IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Morgan v. Jesani,*
2026 BCSC 139

Date: 20260129
Docket: S193861
Registry: Victoria

Between:

Janet Wilhelmina Morgan and Gerry Ross Morgan

Plaintiffs

And:

Alnoor Jesani, Litigation Representative of Mirza Jesani, deceased

Defendant

And:

Janet Wilhelmina Morgan and Gerry Ross Morgan

Defendants by Counterclaim

Before: The Honourable Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs and Defendants by Counterclaim:	A. Yen
Counsel for the Defendant:	S. Visram
Place and Dates of Trial:	Victoria, B.C. October 20–24; 27–31 and December 17–18, 2025
Place and Date of Judgment:	Victoria, B.C. January 29, 2026

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Introduction

[1] The plaintiffs owned property located at 3770 (later changed to 4181) Rocky Mountain Road, Malahat, British Columbia (the "Property") on which they operated a bed and breakfast/hotel business (the "Business") known as the "Morningside Estates". The Business was operated through 679191 B.C. Ltd. ("679191").

[2] To do so, they needed investment funds. Much of those funds were provided by the defendant, Mirza Jesani, and his wife, Shahnaz Jesani (together, the "Jesanis"). The defendant, Mr. Jesani, passed away on or around February 20, 2023, and his cousin, Alnoor Jesani ("Alnoor"), now acts as his litigation representative for the purposes of this action.

[3] Issues arose and the Property and the Business were sold. The parties, by way of claim and counterclaim, seek a determination of how the proceeds of sale are to be divided. The plaintiffs say that all of those proceeds and more should be distributed to them by reason of the defendant's various breaches of trust. The defendant's position is that all of the proceeds of sale should be distributed to the defendant.

[4] The plaintiffs also seek damages against the defendant for breach of trust.

[5] For the reasons that follow, I generally find for the plaintiffs and reject the defendant's claims.

Background/Evidence at Trial

[6] At all material times, the plaintiffs, Gerry Morgan and Janet Morgan, were husband and wife (individually referred to as "Gerry" and "Janet"). They are currently 72 and 71 years old, respectively.

[7] Gerry has university degrees in the field of education. After graduation, he worked as the assistant director for the Victoria School Board. Janet is an artist.

[8] In 1991, the plaintiffs founded a software development company called "Morgan Media". In 1998, they sold Morgan Media to a publicly-traded company

named “Big Picture Technologies” (“Big Picture”) in exchange for a “small amount of cash” and shares in that company. Trading of their newly acquired shares was restricted for one year. Once the shares became free-trading, the plaintiffs planned to sell them for what they anticipated would be many millions of dollars (the “Morgan Media Proceeds”). Gerry became an employee of Big Picture.

[9] In June 2000, in anticipation of their pending new wealth, the plaintiffs sold their home and purchased the Property for $950,000. At the time of the purchase, the Property, which comprised approximately seven acres, included three separate buildings, dubbed: (1) the Main House and Pool House; (2) the Glass House; and (3) the Garden House. The Garden House and the Pool House were lovely and inhabitable, but the other structures were “half built” and “boarded up” and needed substantial construction work. The plaintiffs intended to complete the construction and live on the Property.

[10] In order to complete the purchase of the Property pending receipt of the Morgan Media Proceeds, the plaintiffs obtained mortgage financing of $536,000 from the Laurentian Bank of Canada (the “Laurentian Bank Mortgage”) and $114,000 from Fisgard Capital Corporation (the “Fisgard Mortgage”), for a total of $650,000 (collectively, the “Plaintiffs’ Mortgages”).

[11] In January 2002, Gerry, together with William Plant (“Mr. Plant”), founded a company called Ink Media Inc. (“Ink Media”) through which they were attempting to develop and market a revolutionary type of computer. Gerry’s vision was that the computer would be robust and inexpensive enough to be used in schools in Third World countries where cleanliness was less than ideal.

[12] In late 2001, Big Picture went bankrupt. The plaintiffs’ shares became worthless. The Morgan Media Proceeds did not materialize.

[13] At the same time, the plaintiffs were under pressure from the Capital Regional District to either complete construction of the Main House and Glass House or demolish them. The plaintiffs were forced to reconsider their plans for the Property.

They settled on converting the Property into a “five-star” hotel and bed and breakfast operation (the “Project”). However, they needed investor financing to do so.

[14] Gerry testified that he had met a man named Azim Jessani (“Azim”) during his marketing efforts for the Ink Media computers. He indicated to Azim that he was actively looking for a partner for the Project. Azim looked at the Property. He mentioned it to his uncle, the defendant, Mr. Jesani, who was a doctor living in Chicago. The defendant asked his cousin, Alnoor, who at the time lived in Richmond, British Columbia, to look at the Property.

[15] Approximately one month later, the Jesanis visited the Property with Azim and Alnoor. By all accounts, they liked what they saw. Gerry testified that he and Janet and the Jesanis immediately “hit it off”.

[16] On August 25, 2003, the plaintiffs, the Jesanis, and Azim entered into a Memorandum of Understanding in respect of the Project (“MOU”). The MOU was prepared by Azim with some input from Gerry. It was poorly drafted. It purported to set out the understanding among the parties that, on the basis of an agreed valuation of the Property of $1.3 million, the plaintiffs would sell one-half of the Property (with an ascribed value of $650,000) to the Jesanis in consideration for the Jesanis taking responsibility for retiring the Fisgard Mortgage and taking over the payments required under the Laurentian Bank Mortgage until it, too, was retired. The MOU also indicated that the plaintiffs and the Jesanis “desired” to provide to Azim a 4% interest in the Property as a referral fee. The MOU went on to provide, in part, that:

> All future revenues shall be split according [*sic*] the % of shareholding in the property. Any business revenue splitting is on the basis of dividends from profits after expenses are paid. Morgans will be responsible for the setting up and maintenance of records. Jesanis have the right to review accounts any time. A dispute mechanism will be in place should any disputes regarding finances occur.

[17] The defendant gave evidence on examination for discovery that the plan was for the plaintiffs to run the Business on the Property together with Azim. Janet

testified that she had no expectation that the plaintiffs would be responsible for any further mortgage payments.

[18] Despite the MOU's frailties, the parties carried on as if it was a formal agreement setting out their respective rights and obligations. The Jesanis paid off the Fisgard Mortgage and assumed the required mortgage payments under the Laurentian Bank Mortgage.

[19] On October 14, 2003, the defendant's solicitor, Sikander Visram (who was also defendant's counsel at trial), completed the incorporation of 679191.

[20] Alnoor testified that the defendant utilized 616879 British Columbia Ltd. ("616879"), a dormant company owned by the defendant's brother, as the vehicle through which his transactions in respect of the Property and the Project were carried out.

[21] On October 29, 2003, the plaintiffs, the Jesanis, Azim, 679191, and 616879 entered into an agreement (the "Shareholders' Agreement"). It too was prepared by Azim. It too was poorly drafted. It provided for the allocation of the issued common shares of 679191 in the same proportion as the respective ownership interests in the Property as set out in the MOU. It also provided, in part, as follows:

> […]
>
> 2.1 All agreements among some or all of the parties hereto regarding the organization and affairs of the Corporation and/or the sale of any Shareholder's shares of the Corporation under certain circumstances, whether written or oral, are hereby terminated.
>
> […]
>
> 4.3 The parties hereto covenant and agree that whilst Gerry and Janet are shareholders of the Company and are operating the Bed and Breakfast operations of the Company, they shall be entitled to occupy a residence at 3770 Rocky Mountain Road, Victoria, BC., for their own personal use free of charge […]
>
> […]
>
> 5.1 Proper books of account shall be kept by the Corporation and entries shall be made therein of all matters, terms, transactions and things as are usually written and entered into books of account in accordance with GAAP and each of the Shareholders shall at all times furnish to the others correct

