BCI Bulkhaul Carriers Inc. v. Wallace, [2017] B.C.J. No. 911

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

H. Groberman, N.J. Garson and G. Dickson JJ.A.

Heard: November 2, 2016.

Judgment: May 16, 2017.

Docket: CA41911

[2017] B.C.J. No. 911 | 2017 BCCA 180

Between BCI Bulkhaul Carriers Inc., Appellant (Plaintiff), and David Scott Wallace, Shona Yvonne Wallace, Eugene Lewis Wallace and Evelyn Mary Wallace, Respondents (Defendants)

(92 paras.)

Case Summary

Civil litigation — Civil procedure — Costs — Particular circumstances — Where success divided — Appeal by plaintiff from costs order awarding appellant costs until date of pre-trial concession by some respondents allowed — Appellant awarded one third of trial costs — Appellant was successful on unjust enrichment claim — Some respondents conceded appellant entitled to reimbursement — Trial judge erred in finding appellant did not succeed on live issues at trial and in apportioning costs based on concession — There was a live issue at trial as to whether the judge should award a remedy for unjust enrichment — None of the respondents conceded that the appellant was owed interest.

Commercial law — Unjust enrichment — Remedies — Damages — Measure of damages — Appeal by the plaintiff from a trial award for unjust enrichment dismissed — Appellant paid mortgage and property taxes on two properties owned by respondents — Appellant claimed respondents were to transfer properties to appellant — Respondents, however, sold properties to third party — Trial judge awarded appellant taxes and mortgage payments made and interest — Trial judge did not err in ordering monetary award on value received basis rather than value survived basis — Facts of this case did not rise to level of joint venture relationship or investment necessary to underlie a value survived award.

Appeal by the plaintiff from a trial award for unjust enrichment and from the costs order. The appellant paid the mortgage and property taxes on two properties owned by the respondents over several years. The appellant alleged the parties had an oral agreement pursuant to which the respondents agreed to transfer the properties to the appellant at a future date. When the respondents sold the property to a third party, the appellant commenced the present action for the sale proceeds and, alternatively, a restitutionary remedy for unjust enrichment. Over a year before the start of trial, some respondents admitted the appellant was entitled to be reimbursed for the taxes and mortgage payments made. The trial judge found no oral agreement existed but ordered a restitutionary remedy equivalent to repayment of the monies paid by the appellant as well as interest on the payments. She

rejected the appellant's claim for a monetary award that reflected not just the monies paid but also the increased value in the underlying properties. In her costs award, the judge concluded that the appellant was unsuccessful on all the live issues at trial because, prior to the trial, the respondents had conceded that the appellant should be repaid for the mortgage and property tax payments. She also found that the appellant acted reprehensibly by pleading that the respondents engaged in dishonest conduct. The judge awarded appellant its costs to the date of the respondents' concession and the respondents their costs after that date.

HELD: Appeal allowed in part.

The costs award was set aside. The trial judge did not err in ordering a monetary award on a value received basis equivalent to repayment of the monies paid by the appellant plus court-ordered interest rather than making a monetary award on a value survived basis. The judge did not err in relying heavily, though not exclusively, on the legitimate expectations of the parties in choosing to quantify the award on a value received basis. There was no error in her determination that this was not a case calling for a value survived award. It was clear from reading the judge's reasons as a whole that the facts of this case did not rise to the level of either a joint venture relationship or to an investment necessary to underlie a value survived award. The trial judge erred however, in finding that the appellant did not succeed on the live issues at trial and in apportioning costs based on a concession in the respondents' pre-trial brief. She omitted reference to the interest that the appellant was awarded, which none of the respondents had conceded. She also erred in saying that the respondents' concession was sufficient to ensure recovery. There was a live issue at trial as to whether the judge should award a remedy for unjust enrichment. None of the respondents conceded that the appellant was owed interest. The appellant was, however, not successful on all the live issues at trial. Taking into account the appellant's conduct and the division of success, the appellant was awarded one third of its trial costs in Scale B.

Statutes, Regulations and Rules Cited

Supreme Court Civil Rules, Rule 14-1(15)

Court Summary:

The appellant company made mortgage and property tax payments on properties owned by the respondents in the belief that the properties would be transferred to it when the mortgage was paid off. The properties were not transferred to the appellant and were eventually sold to a third party. The appellant brought a claim for the sale proceeds of the properties (or a portion thereof) based on an alleged oral agreement, as well as an alternative claim for unjust enrichment. In a trial brief filed over a year before the claims were tried, two of the four respondents conceded that the appellant should be repaid for the mortgage and property tax payments it made, without interest. At trial, the appellant was unsuccessful on the oral agreement claim, but successful on its alternative claim for unjust enrichment. The trial judge granted a monetary award quantified on a "value received" basis reflecting the total payments made by the appellant in relation to the properties, plus court-ordered interest. After a separate hearing on costs, the judge found that the appellant had not succeeded on any live issues at trial because each of the respondents had conceded repayment prior to trial. The judge also found that the appellant had acted reprehensibly by pleading dishonesty on the part of the respondents. She granted the appellant its costs before the date of the concession in the trial brief and the respondents their costs after that date. The appellant appeals the quantum of the monetary award and the order on costs. Held: appeal allowed in part. The judge made no error in finding that the appropriate remedy for the unjust enrichment was a monetary remedy based on "value received" rather than "value survived". Equitable remedies are flexible tools that address the particular circumstances of each case. A highly deferential standard of review is applicable, and

there was a solid basis for the judge's choice of remedy. With respect to costs, the judge erred in apportioning costs based on a pre-trial concession made by some of the respondents. The other respondents maintained throughout the trial that the appellant was not entitled to any compensation at all, and thus the remedy for unjust enrichment was a live issue at trial. The judge's order on costs is set aside and an order granting the appellant one third of its trial costs is substituted.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated January 26, 2015 (*BCI Bulkhaul Carriers Inc. v. Wallace*, *2014 BCSC 885* and *2015 BCSC 107*, Vancouver Docket S075187).

Counsel

Counsel for the Appellant: S.A. Mellows, J.B. Rotstein.

Counsel for the Respondents Eugene Lewis Wallace and Evelyn Mary Wallace: P. Sandhu.

Counsel for the Respondents David Scott Wallace and Shona Yvonne Wallace: B.T. Hara.

Reasons for Judgment

The judgment of the Court was delivered by

H. GROBERMAN and N.J. GARSON JJ.A.

Introduction

1 The issue to be decided in this appeal is the appropriate remedy for the unjust enrichment of the respondents at the expense of the appellant company, BCI Bulkhaul Carriers Inc. ("BCI"). The trial judge ordered a restitutionary remedy equivalent to repayment of the monies paid by BCI to retire a mortgage and pay property taxes on two properties in Richmond, BC, owned by the respondents. She also awarded court-ordered interest on the payments. She rejected BCI's claim for a monetary award that reflected not just the monies paid but also the increased value in the underlying properties.

