to the questions at hand, in an effort to mislead the questioner into thinking that none of the secondary defendants held any property belonging to the Brothers’ Trust;
- (b) Mhinder Mayer intended to misdirect the questioner in the hope that he would not be asked crucial questions that he did not want to answer; and
- (c) he did not want Bhagwan Mayer’s lawyer asking him questions about the new family trust, his purported relationship with Richard Mayer and Rita Webb, and the Acknowledgements.

[223] Further, if Mhinder Mayer is telling the truth in this action about a new family trust and the signing of the Acknowledgments, then there is no question that he sought to mislead Bhagwan Mayer and the examiner at his discovery in that action by volunteering information unrelated to the question asked and in other instances by giving answers that he knew to be incorrect. He relied on a document which he knew to be a sham in order to effect a benefit for himself in the Bhagwan Mayer Action.

[224] If, however, Mhinder Mayer was truthful in the Bhagwan Mayer Action, then there is no merit to his express and resulting trust claims, and most of the constructive trust claims he has brought in this action. It also means that he has not been truthful in this action.

[225] In all, I found the evidence Mhinder Mayer gave on this application to be so lacking in credibility and reliability that he cannot overcome the clear meaning of the words contained in the Bhagwan Mayer Settlement Agreement.

[226] I am also of the view that Mhinder Mayer's claim for an express trust cannot be proven by the Acknowledgments. Those documents do not, on their face, establish the existence of the new family trust alleged by Mhinder Mayer.

[227] In his written submissions, Mhinder Mayer conceded that the new family trust was incapable of being enforced prior to the date on which the Acknowledgments were signed:

36. It is fair to observe that the New Family Trust was probably too uncertain to be recognized and enforced by a court of equity before the Acknowledgments were signed. That is neither here nor there given that the Acknowledgments were signed.

[228] Given the glaring inconsistencies in Mhinder Mayer's evidence, my findings concerning his credibility and the unreliability of his evidence, I am unable to accept his evidence concerning the effect to be given the Acknowledgments.

[229] Moreover, I do not need to resolve the purpose or circumstances in which the Acknowledgements were signed in order to determine whether an express trust was created. Even if it were the case that the Acknowledgments were created for an

inappropriate purpose so that it could be said the applicants lack clean hands, the applicants are not advancing a claim against Mhinder Mayer founded on those documents.

[230] I find that Mhinder Mayer has not proven his claim of express trust on a balance of probabilities. My determination is based upon my view of all of his evidence and my adverse assessment of his credibility and the unreliability of his evidence. He has failed to discharge his onus to prove an intention to create a trust, let alone the certainty of objects or subject matter.

[231] Where an intention to create an express trust may not be gleaned from documents, it may found from specific words and conduct or from surrounding circumstances: *Horizon FX Investments Incorporated (Re)*, 2010 BCSC 416. In this case, Mhinder Mayer has not discharged his onus to prove when the new family trust was created, what property was settled on that trust, and the identity of the trustees and beneficiaries.

[232] The case of *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [1997] B.C.J. No. 494, 69 A.C.W.S. (3d) 257 (S.C.), cited by Mhinder Mayer, does not assist him because it involved a Rule 19(24) application before particulars were delivered. My determination is made at summary trial.

[233] It was argued on behalf of Mhinder Mayer that his present action against the applicants should not be barred because he took an inconsistent position in his pleadings filed in the Bhagwan Mayer Action and other actions. It was argued that the "departure rule" only prohibits inconsistent pleadings in the same action that may not properly be framed in the alternative: *National Bank Finance Ltd. v. Potter*, 2005 NSCA 139; and *Gabbs v. Bouwhuis*, 2005 BCSC 1782.

[234] My decision on this application is not based on the mere existence of inconsistent pleadings in other actions. It is based upon my assessment of Mhinder Mayer's evidence given in this action, which includes his evidence concerning his prior pleadings.

[235] In my opinion, the Bhagwan Mayer Settlement Agreement should, on its face, operate to bar Mhinder Mayer's resulting trust claims against Richard Mayer and Rita Webb. It should also operate to bar his constructive trust claims for transactions he was aware of at the time Mhinder Mayer signed that settlement agreement.

[236] Further, Mhinder Mayer should also be barred from advancing constructive trust claims for transactions for which he could reasonably have been aware of by the time he signed the Bhagwan Mayer Settlement Agreement given the clear nature of his examination for discovery evidence, the clear meaning of clauses 4 and 5 of that settlement agreement, and his clear discovery obligations arising from the nature of the claims advanced against him in that litigation.

[237] I reject Mhinder Mayer's submission that clauses 4 and 5 are merely recitals, as opposed to statements of fact, which lack contractual effect. Clauses 4 and 5 represent the position he took in the Bhagwan Mayer Action as well as the examination for discovery evidence he gave in that case. Mhinder Mayer relied on the statements in those clauses to effect, and benefit from, the settlement of the Bhagwan Mayer Action. He intended it to have contractual effect and to benefit from it.