> information, accounts and statements of and concerning all transactions pertaining to the Corporation without any concealment or suppression. Each Shareholder shall be entitled to reasonable access to the books and records of the Corporation at all reasonable times.
>
> 5.2 The external accountants of the Corporation shall be such firm of accountants as the Shareholders shall appoint from time to time and such accountants shall, at the fiscal year end of the Corporation and at such other times as they may be reasonably requested by either Shareholder, prepare financial statements for such fiscal year […]
>
> […]
>
> 5.4 The Shareholders agree that all funds required for the purposes of the Corporation shall be obtained, to the greatest extent possible, by borrowing from a chartered bank or other lender. The decision whether such funds are required, from whom such funds will be borrowed and the terms and conditions of such borrowing shall be determined by the unanimous approval of Shareholders from time to time […]
>
> 5.5 If, notwithstanding the compliance by the Shareholders with the provisions of Section 5.4, the Corporation shall not have obtained all or part of the said funds from a bank or other lender, then, within ten days after a demand in writing by the Corporation is given by the Corporation to the Shareholders, each Shareholder shall advance to the Corporation such portion of the said funds, or the part thereof that the Corporation shall not have obtained from a bank or other lender, as is proportionate to their then beneficial ownership of fully-participating shares of the Corporation. All advances made to the Corporation pursuant to this Section shall be treated as shareholder's loans …None of those loans shall be called by the Shareholders or repaid to them, in whole or in part, except as is determined by the Board of Directors […]
>
> […]
>
> 5.12 Gerry and Janet shall operate the Bed and Breakfast operations of the Corporation, on a day to day basis, which shall include the ordering of supplies, the hiring and firing of staff, the setting and collection of room rents for guests, tree maintenance and upkeep of the premises and all of the matters necessary and incidental to the operation of the Bed and Breakfast operations of the Corporation.

[22] The Shareholders' Agreement did not define the term "the Bed and Breakfast operations of the Corporation".

[23] Nevertheless, the parties conducted themselves on the basis that the plaintiffs and the Jesanis each held 48% of the Property and the shares of 679191, while Azim held 4% of each. However, the ownership arrangement in respect of the Property was not registered in the Land Title Office. The plaintiffs continued to hold 100% of the legal title to the Property.

[24] Construction of the Project commenced with the plaintiffs working full-time as construction managers, a role which included sourcing materials and supplies and often working as labourers. Azim took up occupation of the Pool House (part-time) and assisted in the construction management. He also assumed the role as bookkeeper. However, shortly after construction began, there was a “falling out” between him and the plaintiffs. Azim moved out of the Pool House and returned to Vancouver. Thereafter, contractors were chosen by the plaintiffs in consultation with the defendant.

[25] Two accounts were opened by the parties at the Royal Bank of Canada in the name of 679191: the “Business Account” and the “Mortgage Account”. Only Janet and the defendant had authority to withdraw from the Business Account. The construction invoices were either sent directly by the contractor or material supplier to the defendant or were paid by Janet from the Business Account.

[26] Alnoor testified that, throughout the period from 2004 to 2019, the defendant had little interest in dealing with day-to-day matters relating to the Property, the Project, or the Business. The defendant assigned Alnoor the role of taking care of the financial aspects related to the Project, the Property, and the Business on his behalf. As money was needed for construction, the defendant sent it to Alnoor, who in turn deposited it into the Business Account. At all times, Alnoor acted as the defendant’s “eyes and ears”.

[27] The plaintiffs paid for a portion of the construction costs personally, including for a significant portion of the landscaping. They did not receive any payment for their services or reimbursement for those expenses.

[28] Gerry obtained employment at an entity called Mercurial Communications from 2004 to approximately 2007. He also drew a small wage from Ink Media.

[29] By April 2004, it was apparent to the parties that additional financing would be required for the construction expenses. The Jesanis assumed the responsibility for

raising the money. At the request of the defendant, the plaintiffs signed the following letter:

> April 10, 2004
>
> To whom it may concern:
>
> Re 3770 Rocky Mountain Rd., Malahat, BC Construction Loa[*sic*]
>
> Dear Sir/Madame:
>
> We would like to confirm that we support the loan for construction loan for the above listed property to Dr. and Mrs. Jesani.
>
> We authorize the bank to take a collateral charge on the property and confirm that we will act as guarantors for the loan.
>
> Sincerely,
>
> Gerry Morgan
>
> Janet Morgan

[30] Gerry testified that he signed the letter because the defendant had said he needed it to raise the money required for the Project. Gerry wanted to cooperate with the defendant in order to ensure the Project's successful completion.

[31] On June 6, 2004, the plaintiffs sold an additional 5% of the Property and shares of 679171 to the defendant for $65,000, thereby reducing the plaintiffs' interest to 43% and increasing the Jesanis' interest to 53%. This transaction was also not registered in the Land Title Office. The plaintiffs continued to hold 100% of the legal title to the Property. The plaintiffs used the resulting money for personal expenses.

[32] The Jesanis committed to pay $416,000 for the Project's construction costs in exchange for which the plaintiff agreed to transfer a further 16% of their interest in the Property to the Jesanis. The "agreement" that purports to document this arrangement is dated June 7, 2004 (the "Funding Agreement"). It was also prepared by Azim and was also poorly drafted. It provided, in part:

> **Agreement for Change of Ownership Equity in the [Property]**
>
> …
>
> Between
>
> Gerry and Janet Morgan (seller)

And

Dr. and Mrs. Jesani (buyer)

Morgans have offered to reduce their interest in the property from 43% to 27% and the Jesanis have agreed to increase their ownership in the property from53% [*sic*] to 69%.

The Jesani's will guarantee to commit $416,000 in additional money to be used for the building project. Additional funds (over and above the $416,000) required for this property development will be shared by all the owners of the property, on a pro rata basis of their ownership share.

If a sale of the property should occur;

1. All of the debts of the corporation will be paid first
2. All of the shareholder loans will be paid second
3. An equity stake in the amount of $650,000 will be paid out to the Morgans and a stake of $650,000 will be paid out to the Jesanis third
4. All proceeds in addition to these amounts will be paid to the owners on an a [*sic*] pro rata basis of their ownership share.

If additional loans are required for capital or operational expenses, then the payment of the loan will fall to the shareholders on the basis of the percentage ownership.

If the property is operated as a Bed and Breakfast and realizes a profit after operating expenses, then, all proceeds after debts and/or reinvestment shall be paid out to the owners on the basis of a percentage of equity ownership.

[33] Again, the arrangement was not registered in the Land Title Office. The plaintiffs continued to hold 100% of the legal title to the Property.

[34] Two additional documents dated June 7, 2004, were prepared by Azim, both of which were called "General Agreement" among the plaintiffs, the Jesanis, and Azim. They too were poorly drafted.

[35] The first document, entitled "General Agreement No. 1", set out that the Project would be sold, failing which the parties would attempt to find an additional investor and operate the Project as a bed and breakfast. General Agreement No. 1 provided, in part:

General Agreement

between

Dr. & Mrs. Jesani

Mr. Azim Jessani

&

Janet & Gerry Morgan

Part One (Formation of the Corporation and the Objectives of the Corporation)

1. A corporation shall be formed for the purposes of running and managing the property interests. […]

2. All current monies that have been put into the property shall be declared and converted to a shareholders loan. These converted monies shall be approved as legitimate expenses of the corporation. No further expenses shall be converted without the express consent of the percent majority shareholders.

    a. All shareholder loans will accrue a compounded interest of prime + 2% calculated annually.

[…]

Bank Loan

If a loan is taken on behalf of the corporation and guaranteed by the partners, it becomes the responsibility of the corporation and shall be paid back before the payment of shareholder loans and before owners equity.

If the corporation does not have income sufficient to make payments, a side agreement between the owners shall be drawn up and a shareholder loan issued at prime +2% that will be payable to the owner as soon as revenue comes in or as soon as a sale occurs.

[…]

Part 2 (Proceeding Forward)

An agreement to move forward was made on June 5, 2004 for the following to occur.

1. …

2. Landscaping should proceed immediately. Gerry and Janet shall take the lead.

    a. Gerry and Janet will have a preliminary budget of $12,000 which can be spent on supplies and labour

    b. Contributions in time related to landscaping will be recorded and converted to a shareholder loan at the rate of $10/hour. This applies to physical labour only. We will only charge for that which we can do efficiently and at less cost than hiring it done [*sic*]. All management will not be charged for.

[…]

[36] Azim was tasked with the marketing and sale of the Property but did not make meaningful efforts in that regard.

