Giles v. Westminster Savings Credit Union

Between
Laurie Giles and others, plaintiffs, and
Westminster Savings Credit Union, Gary J. Thomas, Taylor Ventures Ltd., Ralph Dennis Taylor, Joanne Taylor, Floyd Taylor, Vince Taylor; Michael G. Oliver, Raymond E. Drabik, Ewen C. Carruthers, and William R. Chalcraft, carrying on business under the firm name and style of Oliver, Drabik, Carruthers & Chalcraft, a Partnership; Kenneth Rogers Appraisals Ltd. and Kenneth N. Rogers, defendants

[2006] B.C.J. No. 159

2006 BCSC 141

Vancouver Registry No. S004562

British Columbia Supreme Court
Vancouver, British Columbia

Sigurdson J.

Heard: November 17 - 19 and 22 - 26, and November 29 - December 3, and December 6 - 10, 2004; and March 21 - 24 and 29 - 31, and April 7 - 8, 11 - 14 and 18 - 19, 2005.
Judgment: January 27, 2006.

(547 paras.)

Tort law -- Negligence -- Contributory negligence -- Apportionment of liability -- Fiduciary duty -- Action by investors in Taylor Ventures for damages against the Credit Union that authorized mortgages without their knowledge dismissed -- The Credit Union was not reckless or wilfully blind as to whether or not the transactions the Credit Union participated in with Taylor Ventures were in breach of trust or in breach of a fiduciary duty owed to the investors -- Based on the foregoing, the Credit Union established a juristic reason for any enrichment it received by way of the mortgages.

Action by investors in Taylor Ventures (TV) for damages against the Credit Union that authorized mortgages without their knowledge -- TV was a real estate development company that operated in the late 1980's and 1990's and was involved in projects with various investors -- Ultimately the company went into receivership and then bankruptcy -- When the company went bankrupt, the plaintiff investors lost their investments -- The investments involved minimal documentation; each investor received only a single document that recorded the amount of money provided and the number of shares in a project received in return -- The basic terms of the transactions were straightforward and were the same in each case -- The case concerned the liability of the Credit Union, and one of its managers, for any actionable conduct of TV in its relationship with its investors -- The investors alleged that the Credit Union and its officer were liable for damages in connection with

the mortgaging of ten properties because they either knowingly received trust property or knowingly assisted in a breach of trust or a breach of fiduciary duty by TV -- HELD: Action dismissed -- Upon a consideration of all of the evidence, it was determined that the Credit Union and its officer were not liable for knowing assistance or for knowing receipt in connection with the breach of fiduciary duty by TV -- There was an obligation of the developer to act honestly and in the best interests of the investors in exercising its discretion when it might affect the interests of the investors, therefore, there was a fiduciary relationship between TV and the investors -- The Credit Union and its officer did not have actual knowledge of a trust or a fiduciary duty, nor did they have actual knowledge of a breach of trust or fiduciary duty -- The Credit Union was not reckless or wilfully blind as to whether or not the transactions the Credit Union participated in with TV were in breach of trust or in breach of a fiduciary duty owed to the investors -- Based on the foregoing, the Credit Union established a juristic reason for any enrichment it received by way of the mortgages.

Statutes, Regulations and Rules Cited:

Land Title Act, R.S.B.C. 1996, c. 250, s. 29

Counsel:

Counsel for the Plaintiffs: J. Laxton, Q.C. J. Shields C. Weiler

Counsel for the Defendant Credit Union: J. Milton D.A. Goult
R. Dalziel

Counsel for the Defendant Gary Thomas: R. McGowan L.J. O'Sullivan

Counsel for the Defendant Lawyers: J. Webster

TABLE OF CONTENTS

1. INTRODUCTION 1
   a. THE PARTIES 17
   b. THE ISSUES 21
   c. THE BACKGROUND FACTS 22
   i. The History and Development of TV .... 22 ii. The Impugned Transactions 29
2. WHAT WERE THE TERMS OF THE AGREEMENTS BETWEEN TAYLOR VENTURES LTD AND THE INVESTORS? 32
   a. POSITIONS OF THE PARTIES 32
   i. Plaintiffs' Position .... 32 ii. Defendants' Position 33
   b. EVIDENCE OF THE INVESTORS 38
   c. EVIDENCE OF TAYLOR VENTURES LTD. 71
   i. Ralph Taylor .... 71 ii. Floyd Taylor 93
   d. DISCUSSION AND CONCLUSION 126
3. WHAT WAS THE LEGAL RELATIONSHIP BETWEEN TAYLOR VENTURES LTD AND THE INVESTORS? ... 165
   a. WERE THE LANDS HELD IN TRUST 171
   i. Plaintiffs' Position .... 173 ii. Defendants' Position .... 186 iii. Discussion and Conclusion 192
   b. WAS THERE A QUISTCLOSE OR PURPOSE TRUST? 258
   i. Plaintiffs' Position .... 259 ii. Defendants' Position .... 261 iii. Discussion and Conclusion 263
   c. WAS THERE A FIDUCIARY DUTY? 272

i. Plaintiffs' Position .... 274 ii. Defendants' Position .... 276 iii. Discussion and Conclusion 278
4. DID THE IMPUGNED TRANSACTIONS BREACH ANY OBLIGATION TAYLOR VENTURES LTD. OWED THE INVESTORS? 295
5. IS THE CREDIT UNION LIABLE, ON PRINCIPLES OF KNOWING ASSISTANCE AND KNOWING RECEIPT, FOR A BREACH OF FIDUCIARY DUTY? 317
a. FACTS RELEVANT TO THE KNOWLEDGE OF THE CREDIT UNION 317
i. Evidence of Barry Forbes .... 319 ii. Evidence of Gary Thomas 389
b. LEGAL PRINCIPLES UNDERLYING LIABILITY OF A THIRD PARTY 451
c. DISCUSSION OF KNOWING ASSISTANCE 469
d. DISCUSSION OF KNOWING RECEIPT 491
6. CONCLUSION 597

1 SIGURDSON J.:-- This action concerns claims by a number of individual investors in Taylor Ventures Ltd. ("TVL").

2 TVL was a real estate development company owned by Ralph Taylor and his wife Joanne and operated in the late 1980's and 1990's with the help of his brother Floyd Taylor. The company was involved in projects with investors and projects of its own, including the development of an ice rink. Ultimately, the company went into receivership and then bankruptcy.

3 The plaintiffs invested, in varying amounts and circumstances, in projects undertaken by TVL. When the company went bankrupt, the plaintiffs lost their investments.

4 During this time, TVL did most of its banking at Westminster Savings Credit Union (the "Credit Union"). This case concerns the liability of the Credit Union and one of its managers, Gary Thomas, for any actionable conduct of TVL in its relationship with its investors.

5 The plaintiffs' investments involved minimal documentation; each investor received only a single document known as a "speedy memo" that recorded the amount of money provided and the number of shares in a project received in return. The basic terms of the transactions were straightforward and were the same in each case: TVL promised the investor twenty percent interest on his or her investment, which was redeemable at any time, and a further share of profits if the investor stayed in until the completion of the project.