***Promissory Estoppel***

[238] To overcome what Mhinder Mayer has admitted is the plain meaning of the Bhagwan Mayer Settlement Agreement, he now seeks to rely on the doctrine of promissory estoppel. He claims that he entered into the Bhagwan Mayer Settlement Agreement, knowing it contained false statements, relying on representations he alleges were made by Richard Mayer and Rita Webb.

[239] Promissory estoppel has been well defined by the Supreme Court of Canada in *John Burrows Ltd. v. Subsurface Surveys Ltd.*, [1968] S.C.R. 607, p. 614-616:

In the case of *Combe v. Combe*, Lord Denning recognized the fact that some people had treated his decision in the *High Trees* case as having extended the principle stated by Lord Cairns and he was careful to restate the matter in the following terms:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

As Viscount Simonds said in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*:

...the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights...

[240] The doctrine of promissory estoppel may not be used as a sword, only a shield: *Combe v. Combe*, [1951] 2 K.B. 215. Here, Mhinder Mayer seeks to resile from a contract, to which he is a party, which he now says is a sham. He does not rely on the doctrine to shield him from a claim on that contract advanced by any of the parties to it. Instead, Mhinder Mayer seeks to use the doctrine as a sword to disavow that contract in support of his claim against the applicants. In my opinion, his reliance on promissory estoppel is inappropriate. His allegations are properly characterized as inducement by representation.

[241] I do not accept Mhinder Mayer's evidence concerning the representations allegedly made by his nephew and niece. His evidence is neither credible nor



sufficient to found an inducement claim. Mhinder Mayer has not proven representations were made. Even if he could, Mhinder Mayer is not, in my opinion, entitled to equitable relief in view of his lack of clean hands (which I discuss in the section that follows).

Clean Hands

[242] According to Ellis' *Fiduciary duties in Canada*, looseleaf (Toronto: Carswell, 2009) at 20-38, "He who seeks equity must come with clean hands". That proposition has been endorsed by the Supreme Court of Canada in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534, at para. 82, and applied in many cases including: *Maximum Ventures Inc. v. de Graaf*, 2008 BCSC 199; *Davie v. Whitley*, 2002 BCSC 364; and *Werner v. Werner*, [1987] B.C.J. No. 2546 (S.C.).

[243] The clean hands doctrine serves to deny equitable relief where the misdeeds or misconduct has "an immediate and necessary relation to the equity sued for": *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167; *DeJesus v. Shariff*, 2010 BCCA 121 at paras. 84 to 86; and John A. McGhee, ed., *Snell's Equity*, 30<sup>th</sup> ed. (London: Sweet & Maxwell, 2000) at 32. In *The Principles of Equitable Remedies*, 6<sup>th</sup> ed. (UK: Sweet & Maxwell, 2001) I.C.F. Spry wrote at pp. 169-170:

...it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief.

[244] Since enforcement of a resulting trust and the imposition of a constructive trust are equitable remedies, the person seeking the Court's assistance must come with clean hands: *Davie v. Whitley et. al.*, at para. 72; and *Werner v. Werner*, at p. 3.

[245] In *Werner*, the court said that in order to prove his trust claim, the plaintiff had to "testify as to the sham nature" of a settlement agreement made in a family dispute with his wife to which he would be bound otherwise. If that agreement was valid,

then his ex-wife was the owner of certain shares. Huddart J. (as she then was) rejected his claim on the basis of the plaintiff's dirty hands. She wrote, at p. 3:

At the very least William will have to rely on his having deprived Nancy of the right she had acquired by dint of her contributions during the 33 years of their common-law relationship to claim an interest in the Allied shares, an interest William acknowledges she had. His evidence itself establishes that she was not properly compensated for that interest.

This constitutes a disposition for an unlawful, immoral purpose, which had the effect of depriving Nancy of an interest in property. In leading this evidence, he would run afoul of the rule established by the Supreme Court of Canada in a series of cases beginning with *Scheuerman v. Scheuerman* (1915), 52 S.C.R. 635. In *Krys v. Krys*, [1929] S.C.R. 153, *Elford v. Elford*, [1923] 64 S.C.R. 125 and *Goodfriend v. Goodfriend*, [1972] S.C.R. 640, the Supreme Court refined the rule to make it clear that the Court will not accept evidence of an illegal purpose from a plaintiff who seeks to rebut the presumption of advancement. Nor will it accept such evidence from a plaintiff who seeks to set up his own fraud as a basis for granting the relief he seeks.

The hands appear still dirtier when one considers that the total effect of the arrangements the plaintiff alleges was to hinder creditors by delaying payment to them for at least 10 years and probably considerably more. The Court will not assist such a plaintiff.

[Emphasis added]

[246] The decision in *Werner* to refuse to find or enforce a trust in furtherance of an arrangement made for an illegal or immoral purpose is in keeping with decisions from other courts in this country : *Taylor v. Wallbridge*, 2 S.C.R. 616, at para. 20; *Sodhi v. Sodhi*, 53 B.C.L.R. (3d) 280; *Takhar v. Hair*, [1988] A.J. No. 1121 (Q.B.); *Richard W. Covlin Professional Corp. v. Kozak*, [1992] A.J. No. 14 (Q.B.); *Irving Industries Ltd. v. Sadim Oil & Gas Co. Ltd.*, [1972] A.J. No. 158 (Q.B.); and *BMF Trading v. Abraxis Holdings Ltd.*, 2002 BCSC 590 (re-trial ordered on other grounds, 2003 BCCA 559).