[37] The second document, entitled “General Agreement No. 2”, purported to memorialize the agreement among the parties regarding the operation of the Property as a bed and breakfast. It provided, in part:

General Agreement

between

Dr. & Mrs. Jesani

Mr. Azim Jessani

&

Janet & Gerry Morgan

Part One (Objectives of the Corporation formed for operation of the [Property]

1 A corporation has been formed (679191 BRITISH COLUMBIA LTD.) for the purposes of running and managing the property interests. This shall be undertaken and be deemed in the best interests of all of the owners.

2. All incidental expenses incurred for the day to day operations of the corporation that are paid for by one of the owners shall be registered as a shareholder loan until the corporation can reimburse the expenses incurred. No expenses over $500 will be registered without the approval of the majority shareholders.

a. All shareholder loans will accrue a compounded interest of prime + 2% calculated monthly.

[…]

6. Failing sale of the property by the time it is fully developed, the owners will consider starting B&B business operations on the property as agreed on June 5, 2004 […]

[…]

Contributions in time related to landscaping will be recorded and converted to a shareholder loan at the rate of $10/hour. This applies to physical labour only. Morgans will be cost cost-effective [*sic*] in taking landscaping decisions […]

7. If these is a sale, then the monies will be divided according to the following priorities:

a. Debts, taxes of the corporation will be paid first

b. Shareholder loans shall be paid 2nd

c. Debt and Equity contributions shall be paid out 3rd

d. The remainder shall be split according to the percentage holding of the property that each has at the time of sale.

e. Notes:

> 1. Debts include agreed upon commissions for sales, legal and other accounting fees owed upon dissolution of the property.
>
> 2. Mr. Alnoor Jesani will do corporate accounting and tax preparation and filing.

8. Ownership Changes

> a. All previous agreements regarding ownership (commitment of shareholders to each other will remain in effect…c. Ownership amounts, shareholder loans and commitment, covenants and governance issues shall be maintained as part of the corporate records and shall be made available to all owners and shall bind all owners […]

[…]

[38] Gerry testified that it was the defendant who "hired" Azim to prepare the MOU, the Shareholders' Agreement, the Funding Agreement, General Agreement No. 1, and General Agreement No. 2. With the exception of the Shareholders' Agreement, the plaintiffs did not receive legal advice in respect of any of these agreements.

[39] From and after the opening of the Business Account and the Mortgage Account, the defendant relied on Alnoor and an accountant named Naguib Dhalla ("Dhalla") to look after the accounting in respect of the Business. Dhalla was a friend of Alnoor's. They both took on the task as a favour to the defendant. Neither was paid for their time.

[40] Unbeknownst to the plaintiffs, in or around June 2004, the Jesanis became entangled (presumably innocently) in a Ponzi scheme (the "Ponzi Scheme") that had been orchestrated by Rashida Samji ("Samji"), the notary public they were using for their transactions in British Columbia. Alnoor testified that both he and the defendant had known Samji for many years. Samji used monies that had been deposited into her trust account to fund the Ponzi Scheme. Victims were promised significant returns on their investments but, in reality, they were paying each other. In the case of the Jesanis, the promised returns were 30%. The Jesanis invested in excess of $500,000 in the Ponzi Scheme.

[41] On July 14, 2004, the defendant signed a Declaration of Trust which provided that:

1) Azim had transferred his 4% interest in the Property to 616879; and

2) 616879 held that 4% interest in trust for Azim.

[42] Alnoor testified that the purpose of this transaction was to enable the defendant to obtain additional financing for the Project's construction costs.

[43] At that same time, the cost of construction for the Project was exceeding the amount that had been committed by the Jesanis. Gerry testified that the defendant convinced him that, if additional funding was not secured, the Project would be lost. The defendant advised the plaintiffs that he would be able to raise the necessary additional funding from the Bank of Montreal ("BoM") but only if:

1) the Jesanis owned 100% of the legal title to the Property; and

2) the funding would be used, in part, to discharge the Laurentian Bank Mortgage.

[44] It is noteworthy that, as part of the Jesanis' acquisition of their initial 50% interest in the Property, they assumed sole responsibility for discharge of the Laurentian Bank Mortgage.

[45] Gerry testified that he felt that he and Janet, the plaintiffs, had no other choice but to agree.

[46] On October 13, 2004, the parties executed a Declaration of Trust pursuant to which:

1) the plaintiffs transferred legal title to the Property into the names of the Jesanis; and

2) the Jesanis agreed to hold 27% of the Property in trust for the plaintiffs.

[47] The Declaration of Trust provided, in part, that:

> 3. We shall account to GERRY ROSS MORGAN and JANET WILHELMINA MORGAN for all net profits made or net revenue received after deducting such expenses as to their 27% interest in the property as is lawfully entitled to be deducted from the said property.
>
> 4. It is understood that if the said property is improved, the improvements shall be made on behalf of GERRY ROSS MORGAN and JANET WILHELMINA MORGAN as to their 27% interest in the property and shall be held by us In Trust for GERRY ROSS MORGAN and JANET WILHELMINA MORGAN.

[48] The Declaration of Trust was prepared by Samji and was executed by the parties in her office. The plaintiffs were not provided with independent legal advice in respect of it. The Declaration of Trust was not registered against title to the Property.

[49] Curiously, transfer of title to the Property was structured such that the plaintiffs transferred their interest first to 616879 and then, simultaneously it was transferred from 616879 to the Jesanis. Both transfers were signed on October 13, 2004, and, on the face of both transfer documents, consideration was stated to be $1,300,000. No explanation was provided for this peculiarity other than the fact that a Right to Purchase had somehow been registered in favour of 616879. The transfers were prepared and registered by Samji's office.

[50] In any event, the Jesanis now held a 100% registered interest in the Property. On October 13, 2004, they obtained mortgage financing of $1,250,000 from the TD Bank (the "TD Bank Mortgage"). This financing was used in part to pay off the balance owing under the Laurentian Bank Mortgage ($526,000). The balance of the proceeds (net of miscellaneous expenses) totalling $696,600 were deposited in Samji's trust account. It appears that $396,620 of this amount was later deposited by Samji into the Jesanis' account at the Royal Bank. The plaintiffs were not advised and were unaware of the TD Bank Mortgage, the amount that had been borrowed, or what the mortgage proceeds were used for.

[51] In October 2004, the share register of 679191 (located in Mr. Visram's office) was updated to reflect the changed pro rata interests as contemplated in the Funding Agreement.

[52] In 2005 and 2006, payments were made by Samji to or on behalf of the Jesanis on the following dates, as part of the Ponzi Scheme, including:

a)	February 15, 2005	$30,000
b)	March 1, 2005	$50,000
c)	April 1, 2005	$25,000
d)	April 8, 2005	$100,000
e)	January 31, 2006	$100,000
f)	August 30, 2006	$50,422
Total:		$355,422

[53] In addition, Samji used monies from her trust account to pay the defendant's personal Visa bills.

[54] Construction of the Project was completed by the end of September 2005, and an Occupancy Permit was issued on October 7, 2005. By any measure, the buildings and amenities were, and still are, spectacular. As had been agreed by the parties, the plaintiffs lived rent-free in the Glass House.

[55] Alnoor testified that he tracked the construction costs on behalf of the defendant. He testified that, as of September 30, 2005, the total costs were $568,060, including the initial $416,000 that the Jesanis had committed to pay. Accordingly, the "additional funds" that were necessary to complete construction were over and above the Jesanis' commitment by a total of $152,060.

[56] The defendant also called an accountant, Allan Zhang, who was engaged by the defendant in 2019 to "tally up" the construction costs. Mr. Zhang testified that Alnoor provided him with two boxes (the "Two Boxes") containing receipts, bank statements, invoices, cancelled cheques, and other records that Alnoor told him were related to the Project's construction costs. Mr. Zhang provided defence counsel with several Excel spreadsheets, summaries, and calculations that purported to evidence the total construction costs. It quickly became apparent during Mr. Zhang's testimony that:

1) Mr. Zhang's personal knowledge of the contents of the Two Boxes was based entirely on what Alnoor had told him, namely that their contents related to the Project's construction costs;

2) The Excel spreadsheets were not prepared by Mr. Zhang, but rather by a member of his office staff, who spent "several weeks" going through the Two Boxes and inputting the information she derived from their contents into the spreadsheets;

3) Mr. Zhang's involvement was limited to his having "verified" his staff member's work by focussing on "the big amounts" in the spreadsheets;

4) The spreadsheets were "incomplete" such that "there must [have been] something missing";

5) The complete information was on a flash drive which was in Mr. Zhang's possession but inexplicably was not produced at trial; and

6) The documents in the Two Boxes had been provided by Mr. Zhang to defendant's counsel but were not produced at trial.