6 There is controversy over whether there were other terms of the contract. This arises from the absence of any written agreement beyond the speedy memo, and the informality of the dealings between TVL and the investors. These dealings consisted largely of verbal representations made in various circumstances, including meetings with the investors that took place at Helen's Deli, a restaurant in the Sapperton district of New Westminster, as well as newsletters that TVL sent to investors.

7 Although the investors did not have substantial documentation, they say they relied on their trust in Ralph Taylor.

8 As I will explain below, it appears from the weight of the evidence to have been agreed by the investors and TVL that the company had the discretion as to how and when to develop the projects and whether to sell the project or the lots created in the development. I will also find that the parties understood that TVL would have sole discretion as to both the calculation of profits and their division and distribution.

9 The investors say that TVL breached the terms of the contract or the trust or fiduciary obligations the company and its principals owed to the investors in a number of ways: by not segregating the money they paid to TVL, but rather commingling it with other company funds; by not using that money to retire initial financing on the properties in which they invested but rather using it for unauthorized purposes, including an ice rink project and a project of the principal's son; by failing to report to investors or account for their investments; and by failing to have development plans or do more than minimal work on the projects.

10 The central allegation in this case surrounds TVL selling and mortgaging ten properties (which the plaintiffs say were investors' projects in which they had an interest) without the investors' knowledge or consent and without accounting to them for any of the proceeds. The plaintiffs say that these transactions were in breach of trust and in breach of a fiduciary duty they allege was owed to them by TVL.

11 The plaintiffs' counsel describes these transactions as part of a bizarre scheme in which, in the words of the plaintiffs' counsel, "the investors' own lands were mortgaged to provide funds to buy lands the investors believed that they had already bought with their own money and which they believed they owned or would own free and clear of all encumbrances".

12 The plaintiffs say that the Westminster Savings Credit Union, where Ralph Taylor and TVL banked for many years, and its officer, Gary Thomas, are liable for damages in connection with the mortgaging of the ten properties because they either knowingly received trust property or knowingly assisted in a breach of trust or a breach of fiduciary duty by TVL.

13 The plaintiffs' overall theory was expressed in different ways in argument, but it was put this way, at least initially, by their counsel. The Credit Union knew of the return promised to the investors and knew that the real estate market had to be strong to sustain that yield. The plaintiffs suggest that TVL was insolvent and deeply indebted to the Credit Union and that the Credit Union, knowing the condition of the real estate market, was concerned about a "run on the bank". They say that the Credit Union's attention was diverted because their employee, Mr. Thomas, was in a conflict of interest as he and some of his family members had made substantial investments in TVL. They say that the Credit Union took part in the scheme or, at the very least, ignored signs that should have put it on inquiry into a possible breach of trust or fiduciary obligation.

14 The Credit Union and Mr. Thomas, on the other hand, say that the legal arrangement between TVL and the investors was a debtor/creditor relationship -either a loan or a participating loan - and was not a trust or a fiduciary relationship. Alternatively, they say that if it was either a trust or a fiduciary relationship, there was no breach of trust or of fiduciary duty. If there was such a breach, the Credit Union and Mr. Thomas say they had neither actual nor constructive knowledge of the breach and are not liable as third party accessories.

15 The Credit Union submits that on the proper construction of the essentially oral contract between the investors and TVL, TVL was authorized to do the following: if it had title to properties, it could sell them; if it did not yet own properties, it could assign its rights under options; as part of its general discretion it could mortgage properties if it saw fit to do so to advance the development of the investor projects; and it could repay the investors' loans on demand. In addition, the Credit Union says that there was no agreed prohibition on the commingling of funds by TVL.

16 This background shows that the starting point in this case is to determine the nature and terms of the contractual relationship between the investors and TVL. The next step will be to characterize the relationship between TVL and the investors to determine if it was a trust or fiduciary relationship and, if so, if there was a breach of the resulting obligations. If there was such a breach, I must determine if the Credit Union and Mr. Thomas are liable for damages.

17 The plaintiffs in this proceeding were ten individual investors: Robert Dunlop, Sandra Miller, Vern Keller, John Berger, James Ogren, John Mountain, Heather Roberton, Tom Koretchuk, Gary Burgess, and Phyllis Atchison. I will set out the circumstances and details of their investments later in these reasons.

18 The trial proceeded only against the Credit Union and its manager, Gary Thomas. It was adjourned against the lawyers, Oliver, Drabik, Carruthers & Chalcraft, although their counsel made submissions.

19 Ralph Taylor, the principal of TVL and his brother, Floyd Taylor, are both named parties, both are bankrupt, and both testified at trial.

20 There are many plaintiffs in this action but only ten went to trial. It is the plaintiffs' counsel's expectation that this decision may lead to a resolution of all of the many claims in this proceeding. (For a description of the circumstances leading to this multi-plaintiff trial, see **Giles v. Westminster Savings** Credit Union, [2002] B.C.J. No. 2567, 2002 BCSC 1583.)

21 The issues in this case are as follows:

1. What were the terms of the contract between TVL and the investors? Specifically, what are the answers to the three following questions, which lie at the heart of the dispute concerning the terms:

    a) was TVL prohibited from using the monies that the investors gave to TVL other than for the purchase and development of the property or properties underlying the project referred to in the speedy memo - in other words, was TVL prohibited from commingling the funds?
    b) did TVL had the right to mortgage the property or did its discretion include the right to mortgage the property or, as the plaintiffs' counsel suggest, did that right only exist in connection with the initial acquisition of the property?
    c) were the investors owners of the individual projects or were they lenders with a right to participate in profits?

2. In the legal relationship between the investors and TVL was there:

    (a) a trust;
    (b) a Quistclose trust; or
    (c) a fiduciary relationship?

3. Was TVL acting in breach of trust, or in breach of a fiduciary duty owed to the investors when it entered into any of the ten property transactions, or otherwise?
4. If it was, are the defendants Westminster Savings Credit Union or Gary Thomas liable for knowing assistance or knowing receipt in connection with the breach of trust or breach of fiduciary duty?
5. If so, what damages are the plaintiffs entitled to?

22 Ralph Taylor incorporated TVL in 1979 and was its operating mind. At all material times, he was an undischarged bankrupt. This status prevented him from serving as a director of TVL when the company was incorporated, although he says he later became a director for "convenience sake". He also regularly told potential investors that, because of difficulties with banks, it was better (for developers) to deal with investors.

23 Although TVL dealt with a number of financial institutions, Westminster Savings Credit Union was the company's main banker from about 1988 to 1998. Ralph Taylor dealt primarily with the Credit Union's employee, Gary Thomas. Mr. Taylor did not disclose to the Credit Union that, throughout this period, he was an undischarged bankrupt.