[247] The following remarks of Garson J. in *BMF*, at para. 110, are, in my view, also appropriate to the circumstances of this case:

More importantly, and regardless of alternative remedies, I do not think that good conscience requires that this court should intercede in these circumstances. First, the parties deliberately structured their affairs to insulate themselves from the burdens of ownership and they were cognizant of both the benefits and restrictions of such an arrangement. Now, the partners come to court alleging a relationship to Four Star which directly conflicts with both the position the partners had taken in an earlier trial. The modern doctrine of

constructive trust, which has been created to remedy an injustice to innocent or vulnerable parties, is not a device to be utilized by sophisticated business people caught in the web of their own intrigue. Constructive trusts are not to be used as a reward to parties who have gained advantages by denying legal ownership of an asset, only then to assert ownership when it suits them at a later date. This court must not facilitate such manipulation.

[248] As I have pointed out, if I had accepted Mhinder Mayer's evidence concerning the existence of a new family trust in this action, then it would mean he gave misleading and inaccurate discovery evidence in the Bhagwan Mayer Action in order to benefit himself. His misconduct in that case relates to the very same subject matter comprising his trust claims in this case. This case is not like the *DeJesus* case, where the claim for breach of fiduciary duty was unconnected to the plaintiff's forgery and falsehoods.

[249] If I had accepted Mhinder Mayer's evidence supporting his claim that Richard Mayer and Rita Webb hold assets for him pursuant to a new family trust, then I would be left with no choice but to find that he lacks clean hands for the following reasons:

- (a) Mhinder Mayer failed to disclose evidence in the Bhagwan Mayer Action in the hope that he would be able to settle that action on favourable terms;
- (b) Mhinder Mayer knew that his failure to disclose that evidence was wrong;
- (c) he knew that disclosure of that evidence would prolong and expand the scope of the Bhagwan Mayer Action;
- (d) Mhinder Mayer gave evidence at his examination for discovery in the Bhagwan Mayer Action in such a way as to mislead Bhagwan Mayer and the examiner;
- (e) Mhinder Mayer gave answers to some questions that he knew were not correct;

- (f) at the time he signed the Bhagwan Mayer Settlement Agreement, Mhinder Mayer was well aware of the effect of the statements made in clauses 4 and 5, and well aware that they concerned all of the assets of the personal applicants, not just those particularized in the settlement agreement;
- (g) when Mhinder Mayer signed the Bhagwan Mayer Settlement Agreement, he expected Bhagwan Mayer to rely upon the statements made in the document, including clauses 4 and 5;
- (h) Mhinder Mayer knew the Bhagwan Mayer Settlement Agreement was false when he signed it; and
- (i) he used the process of this Court to effect a (with prejudice) dismissal of all of the claims advanced by Bhagwan Mayer, including those that bear on the trust claims Mhinder Mayer advances in this action.

[250] In that circumstance, to allow Mhinder Mayer to pursue a constructive trust remedy in respect of transactions that occurred prior to the date of the Bhagwan Mayer Settlement Agreement, for which he had knowledge, or reasonably had the means of knowledge, would require the Court to overlook his lack of clean hands. Application of *Werner* and *BMF* would bar such a claim. In my opinion, it would be unjust to allow Mhinder Mayer to pursue constructive trust relief against the applicants in respect of those transactions. To do otherwise, and accept Mhinder Mayer's argument, would, as the court said, at para. 28, in *Irving Industries*:

... To accept the defence argument would be to condone chicanery if not actual fraud. This no Court will do. ...

[251] Of course, as I have stated, if Mhinder Mayer's position and evidence in the Bhagwan Mayer Action was correct – that he had no interest in the assets of the personal applicants and that transactions with the applicants were valid commercial transactions for value – then there is no merit in Mhinder Mayer's express and resulting trust claims in this action, and no merit to his claim for a constructive trust

remedy in respect of transactions for which he was aware or reasonably could have been aware of at the time he signed the Bhagwan Mayer Settlement Agreement.

[252] In submissions, argument was made on behalf of Mhinder Mayer that resulting and constructive trusts do not exist until they are determined by a court to apply. As a result, it was argued that any misconduct or lack of clean hands on Mhinder Mayer's part in relation to the Bhagwan Mayer Settlement Agreement or his discovery evidence should not bar his resulting and constructive trust claims against the applicants, since those claims precede the imposition of those trusts and are therefore unconnected. In my opinion, that submission misconstrues the clear holding in *Werner* and seeks to employ a legal artifice to excuse dirty hands clearly connected to the subject matter of this action.

