COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Zhang v. Zhang,*
2025 BCCA 143

Date: 20250430
Docket: CA48805; CA48806

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Between:

Guang Ning Zhang and Ping Hui Lu

Appellants
(Defendants)

And

Yue Zhang and Can-Pacific Enterprises Ltd.

Appellants
(Plaintiffs by Counterclaim)

And

Ming Zhang and Xiaoqin Yang

Respondents
(Plaintiffs)

- and -

Docket: CA48806

Between:

Ping Hui Lu

Appellant
(Defendant)

And

Ming Zhang and Xiaoqin Yang

Respondents
(Plaintiffs)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated December 9, 2022 (*Zhang v. Zhang*, 2022 BCSC 2156, Vancouver Docket S1913633).

Counsel for the Appellants:	R.W. Cooper, K.C.
Counsel for the Respondents:	E.S. Bojm M.B. Funt
Place and Date of Hearing:	Vancouver, British Columbia October 23, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 30, 2025

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Mr. Justice Abrioux
The Honourable Justice Iyer

Summary:

The appellants were found liable for breach of trust in relation to two trusts by which they held shares and units in a BC company in trust for the respondents. Though they denied the existence and enforceability of the trusts, the trial judge found the trusts enforceable and held the appellants liable for substantial sums of money. In addition, he ordered them to pay punitive damages and special costs.

The appellants did not dispute the judge's findings of fact and credibility but argued that the trusts were set up to help the respondents avoid creditors and were thus illegal and unenforceable. Alternatively, they claimed the judge erred in principle in assessing damages at the highest value at which the shares were traded and in awarding punitive damages.

Held: appeal dismissed. The trial judge's conclusion that the trusts were enforceable was principled, consistent with the authorities, and is owed deference, given the trusts were not illegal per se, and what evidence was before the judge. Further, it was open to the judge to assess damages at their highest trading value based on a balancing of equities and with the goal of deterring faithless fiduciaries. His assessment was entitled to deference.

Moreover, the judge did not err in principle in awarding punitive damages. In the circumstances, punitive damages did not reward illegal conduct, and it was open to the judge to make the award he did to reflect appropriate denunciation of conduct he found to be exceptionally egregious.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] After a lengthy trial, Mr. Justice G.C. Weatherill found the appellants (defendants below) liable to the respondents (plaintiffs below) for substantial sums of money for the breach of two trusts, and further ordered them to pay punitive damages and special costs. The appellants do not challenge the trial judge's findings of fact or credibility, or his conclusion that they acquired and held the relevant shares in trust for the respondents (something they denied strenuously at trial). They maintain, however, that the judge erred in law in finding them liable because, they say, the trusts were set up for the illegal purpose of enabling the respondents to avoid their creditors, and were therefore unenforceable. In the alternative, they submit that the judge erred in principle in assessing the damages

flowing from the breaches of trust. Finally, they argue that the judge erred in awarding punitive damages.

[2] For the reasons that follow, I would dismiss the appeal.

2. OVERVIEW

[3] Using the same references as the trial judge, and meaning no disrespect, I will refer to the appellant Guang Ning Zhang as “Nick”, and to the appellant Ping Hui Lu, his wife, as “Helen”. Similarly, I will refer to the respondent Xiaoqin Yang as “Rose”, and to the respondent Ming Zhang, her husband, as “Myles”.

[4] Given the factual and credibility findings of the judge, the appellants face a significant hurdle. The nature of the problem is illustrated by the judge’s introduction in his reasons for judgment, indexed at 2022 BCSC 2156. There, he described the two trusts in issue: the “Discounted EVC Units Trust” and the “Unison Trust”, and the problems arising from the evidence:

> [1] The claims and counterclaims in these actions arise out of the business and investment activities of the members of two families. The issues raised are an illustration of the level to which some people will descend to extract retribution when money is lost. Unfortunately, this case is also an example of the willingness on the part of some counsel to advocate a client’s position despite it being untethered from the truth.
>
> [2] The relevant events are convoluted. There are allegations of document fabrication and fraudulent misrepresentation. There are denials of obvious fact. The Rule in *Browne v. Dunn,* 1893 CanLII 65, 6 R. 67 (H.L) was disregarded throughout the trial despite repeated admonitions from the bench. Most of the *viva voce* evidence was presented through an interpreter. Many of the questions asked of witnesses were poorly articulated and the meaning was lost in both translation and the nuances of the Chinese language. The court was left to weave as best it could through a labyrinth of irrelevant evidence and dealings that defied common sense.
>
> [3] In Vancouver Registry Action No. S1913633 (the “Discounted EVC Units Trust Action”), the plaintiffs allege that the defendants, Guang Ning Zhang (“Nick”) and Ping Hui Lu (“Helen”) (collectively, [the] “Discounted EVC Units Trust Action defendants”), hold certain shares and warrants in trust for them and that they suffered loss as a result of the defendants’ conduct in denying the trust and refusing to sell the shares and warrants at a favourable time. The plaintiffs also allege that the defendants have failed to account for the proceeds of sale of certain other shares (“Light & Effects Investment”).