2 In a subsequent hearing on costs, the judge concluded that BCI was unsuccessful on all the live issues at trial because, prior to the trial, some of the respondents had conceded that BCI should be repaid for the mortgage and property tax payments. She also found that BCI acted reprehensibly by pleading that the respondents engaged in dishonest conduct. As a result, the judge awarded BCI its costs to the date of the concession, September 25, 2012, which was over a year before the trial began. She awarded the respondents their costs after that date.

3 BCI appeals the judge's choice of remedy on the grounds that the judge failed to consider the causal link between BCI's contributions and the increased value in the property. It says that the judge erred by concluding that the parties' reasonable expectations were the determinative factors in choosing a remedy and made an inconsistent finding on BCI's expectations. BCI also appeals the judge's order respecting costs on the grounds that the judge plainly erred in concluding that it had been wholly unsuccessful on the live issues at trial.

Background

4 BCI is a drywall collection company incorporated at the direction of Daniel Wallace, who is also the director. The respondents are Daniel's parents, Eugene and Evelyn Wallace, and his brother and sister-in-law, David and Shona Wallace. Lori Pettifer and Brent Wallace, who are not parties to the action, are Daniel and David's siblings. To avoid confusion, we shall refer to the family members by their first names.

5 The sole shareholder of BCI is the Wallace Family Trust ("the Trust"). The Trust is discretionary, and Daniel is the sole trustee. Eugene, Evelyn, and their children, Lori, Daniel, David, and Brent, are the beneficiaries. Daniel created the Trust with the intention that it would hold assets of the family businesses that could be distributed to the beneficiaries in the future with tax advantages. To date, the Trust has not distributed any funds to the beneficiaries. Notwithstanding the beneficial interest the parents and all the siblings hold, at least indirectly, in BCI and the fact that Eugene was the named director of BCI until 2007 and viewed it as a continuation of the family businesses, the parties agree that Daniel has always controlled most, if not all, aspects of BCI. No issue was taken with that characterization at trial or on appeal. The interests of BCI and Daniel were treated by the parties as one and the same.

6 The background to this dispute involves the family businesses initially operated by Eugene. He operated a number of waste disposal and recycling ventures. All of Eugene's sons were part of the family businesses at some point, but David and Brent eventually moved on to other professions, while Daniel continued to work with Eugene until Eugene's retirement.

7 In 1981, Eugene bought three contiguous lots in Richmond, commonly known as 2780, 2800, and 2820 Smith Street. He registered the lots in the names of Eugene, Evelyn, and Lori. Eugene purchased a fourth contiguous lot, 2760, in 1986. In the early 1990s, lots 2800, and 2820 were consolidated into one lot, 2800, such that the family then owned 2760, 2780, and 2800 Smith Street. The three lots are described in this litigation in a combined way as the "Smith Properties". All of the Smith Properties were used by the family businesses until approximately 1993.

8 Around 1991, Eugene and a business partner purchased another property at 11610 Twigg Place in Richmond ("the Twigg Property"). Eugene subsequently bought out his partner's interest and held title to the Twigg Property solely in his own name. Eugene and Daniel have operated several businesses from the Twigg property, including BCI.

9 Eugene used a combination of conventional and private financing to purchase the Smith Properties and the Twigg Property, to finance his various businesses, and to pay his tax liabilities. To acquire lot 2760 in 1986, Eugene took out a private mortgage with a family member, Richard Welsh ("the Welsh mortgage"). The other Smith lots were financed with a

mortgage from Richmond Credit Union and then, subsequently, Coast Capital Savings ("the Coast mortgage").

10 By the year 2000, Eugene had largely retired. He was no longer able to meet his debt obligations on the Smith Properties. He listed them for sale, but did not sell them. Later he asked David to assume responsibility for the Welsh mortgage and Capital mortgage payments on the Smith Properties and the property taxes for lot 2760. At that time, the Welsh mortgage payment was $1,000 per month and the Coast mortgage payment was $1,750 per month. David made these payments from January 2000 through October 2001. Around July 2000, Eugene transferred ownership of lot 2760 to David and Shona in consideration for the mortgage payments that David was making on the Smith Properties and a lump sum of $20,000 that David paid to Eugene to resolve certain tax issues.

11 In November 2001, Eugene asked Daniel to cause BCI to take over the monthly Coast mortgage payments for the two Smith properties which Eugene still owned ("Lots 2780 and 2800"). Daniel agreed to do so until Lots 2780 and 2800 were sold or the mortgage came due. When the Coast mortgage matured in March 2002, the principal sum owing was $196,235.76. The assessed value for Lots 2780 and 2800 in 2000/2001 was $411,500, but just three years later, the assessed value of Lots 2780 and 2800 had dropped to $275,000. Because property values were diminishing, Eugene did not wish to sell Lots 2780 and 2800 at that time, and he and Daniel discussed what should be done with them. Ultimately Daniel agreed that BCI would continue paying the mortgage and also pay the property taxes. The Coast mortgage was renewed for a five-year term, and the mortgage was fully paid off by BCI in March 2007. BCI paid all the property taxes levied on Lots 2780 and 2800 until 2011. There is no dispute over these aspects of the parties' arrangement.

12 The contentious issue is whether Daniel and Eugene entered into an oral agreement in March 2002 that Eugene, Evelyn, and Lori would hold Lots 2780 and 2800 in trust for BCI while BCI paid off the Coast mortgage and the property taxes, and that they would transfer legal title of Lots 2780 and 2800 to BCI at a future date. Daniel testified that without this oral agreement, he would not have agreed on behalf of BCI to make the mortgage and tax payments. Eugene disputed the existence of the agreement. (The judge rejected the contention that there was an agreement. Her finding in this respect is not under appeal.)

13 In March 2002, Daniel and Eugene also discussed the Twigg Property. They agreed that BCI would make the mortgage and property tax payments on the Twigg Property as rent for its use, and they signed a lease to that effect. Daniel testified that, as with Lots 2780 and 2800, Eugene agreed to transfer the Twigg Property to BCI or a subsidiary of BCI that would also be owned by the Trust. It was Daniel's intention that, through BCI or another company, the Trust would hold Lots 2780 and 2800 and the Twigg Property so that these assets could eventually be distributed to the beneficiaries with resultant tax benefits.

14 On November 28, 2006, unbeknownst to Daniel, a 1/3 undivided interest in Lots 2780 and 2800 was transferred to David and Shona for nominal consideration. An effect of this transfer was that Lori no longer had an interest in the properties. On the same day, Eugene and Evelyn granted David and Shona an option to acquire the remaining 2/3 undivided interest in Lots 2780 and 2800 for $250,000 if the option was exercised before November 1, 2011. David and Shona exercised this option on October 31, 2011 prior to the closing of the sale of the Smith Properties to a third party.