[57] Most concerningly, Alnoor was never asked to confirm the truth of any of the foregoing.

[58] The Business, that is, the Morningside Estates bed and breakfast, opened for business in late August 2005. The Main House, the Pool House, and the Garden House were rented to guests as part of the Business. All revenues were deposited by Janet into the Business Account. All expenses related to the Business were withdrawn from the Business Account, including some operating expenses that had been paid by Janet using her personal Visa card.

[59] Janet testified that she understood the purpose of the Mortgage Account was for use by the defendant to deposit mortgage funds and make mortgage payments.

[60] Janet worked full-time as the manager of the Business from 2005 until 2019. She testified that it was run “very much as a family business”. The plaintiffs were not paid a salary or wages for their work on the Property. When needed, Janet withdrew a modest amount of money from 679191’s bank account as a draw for the plaintiffs’ living expenses. However, as the years went by, the plaintiffs were becoming financially strained.

[61] On March 21, 2006, the defendant obtained mortgage financing of $2,125,000 from the BoM secured by a mortgage against title to the Property (the “BoM Financing”). The BoM mortgage payments were $12,500 per month. Samji deposited these moneys from her trust account into the Mortgage Account.

[62] It appears that the Jesanis used the BoM Financing to discharge the TD Bank Mortgage and to pay for the construction funding shortfall. The defendant’s unaudited journal entry records suggest that the shortfall was approximately $689,000, however that figure cannot be verified or authenticated. The Jesanis made the payments required by the BoM Financing, including the portion attributable to the plaintiffs’ 27% of the additional construction cost shortfall. The balance of the BoM Financing (net of expenses and fees) of $898,030 was deposited into Samji’s trust account.

[63] Despite having a 27% beneficial interest in the Property and the Business through 679191, the plaintiffs had no knowledge of any of the BoM Financing or of any of the transactions related to it.

[64] Gerry testified that, throughout their time working together, he considered the defendant to be a friend and trusted him. Gerry testified that, at various times prior to 2008, he “gifted” shares in Ink Media to the defendant. In June 2007, at the defendant’s direction, Samji transferred at least $22,500 from her trust account to Ink Media as payment for other shares in Ink Media on behalf of the defendant.

[65] Janet had no training as a bookkeeper and assumed that the defendant and/or Alnoor were taking care of the accounting matters throughout their time

working together. Alnoor testified that he and Dhalla worked together with Janet to complete the books and records of the company. For her part, Janet prepared "spreadsheets" that listed the revenues and expenses for the Business on a daily and monthly basis. From the Business's opening until approximately 2012, Alnoor and Dhalla attended the Property (Alnoor testified that they visited approximately twice per year) and reviewed Janet's spreadsheets and the backup documentation with her. Dhalla recorded the information in more formal spreadsheets on his laptop computer. Alnoor testified that he was content with the information that was provided by Janet. It allowed him to track the Business's ongoing income and expenses and report to the defendant.

[66] In approximately July 2012, Alnoor and Dhalla stopped attending the Property. Alnoor testified that he and Dhalla had attended several times previously only to find that Janet was either too busy to sit down with them or that her printer was not working. He testified that because the trips had been unproductive and that neither he nor Dhalla were being compensated for their time, they decided to simply rely on the information Janet provided to them for accounting purposes.

[67] Janet testified that, despite having no experience in bookkeeping, she did the best she could to maintain and organize the receipt and expense records for the Business. For 2012, the first year that Alnoor and Dhalla stopped attending the Property to prepare the financial documentation, Janet retained a professional bookkeeper to assist her in that regard. The bookkeeper used a software product called Quickbooks which he shared with Janet. Armed with this software, Janet felt that she would be able to continue with the bookkeeping on her own starting in 2013, but she quickly realized that the task was beyond her capabilities. She abandoned Quickbooks and resorted to the process that had previously been accepted by Alnoor and Dhalla. However, they did not attend the Property as they had done previously, despite her requests that they do so.

[68] Janet testified that she provided Alnoor with the Quickbooks files that had been created by the professional bookkeeper for 2012 but that he could not open

them on his computer. She testified that she attempted to provide Alnoor and Dhalla with the bookkeeping records she had created from mid-July 2012 to 2015, but that Alnoor and Dhalla were content to rely on the bank account statements that they could access online.

[69] The usual accounting, tax filings, and other formalities in respect of the Business and 679191 were not adhered to. Alnoor testified that this “lax-ness” was simply because his review of the financial records demonstrated to him that the Business was not generating a profit and, hence, he determined that formal accounting and filings were unnecessary. He did, however, take care of the GST filings. He agreed on cross-examination that there was no expectation that the plaintiffs would be responsible for these matters. He also agreed that his expectation was that Mr. Visram’s office would take care of any corporate filings that were required.

[70] The plaintiffs testified that, after execution of the Declaration of Trust, they did not receive any information regarding the financial circumstances of the Property, the Project, or 679191, despite numerous requests that they had made of the defendant for this information. Janet testified that she repeatedly asked the defendant for information as to how much the plaintiffs owed him for the construction costs, but never received an answer. Gerry testified that the defendant repeatedly told him that the plaintiffs had nothing to worry about, that all would be well eventually, and that they would be paid for their time and efforts.

[71] It appears that the trust account deposits from the TD Bank Mortgage and the BoM Financing were used by Samji as part of the Ponzi Scheme and were lost.

[72] During the period of January 2008 to January 2010, at the direction of the Jesanis and presumably as part of the Ponzi Scheme, Samji transferred a total of $251,100 to Ink Media by way of several bank drafts. There is no documentary evidence explaining these transfers. Gerry testified that he had no knowledge of them and that he never agreed to Ink Media borrowing money from the defendant.

[73] In March 2008, 679191 was dissolved for failure to file the required annual reports. However, it was subsequently restored. The plaintiffs were not made aware of either event.

[74] Ink Media became dormant in 2010.

[75] In 2010, Gerry received an offer to become the principal of an international school in Thailand. Because the plaintiffs needed an income, he took the job and ended up living in Thailand and China, working as the principal at three different schools from 2010 to 2022. Janet continued to live on the Property and operate the Business. Although Gerry returned to Canada for two months each year when the schools were not in session, his marital relationship with Janet slowly fell apart. It ended in 2018.

[76] The Ponzi Scheme was uncovered in January 2012, and a massive investigation was launched. Ultimately, Samji was convicted and incarcerated.

[77] On November 1, 2013, Samji's Trustee in Bankruptcy (the "Trustee") commenced an action against the Jesanis, 679191, and Ink Media (the "Trustee's Action") for recovery of:

1) the $251,100 that had been transferred to Ink Media by Samji;

2) payments totalling $575,076 that had been transferred to 679191 by Samji during the period of April 2008 to January 2012;

3) payments totalling $125,864 that had been made by Samji towards the TD Bank Mortgage during the period from September 2007 to January 2012; and

4) payments totalling $63,337 that had been made to the solicitors for the BoM in respect of arrears in payments of the BoM Financing.

[78] The Trustee also filed a Certificate of Pending Litigation against the Property ("CPL1").

[79] In October 2014, Janet learned that 679191 had failed to remit required GST filings to the Canada Revenue Agency. She raised the issue with Alnoor and Dhalla but received no response.