> [4] In Vancouver Registry Action No. S2013500 (the "Unison Trust Action"), the plaintiffs allege that the defendants, Helen, Baocheng Su ("Su"), Yong Jiu Jiang ("Jiang"), and Chang Jun Qiao ("Qiao") (collectively, the "Unison Trust Action defendants"), hold shares in a company called Unison International Holdings Ltd. ("Unison") in trust for them. Throughout this litigation, the Unison Trust Action defendants denied the very existence of the trust, alleging that signatures had been forged. That position was advocated by their counsel. On day 16 of the trial, in the face of overwhelming evidence of their participation in and knowledge of the trust, the Unison Trust Action defendants relented and conceded the obvious—that the trust existed and that the signatures had not been forged.

[5] The judge noted that the outcome of the case turned on the credibility of the parties (at para 241). He found the respondent Myles to be seemingly credible, with his testimony generally corroborated by the documentary evidence, but found him anything but forthright during cross-examination, particularly in relation to his business dealings and debts in China. He concluded that Myles "is a person who will say anything he perceives is necessary to achieve what in his view would result in justice for him and his family" (at paras 244–245). On the other hand, he found the respondent Rose to be honest, consistent, and credible (at para 246).

[6] Turning to the appellant Helen, the judge did not hold back. He described her testimony as "replete with unabashed lies ... rambling, contradictory and devoid of veracity" (at para 248). After reviewing numerous examples, he continued:

> [259] I find that Helen views herself as skilled in deception and has no need to be constrained by the facts. Like Myles, she is a person who will say anything she perceives is necessary to achieve a victory for her and her family. I have no difficulty finding that virtually everything Helen uttered during her testimony was deliberately contrived and false.

[7] The judge found the evidence of the appellant Nick worthy of little weight (at para 265). He considered the evidence of the appellants' son, "Jack", to be "robotic and overly rehearsed" (at para 266) and "plainly scripted to align [with] Helen and Nick's theory of the case" (at para 271).

[8] In this context, and after a thorough review of the evidence, the judge found the two trusts to be enforceable. Given that his findings are not challenged other than as outlined above, I do not propose to review the facts in detail except as is necessary to set the context and dispose of the issues raised on appeal.

[9] The Discounted EVC Units Trust claim concerned "EVC units" (shares in Electrameccanica Vehicles Corp., a B.C. company, with attached warrants). The judge concluded that Nick held 50% of the EVC units (125,000 shares plus 125,000 warrants) in trust for Rose (at para 314). The judge found that Nick breached this trust by failing to sell these shares when Myles, on behalf of Rose, demanded that he do so (at para 315). He awarded damages based on (1) the value of the shares on the date Myles first demanded their sale (CA $560,490), and (2) the value of the warrants in accordance with the presumption that, but for Nick's breach of trust, Rose would have exercised them at the highest price at which the shares traded over the period in question (CA $1,724,620) (at paras 325, 341). The resulting award totalled CA $2,285,110. The appellants say that the judge's approach to valuation was wrong in principle.

[10] The Unison Trust also involved shares in EVC. The judge found that Helen owed a fiduciary duty to Rose and breached the trust when she caused Unison to distribute 420,000 EVC shares to her, 210,000 of which she held in trust for Rose (at para 365). Employing the same approach to evaluating the loss as he did in relation to the Discounted EVC Units, the judge found that Rose was entitled to an award of damages against Helen in the amount of CA $3,737,362 (at para 366).

[11] In awarding punitive damages, the judge found that Helen had "fabricated claims, agreements and evidence" as a means of exacting retribution, profiting at the respondents' expense (at para 378). He concluded that the appellants' conduct was "precisely that which an award of punitive damages is designed to condemn" (at para 379) and assessed punitive damages at $100,000 (at para 382).

[12] Turning to the issues raised on appeal, I will consider first the question of the enforceability of the two trusts; second, the question of the valuation of the respondents' loss; and third, the availability of an award of punitive damages.