[253] The clean hands doctrine does not prevent Mhinder Mayer from otherwise pursuing constructive trust claims for transactions that occurred after June 8, 2006 since they are not captured by nor connected with the Bhagwan Mayer Settlement Agreement or the issues advanced in that action. Although the applicants sought to have those claims dismissed on the basis that no evidence had been led by Mhinder Mayer to support his claim of no or inadequate value, in fairness to Mhinder Mayer, he was operating under a case management direction that allowed for expert reports to be delivered 90 days before trial (i.e., October 12, 2010). Accordingly, it would be inappropriate to dismiss any of those claims for lack of evidence at this time.

*What Remains of Mhinder Mayer's Constructive Trust Claims?*

[254] Mhinder Mayer's constructive trust claims are premised on his allegations that substantial assets were transferred to the personal applicants and their companies from the Brothers' Trust after Bhagwan Mayer left that trust by or at the direction of Bhora Mayer.

[255] In submissions, Mhinder Mayer's overarching position was that Bhora Mayer and Marc Furnemont diverted assets of the Brothers' Trust, as opposed to assets of companies' owned by the Brothers' Trust, to the applicants after Bhagwan Mayer left that trust. Yet, Mhinder Mayer's amended statement of claim suggests that most of

the transactions complained of were those involving the Osborne Group of Companies and the Disputed Trust Companies.

[256] Paragraph 58 of Mhinder Mayer's amended statement of claim pleads:

58 At the direction of Mr. Furnemont and Bhora Mayer, since Bhagwan Mayer left the Brothers' Trust, large amounts of money and assets have been transferred to Ricky Mayer, Gina Mayer, and Rita Webb, and the Other Family Companies, for no consideration or at gross undervalues, some particulars of which are set out in this Statement of Claim. This was done without Mhinder Mayer's knowledge, or in the alternative, without his informed consent. Further particulars are peculiarly within the knowledge of those parties and will be given in accordance with Rule 19(11.1) of the Rules of Court. In the circumstances, Ricky Mayer, Gina Mayer, Rita Webb, and the Other Family Companies hold that money and those assets in trust for Bhora Mayer and Mhinder Mayer. Mhinder Mayer pleads the doctrine of resulting and constructive trust.

[257] Paragraph 60 provides particulars of the transactions. Some of the particulars are expressed in a general way, e.g., Bhora Mayer exercising his power as a director or trustee of the Brothers' Trust in an arbitrary manner, inconsistent with the interests of that trust, and, appropriating, diverting, or encumbering assets of the Identified and Disputed Trust Companies and of the Brothers' Trust for himself or for members of his family.

[258] Specific transactions are also particularized. Almost all of them concern improvident contracts, loans, or transactions involving the Osborne Group of Companies, which are owned by the Brothers' Trust, and the Disputed Trust Companies. The only particulars specific to the Brothers' Trust state:

- 60 c) Appropriating, diverting, giving and/or encumbering assets of the ... Brothers' Trust and/or causing ... the Brothers' Trust ... to appropriate, divert and/or encumber assets to the purposes of Bhora Mayer and/or his family members without the consent or without the properly informed consent of Mhinder Mayer;
- d) Causing and permitting Ricky Mayer, Gina Mayer, or Rita Webb to use assets of ... the Brothers' Trust to purchase properties in his, her or their own names, which includes:
- PID: 018-261-272 [remainder omitted];
- e) Unnecessarily maintaining two corporate offices, both of which are rented from companies controlled by Ricky Mayer or Rita Webb;

- i) Causing Holman Transport to buy a used Ford F-250, which it did not need, from R & G Equipment, Gina Mayer's company, at an inflated price.
- j) Clandestinely conducting other business activities that should have been part of the Brothers' Trust through some of all of the Other Family Companies, and the only particular of this of which Mhinder Mayer is currently aware is entering a business, perhaps through R & G Enterprises, to produce light weight volcanic aggregate.

The PID number refers to the property located at 309-150 Promenade Drive, Nanaimo, owned by Richard Mayer, Rita Webb, and Gina Mayer.

[259] I was also told during submissions that substantial assets and cash were diverted from the Brothers' Trust, with Mhinder Mayer's knowledge after 1991, and prior to the Bhagwan Settlement Agreement.

[260] During the course of submissions, the constructive trust claims were particularized to include:

- (a) \$300,000 loan made by one of the companies in the Osborne Group of Companies for equipment;
- (b) overcharging by Mack Sales for repairs of equipment owned by Holman Equipment;
- (c) overcharging by Bastion for accounting services to Osborne Contracting;
- (d) purchase of a pump truck from Custom Pumping (Rita Webb's company) by Gulf Coast for overvalue;
- (e) purchase of a pick-up truck by Holman Transport from R & G Equipment (Rita Webb's company) for \$6500, which is alleged to be over-value;
- (f) inappropriate rent charged by R & G Equipment to Holman Transport, at \$700 month for 13 months, alleged to be over-value; and

- (g) rent paid by one of the companies in the Osborne Group of Companies to Archer Holdings (Rita Webb's company), for property at 265 Fry Street.

[261] As I have said in the previous section of these reasons, Mhinder Mayer should not be allowed to advance resulting trust claims in respect of transactions that occurred prior to the execution of the Bhagwan Mayer Settlement Agreement.