15 In January 2007, Daniel discovered that David and Shona had acquired a 1/3 interest in Lots 2780 and 2800 with an option to purchase the remaining interest. BCI commenced the underlying action on July 31, 2007, seeking a declaration that BCI had a beneficial interest in Lots 2780 and 2800 pursuant to the alleged March 2002 agreement and that the transfer of a 1/3 interest and a purchase option was a breach of trust.

16 On June 11, 2010, BCI obtained a default judgment against Eugene and Evelyn for the breach of trust claim due to Eugene and Evelyn's failure to file a statement of defence. This judgment was set aside on August 12, 2013, and Eugene and Evelyn were granted leave to defend themselves against BCI's claims.

17 On July 29, 2011, Eugene, Evelyn, David, and Shona agreed to sell their combined interests in the Smith Properties to an unrelated party for a total of $1.5 million. The sale of the Smith Properties could not be completed, however, because a certificate of pending litigation ("CPL") was registered against Lots 2780 and 2800 as a result of the within action. On October 14, 2011, Mr. Justice Goepel (then of the British Columbia Supreme Court) ordered cancellation of the CPL upon agreement that the respondents pay $750,000 of the sale proceeds into a trust account pending the outcome of the action. As noted above, prior to the closing of the sale, David and Shona exercised their option to purchase Eugene and Evelyn's interest in Lots 2780 and 2800. The sale was then completed, and the respondents placed the required amount of sale proceeds in a trust account.

18 On March 30, 2012, Eugene entered into an agreement to transfer ownership of the Twigg Property to a numbered company incorporated by Daniel for consideration of $785,000 in the form of preferred shares in the numbered company and a promissory note. The appraised value of the Twigg Property at the time was $1.37 million. This numbered company is not owned by the Trust.

Pleadings and Positions Taken at Trial

19 In its amended notice of civil claim, BCI asserted that Eugene and Daniel entered into an oral agreement in March 2002 whereby it was understood that BCI would gain a beneficial interest in Lots 2780 and 2800 by paying the mortgage and property tax payments and Eugene, Evelyn, and Lori would hold BCI's beneficial interest in trust. On that basis, BCI sought a declaration that it was the sole beneficial owner of the sale proceeds of Lots 2780 and 2800, or alternatively, a determination of the extent of its beneficial ownership and a declaration to that effect. BCI sought an order that the respondents transfer to BCI an amount of the sale proceeds equivalent to BCI's beneficial interest in Lots 2780 and 2800. In the further alternative, BCI pleaded unjust enrichment and sought a restitutionary remedy.

20 BCI also argued that all of the respondents, including David and Shona, knew about the oral agreement and acted dishonestly in effecting the transfer of interest and the purchase option to David and Shona.

21 In its closing submissions at trial, BCI made the following argument concerning the appropriate remedy for its alternative claim of unjust enrichment:

> The award, I submit, must reflect the increase in value of the Smith properties as a result of the preservation and maintenance of the Smith properties by the plaintiff. I submit that

> the appropriate award for an unjust enrichment claim would be at least 50 percent of the $1.1 million [sale price of lots 2780 and 2800], being $550,000.

22 On September 25, 2012, over a year before the start of the trial, Eugene and Evelyn filed a trial brief in which they said:

> The Defendant Eugene Wallace acknowledges that the Plaintiff should be reimbursed for any Expenditures that the Plaintiff has paid on behalf of the Defendant Eugene and Evelyn for the mortgage and taxes on the Properties.

23 In the trial brief, Eugene and Evelyn also said that BCI should only be entitled to reimbursement "to the extent that the Plaintiff can show the actual amount directly paid by the Plaintiff for the mortgage and the taxes".

24 Of import to the second ground of appeal related to costs, David and Shona made no such concession.

25 At trial David and Shona highlighted the mutual benefit that BCI received by using Lots 2780 and 2800 (as well as the Twigg Property) for tax purposes and as security to obtain financing for its business. David and Shona also argued that the transfer of the Twigg Property to Daniel's numbered company for half of the property's assessed value was appropriate compensation for BCI's deprivation.

26 In their closing submissions at trial, Eugene and Evelyn acknowledged that BCI should be reimbursed $227,500 for mortgage payments and $46,934.24 for property taxes. However, they argued that BCI should not be awarded interest on those monies because it had received mutual benefit, as outlined above.

27 In David and Shona's closing submissions, they maintained that BCI was not entitled to any compensation because of the mutual benefit it received. They asserted that, if the court found there was an unjust enrichment, repayment of the monies paid was sufficient and BCI should not be awarded court-ordered interest.

Reasons for Judgment of the Trial Judge

28 In reasons for judgment indexed as *2014 BCSC 885*, the trial judge dismissed BCI's claim that it held a constructive trust in Lots 2780 and 2800 and, thus, in the subsequent sale proceeds of those properties. She found that if the alleged oral agreement was made, it was not enforceable because the terms of the agreement were unclear. She also considered it unlikely that Eugene would have entered into such an agreement. BCI does not appeal from the dismissal of this claim.

29 The judge did find, however, that the respondents had been unjustly enriched by the monies paid by BCI.

30 The judge concluded that the proper remedy for the unjust enrichment in this case was a monetary award to reimburse BCI for the payments it made, along with court-ordered interest. She said:

> [73] Although the plaintiff claims at least the bulk of the proceeds of sale on the basis on [sic] a "value received" basis, in my view that does not accord with the expectation of the parties. As I have indicated above, I am not persuaded that there was an agreement to transfer the property. Payment of the proceeds of sale to the plaintiff would effectively grant the same remedy, in the absence of an agreement. This would not accord with the expectation of the parties and would not be reasonable relief in the circumstances of this case.
>
> [74] This is not a domestic relationship where the parties entered a joint enterprise, and pooled their resources. Rather, Eugene asked the plaintiff to pay the mortgage payments believing that the plaintiff was "his" business. That is, that the plaintiff was simply one of a series of family businesses. In his mind it would be appropriate for the family business to pay expenses incurred by the family business; but there is no suggestion that he intended to transfer the Smith Street properties or the equity in them to the family business. In fact, he intended to make the Smith Street properties available for David.
>
> [75] The appropriate remedy in this situation is to place the plaintiff in the situation that it would have been in, had it not made the payments on the Smith Street mortgage. That is in accordance with the established law that "[r] emedies for unjust enrichment are restitutionary in nature" (*Kerr* at para. 46). Here, restitution is most effectively accomplished by judgment against all defendants for the amount paid, plus court ordered interest.
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> [76] Eugene and Evelyn received the benefit of the plaintiff's mortgage and tax payments, which discharged the debts they owed to Coast Capital and permitted them to transfer the property free of these charges to David and Shona. David and Shona received the benefit of the property, free of the charges paid by the plaintiff. After the sale of the Smith properties, the proceeds of sale were ordered to be held in trust. The judgment will be satisfied from those funds.