3. DID THE JUDGE ERR IN FINDING THE TRUSTS ENFORCEABLE?

3.1 The appellants' argument

[13] The appellants say the judge found that the two trusts were established as part of a scheme by Myles and Rose to avoid their creditors in China. The law, they submit, is clear that schemes to defraud, hinder, or avoid creditors are precisely the type of illegal or improper purpose that may bar someone from obtaining an equitable remedy. The question, they then assert, is whether the granting of the equitable relief sought by Rose and Myles would defeat or frustrate the law's policy of prohibiting schemes to avoid creditors.

[14] The appellants then submit that the judge erred in answering this question by fixating on the absence of evidence of harm to the appellants as the determinative factor. Citing *Hall v Hebert*, [1993] 2 SCR 159 at 175–176, 1993 CanLII 141, they submit that this focus was misplaced as the harm that matters is the harm to the integrity of the legal system. As it is, they argue, enforcing trusts that the respondents created with the intention of avoiding creditors necessarily leads to an inconsistency in the courts' treatment of the same conduct: punishing it in one context and rewarding it in another.

[15] Moreover, the appellants contend, this inconsistency was exacerbated by the judge's award of the highest possible level of damages, unconnected to the appellants' actual enrichment—thereby giving the respondents a windfall from their own illegal transaction.

3.2 The judgment below

[16] The judge indeed found that Myles had amassed significant debts in China, and that these were "at least to some extent, the impetus for the Unison Trust, the

Discounted EVC Unit[s] Trust and the Light & Effects Investments being structured as they were" (at para 245; emphasis added).

[17] The judge concluded, however, that this was not sufficient to render the trusts unenforceable given what was and what was not in evidence before him. The trusts were not illegal *per se*. There was no evidence from creditors in China, and no evidence that the respondents had insufficient assets in China to satisfy their creditors. There was no evidence that the trusts had any impact on claims by creditors, or of any harm to creditors or anyone else. In addition, the judge noted that while the applicable legislation provided protection to creditors, it was not intended to protect persons committing a breach of trust, like the appellants:

> [281] The thrust of the defendants' case is that, because Myles and Rose were facing significant financial claims in China, they developed a scheme to immigrate to Canada to hide their assets from their Chinese creditors. The defendants say that they became the unknowing victims of the plaintiffs' scheme and were misled into participating in the investments that are the subject matter of these actions.
>
> [282] The defendants claim that the plaintiffs took advantage of their naivety as a means of implementing their scheme such that, not only were the plaintiffs' Chinese creditors deceived, so too was the CIC which granted their permanent resident applications on the basis of falsified information.
>
> [283] One difficulty I have with the defendants' position is that is based on speculation. None of the Chinese creditors or any representative of the CIC was called to testify. Another difficulty is that the deception of others is no defence to the plaintiffs' claims against the defendants.
>
> [284] Throughout their submissions, counsel for the defendants misstated the evidence and attempted to spin case authorities as support for propositions that they did not. In the result, the court was left with little confidence that it could rely on their submissions as representative of the facts or law.
>
> …
>
> [290] The doctrine of *ex turpi causa non oritur action* prevents a party from benefitting from illegal or immoral conduct. The doctrine applies in both contract and in tort: *Randhawa v. 420413 B.C. Ltd.*, 2009 BCCA 602 at para. 66. However, the case law is clear that a court may only bar a plaintiff's claim on the ground of immoral or illegal conduct in circumstances where failure to do so would affect the integrity of our legal system and hence contrary to public policy: *Hall v. Hebert*, [1993] 2 S.C.R. 159 at 185, 1993 CanLII 141; *Kim* at paras. 42–46; [*Wang v. Jiang,* 2021 BCCA 132] at para. 51. In other words, equity will not intervene in an illegal or immoral act unless failure to do so will defeat or frustrate the policy underlying the