[262] Regardless of whether the transactions described in paras. 255 and 260 pre- or post-date the Bhagwan Mayer Settlement Agreement, they are not, in my opinion, claims for which Mhinder Mayer has personal standing to advance. Those claims belong to an aggrieved corporation and not a shareholder. Characterizing them as claims for a constructive trust remedy does not alter the analysis since the pleading is that corporate funds have been diverted: *Randolph v. Graye*, [1995] O.J. No. 777, at para. 7.

[263] During the hearing, Mhinder Mayer argued that he has standing to bring the claims in his personal capacity. Subsequently, counsel provided further, written submissions on the point. In his further submissions, Mhinder Mayer narrowed his previous submission, advancing an argument that he has standing to bring constructive trust claims against Bhora Mayer as a *cestui que trust* of the Brothers' Trust:

6 The Plaintiff's case is founded in Mhinder Mayer's status as the *cestui que trust* of a trust that owned (directly or indirectly) 50% of any assets transferred to the defendants. In case of the assets transferred from the Identified Trust Companies and the Disputed Trust Companies, Mhinder Mayer's interest was indirect as the trustee and *cestui que trust* of the overarching trust that governed all of the Mayer Brothers' dealings, and a shareholder of those companies. As noted in *Waxman*, Mhinder Mayer is able to enforce the companies' rights pursuant to s. 227(3) of the *Business Corporations Act*. As noted in *Robak Industries Ltd. v. Gardner*, Mhinder Mayer's status as a *cestui que trust* of the overarching trust sustains a cause of action against Bhora Mayer that is separate and distinct from Mhinder Mayer's rights as a shareholder. In short, Mhinder Mayer is seeking to recover "his own funds".



[264] Mhinder Mayer is presently advancing a claim, predicated on his status as a *cestui que* trust, against Bhora Mayer for his alleged *delicts*, in separate, albeit related litigation. Bhora Mayer is not a party to this action, and Mhinder Mayer is not advancing a claim or seeking relief against him in this action.

[265] Claims in respect of diversion of corporate assets should be brought by the companies aggrieved. The present case is not like *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201, where the plaintiff signed over his entire interest in a company he co-owned with his brother as a result of the latter's misconduct. In that case, the plaintiff was allowed to advance a claim in his own name.

[266] To the extent that Mhinder Mayer may be aggrieved by the acts or omissions of any of the Osborne Group of Companies in which he holds shares or has a beneficial interest, there may be remedies available to him under the *Business Corporations Act*, S.B.C., c. 57, e.g., ss. 42, 227, and 232.

[267] In fact, Mhinder Mayer's two petition proceedings seek such relief. It is unclear, however, whether he continues to seek the relief sought in either or both of those petitions.

[268] The confusion arises from para. 87 of Mhinder Mayer's amended statement of claim because he disavows all relief sought in his oppression proceeding and the relief he seeks in the counterclaim filed on his behalf in the Bhora Mayer Action:

Mhinder Mayer has commenced Action No. S093607 (the "Oppression Proceeding"), and has filed a counterclaim in Action No. S073324 (the "Original Action") against Bhora Mayer and the Identified Trust Companies. In this action he disavows any relief he claims in the Oppression Proceeding and the Original Action.

Much, but not all of the relief sought in that counterclaim (filed in the Bhora Mayer Action) is also sought in Mhinder Mayer's first petition seeking derivative relief.

[269] The prayer for relief in Mhinder Mayer's amended statement of claim seeks interlocutory or final orders granting him leave to commence actions in the name of the Identified Trust Companies:

Wherefore Mhinder Mayer Claims:

- A. Interlocutory or final orders granting Mhinder Mayer leave to commence in the name of all or any of the Identified Trust Companies (and at their initial expense) litigation in order to address any of the delicts alleged in this Statement of Claim.

[270] It is not clear therefore, whether Mhinder Mayer intends to seek any of the relief sought in his original petition that was not duplicated in the counterclaim he filed in the Bhora Mayer Action. Nor is it clear what sections of the *Business Corporations Act* Mhinder Mayer relies upon in his current action as none are mentioned in the amended statement of claim. There was a lack of consistency in oral submissions as well. I leave it for another day to resolve the nature of the statutory relief Mhinder Mayer seeks, i.e., whether he seeks any of the relief previously sought in the petitions, and whether at this stage, he is entitled to do so.

[271] Mhinder Mayer also advances claims for recovery of his personal funds he alleges were advanced to Richard Mayer and Rita Webb in the 1990s without his knowledge. He claims that he pre-signed cheques that he gave to Marc Furnemont, who in turn made them payable to Richard Mayer and Rita Webb. Although the applicants submit that Mhinder Mayer must surely have known that these funds were removed from his chequing account while the Bhagwan Mayer Action was underway, I am not able to make that determination from the evidence available before me. Mhinder Mayer may pursue that claim in this action, although I make no comment as to the merits of the claim at this time.

[272] It is not clear from Mhinder Mayer's submissions which transactions he was unaware of prior to the Bhagwan Mayer Settlement Agreement, for which he now advances a constructive trust claim. Three were identified by Mhinder Mayer at the conclusion of the hearing:

- (a) misappropriation of Mhinder Mayer's personal funds from his chequing account by Richard Mayer and Rita Webb;
- (b) rents collected by Gina Mayer for properties owned by Mhinder Mayer;  
and

- (c) inappropriate salary paid to Bhora Mayer.