[80] On September 20, 2015, there was a formal meeting of the shareholders of 679191 at the Property. In attendance were the defendant, Alnoor, Janet, and the plaintiff's daughter, Christina ("Christina"), who attended as Gerry's representative (as he was living in Thailand). Christina took notes of the discussions and circulated typed minutes of the meeting. At the meeting, the attendees agreed that a better job of the Business' accounting was required. They also agreed, in relevant part, that:

1) Going forward, Janet would be paid an annual salary of $24,000 from the income of 679191;

2) Janet would receive retroactive pay from 2005 to the date of the meeting that would "top up" what she had received during that period to $24,000 per year;

3) The defendant would receive $60,000 per year from the income of 679191 towards the loan he had made to the company;

4) Janet would be given full access to all accounting records of 679191;

5) Janet would be provided with a Visa card for the Business's expenses; and

6) Janet would submit to Alnoor "monthly accounts" and Alnoor would provide her with a spreadsheet to assist her in her accounting work.

[81] There was no mention at the meeting of the Trustee's Action. The plaintiffs were unaware of it.

[82] Shahnaz died in April 2017. Her interests in the Property and 679191 were acquired by the defendant through a probate process in the State of Illinois.

[83] 679191 did not prepare financial statements or remit income tax or GST, as required, to the Canadian Revenue Agency in respect of its business. On August 27, 2018, 679191 was dissolved a second time for failure to file the required annual reports. The plaintiffs were unaware of this dissolution.

[84] In December 2018, the Trustee's Action was settled for the sum of $250,000 payable to the Trustee. On February 18, 2019, the Property was sold by the defendant for $2,660,000 with a closing date of October 31, 2019.

[85] The plaintiffs had no knowledge of or involvement in the Ponzi Scheme, the Trustee's Action, the retainer by the Jesanis of counsel to act on behalf of the defendants in the Trustee's Action, the Response to Civil Claim that was filed, or of the December 2018 settlement of the Trustee's Action.

[86] In 2019, while in Thailand, Gerry learned through Janet that the defendant wanted to sell the Property. Although Gerry thought that the timing was not the best, he did not object to it being sold. Janet testified that she did not want to sell the Property and could not understand why the defendant wanted to do so.

[87] This action was commenced on September 4, 2019. The plaintiffs filed a Certificate of Pending Litigation against the Property ("CPL2"). It was only after commencement of this action that Gerry became aware of the Trustee's Action and its settlement.

[88] On October 31, 2019, the sale of the Property closed. Mr. Visram acted as the vendor's solicitor in respect of the sale. The net proceeds of sale totaling $2,544,186.32 were paid into Mr. Visram's trust account. The following payments/allocations were made from those proceeds:

1) $250,000 as payment for the settlement of the Trustee's Action and discharge of CPL1;

2) $665,000 was held back for withholding tax;

3) $1,083,933.66 was used to discharge the BoM Mortgage;

4) $5,000 was used to settle legal fees; and

5) $540,252.66 was paid to the defendant.

[89] CPL2 was discharged by the plaintiffs on Mr. Visram's undertaking to preserve the holdback and payment to the defendant in an interest-bearing trust account pending the outcome of this action. The current balance of that trust account is approximately $1,287,964. The Court was advised during submissions that those funds are in a term deposit that matures on February 26, 2026, earning interest at 2.5% (the "Term Deposit").

[90] Over the course of the period from 2005 to 2019, Janet received wages (taken as draws, retroactive salary, or salary) totalling $241,146. That amount is $114,853 less than what she would have received had she been paid $24,000 per year as agreed during the September 20, 2015, meeting.

[91] Janet's uncontroverted analysis of the Business Account's records discloses that the defendant withdrew $273,014 (net of credit deposits and withdrawals after the sale of the Property) and that Janet transferred $2,729 more than she ought to have from the Business Account to pay her personal Visa account. She concedes that she must account for this amount.

[92] As noted, the defendant, Mr. Jesani, died in February 2023. Alnoor was appointed as his litigation representative for the purposes of this action.

[93] At the request of the Court during trial, Mr. Visram was asked to produce all of the corporate records of 679191 as they were considered relevant to the issue that has been raised by the defendant regarding which of the parties was responsible for record-keeping and accounting for the company and the extent to which shareholder's loans were owed to the parties. Mr. Visram advised the Court that, with the exception of 679191's Minute Book (which he produced), all of the corporate records were destroyed by his office sometime after 2024.

Expert Evidence

[94] The plaintiffs retained an accountant, Christopher Smith, to provide opinion evidence regarding the cost of construction of the Property and shareholder contribution, withdrawal, and loan reconciliations. Mr. Smith was qualified in that capacity without objection.

[95] The thrust of Mr. Smith's opinion is that there is insufficient information in the books and records of 679191 to enable him to provide the requested opinions.

[96] Mr. Smith testified that it is typically the case that shareholder's loans to a corporation are recorded in the books and records of the corporation, which are maintained in the corporation's registered and records office.

Credibility and Reliability

[97] The plaintiffs gave their evidence in a forthright, sincere, and genuine fashion. They were not prone to exaggeration and did their best to provide the Court with an honest narrative. Their evidence was not controverted by any evidence led by the defendant. Neither their credibility nor reliability was undermined during cross-examination. I have no hesitation accepting their evidence in its entirety.

[98] Christina and Mr. Smith were excellent witnesses. They were articulate, matter-of-fact, and credible. I accept their evidence in its entirety.

[99] Alnoor was a delightful witness who provided his evidence in an honest and frank manner, doing his best to provide an accurate account of his involvement in the Project and the Business. From time to time, he was inclined to stray from his personal involvement to an interpretation of what others had done or to after-the-fact acquired knowledge gleaned from other sources. I have no difficulty accepting his evidence to the extent that it was based on his personal knowledge.

[100] Mr. Zhang's evidence was based entirely upon unsubstantiated speculation and hearsay. He advised the Court that the staff member who prepared the spreadsheets still works in his office. That person was not called to testify. The

source documents forming the basis of the information in the spreadsheets and summaries were in the possession of defendant's counsel but were not put in evidence. Mr. Zhang conceded that the spreadsheets in evidence were "incomplete" and said that he had in his possession a flash drive containing the missing information but that the drive was not put in evidence.

[101] The statements from Alnoor that Mr. Zhang relied on what Alnoor told him as the basis for his evidence were not put to Alnoor for verification. Moreover, Alnoor's evidence, which I accept, conflicted with those alleged statements. I decline to give Mr. Zhang's evidence, or the spreadsheets he and his firm prepared, any weight.

Adverse Inference

[102] An adverse inference may be drawn when, without explanation, a party fails to call a witness who, in the circumstances, would have had knowledge of the facts in dispute. This failure is akin to an admission that the evidence would have been contrary to the party's case or at least would not support it: *Rohl v. British Columbia (Superintendent of Motor Vehicles)*, 2018 BCCA 316 at para. 1.

[103] Alnoor testified that Azim is alive and healthy and that he now resides in Portugal. Alnoor also testified that there was a falling out between Azim and the defendant regarding Azim's 4% share entitlement in 679191. Nevertheless, no explanation was provided for why Azim was not called by the defendant as a witness.

[104] In my view, Azim would have had knowledge of the facts surrounding the defendant's claims regarding not only the preparation of the various agreements in issue but also the cost of construction of the Project.

[105] I draw an adverse inference from the defendant's failure to call him as a witness.

Analysis

The Obstacle

[106] The Court has been put in the unenviable position of having to conduct its analysis of the issues in this action on the basis of poorly drafted, vague, uncertain, and ambiguous documents that were executed over 20 years ago by lay persons without regard for consistency or any need for comprehension by third parties.

[107] Of the five parties involved, two are now deceased and one, Azim, was not called to testify. With the exception of the Shareholders' Agreement, none of the documents purports to bind 679191 to anything, let alone the Property, the buildings constructed on it, or the personal mortgages taken as security for the defendant's loans. Funding flowed from the Jesanis to 679191, in which they held only a 73% interest, without any documentation evidencing whether it was by way of shareholder's loan or otherwise, and was used to pay for improvements on the Property in which 679191 had no interest.

[108] In the result, the Court endured over two weeks of confused, after-the-fact conjecture of what the parties' understandings were likely to have been at the time. The confusion would have been prevented had the parties engaged competent lawyers to craft the documents. Sadly for all concerned, that was not the case.