(Although at para. 73 the judge states that BCI claimed the bulk of the sales proceeds on a "value received" basis, we think it is clear she misspoke and that she intended to reject an award on a "value survived" basis.)

31 At a subsequent hearing on costs, the respondents argued that BCI should not be awarded all of its costs because: 1) the respondents made various offers to settle, which BCI unreasonably rejected; 2) there was divided success at trial; and 3) BCI acted reprehensibly in pleading that the respondents effected a transfer of Lots 2780 and 2800 dishonestly, which warranted an award of special costs against it.

32 In reasons for judgment on costs indexed as *2015 BCSC 107*, the judge rejected the respondents argument regarding the offers to settle, but she found that BCI had not been successful on the live issues at trial and had acted reprehensibly by pleading dishonest conduct on the part of the respondents. Regarding BCI's lack of success at trial, she said:

> [25] Although the plaintiff obtained judgment, it did not 'succeed' on the live issues at trial. The defendants were the successful parties. The judgment gave the plaintiff the amount that it was out-of-pocket from paying the mortgage and property taxes on the property. Each of the defendants conceded that the plaintiff was entitled to this amount. Evelyn and Eugene each said so in the course of their evidence. They also said so in their trial brief, filed September 25, 2012. The plaintiff made the mortgage payments (which were the

> bulk of the award) and the majority of the property tax payments before the property was transferred to David and Shona Wallace. Accordingly, the concession of Evelyn and Eugene would be sufficient to ensure that those funds were recovered by the plaintiff, even if David and Shona did not agree. However, the point was not strenuously opposed by David and Shona. David and Shona did argue that the payments the plaintiff made were among the benefits flowing back and forth between Eugene and Evelyn and the various family businesses and could not constitute a basis for a finding of unjust enrichment. Although David and Shona advanced this argument, it was an argument to be advanced by Evelyn and Eugene, should they choose to make it. Eugene and Evelyn did not make this argument.
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> [26] The plaintiff sought the property itself, or all of the funds received from the sale of the property, on two bases:
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> 1. An agreement between the plaintiff and Eugene Wallace; or
> 2. Unjust enrichment on the "value received" basis.
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> Those were the issues at trial. The plaintiff was not successful on either of these issues.
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> [27] The evidence regarding the alleged agreement took most of the time at trial.
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> ...
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> [33] As I have said, the plaintiff failed on all of the live issues at trial. Although the plaintiff obtained judgment for the amount it was out-of-pocket, that amount had been conceded by the defendants as early as September 25, 2012. The plaintiff had formal notice of this position by way of the filed trial briefs. Armed with this knowledge, the plaintiff proceeded to trial on the issues on which it failed. The plaintiff failed in its cause. The defendants succeeded on the issues that they disputed. They succeeded in the cause.

(It is clear from the context that the judge again misspoke and intended to say "value survived" at para. 26.)

33 The judge awarded BCI its costs until the date of the trial brief, September 25, 2012, and the respondents their costs after that date. For pre-trial orders awarding costs in the cause, BCI was awarded costs for applications up to September 25, 2012, and the respondents their costs after that date.

Issues

34 We would frame the issues on appeal in the following way:

1. Did the judge err in ordering a monetary award on a "value received" basis equivalent to repayment of the monies paid by BCI, plus court-ordered interest rather than making a monetary award on a "value survived" basis?
2. Did the judge err in finding that BCI did not succeed on the live issues at trial and apportioning costs based on a concession in the respondents' pre-trial brief?

Discussion

Remedy for Unjust Enrichment

35 The narrow issue on this ground of appeal is whether the judge erred in choosing the remedy of a monetary award quantified on a value received basis instead of a value survived basis. A value received award generally reflects the market value of the monies or services contributed by the claimant, while a value survived award reflects all or part of the current value of the property acquired or preserved by the contribution.

Positions of the Parties

36 BCI contends that its payment of the Coast mortgage and property taxes for Lots 2780 and 2800 permitted Eugene to retain ownership of the properties during a period of depressed values. In light of this, BCI believes that it should share in the subsequent increase in value of Lots 2780 and 2800.

37 BCI makes three main arguments on this ground of appeal.

38 First, it says that the judge erred by relying exclusively on the parties' expectations when determining a remedy. It asserts that legitimate expectations are relevant when determining whether a juristic reason exists for the enrichment and deprivation but should not play a significant role in the choice of remedy. In addition, BCI says that the judge made inconsistent findings on BCI's expectations. At the juristic reason stage, she found that BCI would not have made the payments had it not anticipated receiving an interest in Lots 2780 and 2800, but at the remedy stage she determined that a value survived approach would not accord with the parties' expectations. In our view, the alleged contradiction is a simple ambiguity in the manner in which the judge expressed herself. We understand her to be doing no more than expressing the view that BCI would not have made the payments without expecting to receive something in return.

39 Second, BCI says that the judge failed to properly consider the true nature of the unjust enrichment. It says that the respondents were not only enriched by the monies that BCI paid but also by being able to retain Lots 2780 and 2800 while they significantly increased in value, which was facilitated by BCI's payments. BCI argues that the judge should have considered the causal link between BCI's payments and the increase in value and ordered a monetary award on a "value survived" basis.

40 Third, BCI says that the judge erred by concluding that a value survived monetary award was inappropriate because such an award would grant BCI the same remedy it sought for its breach of trust claim, which the judge dismissed. BCI says that this conclusion is plainly wrong because the remedy it sought for its breach of trust claim was for the entirety of the sale proceeds, which was $1.1 million, whereas an appropriate monetary award on a value survived basis would be for 50 percent of the sale proceeds, which is $550,000.

41 The respondents say that there is no closed list of factors which a judge must consider when fashioning a remedy for unjust enrichment. They cite *Kerr v. Baranow*, *2011 SCC 10*, for the proposition that equitable remedies are flexible tools involving the exercise of discretion, which appellate courts must treat with deference.

42 The respondents say that the judge considered all relevant circumstances when choosing an appropriate remedy, including the benefits that BCI received directly and indirectly from the respondents. As they did at trial, the respondents point to the fact that Eugene allowed BCI to use Lots 2780 and 2800 as security for a business loan, as well as the fact that Eugene

transferred the Twigg Property to Daniel's numbered company for half of its assessed value. The respondents say that, in light of these circumstances, the judge's award was reasonable.