[273] Mhinder Mayer has standing to pursue the first two claims since they are personal to him. The third claim is likely a corporate claim, and if it is, he lacks standing to pursue it.

[274] Lastly, I wish to point out that my determination concerning Mhinder Mayer's resulting and constructive trust claims does not in any way bar any of the companies owned by the Brothers' Trust from pursuing their own claims for assets they claim were inappropriately paid to others, including any of the applicants.

*Consent Dismissal Order entered in the Bhagwan Mayer Action*

[275] Submissions were made by the applicants and Mhinder Mayer as to whether the entry of the consent dismissal order bars Mhinder Mayer's trust claims over assets which were in issue in the Bhagwan Mayer litigation. The applicants' position is that application of the principles of either *res judicata* or issue estoppel bar his claims. Mhinder Mayer's position is that the weight of the authorities makes it clear that the dismissal of the Bhagwan Mayer Action did not decide anything between him and the applicants. While I have found that Mhinder Mayer used the Court's process to obtain a benefit for himself by instructing counsel to have Bhagwan Mayer's lawsuit dismissed, for the reasons I have set out above, I do not need to decide this point in order to determine the application.

*Embarrassment*

[276] It was submitted on behalf of Mhinder Mayer that adverse findings concerning his credibility will prejudice him and "wreak havoc" on the related actions. No particulars were provided to me other than it would be unfair to Mhinder Mayer to make adverse remarks about his credibility. I respectfully disagree. To decline, as a general rule, to decide Rule 18A applications out of concern for adverse findings of credibility in multi-party or complex litigation would permit the Court's process to be used by an untruthful party to prolong a case without merit against another party.

[277] To suggest that the application should be dismissed because Bhora Mayer has dirty hands, as Mhinder Mayer has done on this application, is no answer. Whether the clean hands doctrine affects any of Bhora Mayer's claims against Mhinder Mayer is an issue that will be dealt with in the Bhora Mayer Action. The issue here is whether the doctrine operates to bar Mhinder Mayer's trust claims against the applicants.

[278] It must be borne in mind that Mhinder Mayer's cross examination on this application came about as a condition to allow his further affidavit (to explain his discovery evidence in the Bhagwan Mayer Action) to be filed after the applicants had put in their case.

[279] My determination of this summary trial application arises from my findings regarding the nature and sufficiency of the evidence adduced in Mhinder Mayer's own case.

[280] As well, my findings concerning Mhinder Mayer's lack of credibility and the lack of reliability of his evidence are confined to his trust claims advanced against the applicants. I have not made any findings about nor expressed any comment in relation to the merits of his other claims. My determination and findings in relation to one aspect of his action does not prohibit Mhinder Mayer from pursuing the remainder of his claims.

[281] I am not persuaded that my decision in respect of Mhinder Mayer's trust claims will cause unfairness in the determination of the claims advanced in the related actions. There is no reason to refrain from determining the Rule 18A application when it can be done based upon Mhinder Mayer's own evidence. In addition, my determination of Mhinder Mayer's trust claims on this application will shorten the length of trial by at least three to four weeks and the interlocutory proceedings considerably.

[282] There is no further evidence that Mhinder Mayer can seek to adduce of which I have been advised in order to prove his express trust claim, or to overcome his

misconduct. Since my determination of this application is based upon Mhinder Mayer's own evidence and conduct, cross examination of the personal applicants on their affidavits will not advance his case in view of the evidence contained in their affidavits.

[283] In reaching my conclusion that I should decide the application insofar as the trust claims are concerned, I am mindful that there may be times when deciding some but not all of the claims made in a case can lead to unforeseen adverse consequences if findings are carried over to the subsequent determination of other issues. That risk is minimized because I am the case management and trial judge of this and the related actions. Although I have determined claims on this application, and not merely issues, I draw comfort from the remarks of Donald J.A. in *Graham v. Moore Estate*, 2003 BCCA 497, where he said at para. 35:

Sometimes splitting the issues in a case can lead to the unavoidable result that findings carry over to the later determination of unresolved issues. That is a consideration to be factored into the decision whether to grant a Rule 18A trial on part of the case, but it is not necessarily a determinative factor. Where, as here, the case is under the management of a single judge who hears all aspects of the case, the danger of injustice is minimized.

*Abuse of Process - Dismissal of Entire Claim*

[284] The applicants seek dismissal of the entirety of Mhinder Mayer's action because he lacks clean hands and because of the manner in which he gave his evidence in this action. The applicants submit that the veracity of his evidence in this case means that he was guilty of intentional misconduct in the Bhagwan Mayer Action, all to the effect that he has demonstrated an utter disregard for the process of this Court and the administration of justice. They rely on the decision of the Supreme Court of Canada in *Toronto (City) v. CUPE, Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, where the Court said, at paras. 35 and 37:

Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interests of justice..."

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which has already been determined.