The Parties' Intentions

[109] Each of the MOU, the Shareholders' Agreement, the Funding Agreement, General Agreement No. 1, General Agreement No. 2, and the Declaration of Trust are rife with ambiguity, notably:

Shareholders' Agreement

i. By its terms, the Shareholders' Agreement terminated the MOU (Article 2.1), yet, it did not replace the terms of the MOU;

ii. Article 4.1 references "the operation and control" and "the affairs" of 679191 but did not tie them to the Business;

iii. Article 4.2 referenced “Schedule A” but no such schedule exists;

iv. Throughout, 679191 was defined as the “Corporation”, however, Article 4.3 refers to “the Bed and Breakfast operations of the Company” without identifying “the Company”;

v. Article 5.1 did not specify which, if any, of the parties would be responsible for the keeping of “proper books of account”. Article 5.2 stipulated that a firm of accountants would be retained but nothing further is specified; and

vi. Article 5.12 provided that the plaintiffs were to operate 679191’s Bed and Breakfast operations but did not identify where those operations would take place.

Funding Agreement

i. provided that, on a sale, “all of the debts of the corporation would be paid first” but did not identify “the corporation”; and

ii. provided that his agreement “does not alter or change any previous agreements and shall be recorded in the corporate records book”. The provision relating to “additional loans” for “capital or operational expenses” referenced undefined “shareholders”. To the extent that this was intended to be a reference to the shareholders of 679191, the provision is inconsistent with the terms of the Shareholders’ Agreement.

General Agreement No. 1

i. did not reference 679191 (which was incorporated in October 2003);

ii. contemplated that “a corporation shall be formed for the purposes of running and managing the property interests.” If that corporation was intended to be 679191, the document could easily have specified so, but it did not;

iii. did not identify “the property interests”;

iv. contemplated a new corporation undertaking “to complete the property for a” bed and breakfast operation, but did not identify the property;

v. provided that “all current monies that have been put into the property shall be declared and converted to a shareholders loan”, presumably of the corporation to be formed, but did not specify which property or which corporation; and

vi. provided that all shareholder’s loans would accrue “a compounded interest of prime + 2% calculated annually” but did not define “prime”.

General Agreement No. 2

i. provided that all incidental expenses incurred in respect of the Property for the day-to-day operations of 679191 “shall be registered as a shareholder loan” and that “all shareholder loans will accrue a compounded interest of prime + 2% calculated monthly”, which is inconsistent with General Agreement No. 1 (signed on the same day); and

ii. the shareholder loan provisions are inconsistent with the provisions of the Shareholders’ Agreement.

Declaration of Trust

i. Clause 3 provided that the Jesanis will account to the plaintiffs for:

> all net profits made or net revenue received after deducting such expenses as to their 27% interest in the property as is lawfully entitled to be deducted from the said property

This clause is vague and uncertain and lacks even a modicum of definition and precision. It is difficult to discern the parties’ intention from the language used. What was meant by “net profits” and how was it to be calculated? What was meant by “lawfully entitled to be deducted”?

[110] It is a “cardinal rule” of the construction of contracts that they are to be interpreted in the context of the intentions of the parties as evidenced from the contract as a whole: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, 1993 CanLII 145 at 23–24. Where a contract is ambiguous, the Court will resort to interpretive principles to resolve the ambiguity, such as the *contra proferentem* rule and the primacy of the specific over the general: *Buchanan v. Wawanesa Mutual Insurance Company*, 2010 BCCA 333 at para. 31.

[111] If, in light of the surrounding circumstances, it is possible to discern what the parties “clearly intended” from the face of the agreement, resort to the *contra proferentem* rule is unnecessary. Otherwise, the agreement will be construed against the party who drafted it.

The Probable Arrangement

[112] On the whole of the evidence, and in light of the surrounding circumstances that existed at the time the agreements were signed, I find that, from and after June 2004, the plaintiffs and the Jesanis intended that:

1) The Property, 679191, and the Business would be beneficially owned in accordance with the following proportions: 73% by the Jesanis (which included Azim’s 4% interest) and 27% by the plaintiffs;

2) The Jesanis would hold 27% of the Property (including all improvements to the Property) in trust for the plaintiffs;

3) In June 2004, the plaintiffs agreed to fund 50% of the then-estimated costs of construction of the Project (50% of $416,000 = $208,000) by transferring 16% of their interest in the Project to the Jesanis. They did so on the basis of the previously-agreed valuation of the Property of $1,300,000 (16% x $1,3000,000 = $208,000).

4) The Jesanis would be responsible for the monies required to complete construction of the buildings on the Property. To the extent that the

construction cost exceeded $416,000, the excess costs would be shared by the parties in the proportion of their beneficial entitlement; and

5) The plaintiffs would manage and operate the Business on the Property through 679191. There is no question that the plaintiffs, and particularly Janet, were in over their heads when it came to business accounting. I find that, at all material times, the defendant relied on Alnoor and Dhalla to act as his agents regarding all things financial and accounting-related in respect of the Business (as set out in paragraph 7(e)(2) of General Agreement No. 2). I find that, as far as the defendant was concerned, Alnoor was responsible for the accounting, corporate recordkeeping, and tax filings for 679191. I find that, throughout, Janet did her best to ensure that reasonable bookkeeping for the Business was maintained and provided to Alnoor and/or Dhalla to allow them to perform their roles. I find that, in order to accomplish the accounting, the parties agreed to and followed a process by which Janet would prepare spreadsheets documenting the revenues and expenses of the Business and maintain the backup documents for the entries. From 2005 until 2012, Alnoor and Dhalla attended the Property on a regular basis, reviewed Janet's spreadsheets with her, and entered the required information into a more formal accounting structure. I find that, in July 2012, Alnoor and Dhalla abandoned that process and thereafter were content to rely on the banking records for 679191's accounting needs.

[113] Mr. Visram contended that, because the plaintiffs failed to provide the Court with an accounting of the Business's net profits, the entirety of their claim should be dismissed. He had no answer for why the information necessary for a proper accounting was not obtained by him through the discovery process or for why the accounting was not provided to the Court to prove the same accounting claim as set out by his client in the Counterclaim. Mr. Visram could not point to any authority for the proposition that the plaintiffs' trust claim should be dismissed as part of the

dismissal of the plaintiffs' separate claim for an accounting in respect of a separate entity (679191). I reject the defendant's submissions in this regard.

Janet's Unpaid Wages

[114] I accept that, on September 15, 2015, the parties agreed that Janet would be paid an annual salary of $24,000, retroactive to September 2005 and that she had been underpaid a total of $114,853. Janet is entitled to payment of that amount from the Business Account.

The Trust Relationship

[115] Both the law generally and the express provisions of the Declaration of Trust require that the defendant, as trustee, act precisely within the terms of his trust obligations, namely to account to the plaintiffs: Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2021) at (974) at 1356; *Zhang v. Zhang*, 2022 BCSC 2156 at para. 360, aff'd 2025 BCCA 143; *Western Union Canada, A Unit of Western Union Financial Services Inc. v. Chandan*, 2022 BCSC 851 at para. 22; *Schwarzkoph v. McLaughlin*, 2008 BCSC 730 at paras. 15–17. Trustees have the burden of establishing that they have both accounted for and discharged their duty prudently: *Schwarzkoph* at para. 18.

[116] The evidence is uncontroverted that the defendant never disclosed to or provided any accounting to the plaintiffs:

1) of the amount of the TD Bank Mortgage that encumbered their 27% interest in the Property or that the proceeds of that mortgage were used in part to pay off the Laurentian Bank Mortgage (which was the defendants' sole responsibility) and in part for the defendant's personal purposes unrelated to the Property, including to invest in the Ponzi Scheme and to pay off his personal credit card;

2) of the amount of the BoM Mortgage that replaced the TD Bank Mortgage or that the proceeds of that mortgage were used for the defendant's

personal purposes unrelated to the Property, including further investments in the Ponzi Scheme and paying off his personal credit card; or

3) that he allowed the BoM Mortgage to fall into arrears in 2008, resulting in additional payments totalling $62,888.95 having to be made to the bank; and

4) the existence of the Trustee's Action and the settlement of it.