> illegality, leading to inconsistency in the law and thereby undermining the integrity of the legal system: [*Kim v. Choi*, 2020 BCCA 98] at para. 50.
>
> [291] In my view, none of the authorities relied on by the defendants is applicable to the facts before me. In each of them, there was a finding that harm had been done to either a party or a third party—the relevant party did something they would not otherwise have done and/or their interests were affected by the conduct in question. There is no evidence before me of any harm having been done to anyone as a result of the creation of the Unison Trust or the Discounted EVC Units Trust. There is no evidence that any Chinese creditor or the CIC was impacted by the creation of the trusts. There is no evidence that enforcing the trusts would lead to a disproportionate or unjustly enriching result.
>
> [292] I reject the submission of defendants' counsel that a mere intention on the part of the plaintiffs to use the trusts as a means for hiding assets, without more, is sufficient in law for the court to exercise its discretion against enforcing the trusts. I am not aware of any authority for such a novel proposition and none was provided to me. All of the authorities relied on by defendants' counsel where the transaction was not enforced involved a finding of harm resulting from the conduct. The malfeasance in question must be tethered in some way to the plaintiff's claim, which in this case is the breach of trust by the defendants. There is no such connection in this case.
>
> [293] The public policy associated with attempts to avoid creditors is set out in the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164. Those statutes provide that a transaction made for the purpose of avoiding creditors is void and of no effect as against the injured creditor, not generally: *Stene v. White* [*Castle*] *Ventures Inc.*, 2022 BCCA 29 at paras. 49–50. In other words, the preservation of the integrity of the judicial system requires that there be a person or entity who would otherwise be harmed in some way. Such harm is absent in this case. There is no evidence that a fraud was committed. There is no evidence that any steps the plaintiff took in British Columbia was illegal or contrary to public policy in China. Although nothing the plaintiffs did was "illegal *per se*", at least under the laws of Canada, and while they possibly structured the investments in question in an attempt to hide assets from creditors in China, the defendants led no evidence that the plaintiffs had insufficient assets in China to pay the Chinese judgments. While the plaintiffs' intention to hide assets may not have conformed to the standards of some, on the evidence it did no harm to anyone.
>
> [Emphasis original.]

[18] On the whole of the evidence, the judge concluded that the conduct of Myles and Rose was not sufficient to taint the creation of the trusts to the extent that enforcing them against the appellants would undermine the integrity of the legal system:

> [294] On the whole of the evidence, I conclude that the defendants have failed to demonstrate on a balance of probabilities that Myles' and Rose's intent at the time of creation of the Unison Trust, the Discounted EVC Units Trust or the Light & Effects Investment was sufficiently tainted such that it had the effect of undermining the integrity of the legal system such that the trusts are unenforceable. Regardless, the conduct of the defendants throughout militates against allowing them to retain the fruits of the various trusts because they would be unjustly enriched and no actual harm has been shown to have been suffered by any third party.
>
> [295] The defendants' claim in this regard is based entirely on unsubstantiated speculation and is rejected. Accordingly, I find that the Unison Trust and the Discounted EVC Units Trust are enforceable.
>
> [Emphasis added.]

3.3 Discussion

[19] As noted above, the appellants do not challenge the judge's findings of fact. The judge found that the appellants held shares and warrants in trust for the respondents. He found that the appellants had breached those trusts, and had essentially stolen the shares. He also found that a significant impetus for the creation of the trusts was Myles's debts in China. In law, that does not render the trust unenforceable *per se*. The judge must balance the equities, measuring the impact of enforcement on the integrity of the judicial system. He must also consider the impact of non-enforcement—in this case, of letting the appellants reap a windfall profit from their blatant breaches of trust and fiduciary duty.

[20] As this Court observed in *Youyi Group Holdings (Canada) Ltd. v Brentwood Lanes Canada Ltd.*, 2020 BCCA 130 at paras 47–48, in such circumstances, each case must be decided on its own facts:

> [47] Contracts may be regarded as illegal in either of two distinct ways. A contract may be illegal *per se* if performance of the contract violates a statutory or common law prohibition. Such a contract will be unenforceable. For a recent example, see *Lindsay v. Ambrosi* [2019 BCCA 442] where this Court refused a *quantum meruit* claim brought in the face of a statutory prohibition.

> [48] The second type of illegality is more nuanced. A contract may be unenforceable in circumstances where it is not *per se* illegal, but was entered into at least in part, with the object of committing an illegal act. Enforcement of such a contract may be so tainted with illegality that a court is entitled to refuse to enforce it. These cases must be considered on a case-by-case basis, unless there is controlling authority, as I conclude there is for the present appeal. But in examining the facts of each case, the application of the illegality defence should be approached on the basis of principle, namely the impact of enforcement on the integrity of the judicial process, rather than as a rules-based exercise.
>
> [Emphasis added.]

[21] I do not agree with the position of the appellants that the judge made an error of principle by basing his decision on the lack of harm. That was but one of the factors considered by the judge, and we were provided no authority suggesting it was not a factor that could properly be considered.

[22] What the judge did do, necessarily, was respond to the appellants' argument that "mere intention on the part of the plaintiffs to use the trusts as a means for hiding assets, without more, is sufficient in law for the court to exercise its discretion against enforcing the trusts" (at para 292), and to the lack of relevant evidence from the appellants. I am not persuaded that in exercising his discretion, the judge erred in principle. As I read the judge's reasons, his approach to the unenforceability defence raised by the appellants was principled and consistent with the authorities. He considered and weighed appropriate factors in accordance with his findings of fact, which are not challenged. The balance he achieved is owed deference, and I see no error in his conclusion that the trusts should be enforced.