Analysis

43 Determining whether the appropriate remedy for unjust enrichment should be quantified on a value received or value survived basis is not always, as is the case in this appeal, an obvious choice. Here the judge chose to quantify the award on a value received basis, thus returning to BCI its contributions plus interest, but denying it any portion of the increase in the value of Lots 2780 and 2800. We should note at the outset that there is no suggestion the increase in the value of those properties is attributable to anything other than the overall upswing in the real estate market.

44 As noted above, the main factors that led the judge to decide upon a value received basis to the award were: the expectations of the parties (at para. 73); the lack of a relationship that could be described as a joint enterprise (at para. 74); and the fact that Eugene believed BCI was one of a series of family businesses and, thus, it was appropriate for BCI to pay the family business expenses (at para. 74).

45 A significant challenge facing BCI on this ground of appeal is the high degree of deference which the judge's choice of remedy attracts. As the Court said in *Kerr*:

> [72] Turning specifically to remedies for unjust enrichment, I refer to Binnie J.'s comments in *Pacific National Investments Ltd. v. Victoria (City)*, *2004 SCC 75*, *[2004] 3 S.C.R. 575*, at para. 13. He noted that the doctrine of unjust enrichment, while predicated on clearly defined principles, "retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience". Moreover, the Court has recognized that, given the wide variety of circumstances addressed by the traditional categories of unjust enrichment, as well as the flexibility of the broader, principled approach, its development has been characterized by, and indeed requires, recourse to a number of different sorts of remedies depending on the circumstances: see *Peter*, at p. 987; *Sorochan*, *[1986] 2 S.C.R. 38* at p. 47.
>
> ...
>
> [158] ...Within the legal principles I have outlined, there may be many ways in which an award may be quantified reasonably...Provided that the correct legal principles are applied, and the findings of fact are not tainted by clear and determinative error, a trial judge's assessment of damages is treated with considerable deference on appeal: see, e.g., *Nance v. British Columbia Electric Railway Co.*, *[1951] A.C. 601* (P.C.).
>
> [Emphasis added.]

46 In *Wilson v. Fotsch*, *2010 BCCA 226*, Huddart J.A. summarized the analytical framework for an unjust enrichment claim. Although in this appeal we are concerned only with the last stage of this analysis, these steps and the factual findings are interrelated. We therefore begin with the *Wilson* framework and a brief description of the first steps in the analysis in order to provide some context for the issues on appeal:

> [11] The basic outline for that analysis can be summarized this way:
>
> 1. Benefit/Enrichment

2. Detriment

3. Absence of a juristic reason for the enrichment

a. Established categories

i. Contract

ii. Disposition of law

iii. Donative intent

iv. Other valid common law, equitable, or statutory obligations

b. Reason to deny recovery

i. Public policy considerations

ii. Legitimate expectations

iii. Potential new category

Defences

Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible

Choice of Remedy

a. Is a monetary remedy sufficient?

b. Is a constructive trust required ...

Quantification of the Remedy

a. Value received (*quantum meruit* basis)

b. Value survived (proportionate share basis)

Set-Off (equitable and legal)

Pre-judgment interest

47 In performing the analysis in the underlying proceeding, the judge decided that the payments made by BCI enriched the respondents to the detriment of BCI. She next considered the juristic reason stage of the analysis. We infer from her reasons that BCI's payments did not fall under any of the established categories at the first step and she turned to consider whether there were any reasons to deny recovery at the second step of the juristic reason stage. The respondents argued that BCI should be denied recovery because it obtained mutual benefits through making the payments. The judge rejected this argument and found that BCI's legitimate expectations were that it would be compensated for the payments it made. She concluded that there was no juristic reason to deny recovery. There is no appeal of this finding.

48 Last, the judge turned to the quantification of the remedy. This remedial choice is the only aspect of the judge's decision at issue on this ground of appeal. In *Wilson*, Huddart J.A. included legitimate expectations of the parties as a factor to consider when determining whether any reasons exist to deny recovery at the juristic reason stage of the analysis. One of the central questions on this ground of appeal is whether the judge erred in focussing on legitimate expectations not only at the juristic reason stage, but also at the quantification of the remedy stage. There is no doubt that the judge relied heavily, though not exclusively, on the legitimate expectations of the parties in choosing to quantify the award on a value received basis. She

found that a value survived award reflecting a proprietary interest was inappropriate because it "would not accord with the expectations of the parties" (at para. 73).

49 The starting point for determining what role legitimate expectations should play in an unjust enrichment analysis is the Court's unanimous decision in *Kerr*.

50 *Kerr* was a decision of the Court on two appeals involving claims for unjust enrichment in the context of common law spousal relationships. The first appeal involved a couple in their 60s, who had lived together for more than 25 years. Following their separation, Ms. Kerr claimed an interest in the family home, which was registered in Mr. Baranow's name. Both parties had worked throughout their relationship and had contributed to their mutual welfare. One of the main issues on appeal was how the parties' legitimate expectations should be considered at the juristic reason stage of the analysis. In the second appeal, the issue was whether the trial judge was required to use a value received approach to quantify a monetary award for unjust enrichment.

51 *Kerr* concerned marriage-like relationships. The focus of the case was on "joint family ventures". Cromwell J. described such relationships as being relationships of cohabiting couples characterized by mutual effort, economic integration, actual intent and priority of the family. The basic principles of law described by Cromwell J. in *Kerr* are applicable to this case, but we must not lose sight of important contextual differences in this case, particularly the absence of a "joint family venture".

52 With respect to legitimate expectations, Cromwell J. held that they have a role to play at the second step of the juristic reason stage when determining whether any reasons exist to deny the claimant recovery. He said (at para. 124):

> ...It is the mutual or legitimate expectations of both parties that must be considered, and not simply the expectations of either the claimant or the defendant. The question is whether the parties' expectations show that retention of the benefits is just.

53 As to remedy, Cromwell J. noted that the constructive trust developed as a flexible tool to determine a party's beneficial interest in a property. He said: "Where the plaintiff can demonstrate a link or causal connection between his or her contributions and the acquisition, preservation, maintenance or improvement of the disputed property, a share of the property proportionate to the unjust enrichment can be impressed with a constructive trust in his or her favour" (at para. 50). He described the necessary link in this way:

> [51] As to the nature of the link required between the contribution and the property, the Court has consistently held that the plaintiff must demonstrate a "sufficiently substantial and direct" link, a "causal connection" or a "nexus" between the plaintiff's contributions and the property which is the subject matter of the trust (*Peter*, at pp. 988, 997 and 999; *Pettkus* at p. 852; *Sorochan*, at pp. 47-50; *Rathwell*, *[1978] 2 S.C.R. 436* at p. 454). A minor or indirect contribution will not suffice (*Peter*, at p. 997). As Dickson C.J. put it in *Sorochan*, the primary focus is on whether the contributions have a "clear proprietary relationship" (p. 50, citing Professor McLeod's annotation of *Herman v. Smith (1984), 42 R.F.L. (2d) 154*, at p. 156). Indirect contributions of money and direct contributions of labour may suffice, provided that a connection is established between the plaintiff's deprivation and the acquisition, preservation, maintenance, or improvement of the property (*Sorochan*, at p. 50; *Pettkus*, at p. 852).