[117] Mr. Visram submitted that an accounting was provided in the form of some calculations prepared by Mr. Zhang in January 2023, in which Mr. Zhang purported to determine how the net sale proceeds from the Property should be allocated between the respective parties. That "analysis" was based on information that had been provided to Mr. Zhang by Mr. Visram and a corresponding misunderstanding and misinterpretation of the facts as I have found them. It was not an accounting by the Trustee but, rather, a one-sided exercise performed by an advocate for the defendant years after the fact and during the course of litigation.

Was the Defendant in Breach of Trust?

[118] The defendant has not met the onus upon him to demonstrate a proper accounting. It is irrelevant that he may not have profited: *Pirani,* at para. 146. I have no difficulty finding that the defendant breached his trust obligations to account to the plaintiffs in respect of the TD Bank Mortgage, the BoM Mortgage, and the use that was made of the proceeds as well as by commingling those proceeds with his personal funds: see for example, *0409725 B.C. Ltd. (Bankruptcy of)*, 2015 BCSC 1221 at para. 15.

[119] The defendant did not discharge his trustee obligations reasonably or responsibly, or at all. He has not proffered any cogent reason why his breaches ought to be excused. He is liable to the plaintiffs for the losses suffered by them as a result.

Construction Costs

[120] The Funding Agreement provided that:

> If additional loans are required for capital or operational expenses, then the payment of the loan will fall to the shareholders on the basis of the percentage ownership

[121] The plaintiffs were never apprised by the defendant that this provision had been invoked, that additional loans were required for "capital", or that they were to pay for 27% of the loans. The Jesanis took it upon themselves to obtain mortgage financing, first from the TD Bank and then from the BoM. The plaintiffs were not consulted or even made aware of the amount of the mortgage loans, the interest rates to be paid, or how the loan payments were arranged. The plaintiffs were never informed by the defendant as to the amount by which the construction costs exceeded $416,000. The Jesanis treated these loans as their own to do with as they wished, without regard for the plaintiffs' rights or obligations. No "shareholder's loans" were ever documented.

[122] The only coherent evidence put before the Court regarding the construction costs was that of Alnoor, who testified that, as of September 30, 2005, the total costs were $568,060.

[123] Accordingly, the "additional funds" that were necessary to complete construction over and above the Jesanis' commitment of $416,000 totalled $152,060 ($568,060 - $416,000). The plaintiffs are responsible for 27% of that amount, or $41,056.

Is Interest Payable by the Plaintiffs in Respect of Their Share of the Monies Borrowed to Fund the Excess Construction Costs?

[124] Under the Shareholders' Agreement, in order for moneys advanced by a shareholder to qualify as a shareholder's loan, it was first necessary for there to be unanimous agreement of the shareholders that the borrowing was necessary. If that requirement was met, it was necessary for 679191 to then attempt to obtain financing from a bank. If unsuccessful, it was necessary for 679191 to make a

demand in writing to the shareholders for them to provide the funding requirements. Only then would those funds be treated as a shareholder's loan.

[125] Despite those terms, the Funding Agreement, signed June 7, 2004, provided, in part, that:

> Additional funds (over and above the $416,000) required for the property development will be shared by all the owners of the property, on a pro rata basis of their ownership share.
>
> […]
>
> If additional loans are required for capital or operational expenses, then the payment of the loan will fall to the shareholder on the basis of the percentage ownership.

[126] There was no provision in the Funding Agreement stipulating that the contribution of additional monies for construction would constitute a shareholder's loan. There was also no provision that the additional monies would attract interest payable by the other party.

[127] General Agreement No. 1, also signed on June 7, 2004, provided that:

> All current monies that have been put into the property shall be declared and converted to a shareholders loan. These converted monies shall be approved as legitimate expenses of the corporation. No further expenses shall be converted without the express consent of the percent majority shareholders.
>
> [Emphasis added.]

[128] This language is not only vague but is inconsistent with the shareholder's loan provisions of the Shareholders' Agreement. Moreover, the document dealt only with "current monies that have been put into the property". There was nothing regarding future monies other than the following:

> If the corporation does not have income sufficient to make payments, a side agreement between the owners shall be drawn up and a shareholder loan issued at prime +2% that will be payable to the owner as soon as revenue comes in or as soon as a sale occurs.

[129] Again, this provision is inconsistent with the terms of the Shareholders' Agreement. Moreover, no "side agreement" was drawn up.

[130] In the circumstances, it is impossible to answer the following questions:

1) Did the parties intend to replace the shareholder's loan provisions of the Shareholders' Agreement with different provisions?

2) If so, what different shareholder's loans provisions were intended, among those set out in the Financing Agreement, in General Agreement No. 1, or in General Agreement No. 2?

3) What rate of interest was intended between Bank of Canada prime or the prime rate charges from time-to-time by chartered banks, and if the latter, which bank?

4) Would the rate of interest on the shareholder's loan be calculated monthly or annually?

[131] I am unable to discern from the evidence as a whole the parties' understanding and agreement regarding the interest expense on monies borrowed to fund any excess construction costs. If the understanding was as set out in the Shareholders' Agreement, those provisions were never adhered to. If the understanding was as set out in the Funding Agreement, the parties would each have raised the financing "on the basis of their percentage ownership". That provision was not adhered to. If the understanding was as set out in General Agreement No. 1, the required express consent was not obtained. General Agreement No. 2 dealt only with "incidental expenses incurred for the day-to-day operations of the corporation", not the construction expenses.

[132] Accordingly, I am not able to clearly discern from the agreements as a whole the parties' intentions regarding the payment of interest on any monies borrowed after June 7, 2004 to pay for construction costs. In the circumstances, resort to the *contra proferentem* rule is necessary. All of the documents in question were drafted by the defendant's agent, Azim. Hence, they must be construed against the defendant.

[133] Normally, fairness would dictate that the plaintiffs be responsible for the payment of interest on their 27% share of the additional construction costs, which equates to $41,056. However, in this case, the existence of the TD Bank Mortgage and the BoM Mortgage was not disclosed to the plaintiffs until after this litigation had been commenced. The amount of interest paid under those mortgages attributable to the plaintiffs' 27% interest in the Property could easily have been provided to the Court. It was not.

[134] Instead, throughout this litigation, including during his submissions on the final day of trial, Mr. Visram, supported by Mr. Zhang's erroneous calculations, steadfastly insisted that the excess construction cost paid by the defendant was $1,482,082 and that the plaintiffs were required to pay interest on that "shareholder's loan" at the rate of "prime" + 2%, totalling $799,192. There was simply no basis for that assertion.

[135] The onus was on the defendant to prove his claim that the plaintiffs should be responsible for paying him 27% of the interest charges he paid on monies borrowed to pay for the construction expenses exceeding $416,000. The defendant has failed to do show what those interest charges were.

[136] In the circumstances, including in light of the findings I have made regarding the defendant's breach of trust, I am awarding nominal interest to the defendant of $100.

The $250,000 Settlement Payment

[137] Mr. Visram argues that the $250,000 paid by Samji to Ink Media was done at the defendant's direction and that the money was a loan to Ink Media. He argues that, because there is no documentation before the Court to show that the money was provided to Ink Media to pay for a share subscription or the purchase of any goods or services, the only plausible explanation is that the money was a loan.

[138] Mr. Visram submitted that, because the money was paid to Ink Media and because Gerry was a director of that company, service of the Trustee's Action on Ink

Media through its president, Mr. Plant, constitutes sufficient proof that the plaintiffs were aware of the Trustee's Action and, because default judgment was taken against Ink Media in that action, the plaintiffs must be taken to have accepted liability for the $250,000 settlement of the Trustee's Action.

[139] Mr. Visram also submitted that the plaintiffs' agreement to discharge the CPL1 and CPL2 they registered against the Property to allow the sale of the Property on Mr. Visram's undertaking to not release the remaining proceeds of sale pending this outcome of this litigation is further demonstration of the plaintiffs' acceptance of the liability.

[140] This is the same convoluted, perverse, and irrational reasoning that permeated Mr. Visram's submissions as a whole.

[141] There is a complete absence of evidence, documentary or otherwise, supporting Mr. Visram's contentions. Mr. Visram had no answer for why there was no loan or other documentation shifting any responsibility for the monies paid to Ink Media to either of the plaintiffs. He provided no explanation for why he did not obtain Ink Media's corporate records or call Mr. Plant as a witness.