24 During the relevant time, Mr. Thomas was the Manager of Commercial Loans and had some independent lending authority. The Credit Union also had a Management Credit Committee that reviewed and approved loans. In the 1990s, Barry Forbes was the Chair of the Management Credit Committee. He is also the President and CEO of Westminster Savings Credit Union and has been so for 26 years.

25 By 1988, at the latest, Ralph Taylor was purchasing and developing real property. Floyd Taylor, Ralph Taylor's brother, acted as the accountant for TVL. He prepared financial statements for the Credit Union and other financial institutions. The two of them operated TVL.

26 The company seems to have had success in the late 1980s and for a few years thereafter, a time when the real estate market appears to have been strong.

27 Even early on, Ralph Taylor raised money from investors. Initially the group of investors involved with TVL was small but, over time, it grew to upwards of 500 people.

28 TVL's activities were largely unregulated. The company did not issue prospectuses to potential investors in its projects. The speedy memo, which I referred to earlier and which provided a bare record of money received and shares issued in a particular project, was the only written document that accompanied an investment. However, many investors would, from time to time, attend monthly meetings with Ralph Taylor at Helen's Deli and there were written agendas for these meetings. The evidence was that Mr. Taylor generally followed these agendas and discussed the topics set out in them.

29 In the 1990s, TVL apparently sold nine properties to some companies of its larger individual investors and another property to a related company. As part of these transactions, the purchasers of these properties - or the nominee purchasers as they were referred to by plaintiffs' counsel at trial - granted mortgages to the Credit Union. The first of these transactions took place in 1992, another took place in 1994, four more took place in 1995 and another four in 1996.

30 The plaintiff investors - none of whom were among the nominee purchasers mentioned above - claim to have had an interest in these properties as investor projects. TVL purportedly continued, after the sales, to participate in the development of these investor projects, although it is unclear on the evidence the extent of development work that was actually done on the properties.

31 The transactions concerning these properties will be discussed in detail in that part of the judgment dealing with the evidence of the Credit Union and its manager. However, for ease of reference in the discussion of the evidence that will follow, I will identify the projects as follows:

* 180 Acres South Nanaimo
* Laguna View
* Chilliwack Mountain
* 43 Acres Langley, a single project comprising four separate properties:
    * 20100 96th Avenue
    * 20230 96th Avenue
    * 20168 96th Avenue
    * 20200 96th Avenue
* Delta Industrial Park
* 3.5 Acres Langley
* Special Investment Club

2. WHAT WERE THE TERMS OF THE AGREEMENTS BETWEEN TAYLOR VENTURES LTD. AND THE INVESTORS?

32 The plaintiffs' position on how the arrangement with TVL operated and the terms of the agreement with TVL was put this way. (I paraphrase their argument.)

(a) The plaintiffs were offered a choice of properties in which to invest.
(b) The plaintiffs gave money to TVL to buy shares in the specific piece of property chosen by the investor.
(c) TVL was to buy the property and develop it. The plaintiffs provided the capital, TVL the expertise.
(d) TVL had complete discretion over how and when to develop the properties it bought.
(e) The plaintiffs placed their full trust and confidence in TVL that TVL would honour the deal honestly and faithfully and Ralph Taylor accepted the investors' trust.
(f) TVL promised a twenty percent annual guaranteed return and to buy back shares at any time when asked by the plaintiffs.
(g) TVL could "flip" the land, partially develop and sell it, or fully develop and sell it.
(h) Whoever was an investor in a specific piece of property at the time of its sale would get a share of any profit above his twenty percent return.
(i) While TVL could finance the initial land purchase through financial institutions, thereafter all the money used would come from TVL and the plaintiff investors.
(j) As shares were purchased, the initial financing would be retired so that the property would be held by TVL free and clear of all encumbrances for the benefit of the investors.
(k) Title was to be held by TVL because providing titles to the hundreds of investors was too cumbersome and expensive, particularly since the investors were al-

lowed to trade' their shares to TVL and to each other. (At some point the practice appeared to change so that TVL was the only party who bought shares.)

(l) The calculation of the profit was left entirely to the discretion of TVL. TVL may have been entitled to "sweat" equity of ten percent or twenty percent and to whatever share of profit in any project was represented by the number of shares TVL had purchased.

(m) TVL gave the plaintiffs monthly reports showing the value of their shares in each project and noting the increase in value each month over a three month period.

(n) TVL told the plaintiffs their money was safely invested in the land in which they had purchased shares.

(o) TVL told the plaintiffs it had money enough to buy back any shares and to pay the guaranteed twenty percent return.

(p) TVL kept records of every investors' purchase and sale.

(q) The only record of the purchase of a share given to the plaintiffs was a speedy memo which identified the name of the project by the land involved, and the number of shares purchased.

(r) Many investors wrote on their cheques used to pay for the shares the name of the project and the amount of shares purchased.

33 The defendants say that the agreement between the investors and TVL was, in essence, a loan and that the investors had a right to participate in the profits of the project if they had not had their investment repaid.

34 The defendants' position, in summary, is that:

(a) It was not a term that the investors acquired an ownership interest in property.

(b) There was no term restricting TVL from selling or mortgaging the properties.

(c) There was no term stipulating that the funds provided by the investors would be used by TVL solely for the purchase and development of specific properties referred in the investors' respective speedy memos. In other words, there was no prohibition against the commingling of monies by TVL.

35 Therefore, the main areas of difference lie in the following areas. First, what is the proper characterization of the relationship between the investors and TVL; that is, were the plaintiffs in fact the beneficial owners of the land or was there was some other legal relationship between the investors and TVL such as that of a debtor and creditor? Second, what were the limits, if any, that the contract imposed on TVL's use of the funds; that is, was there a prohibition against commingling funds or were the funds to be held and used only for the purchase or the purchase and development of the particular pieces of property? Finally, what was the scope of the discretion the investors gave TVL to deal with the land that was the subject of the investment; that is, could the land be mortgaged or sold by TVL without their consent?

36 Since the speedy memo is the only written record of the agreement, I must look to the discussions that took place between Ralph Taylor and the investors on an individual basis and at the regular meetings at Helen's Deli. Evidence of these discussions was given by each of the individual plaintiffs as well as by Ralph Taylor and Floyd Taylor.

37 I will start with a review of the evidence regarding the terms of the contract and will then make my findings on what was agreed to between these plaintiffs and TVL.

38 In this section, I will first identify the plaintiff investors and their relationship with TVL. I will then summarize their evidence on the communications between the investors and Ralph Taylor as to the details of their relationship.

39 Robert Dunlop, a retired high school teacher, met Ralph Taylor in mid -1994 through his son and friends, who were investors. He made an early investment in TVL in a project called Parkway Industrial, which was not at issue in this trial. Mr. Dunlop invested in two projects that are at issue in this lawsuit. He paid $12,000 for three shares of the Delta Industrial Park project and $10,000 for ten shares in the 3.5 Acres Langley project.

40 Sandra Miller is a single mother with four children. She is the daughter of Robert Dunlop. Ms. Miller made two separate investments in the 3.5 Acres Langley project, paying $7,000 for seven shares in total.