4. DID THE JUDGE ERR IN ASSESSING DAMAGES?

4.1 The appellants' argument

[23] The appellants maintain that, even if the trusts "are enforceable despite the improper purpose for which they were established", the judge's damages award must be reduced to ensure that the respondents do not profit from their "illegal and improper conduct". They point out that remedies for breach of trust are equitable, and therefore always subject to the discretion of the courts. The courts of equity must fashion a remedy that is just in the circumstances of each case.

[24] In this case, the appellants submit, the appropriate award of damages would have been purely restitutionary. Instead, the judge found the appellants liable for losses calculated on the assumption that the securities in question would have been sold at the best price available. In doing so, say the appellants, the judge wrongly relied on *Guerin v The Queen*, [1984] 2 SCR 335, 1984 CanLII 25, and *McNeil v Fultz*, 38 SCR 198, 1906 CanLII 41, as mandating this "highest value" approach, instead of analyzing what remedy would be just in the circumstances.

[25] The appellants point to cases such as *Fales v Canada Permanent Trust Co.*, [1977] 2 SCR 302, 1976 CanLII 14, where the Court accepted an assessment based on the average price at which the relevant shares traded—instead of the highest price—over the period in issue. They argue that equity demands consideration of all the circumstances, and that the judge failed to account for the nature of the market, the nature of the shares, and the respondents' "unclean hands".

[26] Accordingly, the appellants contend that the award of damages ought to be limited to what is necessary to unwind the transactions (return of the initial investment), or, in the alternative, to what is necessary both to unwind the transactions and deprive the appellants of any benefit from their breach of trust (return of the initial investment plus disgorgement of actual profit gained).

4.2 The judgment below

[27] The judge reviewed what he considered to be the applicable law, citing *Guerin*, *Asamera Oil Corporation Ltd. v Sea Oil & General Corporation et al.*, [1979] 1 SCR 633, 1978 CanLII 16, *McNeil, Cash v Georgia Pacific Securities Corp.*, [1990] BCJ No. 1315, 1990 CanLII 1052, and Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021). The judge noted the difference between damages for breach of trust and damages for breach of contract, and the principle that, in circumstances like the present, the loss should be calculated on the assumption that the securities would have been sold at the best price obtainable:

[319] The obligation of a defaulting trustee was summarized by the Supreme Court of Canada in *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 360–361, 1984 CanLII 25:

> The position at common law concerning damages for breach of trust and, in particular, the difference between the principles in trust law from those applicable in tort and contract, are well summarized in the following passages from Mr. Justice Street's judgment in the Australian case of *Re Dawson; Union Fidelity Trustee Co. v. Perpetual Trustee Co.* (1966), 84 W.N. (Pt. 1) (N.S.W.) 399, at pp. 404-06:
>
> > The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.
> >
> > […]
> >
> > *Caffrey v. Darby* (1801) *6* Ves. Jun. 488; 31 E.R. 1159 is consistent with the proposition that if a breach has been committed then the trustee is liable to place the trust estate in the same position as it would have been in if no breach had been committed. Considerations of causation, foreseeability and remoteness do not readily enter into the matter.
> >
> > […]
> >
> > The principles embodied in this approach do not appear to involve any inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach.
> >
> > […]
> >
> > The cases to which I have referred demonstrate that the obligation to make restitution, which courts of equity have from very early times imposed on defaulting trustees and other fiduciaries, is of a more absolute nature than the common-law obligation to pay damages for tort or breach of contract. It is on this fundamental ground that I regard the principles in *Tomkinson's* case *[Tomkinson v. First Pennsylvania Banking and Trust* Co. [1961] A.C. 1007] as distinguishable. Moreover the distinction between common-law damages and relief against a defaulting trustee is strikingly demonstrated by reference to the actual form of relief granted in equity in respect of breaches of trust. The form of relief is couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it. Increases in market values between the date of breach and the date of recoupment are for the trustee's account; the effect of such increases would, at common law, be excluded from the computation of damages but in equity a defaulting trustee must make good the loss by restoring to the estate the assets

> of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation. In this sense the obligation is a continuing one and ordinarily, if the assets are for some reason not restored in specie, it will fall for quantification at the date when recoupment is to be effected, and not before. [Wilson J.'s emphasis.]
>
> The reasoning which the House of Lords adopted in *Tomkinson's* case proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach.
>
> [Emphasis in trial judgment]

This statement of the law has been cited with approval in *Underhill's Law of Trusts and Trustees* (13th ed. 1979), at pp. 702-03, and was also recently adopted by Brightman L.J. in *Bartlett v. Barclays Bank Trust Co. (No. 2),* [1980] 2 All E.R. 92 (Ch.), at p. 93: see also Waters, *Law of Trusts in Canada* (1974), at pp. 843-45.