[142] Regardless, I accept Gerry's evidence that the money was provided by the defendant to pay for computers he had ordered and to pay for his investment in Ink Media shares. That evidence is uncontroverted. Mr. Visram's submissions are devoid of any factual foundation and I dismiss them.

[143] Moreover, even if the money was provided by the defendant to Ink Media as a loan, it was a matter that did not involve the plaintiffs or the Property. The plaintiffs had no involvement or input in the defendant's decision to settle the Trustee's Claim on the basis that $250,000 would be paid from the proceeds of sale of the Property. That payment lies entirely at the feet of the defendant and does not warrant any deduction from the plaintiffs' share of the Property sale proceeds.

Division of the Net Sale Proceeds

[144] It is first necessary to determine what the available proceeds for distribution ought to be.

[145] The defendant was entirely liable for payment of the $250,000 to settle the Trustee's Action. That amount must be added to what should have been the available proceeds.

[146] Only that portion of the BoM Mortgage used by the defendant to fund the construction costs exceeding $416,000 ($152,060) should have been deducted from the proceeds of sale of the Property. The difference between that amount and the amount required to discharge the BoM Mortgage ($1,083,934 - $152,060 = $931,874) must be added to what should have been the available proceeds.

[147] I find that the total Net Sale Proceeds that are to be the subject of division between the parties is $1,287,964 + $250,000 + $931,874 = $2,469,838 (the "Adjusted Sale Proceeds").

[148] The Funding Agreement stipulates how the proceeds will be divided by the parties "if a sale of the property should occur".

All debts of corporation paid first

[149] A reconciliation of the Business Account is required. The evidence demonstrates that:

i. Janet owes $2,729 to 679191 for overpayments to her Visa; however, 679191 owes Janet $114,853 for her salary. Janet is therefore entitled to a credit of $112,124;

ii. The Jesanis withdrew $273,014 from the Business Account to make their mortgage payments and to pay other personal expenses.

[150] Accordingly, the plaintiffs are entitled to receive $112,124 from 679191 and the defendant must account to 679191 for $273,014 for a net amount owing to 679191 of $160,890.

[151] $273,014 will be credited to the parties with breakdown as follows:

1. The Plaintiffs:

a)	Salary owing to Janet	$112,124
b)	27% of $160,890	$43,440
		$155,564

2. The defendant:

a)	73% of $160,890:	$117,450

All shareholder's loans paid second

[152] No shareholder's loans have been demonstrated on the evidence.

Equity stakes of the parties of $650,000 each will be paid third

[153] Subject to the further adjustments set out below, the plaintiffs and the defendant are each entitled to $650,000 from the Adjusted Sale Proceeds.

[154] Those debt payments must be accounted for by further adjustments as follows:

a)	The plaintiffs: $650,000 + $155,564	$ 805,564
b)	The defendant: $650,000 - $273,014 + $117,450	$ 494,436
	Total	$1,300,000

[155] Accordingly, the Adjusted Sale Proceeds are reduced as follows:

a)	Adjusted Sale Proceeds	$2,469,838
b)	Less amount allocated to the parties above	($1,300,000)
	Total ("Further Adjusted Sale Proceeds)	$1,169,838

[156] Accordingly, entitlement to the Adjusted Sale Proceeds is calculated as follows:

1. The Plaintiffs

a)	Entitlement under the Funding Agreement	$805,564
b)	Less nominal interest	($100)
c)	27% of the Further Adjusted Sale Proceeds	$315,856
	Total	$1,121,320

2. The defendant

a)	Entitlement under the Funding Agreement	$494,436
b)	Plus nominal interest	$100
c)	73% of the Further Adjusted Sale Proceeds	$853,982
	Subtotal	$1,348,518
d)	Less repayment of the Settlement of the Trust's Action	($250,000)
e)	Less repayment of the BoM Mortgage	($931,874)
	Total	$166,644

[157] The total payable to the plaintiffs ($1,121,320) together with the total payable to the defendant ($166,644) equals the amount of the Term Deposit, $1,287,964 (this figure does not include the interest that has accrued in the term deposit).

Other Remedies Claimed by the Plaintiffs

[158] In addition to the foregoing accounting of the net revenues from the sale of the Property, the plaintiffs seek damages in the form of restitution for the defendant's breach of trust.

[159] Where, as here, a breach of trust has been found, the plaintiffs are entitled to be restored to the position they would have been in had the breach not occurred: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 9 W.W.R. 609 at para. 73. Ultimately, the damages assessment is flexible and must be based on the best evidence available to make a reasonable estimate of the loss: *Pomozon v. Beausoleil*, 2020 BCSC 2084 at para. 158. The court does not require exacting or precise proof of the loss: *Osborne v. Harper*, 2005 BCSC 1683 at para. 6. Any evidentiary difficulties arising from the trustee's intermingling of funds are to be resolved in favour of the innocent party: *Zhang* at para. 338.

[160] As Mr. Smith confirmed, a full accounting of the Business dating back to 2003 is not possible. A determination of the extent of the defendant's intermingling of personal funds with those of the Business would be a herculean task, particularly given that the defendant is deceased.

[161] What is clear is that the defendant encumbered the Property with mortgage loans in amounts substantially in excess of what was needed to complete construction of the Project. He used the plaintiffs' 27% of the Property, which he held in trust for them, for his personal purposes and kept the plaintiffs in the dark about all of it.

[162] Meanwhile, Janet worked to build the Business's reputation and goodwill, which I find contributed substantially to the ultimate purchase price that was paid for the Property and the Business.

[163] Upon the sale of the Property, the defendant improperly paid the entirety of the BoM Mortgage and the settlement of the Trustee's Action from the sale proceeds, thereby depriving the plaintiffs of the interest that would have been earned on the net proceeds that have been held in Mr. Visram's trust account since October 31, 2019, at 2.5%. Had those funds not been used to pay the defendant's personal debts, additional interest would have been available for distribution to the parties as follows:

The defendant's personal portion of the BoM Mortgage	$931,874
Settlement of the Trustee's Action	$250,000
Total	$1,181,874
$1,181,874 at an interest rate of 2.5%/year x 6 years x 27%	$47,866

[164] In the circumstances, I award the plaintiffs $47,866 in restitutionary damages.

Order re Funds on Deposit in Mr. Visran's Trust Account

[165] As stated above, the net proceeds from the sale of the Property were deposited by Mr. Visram in an interest-bearing trust account by way of a term

deposit that matures on February 26, 2026. The parties are content to await distribution until the term deposit has matured.

[166] The plaintiffs are entitled to a distribution of the interest that will accrue on the Term Deposit monies proportionate to their entitlement to the original deposit as follows:

$1,181,874 / $1,287,964 = 0.91763 rounded to 92%

[167] Accordingly, as soon as practicable after February 26, 2026, I am ordering Mr. Visram to cause the following distribution to be made to the parties of the total monies held in trust upon maturity of the Term Deposit:

A. To the plaintiffs:

$1,181,874 + $47,866 + 92% of the accrued interest.

B. To the defendant:

$166,644 - $47,866 + 8% of the accrued interest.

Counterclaim

[168] The defendant seeks the following by way of Counterclaim:

1) Judgment against the plaintiffs in the amount of $207,446.47 for the interest paid by the defendant to the Bank of Montreal on the plaintiffs' share for the extra construction costs. As set out above, this claim for interest has not been established. This claim is dismissed.

2) Judgment against the plaintiffs for the $250,000 payment by the defendant to the Trustee in the Trustee's Action. As set out above, the plaintiffs had no liability for this payment. This claim is dismissed.

3) An accounting for monies received by the plaintiffs from the operation of the Business. It has not been established that the plaintiffs received any monies from the operation of the Business, other than what has been

accounted for in the distribution analysis set out above. This claim is dismissed.

4) A set off against all monies that are due and owing by the defendant to the plaintiffs from the sale of the Property. As set out above, this set off has been accounted for in the distribution analysis set out above.

Costs

[169] I am not persuaded that this is an appropriate case for an order of Special Costs. The plaintiffs are entitled to their costs of the Claim and Counterclaim at Scale B.

"G.C. Weatherill J."