41 Vern Keller is semi-retired, having worked for nearly fifty years in the construction of large warehouses. He made the following investments in TVL: he purchased five shares in the Special Investment Club, paying the company $2,470 for four of these and buying the fifth from another investor, with Ralph Taylor's knowledge, for $1,400; he received six shares in 180 acres South Nanaimo in lieu of a $20,000 payout due to him from another TVL project in which he had invested; and he paid $81,200 for twelve shares in 43 Acres Langley, $9,150 for three shares in Delta and $3,090 for three shares in 3.5 Acres Langley. His total loss through TVL was about $150,000. Ultimately, through his accountant, Mr. Keller applied for an Allowable Business Investment Loss ("ABIL") and wrote off losses of $92,000.

42 John Berger is a retired carpenter. In August 1994, he made his first investment with TVL. He made three separate investments, all in the Delta project, for a total of $304,550. His total loss, including other TVL investments, was $428,200.

43 James Ogren is a purchasing agent for Burrard Ironworks. He met Ralph Taylor in the late 1980s. Like many of the investors, he got to know Ralph Taylor through hockey; they played in the same league and later on the same team. Mr. Ogren made the following investments in TVL, all of which were ultimately lost. He paid $6,700 for ten shares in the Special Investment Club. He bought a share in a Kelowna project which is not at issue here, and that share was worth $7,200 when he swapped it for a share in 180 Acres South Nanaimo worth $6,500. He later bought another share in the same development for $6,500. Finally, he paid $19,800 for three shares in the 43 Acres Langley project. Other lost investments with TVL, he said, brought his total loss to nearly $49,000. He applied for an ABIL but his claim was disallowed.

44 John Mountain retired from teaching in 1998, and then worked as a substitute teacher for about five years. He knew Ralph Taylor's wife for many years and was introduced to Mr. Taylor in 1989. He made the following investments in TVL which are raised in this action: $6,100 for one share in the 180 Acres South Nanaimo project; $3,150 for one share in Laguna View; $18,250 for five shares in Delta Industrial Park and $3000 for three shares in 3.5 Acres Langley. His loss in these investments was $30,500. His total loss, including TVL projects not at issue here, is in excess of $50,000.

45 Heather Roberton's husband played hockey with Ralph Taylor. She invested in three projects that are the subject of this action. Her investments are as follows: $60,000 for six shares in Chilliwack Mountain, one of which she redeemed for $37,000; $3,200 for five shares in the Special Investment Club; and $9,450 for three shares in Delta Industrial Park.

46 Tom Koretchuck knew Ralph Taylor from playing hockey. He is a former teacher who first invested in TVL in 1992. He paid $18,900 for three shares in the 180 Acres South Nanaimo project. He later sold one of these shares for $12,900. He lost the balance. He and his wife also invested Parkway Industrial, a project that is not at issue here. Mr. Koretchuck's wife claimed an ABIL.

47 Gary Burgess met Mr. Taylor in 1990 through refereeing hockey games. He did not attend the Helen's Deli meetings. His investment that is the subject of this action was $56,000 for eight shares in the 43 Acres Langley project. His total loss was about $73,600. Mr. Burgess claimed an ABIL.

48 Phyllis Atchison is a retired legal secretary. In two separate transactions, she paid TVL $26,600 for four shares in the 180 Acres South Nanaimo project. Ms. Atchison applied for an ABIL in 2002.

49 The investors all appeared to have the same understanding of the basic deal offered by TVL. They all understood, and I conclude they were told by TVL, that they would receive, on redemption, twenty percent per annum return on their investment, plus a share of the profit of the project if they stayed in until the end. Most of the investors testified that their understanding was that the twenty percent was guaranteed and payable on demand. Mr. Burgess, however, said he did not think the rate of return was guaranteed. He also believed that Ralph Taylor would only redeem the investment if he could find another buyer.

50 None of the investors said they gave money to Ralph Taylor in trust, nor did any of them testify that TVL accepted the money in trust. It appears, from their testimony, that there was no discussion between TVL and the investors of whether the money should be held in separate bank accounts or subject to separate ac-

counting. However, some investors, such as Mr. Mountain, testified that they assumed that this was the arrangement.

51 None of the investors recalls Ralph Taylor using the word "loan" in any of their discussions and most said that if the investment had been characterized as a loan, they would not have given Mr. Taylor their money. On cross-examination, however, Mr. Keller agreed that Mr. Taylor could have said many times that the investment was like a term deposit and Mr. Berger agreed with his discovery evidence that his investment could be equated with a term deposit and that a term deposit is a loan. However, Mr. Berger also said that if he wanted a term deposit, he would have gone to a bank.

52 All but two of the investors referred to themselves as shareholders, although Ms. Roberton said that Mr. Taylor also used the terms "club members" and "investors" to describe the investors. They appear to have generally understood that as shareholders, their shares were connected to a particular project and that their money was to be used to buy and develop the land.

53 While the investors may have believed they were shareholders, it is not clear how many shares were available. Shares were usually sold at the Helen's Deli meetings. Some investors, such as Mr. Keller, testified that Mr. Taylor told them there were a limited number of shares. Others, such as Ms. Miller, testified that there was both a limited number of shares and a time limit on share purchases. Others, such as Mr. Ogren, testified that Mr. Taylor never said anything about a limit on the number of shares available, but did say the shares were available for a limited time. As far as Mr. Dunlop was aware, when the share offering was finished, it was finished. A couple of plaintiffs appeared to believe that TVL could issue more shares after the sale closed but that appears only to be an assumption on their part. Ralph Taylor said that he could issue more shares but that does not appear to have been the subject of discussion with the investors. TVL kept a record of the number of shares sold on each project and the shares that had been redeemed by TVL.

54 There was evidence of the communications between TVL and the investors as to whether the investor's share was an interest in the land. Most investors appeared to have believed that TVL was on title. They all had communications with TVL before they bought. The transactions were all very similar. Some of the investors testified they were told that the property was registered in the name of TVL because there were so many shareholders it would be impossible to put them all on title. While some investors only assumed that they owned the land attached to the various projects, a number testified that Ralph Taylor led them to believe they were owners of the land. This being an important issue, I will review briefly the evidence of each of the investors as to what Ralph Taylor told them.

55 Mr. Dunlop said that, when he visited the 3.5 acres in Langley, Ralph Taylor indicated that "this is your land." He said that, when he bought his share, Mr. Taylor told the meeting that, in Mr. Dunlop's words, "We were collectively buying a share in a particular project, which in this case would be land ...". He said he understood Mr. Taylor owned shares as well and then when shareholders redeemed, Mr. Taylor would say that he became "that much bigger of an owner of that project". Mr. Dunlop understood he would be getting a share of the profits of a project if he stayed in.

56 Ms. Miller said she was told by Ralph Taylor that the money would be invested in a given project and would be used to buy and develop the land in the project. She testified that Mr. Taylor told her that by owning the land, the money would be secure.