[320] While the presumptive date for the assessment of damages for breach of contract is the date of the breach, there is an exception where as here, the contract is in relation to shares whose value is volatile and subject to sudden fluctuations of unpredictable amplitude: *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation*, [1979] 1 S.C.R. 633 at 664–665, 1978 CanLII 16 [*Asamera*].

[321] In *McNeil v. Fultz*, [1906] 38 S.C.R. 198 at 205, 1906 CanLII 41, the Supreme Court of Canada held that damages for breach of trust such circumstances should be calculated at the best price the shares had during the period in which they were withheld:

> […] the defendant was under an obligation to account to the plaintiffs at once for that which he received as trustee for them. Treated as a trustee wrongfully withholding property which he was bound under his trust to deliver to his *cestuis que trustent*, he is liable to make reparation for the loss suffered by the trust by reason of his breach of trust; and (every presumption being made against him as a wrongdoer), that loss must be calculated on the assumption that the securities would have been sold at the best price obtainable […]

> [322] This principle was also affirmed in *Guerin* at 528:
>
> > Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee […], so also it should be presumed that the band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determining damages for breach of trust are to be contrasted with the principles applicable to determining damages for breach of contract. In contract it would have been necessary for the band to prove that it would have developed the land; in equity a presumption is made to that effect […]
>
> [323] This logic is explained in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at 1368 [*Waters'*]:
>
> > […] Why should the plaintiff have the benefit of the highest price during the relevant time where the claim is for breach of trust? The logic seems to be that the contract rules presumptively identify a particular moment as the moment of breach, and the plaintiff is speculating on his or her own account if he or she does not replace the property, at the market price, when the defendant fails to deliver. The trust, however, is a relationship that involves holding property over time. The breaching trustee has created an evidentiary difficulty as to what benefit the beneficiary would have acquired; and, because the difficulty was created by the trustee's own wrongful act, it is resolved against him or her.
>
> [324] This principle has been applied by this Court in circumstances similar to those in these actions: *Cash v. Georgia Pacific Securities Corp.*, 1990 CanLII 1052, 1990 CarswellBC 1821 (S.C.).

4.3 Discussion

[28] As we have seen, applying the principles he discussed concerning the assessment of damages for breach of trust, the judge assessed the respondents' damages as follows:

1. For the 125,000 Discounted EVC Shares held in trust for Rose, CA $560,490, based on the value of those shares on the date that Myles asked Nick, as trustee, to sell them (US $3.36/share).

2. For Rose's 125,000 warrants for Discounted EVC Shares, CA $1,724,620, based on the value of highest price at which the discounted EVC shares traded between April 23, 2019, and November 21, 2021 (US $13.60/share).

3. For Rose's 210,000 EVC shares held in trust by Helen (and subsequently sold by Helen for her own account), CA $3,737,362, based on the value of highest price at which the discounted EVC shares traded between December 5, 2019, and November 21, 2021 (US $13.60/share).

[29] I can see no scope for error with respect to #1, the 125,000 Discounted EVC Shares. The question, then, relates to #2 and #3: whether it was an error for the judge to assess damages arising from the 125,000 Discounted EVC Share Warrants and the 210,000 EVC shares on the basis of the "highest value" approach. I do not think it was.

[30] While the highest value approach has been commonly applied, the cases demonstrate it is not mandatory *where the evidence and the circumstances would render it unjust*. Was this such a case? The judge obviously thought not.

[31] When the Supreme Court of Canada approved an averaging approach in *Fales*, upholding the judgment in this Court (*Fales v Canada Permanent Trust Company*, 55 DLR (3d) 239, 1974 CanLII 1143), it was considering a case in which Canada Permanent Trust Company, as trustee of an estate, had failed to sell shares in that estate in a timely fashion. In approving the averaging method used by the courts below, the Court said this at 322:

> … Highest value is not the sole criterion. All of the circumstances bearing on value must be considered. The trial judge and the Court of Appeal preferred an averaging of upper and lower values and I would agree. One could not expect to dispose of a substantial holding of shares at the top of the market. …

[32] I observe that, while the Supreme Court was dealing with a breach of trust, it was nothing like the breaches found in the present case. Rather, it was a failure to abide by the standard of care expected of a trustee in managing the affairs of the trust—or as this Court had put it at 265: a "continuation of acts or omissions which by their extension over a lengthy period amounted to breach of trust". It was not, in essence, theft, like the breaches in this case.