[285] The applicants' submission is premised in part on the assumption that Mhinder Mayer committed fraud in the Bhagwan Mayer Action. I have not made that finding.

[286] As a result, it is my view that the issue to be decided is whether Mhinder Mayer's claims are in essence a re-litigation of the issues in the Bhagwan Mayer Action in a manner that offends the process of the court. That point is made in *Canam Enterprises Inc. Coles* (2000). 51 O.R. (3d) 481 (C.A.). At para. 55, Goudge J.A. described the abuse of process as "a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel" whose primary focus is the integrity of the adjudicative functions of the court.

[287] At paras. 42-43, the Supreme Court of Canada stated in *Toronto (City) v. CUPE*:

[42] The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. [citations omitted]

[43] Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *Hunter, supra*, and *Demeter, supra*), the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

[288] I have already determined that Mhinder Mayer should not be allowed to advance resulting and constructive trust claims in this action for transactions which

he was aware or could reasonably have been aware prior to the execution of the Bhagwan Mayer Settlement Agreement. Mhinder Mayer's claim in this case is not, however, confined to those transactions. He seeks constructive trust remedies in respect of transactions following that settlement agreement as well as his non-trust claims. The findings I have made on this application do not, and should not, of themselves, bar Mhinder Mayer from seeking relief, where he has standing to do so, against others who he can prove have been unjustly enriched.

**Abuse of Process - Duplicate Claims**

[289] The pleadings filed in this and the related actions show that some of Mhinder Mayer's non-trust claims in this action duplicate each other.

[290] For example:

- (a) Mhinder Mayer commenced an action against Gina Mayer, on August 7, 2008 (Vancouver Registry no. S085604) seeking recovery of rents she collected on alleged to be owned by him. That claim is also pursued in this action; and
- (b) repayment of loans is sought by Mhinder Mayer's company, Mid-Isle Holdings Ltd. against Archer Holdings and Front Street Projects, whose shares are owned by Rita Webb, for repayment of loans, in Nanaimo actions S57811 and S54165, commenced on September 30, 2009 and August 20, 2008, respectively. Mhinder Mayer also challenges those loans in this action.

[291] All duplicate claims advanced in this action should be stayed as they are an abuse of process.

**Summary**

[292] Most of Mhinder Mayer's trust claims are appropriate for determination on this Rule 18A application. I have determined this application based on Mhinder Mayer's

own case, including his evidence and prior conduct, without the need to weigh conflicting affidavit evidence.

[293] Mhinder Mayer gave his evidence in cross examination on this application without regard for the truth. Much of his evidence lacked credibility; some of it was unreliable. I reject his evidence on this application in relation to his trust claims as entirely lacking in credibility and in some instances reliability.

[294] Mhinder Mayer has not proven that there was an express trust. He has not proven that the position he took and the evidence he gave in the Bhagwan Mayer Action was false. Nor has he proven that he is entitled to resile from the Bhagwan Mayer Settlement Agreement because it was a document that contained false statements.

[295] If Mhinder Mayer was telling the truth in the Bhagwan Mayer Action, then it means that there is no merit to most of his trust claims against the applicants. It also means that much of the evidence he gave on this application was untruthful. If Mhinder Mayer was being truthful on this application, then he lacks clean hands because he gave misleading evidence at examination for discovery in the Bhagwan Mayer Action and signed a document he knew to be false. In that event, equity bars him from pursuing most of his trust claims against the applicants.

[296] In either case, Mhinder Mayer is bound by all of the consequences flowing from his participation in the Bhagwan Mayer Settlement Agreement.

[297] Mhinder Mayer's express trust claims against the applicants are dismissed.

[298] His resulting trust and constructive trust claims in respect of transactions that pre-date the execution of the Bhagwan Mayer Settlement Agreement, i.e., June 8, 2006, for which Mhinder Mayer was aware of or could reasonably have become aware of by that date, are barred.

[299] Mhinder Mayer lacks standing to pursue a claim, in his own name, for diversion of funds belonging to the Osborne Group of Companies.



[300] Mhinder Mayer's claims set out in the amended statement of claim that duplicate his claims sought in other actions are stayed pending reconciliation of the pleadings.

[301] Counsel may arrange to speak to the issue of costs.

"P. Walker J."

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The Honourable Mr. Justice Paul Walker

**Appendix A: Glossary of Terms**

**“Acknowledgements”**

Signed by Richard Mayer, Rita Webb, and Gina Mayer, dated December 24, 2001. Alleged by Mhinder Mayer to evidence an express trust or “new family trust” for his benefit.

**“Archer Holdings”**

Archer Holdings Ltd. An amalgamation of various companies bearing the names Archer Holdings Ltd., Malo Enterprises Ltd., Mayne Island Concrete Ltd., and Ladysmith Holdings Ltd. (formerly Wee Tree Lumber Ltd.). A company owned by Rita Mayer. “Archer Holdings” is referred to by Mhinder Mayer as “New Archer Holdings”, and is to be distinguished from previous companies with an identical or similar name.

**“Aqua Pod”**

Aqua Pod Ltd. A company owned by Gina Mayer.