57 Mr. Keller said that Ralph Taylor told him that when he purchased shares he owned a portion of the property that he bought shares in, that there was no mortgage and that the shareholders owned the land outright. Mr. Keller also said he was buying shares of the profits of an entire project.

58 Mr. Berger testified that Ralph Taylor told him he was buying an ownership interest which represented an interest in land and that the investment club was pooling money in order to purchase and develop land. But he also testified, "By buying a share I'm automatically a part owner. It doesn't have to be said". Mr. Berger also said that Mr. Taylor said and he understood the deal to be that if he left his money in he was entitled to share in the profits of the projects in the speedy memo.

59 Mr. Ogren said that Ralph Taylor told them that they could wait it out because they owned the land. He said that Mr. Taylor also told him that if he left his money in, he would be entitled to share in the profits of the project and it was up to Mr. Taylor to determine what the profits of the particular project were.

60 Mr. Mountain said that Ralph Taylor told him about TVL, how they could invest together and that they would buy shares in land in individual projects. He said that Mr. Taylor said that the money would be used for the project. He said that Mr. Taylor told him he would get a share of whatever profit the project generated but that he had no idea of the expenses that were incurred on the project.

61 Ms. Roberton said Ralph Taylor indicated to her that she would have an ownership interest in the land. When it was suggested to her that the proof of claim she and her husband filed in the bankruptcy did not assert any ownership interest in land, she replied that the document was prepared by the original trustee and she had not seen a form like this before and that she signed it because she was told the document was required by the trustee. She said that Mr. Taylor said that if you wanted to cash your share in before completion that you would get your twenty percent but you would not get your share in the profit of the project if it sold.

62 Mr. Koretchuk said that he assumed that TVL had title. If there was a mortgage on title, he said he assumed that TVL would pay off the mortgage with the money from the shares. He said that they were guaranteed twenty percent and a share of the profits at the end. He said he was not sure how that worked but that they were still guaranteed twenty percent.

63 Mr. Burgess said Ralph Taylor told him the property was owned by the group. He said that he was purchasing shares in a specific project and there was no financing from outside the group of people who were investing in that project. He said as well that he was going to get a share of the profit that was obtained from the sale of the project.

64 Ms. Atchison said Ralph Taylor told her she was purchasing a share in the land. She was also told that if they stayed in, they were entitled to a share of the profits of the project, in addition to interest.

65 A number of investors were asked on cross-examination if they understood or were told that they were responsible for any costs or taxes that might arise in the development or for any losses that might result. All said no. While Ralph Taylor later testified that some investors asked him about their liability for mortgage payments and other possible costs and that he told them they would not be responsible, the issue does not appear to have been a subject of general discussions between Mr. Taylor and the investors.

66 The investors all said that Ralph Taylor had broad discretion to manage and develop the projects and a number of them testified that it was up to him to calculate the profit on a project. The investors all said they trusted him and expected him to make them money.

67 On the question of whether that discretion included the right to sell or mortgage the property in a project without the investors' knowledge or consent, most of the investors said that Ralph Taylor did not specifically raise that with them. Mr. Dunlop assumed that as a shareholder no one else outside the club was investing and there would be no mortgage. Mr. Keller, when asked about mortgages, said that Mr. Taylor said that the land was clear title. He testified that he attended most of the meetings at Helen's Deli. He was asked in cross-examination about the agenda for the club meeting in September 1994, which contained an item dealing with mortgages. He said he did not recall the discussion. Mr. Ogren, who testified that Mr. Taylor said there would never be mortgages on the properties, was also asked about this meeting and said that he did not recall the meeting when the agenda item was discussed. Mr. Burgess testified that Mr. Taylor told him, on a number of occasions, that he would not mortgage the property to a financial institution.

68 The other investors did not raise the issue of TVL's ability to mortgage with Ralph Taylor on their own initiative. They all testified that they never gave him permission to mortgage the properties, nor, on the other hand, did they expressly prohibit it. Yet while many of the investors did not recall any specific discussion of mortgages on the project properties, they say that Mr. Taylor spoke frequently of his aversion to banks. Mr. Mountain said Mr. Taylor said the whole idea of the investment club was that there were no mortgages, so if the market went bad they could wait it out. Mr. Mountain testified he did not recall being at a meeting where a mortgage on another investor project was on the agenda. Mr. Keller said much the same thing. Other investors, including Ms. Miller and Ms. Atchison, testified that Mr. Taylor said frequently that he did not need banks or mortgages because he was raising money from investors. Mr. Berger said that Mr. Taylor kept preaching they were strong enough and did not need outside money. Mr. Taylor's comments left Mr. Koretchuk with much the same feeling as these witnesses.

69 A number of the investors testified that Mr. Taylor spoke about what was required for investors to obtain security. Mr. Keller said that Ralph Taylor mentioned that collateral was available for investments of more than $50,000 at almost every meeting and that investments smaller than that did not have security. Mr. Taylor gave Mr. Berger a duplicate certificate of title to secure one of his investments, but later asked him to return it, which Mr. Berger did. On cross-examination, Mr. Berger denied he required the duplicate certificate to have security, but when it was put to him that he had said otherwise at his examination for discovery, he agreed his earlier statement was correct. Mr. Koretchuk was aware that TVL offered security to investors with over $50,000 but it is not clear where he got that information.

70 The investors were also asked about their knowledge of Ralph Taylor's ice rink project. While all appear to have heard of the project, their testimony was generally to the effect that Mr. Taylor had said that it was, in the words of one witness, "his baby" and that they could not invest in it.

71 Ralph Taylor testified as an adverse witness called by the Westminster Savings Credit Union. He was also cross-examined by Mr. Shields, counsel for the plaintiffs. He later testified again on his own behalf, near the end of the trial.

72 I found Ralph Taylor to be somewhat charismatic, but argumentative, defensive and, at times, long-winded. He appeared to have a good memory, but was quick to blame other people and external events for the failure of his development ventures.

73 Mr. Taylor was 70 years old at the time of trial. At all material times, he was an undischarged bankrupt.

74 Mr. Taylor was a teacher before he was a developer. After forming TVL in 1979, he had some success buying, renovating, and selling houses.

75 In 1988, he began bringing in investors to help finance TVL's projects. In the 1990s, it appears that TVL was quite successful. Some investors received substantial payouts. Over time, however, that changed. Mr. Taylor could not recall any project between 1994 and 1998 that made any money.

76 From the time he began bringing in investors, his arrangement with them seems to have been the same: he offered them twenty percent per annum return on their investment plus a share of the profits in a particular project, if they remained involved to the end of the project. Although he indicated in his testimony that he could have insisted on redeeming shares of investors by paying them the principal amount plus twenty percent interest and could have done so even if they wanted to stay in, this was never discussed with the investors and appears to be entirely hypothetical. It provides a telling example, however, of both Ralph Taylor's stubbornness and of how one party can form a subjective intent about an agreement, even though that aspect was never the subject of discussion between the parties.