[33] Similarly, in *Boreta Estate v McRory*, 2014 ABQB 498, the judge distinguished the facts of the case from those in *McNeil* and *Guerin* on the basis that the breach in issue was not a wrongful taking of trust property to one party's advantage as it was in those two authorities (as well as in the present case).

[34] In *Claiborne Industries Ltd. v National Bank of Canada*, 59 DLR (4th) 533 at para 141, 1989 CanLII 183 (Ont CA) (a case involving conversion of shares) the Court of Appeal for Ontario also discussed the applicability of *McNeil* and the highest value approach:

> It is my view that the Supreme Court in *McNeil v. Fultz, supra*, did not intend to set aside normal principles of assessment of damages except where a trustee is wrongfully withholding the property and must therefore take absolute responsibility for the risk of doing so.
>
> [Emphasis added]

[35] In *Southwind v Canada*, 2021 SCC 28, Justice Karakatsanis for the majority confirmed in a case of breach of fiduciary duty that "[e]quity presumes that the plaintiff would have made the most favourable use of the trust property" (at para 79), while noting that the most favourable use must be "realistic" (at para 80). Justice Karakatsanis also confirmed that equitable compensation is "discretionary and restitutionary in nature, aiming to restore the actual value of the thing lost through the fiduciary's breach, referred to as the plaintiff's lost opportunity" (at para 69). She went on to say this:

> [72] Another difference between equitable compensation and common law damages is that equity is especially concerned with deterring wrongful conduct by fiduciaries. As Professor Rotman observed, "[b]eneficiaries are … implicitly dependent upon and peculiarly vulnerable to their fiduciaries' use, misuse, or abuse of power over their interests" (p. 991). It is therefore crucial

> that equitable remedies deter fiduciaries from misusing their powers. By restoring the beneficiary's lost opportunity, equitable compensation enforces the fiduciary relationship and deters the fiduciary's wrongful conduct.
>
> [Emphasis added.]

[36] The mode of assessment of equitable compensation, then, is discretionary, aiming to achieve, in the circumstances before the judge, full restitution for losses and lost opportunities, thereby deterring the wrongful conduct of the faithless fiduciary. It follows that in cases that require a trustee to account for wrongfully withholding or taking trust property to the trustee's advantage, as was the situation here, it is in principle open to the judge to assess by assessing the beneficiary's loss at the asset's highest value over the time it was wrongfully withheld. That is the risk the trustee takes in deliberately breaching the trust, for the reason explained in the *Waters* text as quoted by the judge at para 323 of his reasons (see para 27 above).

[37] Was it nevertheless a reversible error for the judge to do so in this case? The appellants say it was, essentially because the evidence and the circumstances rendered the assessment unjust. This proposition is based, first, on Myles' purpose in creating the trusts, and second, on the evidence that the shares reached their highest value on only one day, making it, they argue, unrealistic to assume the respondents would have sold all their shares at that price.

[38] With respect to the first basis, the appellants argue that the judge erred in principle by failing to strike a fair balance between "deterring faithless fiduciaries and ensuring the respondents were not able to profit from their illegal trust". I disagree. The trusts were not illegal *per se*, and the respondents committed no crime; the judge had already balanced the *conduct* of the respondents with that of the appellants in concluding that the trusts were enforceable. The judge concluded, as was open to him, that, as the trusts were enforceable, the respondents were entitled to restitution. Did the award go beyond restitution to reward the respondents for their own wrongdoing?

[39] The appellants say it did, because the highest price at which the stock traded (US $13.60 per share), used by the judge as the foundation of the award, was achieved only on one day: November 20, 2020. It is unrealistic, they submit, to assume that the respondents would have traded the relevant shares right at this time.

[40] It is correct to say, as Karakatsanis J. put it in *Southwind*, that the most favourable use must be "realistic". That was, however, in the context of assessing the best use the Lac Seul First Nation might have made of reserve land extensively damaged by the Crown wrongfully and without authorization. The best use was not limited to its expropriation value, but had to take into account its development potential. On the other hand, that value had to be realistically achievable, not based upon the highest conceivable potential.

[41] In my view, it does not follow that, because the relevant shares achieved their highest price on only one day over the time they were wrongfully withheld, it is unrealistic to value the loss at that price. The shares did achieve that value; it was not a matter of speculation. By wrongfully withholding the shares and warrants, the appellants ensured that the respondents could not take advantage of that top price. Being held responsible for that deprivation is a risk that the law imposes on faithless fiduciaries. It was then for the trial judge to balance the equities in the circumstances before him and I would defer to his assessment of that balance, bearing in mind the goal as stated in *Southwind* of deterring fiduciaries from misusing their powers. Accordingly, I would not disturb his award.