**“Bastion”**

Bastion Project Management Ltd. A company owned by Richard Mayer.

**“Bhagwan Mayer Action”**

VA S-017022. An action commenced by Bhagwan Mayer against his brothers on December 12, 2001.

**“Bhagwan Mayer Settlement Agreement”**

The Bhagwan Mayer Action was settled pursuant to an agreement dated June 8, 2006. The parties to that agreement include: Bhagwan Mayer; Mhinder Mayer; Bhora Mayer; Richard Mayer; Rita Webb; Gina Mayer; Kelly Mayer; the Osborne Group of Companies; and the companies owned by Richard Mayer, Rita Webb, and Gina Mayer. The terms of the agreement included a payment of \$1.175 million to Bhagwan Mayer, and required the parties to enter into broad mutual releases and to cause the Bhagwan Mayer Action to be dismissed by entry of a (with prejudice) Consent Dismissal Order.

**“Bhora Mayer Action”**

VA S-073324. An action commenced by Bhora Mayer against Mhinder Mayer on May 15, 2007, seeking, *inter alia*, a declaration as to an undivided one-half interest in the assets he claimed were owned by the Brothers’ Trust and

asserted by Mhinder Mayer to belong to him personally. Those companies are referred to as the “Disputed Trust Companies”.

**“Brothers’ Trust”**

A trust originally comprised of all five Mayer brothers (Bhim, Bhagwan, Bhora, Mhinder, and Welbier), and evidenced in documents as having been created in 1966.

**“Cohabitation Agreement”**

An agreement entered into by Mhinder Mayer and his wife Kelly Mayer on August 19, 1996.

**“CPLs”**

Certificates of Pending Litigation, filed against title to six of the properties involved in this action.

**“Custom Pumping”**

Custom Pumping Ltd. A company owned by Rita Mayer.

**“D & A Crushing”**

D & A Crushing Ltd. A company owned by Kelly Mayer.

**“Disputed Trust Companies”**

Mid-Isle Holdings Ltd., C.A.R. Aviation Ltd., Chemainus Ventures Ltd., and Island Structures Ltd. The ownership of these companies is the subject of a dispute between Bhora Mayer and Mhinder Mayer. That dispute is identified in the pleadings filed in the Bhora Mayer Action. The companies either belong to the Brothers’ Trust or to Mhinder Mayer personally.

**“Front Street Properties”**

Front Street Properties Ltd. A company owned by Rita Mayer.

**“Fry Street Property”**

265 Fry Street. Referred to in Mhinder Mayer’s examination for discovery in the Bhagwan Mayer Action. The property was sold to a small company owned by Richard Mayer’s company, Nanaimo Concrete Ltd. (Island Aggregates).

**“Identified Trust Companies”**

Osborne Contracting Ltd., Osborne Industries Ltd., Gulf Coast Materials Ltd., Mayer Truck & Equipment Ltd., Timberland Investment Ltd., and Holman

Transport Ltd. They are owned by the Brothers' Trust. They are also known as the "Osborne Group of Companies".

**"Island Aggregates"**

Island Aggregates Ltd. A company owned by Richard Mayer. It is the result of an amalgamation of Island Aggregates Ltd. (Nanaimo Concrete Ltd.) and Island Pumping Ltd.

**"Kelly Mayer's Acknowledgement"**

The Acknowledgment signed by Kelly Mayer (Mhinder Mayer's wife). It is dated January 24, 2001.

**"Mack Sales"**

Mack Sales & Service of Nanaimo Ltd. A company owned by Richard Mayer.

**"New Concrete Concepts"**

New Concrete Concepts Ltd. A company owned by Richard Mayer.

**"Original Petition"**

VA S-078623. Issued on behalf of Mhinder Mayer on December 18, 2007, seeking leave to commence an action in the name of Osborne Contracting Ltd. against Island Aggregates.

**"Oppression Proceeding"**

VA S-093607. An action commenced by Mhinder Mayer on May 15, 2009, seeking a declaration of oppression, that certain companies be liquidated, an accounting of all monies due, and the appointment of a receiver-manager. The respondents are Bhora Mayer and the Osborne Group of Companies.

**"Osborne Group of Companies"**

Osborne Contracting Ltd., Osborne Industries Ltd., Gulf Coast Materials Ltd., Mayer Truck & Equipment Ltd., Timberland Investment Ltd., and Holman Transport Ltd. They are also known as the "Identified Trust Companies". These companies all belong to the Brothers' Trust.

**"Non-trust claims"**

Mhinder Mayer's claims for derivative relief, an accounting, and recovery of debt.

**“R & G Equipment”**

R & G Equipment Ltd. Formerly R. & G. Equipment Rentals. A company owned by Gina Mayer.

**“Secondary Defendants”**

A term used in the Bhagwan Mayer Settlement Agreement. It includes Richard Mayer, Rita Webb, and Gina Mayer, as well as the companies owned by them, and Marc Furnemont.

**“Wee Tree”**

Wee Tree Lumber Ltd. Changed its name to Ladysmith Holdings Ltd. Through amalgamation, it is now known as Archer Holdings. It is a company owned by Rita Webb.