77 The Credit Union argues that this transaction between Taylor and the investors is properly characterized as a loan or a participating loan. But Mr. Taylor testified on cross-examination that he never used that term when dealing with the investors, nor did he advise them that the money they received as a return on their investment was interest that had to be declared to Revenue Canada. Likewise he never referred to the investors as "lenders"; he originally called them "shareholders", and later, "investors".

78 Mr. Taylor, contrary to the evidence of a number of the investors, testified that he never told the investors that they were part-owners of the property, and he said that, before the litigation, no investor had ever said that they owned the land or that they should be on title. Mr. Taylor's evidence was that TVL was the owner of the land and that the investors' money was pooled with TVL's money. He testified that the investors' money was never segregated nor had the parties agreed it should be segregated.

79 He also testified he never told investors that TVL was holding their money in trust. He never told the investors he was holding the properties in trust. He also testified that no investor told him the money was to be held in trust.

80 TVL had only one account at the Westminster Savings Credit Union. Mr. Taylor deposited the investors' money into that account and used it to pay all and any expenses, including all redemptions, all personal and family expenses, and all corporate expenses for any and all projects.

81 While Mr. Taylor used the account for all his expenses, he appears not to have actually drawn a salary during the time he was banking at the Credit Union. In his tax filings in the early 1990s, he did not declare

any of the many payments made to him or on his behalf as income or taxable benefits. He stated he was a bankrupt dependent upon his wife. His income tax returns contain misstatements in that regard.

82 Mr. Taylor said that TVL having only one account was consistent with the obligation that he had undertaken to the investors to pay them back on demand without segregating the funds.

83 TVL became a substantial enterprise. Ralph Taylor said that by 1998, when the company went into receivership, about one-third of the projects had investor participation and there were approximately 500 project investors. The balance of the projects were undertaken by TVL alone or with other partners. One of these projects was the development of the ice rink, which TVL undertook with a partner and which proved to be a significant financial burden for the company.

84 Ralph Taylor was cross-examined extensively over what he said to the investors. He testified that he would often say that the money is invested in land, that land is safe and that the plan was to buy land, develop land, sell land, and split the profits. He understood that the investors trusted him and relied on him and his advice. Mr. Taylor said that the investors also understood that the money went for more than just the land; they knew they were participating in the project and that their money also went towards development expenses.

85 He was not willing to say that TVL and the investors pooled their money to buy properties. The distinction he tried to make in his evidence was that it was shares in a project, not shares in the land. He emphasized that, rather than saying "this is your land", he would have said to the investors, "this is our land" or "our project".

86 He agreed that in the 1990s the investors had a choice of properties they could invest in. At the same time, he only had one account the money could go into. While he said that they all would have known this, because all his cheques, including redemption cheques, were written on the account, he admitted that he never told the investors that their money was going into a single account. He agreed that he told the investors over the years that the money was in land, and land was secure. When he told the investors, "we own part of the land", he said he meant that TVL owned the land. He testified that he did not tell Ms. Miller that "they owned the land" but he did tell them that they owned the property outright and had the advantage that they did not have to deal with the banks. He said he told Ms. Miller "the money was going to go into a project to buy land and do a development and after the lots are sold the profits would be divided", or something like that.

87 Mr. Taylor testified that the minutes of the meetings at Helen's Deli showed that he offered security, in the form of clear titles to land, for large investments. He said he spoke to the investors about this as early as April 1990 and at the meetings in November 1991, April 1992 and May 1992.

88 There seems to be little dispute that, as Mr. Taylor stated, he had sole discretion to make development decisions and decisions how to pay for the project. One issue in dispute, however, is whether he could mortgage the properties.

89 He testified that he never said he would consult the investors before mortgaging and that no one ever said he could not mortgage. He denied there was anything wrong with mortgaging the properties associated with the investors. He agreed, however, that he never told investors that TVL had the right to sell a property to a company which could then mortgage the property.

90 He says he raised the issue of mortgages at the meetings at Helen's Deli and said mortgages were discussed regularly, for example in January 1992 and in 1994. From my review of the documents, however, the issue of mortgages does not appear frequently on the agendas and possible discussion of the issue appears to have been a rare occurrence.

91 Mr. Taylor said that investors must have known the banks were lending to TVL on the projects. However there appears to be little doubt that he indicated, on numerous times in numerous meetings, that banks were to be avoided because they create problems. At the very least, he implied that borrowing money from banks to finance developments was to be avoided.

92 I will discuss later Mr. Taylor's perspective on TVL's involvement in the ten impugned transactions between 1992 and 1996 where lands were sold and mortgaged. I note here, however, that Mr. Taylor's basic

explanation of these transactions reflects his stubborn approach. It was suggested to him that the underlying purpose of the sale of the ten properties to large investors, who then obtained mortgage funds to pay out options or prior encumbrances or to provide funds to Taylor Ventures, was to avoid the $3 million lending cap that TVL and related entities were subject to with the Credit Union. He replied, "You cannot avoid the loan cap." He then as much as acknowledged that the purpose of the transactions was to do indirectly what TVL could not do directly: borrow more money from the Credit Union than it would otherwise be prepared to lend.

93 Floyd Taylor, the brother of Ralph Taylor, was called as the plaintiffs' first witness. Although he describes himself as a bookkeeper, he has a Bachelor of Commerce degree from the University of Saskatchewan.

94 In 1989, Floyd Taylor became involved in TVL. He set up the files, was responsible for the accounting and bank reconciliations and he prepared the company's financial statements. He understood that TVL had accounts at financial institutions other than Westminster Savings Credit Union, including the Canadian Western Bank, Laurentian Bank, CIBC, and the Gulf & Fraser Fisherman's Credit Union. He said he provided the financial statements to some of those institutions.

95 He also prepared some of the speedy memos given to the investors. He typed the agendas for the meetings at Helen's Deli and the newsletters that were distributed to investors, but always under the direction of Ralph Taylor.

96 Because of TVL's failure, Floyd Taylor lost his home, which had been pledged as collateral for loans on a project. He said he wanted to clear his name and was clearly troubled that he had been made to look like a thief and a fraudster.

97 In giving his evidence, he often described his own understanding of the agreement with the investors rather than simply recounting the communications between TVL, through Ralph Taylor, and the investors. In that respect, some of his evidence was not relevant to the determination of the terms of the agreement.

98 Floyd Taylor recalls the investment club starting in 1988. The idea of pooling investors' money, he said, started with a project Ralph Taylor did in Maple Ridge. In the first few years, he said, TVL did well, and his brother distributed money to the investors.

99 He agreed that were two basic types of development projects: projects with speedy memo investors involved and TVL's own projects, which were financed by some other form of financing. He said the development projects in British Columbia included subdivisions, rezonings, and that some required hard development costs such as roads and sewers. In one project, TVL went into the house-building business. It was not unusual, he said, for TVL to tie up property by purchasing an option.