5. DID THE JUDGE ERR IN AWARDING PUNITIVE DAMAGES?

[42] In making this award, the judge said this:

> [375] Punitive damages are imposed for purposes of retribution, denunciation and deterrence. They are only awarded in circumstances where the compensatory damages are insufficient to express the court's repugnance at the misconduct in question. Although in most cases an independently actionable wrong is a precondition for a punitive damages award, it is not the case for breach of a fiduciary duty where the fiduciary's actions are purposefully repugnant to the beneficiary's interests: *Mulligan v. Stephenson*, 2016 BCSC 1941 at paras. 139–141.

[376] In *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the following factors for assessing the blameworthiness of a party's conduct were identified, at para. 113:

a) whether the misconduct was planned and deliberate;

b) the intent and motive of the party;

c) whether the party persisted in the outrageous conduct over a lengthy period of time;

d) whether the party concealed or attempted to cover up his/her misconduct;

e) the party's awareness that what he or she was doing was wrong;

f) whether the party profited from the misconduct; and

g) whether the interest violated by the misconduct was known to be deeply personal or irreplaceable.

[377] Counsel for the defendants submitted that Helen "should not be punished for doing what she thought was protecting herself and requiring the plaintiffs to prove their case".

[378] It is true that a plaintiff must prove his or her claim. But having weaved through and considered the evidence as a whole, I find that each of the foregoing *Whiten* factors is applicable in this case. The defendants' conduct was planned and deliberate. I am left with little doubt that the defendants' conduct was motivated by Helen, and to a lesser extent Nick, being unhappy about the money they lost in their investment in Lumenari. I find that Helen decided she would exact retribution by denying the trusts and usurping to herself and her family the EVC shares and warrants held by Unison and Nick as well as the Light & Effects Investment proceeds. She fabricated claims, agreements and evidence as a means of doing so. The defendants persisted in their contrived and contemptuous conduct, attempting to justify it throughout this litigation. They profited at the plaintiff's expense.

[379] In my view, the defendants' conduct is precisely that which an award of punitive damages is designed to condemn. Such an award is appropriate in this case.

[380] Following *Whiten* at paras. 114–126, any award of punitive damages must be proportionate to:

a) the degree of vulnerability of the innocent party;

b) the harm or potential harm directed specifically at the plaintiff;

c) the need for deterrence;

d) other penalties, both civil and criminal, which have been or are likely to be inflicted on the wrongdoer for the same misconduct; and

e) the advantage wrongfully gained by the wrongdoer from the misconduct.

> [381] The monies and loss of opportunity that the defendants took from the plaintiffs were significant, in the millions of dollars. The harm was directed specifically at the plaintiffs. Other than the restitutionary award I have made in this case in an attempt to restore the plaintiffs to the position they would have been in had the defendants' misconduct not occurred, the defendants face no other penalties for their conduct. There is a need to send a message that, if you choose to behave in that fashion, there will be consequences.
>
> [382] I award punitive damages in the amount of $100,000.
>
> [Emphasis added.]

[43] The appellants do not challenge the judge's review of the applicable law. Rather, relying on *Hall*, they assert that the judge erred in principle because, by awarding punitive (non-compensatory) damages, he permitted the respondents to profit from their "illegal conduct".

[44] I disagree. First, the Court in *Hall* was considering "profiting from illegal conduct" in the context of a claim for compensation for personal injury, the illegal act being driving while impaired. While Justice McLachlin noted at 175, in *obiter*, that exemplary damages, being non-compensatory, should arguably be denied to a wrongdoer who would otherwise profit from a *crime*, that is not the case before us. That discussion was based on the need to maintain internal consistency in the law in the interest of promoting integrity of the justice system, as reviewed above in relation to the question of whether the judge erred in finding the trusts enforceable. Nothing in *Hall* suggest that it would be an error to award punitive damages against parties who were guilty of egregious conduct as faithless fiduciaries in the sort of circumstances that arise here: that is, where one of the purposes in setting up the trusts may have been contrary to a statute protecting creditors, but was not criminal.

[45] I would therefore reject this ground of appeal.

[46] I should add this: an award of equitable damages for breach of trust, unlike common law damages for breach of contract, may address some of the considerations that underlie an award of punitive damages (e.g. deterrence). This was not, however, raised as an issue before us, and I do not propose to

comment on it further other than to note that the judge clearly considered that additional denunciation was merited. I would not interfere with that conclusion.

6. DISPOSITION

[47] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Justice Iyer"