54 In contrast, Cromwell J. found that the quantification of a monetary award for unjust enrichment was not straightforward and there had been confusion in the jurisprudence on the issue (at paras. 47-49). Until *Kerr*, some courts and commentators interpreted *Peter v. Beblow*, *[1993] 1 S.C.R. 980*, as standing for the proposition that a monetary award could only be calculated on a value received or *quantum meruit* basis. Cromwell J. rejected this view (at paras. 57-58). He held that a monetary award must reflect "the extent of the enrichment unjustly retained by the defendant" and there is no reason to suppose that a value received award will always satisfy this aim (at para. 73).

55 Thus, a monetary award can be calculated on a value received or a value survived basis (*Kerr* at para. 55; see also *Wilson* at paras. 46-50).

56 The important principle emerging from *Kerr* is the Court's rejection of the "remedial dichotomy" between proprietary awards that reflect the value surviving and monetary awards calculated on a value received basis. One of the reasons Cromwell J. gave for rejecting this remedial dichotomy was that it could leave claimants who had been involved in joint family ventures without a remedy that reflected the true nature of the unjust enrichment. Under a strict remedial dichotomy, claimants involved in joint family ventures, who had contributed to an overall accumulation of wealth but could not establish a causal link between their contributions and the specific property in dispute, would not meet the test for a proprietary remedy and would only be entitled to a monetary award on a value received basis. Accordingly, Cromwell J. held that monetary awards should be calculated on a value survived basis in such circumstances to reflect the reality of the claimant's significant contributions (at para. 100).

57 Although *Kerr* moves the analysis away from the "remedial dichotomy", Cromwell J. did not describe a fixed set of criteria to be applied in choosing between a remedy that reflects the value received as opposed to the value surviving. As noted above, *Kerr* emphasizes that the remedy is flexible and the approach principled (at para. 72). We turn, therefore, to the question of what factors should guide courts in selecting the appropriate remedy, recalling that the main argument on appeal is that the judge erred in relying on legitimate expectations and ignored the causal link between the payments BCI made and the increased value of Lots 2780 and 2800.

58 The role of the parties' legitimate or reasonable expectations in the remedial analysis was expanded upon by this Court in *Haigh v. Kent*, *2013 BCCA 380*. The claimant, Mr. Haigh, had contributed to the defendants' campground and beach resort business for 25 years. He participated in various building projects which improved the property, and he contributed to the payment of a loan that was used to fund the construction of campsites. The claimant was not fully paid for these contributions.

59 The trial judge in *Haigh* found that there had been an unjust enrichment and awarded the proprietary remedy of a constructive trust. On appeal, the appellants argued that the judge erred because a proprietary interest was not in either party's reasonable expectations. Writing for the majority, Harris J.A. said:

> [32] ...Although the reasonable expectations of the parties may be relevant to an appropriate remedy, they are not determinative. Rather the critical question is the nature of the contribution made to the property. If the contribution is sufficiently direct and substantial, then awarding a proprietary remedy may be appropriate, even if the contribution was made without an expectation that it would earn an interest in land.

> ...
>
> [34] With respect to a remedy, it is sufficient to observe that reasonable expectations may be a factor in deciding to grant a proprietary remedy, but they are not determinative. In other words, a proprietary remedy may be granted even where the contribution is made without an expectation of earning an interest in particular property. This [is] clear, in my view, from *Kerr*. For example, at para. 66, Justice Cromwell, for the Court, described the result in *Pettkus v. Becker*, *[1980] 2 S.C.R. 834*, as turning on participation in a joint venture and the benefits it would create, rather than a precise expectation of earning an interest in certain properties:
>
> > I agree with Professor McCamus that the Court in *Pettkus* was "satisfied that the parties were engaged in a common venture in which they expected to share the benefits flowing from the wealth that they jointly created" (p. 367). Put another way, Mr. Pettkus was not unjustly enriched because Ms. Becker had a precise expectation of obtaining a legal interest in certain properties, but rather because they were in reality partners in a common venture.

60 The majority in *Haigh* upheld the trial judge's choice of remedy. Though he dissented in the result, Chiasson J.A. accepted the majority's view that "the expectation of the parties is not determinative at the remedy stage of the unjust enrichment analysis" (at para. 78). He would have found that a monetary rather than a proprietary award was adequate.

61 In order for a contributor to be entitled to an interest in property or its monetary equivalent, there must, ordinarily, be a direct link between the contribution and the increased value of the property. Such a direct link does not have to (though it may) rest on an expressed or implied expectation by the parties that the contributor will share an interest in the property. Rather, it rests on the principled view that, despite the absence of such expectations, it may be unfair, in some circumstances, to deprive the contributor of the value or wealth created by his or her labours or financial contribution. *Kerr* took this analysis one step further by describing a joint enterprise in which the parties have contributed to a pool of assets rather than a specific property.

62 But what are the circumstances that would point to the adoption of a value survived approach when calculating a monetary award, as opposed to value received? Writing for the majority in *Wilson* (decided before, but consistently with *Kerr*), Huddart J.A. put it this way: "Commonly, factors that would permit the imposition of a constructive trust, were it appropriate for the parties to share continuing ownership, will support the value survived approach to quantification of the alternative monetary award" (at para. 51). As noted above, the most important factor in imposing a constructive trust is whether the claimant has shown a causal link between his or her contributions and the "acquisition, preservation, maintenance or improvement of the disputed property" (*Kerr* at para. 54). Some commentators have suggested that a value survived remedy monetary award should only be available to those in domestic partnerships. The authors of *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), state that such an award "is only appropriate where there has been a 'joint family venture'" (at 495). That proposition appears to have been assumed, as well, in some appellate jurisprudence. In the recent case of *Reiter v. Hollub*, *2017 ONCA 186*, the court said:

> [22] To receive a monetary award on a value survived basis, the claimant must show that there was a joint family venture and that there was a link between his or her contributions to the joint family venture and the accumulation of assets and/or wealth: *Kerr*, at para.

> 100. Whether there is a joint family venture is a question of fact to be assessed in light of all of the relevant circumstances, including the four factors noted above -- mutual effort, economic integration, actual intent and priority of the family: Kerr, at para. 100.

63 In our view, *Kerr* need not be taken to stand for the proposition that a monetary award on a value survived basis can *only* be awarded where a joint family venture is proven. The concentration in *Kerr* on the concept of a joint family venture, however, makes it clear that something beyond simply an unjust enrichment is necessary to justify the granting of a value survived remedy.