100 He confirmed that the basic deal with the investors was a guaranteed minimum twenty percent return per annum, payable on demand, and that investors would share in the profits, resulting in an even higher return, if they stayed in until the project was sold. He said Ralph Taylor would determine the profits, but that he did not tell him or the investors how those profits were to be determined. The expenses, he said, were really done in Ralph Taylor's head. He does not recall Ralph Taylor preparing an information sheet summarizing the selling price or expenses of any project. People, he said, took Ralph Taylor at his word.

101 As he understood it, the whole concept of TVL was that Ralph Taylor would make all the decisions, exercising his business judgment to make the highest possible profits on the project. He said TVL did not put any money itself into the investor projects, but instead provided the expertise in return for a share of the profits. He was not sure what share of the profits from each project the company would take - he thought fifteen to twenty percent - but he understood that its share would increase when it redeemed a speedy memo investment.

102 He agreed that a development project is more than just the land, but includes the permits, subdivision costs, roads, sewers, servicing, etc. He also agreed the investors who stayed in were entitled to a share of the profits of the entire project rather than to a share of what the land was worth.

103 Floyd Taylor attended nearly every meeting at Helen's Deli, as least for the first few years. In the course of his testimony, he was taken through the newsletters and agendas distributed to the investors. He agreed that Ralph Taylor would discuss everything on the agenda at these meetings.

104 He was asked about the February 27, 1992 agenda, which contained the following item: "How does our club work? A, buy land; B develop land; C sell land; D split profits." He said that Ralph Taylor told investors this meant they would, as a group, buy a piece of land, develop it and sell it and that there were different groups of people into different projects, but that each piece of land was owned jointly by the people in each group.

105 At the outset of his evidence, he said that Ralph Taylor told the people who attended the Helen's Deli meetings that he would hold the property in the name of TVL, that TVL would be on title, but he would hold it in trust for that group of people, and that they could trust him to develop and sell it and share the profits. In his words, "it's a trust, trust thing".

106 Floyd Taylor was the only witness who testified that Ralph Taylor specifically told the investors that the property was held in trust. I find that he has to some degree allowed his remorse over investors' losses, as well as what he feels is misdirected blame, to affect his objectivity in recalling what occurred at the material time in the company's dealing with the investors.

107 On cross-examination, he agreed that the December 31, 1993 financial statements that he prepared showed a number of investor projects, including 180 Acres South Nanaimo, Chilliwack Mountain and Laguna View, listed under the assets of TVL and that all these were shown as being owned or optioned by TVL and that there was no indication of those properties being held in trust. He also agreed that none of the investors ever asked for a copy of the legal title or whether they were going to be on title, nor did he tell them, when he delivered a speedy memo, that he or TVL was a trustee. He did not recall any speedy memo investor asking what security was being offered, whether TVL kept segregated bank accounts or why all the redemptions were made from one account, nor did he volunteer this information to investors.

108 He agreed that, in 1994, Ralph Taylor was referring to the share purchases as "term deposits at 20% with possible bonus", but did not agree that this was an accurate way of describing the arrangement. While he said he never told the investors they were loaning money, he never asked his brother why he described the investments as term deposits, nor did he tell him he should not do so.

109 He said that the only time Ralph Taylor used the term "loan" was in relation to money invested in the company at twelve percent interest. These loans, he said, did not entitle the lender to a share in the project, but only monthly interest payments. He said he prepared T-5 slips for those lenders, so they could declare the interest received as income.

110 He did not recall anyone objecting when the investments were described as "term deposits" or anyone saying, "they're not term deposits, I own the land." Nor can he recall any discussions with investors regarding whether they would be liable for any additional development costs or builders' liens and the like.

111 On the issue of security, he said TVL began providing clear title properties as security to people with more than $50,000 invested in their project, including the speedy memo projects. He understood that no collateral would be available for investments of less than $50,000. He said that this policy was reiterated at many meetings, and he made reference to the November 26, 1992 agenda, which indicated that security was provided for investments of $50,000 or more.

112 When he was asked by the plaintiffs' counsel, Mr. Weiler, whether mortgaging lands was consistent with the purpose and intent of the investment club, Floyd Taylor said it might be necessary to take out a mortgage if the investors didn't want to put up cash necessary to buy and develop the land. On cross-examination he said, as an investor himself, he was not concerned that there was a mortgage on title, or that a numbered company was used. In fact, he said, it never crossed his mind. He did not, however, recall Ralph Taylor telling investors that he was going to put a mortgage on the lands they were investing in or that they were short of money.

113 He said Ralph Taylor told the investors that the "money is in the land", "the land stays put, it's not going to go anywhere, it's there for anybody to see" and "land over time appreciates in value". He said that Ralph Taylor told the investors that TVL and the investment club could survive hard times, while businesses that relied on the banks would fail, because they were a large group of people pooling their resources and, since they didn't have to worry about interest charges, they could hold the land until the economy improved. He said the message from Ralph Taylor was that the banks are not helping developers so the investment club would go it alone and banks should not be needed.

114 He acknowledged, however, that he received money from speedy memo investors in the 180 Acres South Nanaimo project even after there was a mortgage on title. He also acknowledged that he assumed that, since the investors trusted Ralph Taylor to run the business to the best of his ability, he could place mortgages on the property.

115 He admitted he never heard Ralph Taylor tell the investors that he would ask for their consent before putting on a mortgage, nor did he hear any investor tell Ralph Taylor they expected him to call a meeting and get their consent before mortgaging the properties. He said that his view was that Ralph Taylor should have had a meeting if he needed more money and, if the investors were not willing to come up with it, then perhaps he could mortgage properties.

116 He understood that Ralph Taylor took out mortgages on various projects and sold shares in projects even when they didn't have title to the land yet, but he admitted he never raised a concern with any of the investors about these practices. This was because either he was not concerned himself or he was too busy doing his job. He said he considered Ralph Taylor had good judgment and he trusted him as everyone else did. He never heard Ralph Taylor say, "I'll need your permission before I'll get a mortgage".

117 Ms. Milton, for the Credit Union, questioned him about the first impugned transaction, which took place in July 1992 when Ralph Taylor used a numbered company, 402847 B.C. Ltd., and borrowed $700,000 from the Credit Union to complete the purchase of the property associated with the 180 Acres South Nanaimo project. He said that he did not have concerns at the time, nor did he raise the issue with his brother or with the investors. He explained that he was too busy at the time and may not have known this was an investor project. He said Ralph Taylor was running this business the best way he saw fit.

118 He blamed Ralph Taylor's downfall on owning and purchasing too much land in the Linley Valley in Nanaimo.

119 Floyd Taylor was questioned about the financial statements he had prepared and signed. In those statements, he said, he referred to shareholders who bought shares under the heading, "due to shareholders". He said that showed the principal amount owing to shareholders.

120 He testified that, as of December 31, 1992, the amount due to shareholders was $15,031,000; at the end of 1993, it was $16,492,000; by the end of 1994, $18,688,000; by December 31, 1995, $19,411,000; by December 31, 1996 $15,470,400.