64 A joint family venture will be sufficient to satisfy the requirement, but other non-family joint ventures may also do so. In *Haigh*, for example, if a monetary remedy had been found to be adequate, it would have been on a value survived basis. The situation in *Haigh*, while not involving a domestic relationship between the parties, did include a number of features analogous to a joint family venture: the parties were jointly engaged in a venture characterized by mutual effort, economic integration, and an intent to work together to ensure the economic success of the enterprise, to the benefit of the parties. Despite the absence of a domestic relationship between the parties, the case called for the granting of a proprietary interest.

65 It may be that there are other circumstances, beyond close economic integration and mutual effort in a joint enterprise that will justify the granting of a proprietary interest or a value survived monetary award. We need not determine, in this case, the full range of circumstances that might, in the interests of fairness, require such an award. For the present purposes, it is sufficient to say that, absent a joint enterprise, factors such as the degree of direct and substantial contribution to the acquisition, preservation and maintenance of the property and the reasonable expectations of the parties may be relevant in making a value survived award. The critical point is that there must be something in the nature of an investment in the value of the property -- something more than a loan -- looked at in a holistic manner.

66 In the present case, BCI's contribution to the preservation of Lots 2780 and 2800 was both substantial and direct. BCI paid the Coast mortgage on Lots 2780 and 2800 from November 2001 until the mortgage was renewed in March 2002 and then from March 2002 until the mortgage was discharged in March 2007. BCI also paid the property taxes on Lots 2780 and 2800 from at least March 2002 until 2011. BCI says that its contributions allowed the respondents to retain the properties and enjoy their increase in value.

67 The judge, however, did not find that the parties were involved in a joint enterprise involving close economic integration. She found that the parties' understandings of the situation differed and they did not, in the result, share mutual intentions or work towards the same goals. The judge found that considerations of fairness did not compel the granting of a monetary remedy on a value survived basis.

68 BCI sought a monetary award of $550,000. The judge awarded it $330,000. She was aware of the interconnectedness of this family's unique monetary arrangements and of all of the circumstances of BCI's contributions. We can find no error in her determination that this was not a case calling for a value survived award.

69 BCI argues on this appeal that the judge erred in relying on the parties' expectations and in ignoring the causal link between its contributions and Lots 2780 and 2800. We would not accede to this argument. We agree with the respondents that there is no closed list of factors to

consider when choosing a remedy for unjust enrichment. It is clear from reading the judge's reasons as a whole that the facts of this case did not rise to the level of either a joint venture relationship or to an investment necessary to underlie a value survived award.

70 The standard of review in this sort of a case is highly deferential. There was a solid basis for the judge's decisions, and we would dismiss this ground of appeal.

71 We turn next to the appeal of the costs award.

Costs

72 The main issue on this ground of appeal is whether the judge erred in apportioning costs based on a concession in Eugene and Evelyn's pre-trial brief.

Positions of the Parties

73 BCI makes four arguments on this ground of appeal.

74 First, it says that the trial judge erred in concluding that it was not successful at trial. It says that the respondents opposed its unjust enrichment claim throughout the proceeding. The judge ultimately found that BCI had established unjust enrichment and awarded it a remedy. In light of this, BCI says that it was the successful party and is entitled to its costs.

75 Second, BCI argues that, by awarding the respondents their costs after the date of Eugene and Evelyn's trial brief, the judge treated the concession in the trial brief akin to an offer to settle which BCI should have accepted. It submits that this is erroneous because a trial brief does not create an offer to settle that can be accepted. As there is no certainty of result to a concession in a trial brief, there is no expectation that costs consequences will result. Further, BCI argues Eugene and Evelyn's trial brief did not address the liability of David and Shona.

76 Third, BCI says that, in apportioning costs based on an arbitrary date, the judge failed to separate discrete issues on which BCI was unsuccessful at trial and identify the time attributable to those issues.

77 Fourth, it argues that the judge's order on costs is unjust in the circumstances because it denies BCI its costs for all steps taken in the litigation after September 25, 2012, including those which it was forced to make in response to the respondents' actions and those on which it was successful, including successfully resisting an application to remove BCI's counsel of record.

78 The respondents say that the trial judge has a broad discretionary power with respect to costs and did not err in apportioning costs between the parties in the way in which she did. They maintain that BCI was unsuccessful on all live issues at trial, including its claim that the respondents acted dishonestly in effecting the transfers, and that the judge's order on costs took into account all of the circumstances of the case.

Analysis

79 The reasons for judgment in respect to costs are indexed at *2015 BCSC 107*. The facts that follow are relevant to the costs issue:

1. On September 25, 2012, Eugene and Evelyn filed a trial brief in which they conceded that BCI should be repaid the amount it had paid for mortgage and taxes but without interest;
2. On October 2, 2012, the respondents made their first offer to settle BCI's claims for $275,000.00, inclusive of interest and costs; the judge considered that this offer was "insufficient to compensate the plaintiff for the amount of the mortgage payments and property taxes it had paid and did not address the costs incurred to date or the issues in dispute" (at para. 20);
3. The judge determined that it was not unreasonable for BCI to have rejected the first offer and two subsequent offers made by the respondents;
4. In written argument on closing submissions at trial, David and Shona asserted that the judge "ought to find that there is juristic reason to deny any recovery by the plaintiff"; alternatively, David and Shona said that only the property taxes paid by BCI should be recoverable; in the further alternative, they said that, if the court awarded more fulsome restitution, deductions should be made from the award for benefits BCI received and no interest should be awarded;
5. In Eugene and Evelyn's written argument on closing submissions at trial, they asserted that "the criteria for a claim in unjust enrichment have not been met" because BCI obtained mutual benefits by making the payments; they acknowledged that BCI should be reimbursed a total of $274,434.24 for the payments it made but argued that it would be inappropriate to award any interest on those payments because of the mutual benefits that BCI received;
6. At trial, BCI sought a declaration that it was the beneficial owner of all sale proceeds for Lots 2780 and 2800, or a portion of the proceeds as determined by the court, based on the alleged oral agreement; alternatively, BCI pursued an unjust enrichment claim and sought a monetary award on a value survived basis of at least 50 percent of the sale proceeds;
7. At trial, the judge dismissed BCI's claim based on the oral agreement but found that BCI had proved its claim for unjust enrichment; the judge ordered a monetary award which reimbursed BCI for the payments it made, plus court-ordered interest;
8. At the costs hearing, the judge found that, on both of its claims, BCI sought the same remedy: "the property itself, or all of the funds received from the sale of the property" (at para. 26). She concluded that BCI was unsuccessful on all the live issues at trial (at paras. 26 and 33);
9. The judge said: "The evidence regarding the alleged agreement took most of the time at trial" (at para. 27); and
10. The judge also found that BCI had acted recklessly in pleading that the respondents had acted dishonestly because their allegations were unfounded and Daniel knew so (at para. 32).

80 The judge awarded costs to the respondents. She said:

Was success at trial divided?

> [25] Although the plaintiff obtained judgment, it did not 'succeed' on the live issues at trial. The defendants were the successful parties. The judgment gave the plaintiff the amount that it was out-of-pocket from paying the mortgage and property taxes on the property. Each of the defendants conceded that the plaintiff was entitled to this amount. Evelyn and Eugene each said so in the course of their evidence. They also said so in their trial brief, filed September 25, 2012. The plaintiff made the mortgage payments (which were the bulk of the award) and the majority of the property tax payments before the property was transferred to David and Shona Wallace. Accordingly, the concession of Evelyn and Eugene would be sufficient to ensure that those funds were recovered by the plaintiff, even if David and Shona did not agree. However, the point was not strenuously opposed by David and Shona. David and Shona did argue that the payments the plaintiff made were among the benefits flowing back and forth between Eugene and Evelyn and the various family businesses and could not constitute a basis for a finding of unjust enrichment. Although David and Shona advanced this argument, it was an argument to be advanced by Evelyn and Eugene, should they choose to make it. Eugene and Evelyn did not make this argument.
>
> [26] The plaintiff sought the property itself, or all of the funds received from the sale of the property, on two bases:
>
> 1. An agreement between the plaintiff and Eugene Wallace; or
> 2. Unjust enrichment on the "value received" basis. Those were the issues at trial. The plaintiff was not successful on either of these issues.
>
> [27] The evidence regarding the alleged agreement took most of the time at trial.

81 On October 31, 2011, upon the closing of the sale of the Smith Properties, $750,000 of the sale proceeds was paid into the trust account of counsel for David and Shona as security for the underlying proceeding, pursuant to Goepel J.'s order of October 14, 2011.

82 Due to the option exercised by David and Shona immediately prior to the closing of the sale, Eugene and Evelyn retained an interest in only $250,000 of these trust funds. David and Shona informed the court in closing submissions that if there was an *in personam* judgment against Eugene, regardless of whether they were entitled to say that the judgment should be payable out of Eugene and Evelyn's $250,000 portion of the trust funds, David and Shona had directed their counsel to pay $250,000 of the funds to Eugene and Evelyn. The implication of this submission is that David and Shona agreed that the judgment would be paid out of the balance of the trust funds after Eugene and Evelyn received their money. In other words, if BCI was awarded nothing, then the $750,000 paid into court would be distributed with $500,000 to David and $250,000 to Eugene. But if BCI was awarded compensation, then David would pay the award out of his $500,000 share so that Eugene would still get his $250,000 share.

83 In their factum on appeal, David and Shona say that at trial "the defendants" admitted BCI should be repaid the mortgage payments and property taxes.

84 Their factum is misleading in this regard. David and Shona appear to have conflated their own position at trial with that of Eugene and Evelyn. At para. 14 of their factum, they cite two examples of concessions made by "the defendants" at trial; both of these concessions were made by counsel for Eugene and Evelyn in oral and written closing submissions. Eugene and Evelyn admitted that BCI was entitled to repayment of the mortgage payments and taxes but not

interest. However, in both oral and written submissions at the close of trial, David and Shona's counsel maintained that BCI was not entitled to recover any compensation at all.

85 Thus, the judge's summary at para. 25 is not accurate. She misapprehended the facts in stating that "each of the defendants conceded that the plaintiff" was entitled to repayment of the mortgage payments and taxes, and she omitted reference to the interest that BCI was awarded, which none of the respondents conceded. Moreover she erred in saying that Eugene and Evelyn's concession in the trial brief was sufficient in any event to ensure recovery. At the time they made this concession, the option in favour of David and Shona had been exercised, Lots 2780 and 2800 had been sold, and Eugene and Evelyn retained only a $250,000 interest in the sale proceeds placed in trust. Thus, Eugene's interest in the funds did not cover the amount of repayment that he conceded, nor did it cover the amount of the ultimate judgment. In our view, there was a live issue at trial as to whether the judge should award a remedy for unjust enrichment. As noted, none of the respondents conceded that BCI was owed interest. Accordingly, the trial brief is, in our respectful opinion, irrelevant to the award of costs. It is not necessary to consider generally the effects of an admission in a trial brief.

86 Costs in this case were awarded pursuant to Rule 14-1(15) of the *Supreme Court Civil Rules*. It provides:

> **Costs of whole or part of proceeding**
>
> (15) The court may award costs
>
> (a) of a proceeding,
>
> (b) that relate to some particular application, step or matter in or related to the proceeding, or
>
> (c) except so far as they relate to some particular application, step or matter in or related to the proceeding
>
> and in awarding those costs the court may fix the amount of costs, including the amount of disbursements.

87 While Rule 14-1(15) grants authority to a judge to apportion costs, such orders are to be confined to relatively rare cases that fit within a defined category and fit the following criteria set out in *Sutherland v. The Attorney General of Canada*, *2008 BCCA 27*, at para. 31:

> (a) the party seeking apportionment must establish that there are separate and discrete issues upon which the ultimately unsuccessful party succeeded at trial;
>
> (b) there must be a basis on which the trial judge can identify the time attributable to the trial of these separate issues;
>
> (c) it must be shown that apportionment would effect a just result.

88 Although the judge erred in saying that BCI was unsuccessful on all the live issues at trial, it is clear that BCI was far from being completely successful. BCI did not succeed on its breach of trust claim based on the alleged oral agreement, and the judge found that most of the time at trial was taken up with evidence concerning that agreement. Further, the judge found that BCI's pleading about the respondents' dishonest conduct was unjustified and reprehensible. She was entitled to make this finding.

89 With the division of success and the finding that BCI's pleadings were unjustified and reprehensible, the court was entitled to exercise a broad discretion in making an order for costs. The judge's order, however, was based on misapprehensions of fact, so it is not entitled to the deference that would ordinarily be accorded to it.

90 Taking into account the conduct of BCI and the division of success, we would substitute for the award made by the judge an award to BCI of one third of its costs in the underlying proceeding to be assessed at Scale B. There were numerous interlocutory applications throughout this litigation, including an unsuccessful application by the respondents to remove BCI's counsel from the record. If the costs of those applications were awarded to either party, rather than in the cause, that amount should be assessed and included or deducted, as the case may be, in the overall costs award.

Disposition

91 We would dismiss the first ground of appeal. We would allow the appeal of the costs award and vary the award as indicated in these reasons.

92 BCI has been successful on one of two discrete issues under appeal. In these circumstances, we would make no award of costs on appeal.

H. GROBERMAN J.A.
N.J. GARSON J.A.
G. DICKSON J.A.:— I agree.