121 He was referred to a comment made in the August 16, 1993 agenda under the heading "Item 8: security." The comment says, "our club members have over $13,000,000 invested at this time" and "we have over $20,000,000 worth of clear title land, so your money is very safe". He was asked if he knew those statements to be true. He said he was not an appraiser and could not say whether that was true, but he had no reason to believe it was blatantly wrong.

122 On cross-examination, he agreed that there was nothing on the financial statements that showed any portion of a property being held in trust for investors. He said he never showed the Credit Union records which would reveal which of the TVL projects had speedy memo investors and which did not. He also said he never told Gary Thomas that Ralph Taylor was a bankrupt.

123 He testified that none of the speedy memo investors ever asked to see any of the financial statements he prepared for TVL.

124 Ms. Milton suggested to Floyd Taylor that the reason the 1992 financial statements show that TVL owns the land and there is a debt to the investors is because that is what the deal with investors was at the time and what he honestly believed at the time. He resisted these suggestions. He said Ralph Taylor needed the financial statements in a rush and the statements were Ralph Taylor's picture of the assets and liabilities at the time. He said he turned kind of a blind eye to the whole thing.

125 I find that the financial statements, indicating TVL as the owner of the investor projects, at least from an accounting perspective, probably reflects what Floyd Taylor thought was an accurate picture at the time.

126 What were the terms of the contract or the contracts between the plaintiff investors and TVL?

127 After I have determined the terms of the contract, I will discuss whether the investors' interest in the agreement or arrangement was also a trust or whether the monies were paid to TVL on some trust or trust-like arrangement or whether there was a fiduciary relationship between TVL and the investors. If I find that there has been a breach of trust or a breach of fiduciary duty, then the question is whether the Credit Union or Mr. Thomas participated in that breach in an actionable way.

128 I have set out earlier what the parties assert were the terms of the acknowledged contractual relationship between TVL and the investors.

129 There was no written agreement signed by the parties. There are only the so-called speedy memos and the cheques written by the investors. Beyond the newsletters and agendas of the monthly meetings, there was limited documentation exchanged. At least some of documents post-dated the making of the contracts.

130 The basic agreements between the parties, which were both oral and written (the twenty percent return, the discretion given Ralph Taylor to develop the properties, the possibility of a share of the profits if the investor stayed in until the end), were clear and are not really in dispute. However, determining the terms of the contract beyond these fundamental aspects is not simple. To the extent that there were other terms, are these to be implied in the circumstances, or are they to be found in the communications between the parties or in their conduct? If the written terms are ambiguous, can evidence of the parties' conduct or of surrounding circumstances resolve those ambiguities?

131 Accordingly, it is important first to set out some of the relevant principles to be applied when attempting to determine the terms of a contract which may be partly written, partly oral and, perhaps, partly implied. Having found those terms, I will set out principles used to interpret those terms.

132 The determination of the terms of a contract is an objective exercise. What did the parties agree to? What did they put in writing or say to each other that was intended to be of contractual effect?

133 While the word "intent" may suggest that the subjective understanding of the parties is relevant, the law is clear that the intention of the parties must be approached objectively. When the contract is alleged to be partly oral and partly in writing or based on a course of conduct, as here, that determination can be difficult. Nonetheless, evidence of one party's understanding of what a term means or whether a term exists is generally not admissible, because it is irrelevant to the objective determination of the intention of the parties.

134 During the course of trial, evidence was led that touched upon parties' assumptions and what various parties believed were the obligations of TVL in particular circumstances. However, as I commented during the trial, this evidence is not admissible for the purposes of determining the terms of the contract between an investor and TVL.

135 The authors of Halsbury's Laws of England, 4th ed. Reissue, vol. 9(1), at 515, para. 768, say, "the problem is one of determining the intention of the parties as evidenced by their words and conduct, so that no general principle of interpretation can be universally true." With that proviso, Halsbury's describes six factors taken into account by the courts in determining whether a communication between parties is intended to be of contractual effect. Three of them are relevant here:

> if only a brief period of time elapses between the making of the statement and the formation of the contract, the court may be disposed to hold that the statement is a term of the contract;
>
> where the party to whom the statement is made makes clear that he regards the matter as so important that he would not contract without the assurance being given, that is evidence of an intention of the parties that the statement is to be a term of the contract;
>
> where the party making the statement is stating a fact which is or should be within his own knowledge and of which the other party is ignorant, that is evidence that the statement is intended to be a term of the contract;

136 The court must interpret and consider the formation of a contract on its factual matrix. In Chitty on Contracts, 29th ed. (London: Sweet & Maxwell, 2004) at p. 764-765, the learned authors suggest the modern law allows the court a broad scope of inquiry:

> Since the purpose of the inquiry is to ascertain the meaning which the words would convey to a reasonable man against the background of the transaction in question, the court is free (subject to certain exceptions) to look to all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words that are ambiguous but even to conclude that the parties must, for whatever reason, have used the wrong words or syntax ... The court must place itself in the same "factual matrix" as that in which the parties were.

The authors then quote Lord Wilberforce's decision in Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 W.L.R. 989 (H.L.) at 995-996:

> No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the "surrounding circumstances" but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract is it certainly right that the court should know the commercial purpose of the contract and this in turn presupposed knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

137 In Delisle v. Bulman Group Ltd. [1991] 4 W.W.R. 637 (B.C.S.C.), Ryan J. (as she then was) said the following, which is relevant not only to the question of the factual matrix and the limitations and the admissibility of the subjective intention of the parties, but as well to the admissibility of evidence where there is ambiguity as to the meaning of contractual terms. She said, at 639:

> 1. Evidence of facts mutually known to the parties prior to the execution of a contract are admissible to identify the meaning of a descriptive term if they are relevant and not excluded by other evidentiary tests. Ambiguity is not a precondition to a consideration of the factual matrix. (Prenn v. Simmonds, [1971] 1 W.L.R. 1381, [1971] 3 All E.R. 237 (H.L.); ACLI Ltd. v. Cominco Ltd. (1985) 61 B.C.L.R. 177 (C.A.)).
> 2. In examining the factual matrix the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract. Viva voce evidence as to what the parties intended is inadmissible in interpreting a written contract. "Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction." (Prenn, supra [p. 241]; Elkiw v. Harris, 39 C.P.C. (2d) 121).
> 3. If, after examining the agreement itself in its factual matrix, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then additional evidence may be admitted. This evidence includes evidence of the facts that led up to the making of the agreement, evidence of the circumstances as they existed at the time the agreement was made, and evidence of subsequent conduct of the parties to the agreement. The two existing reasonable interpretations may be the result of ambiguity arising from doubt, uncertainty or difficulty of construction. (Canadian National Railway v. Canadian Pacific Ltd., [1979] 1 W.W.R. 358, 95 D.L.R. (3d) 242 (B.C.C.A.))

138 This passage has been has been cited with approval frequently, most recently in Group Eight Investments Ltd. v. Taddei (2005), 143 A.C.W.S. (3d) 532, 2005 BCCA 489.

139 Evidence of unilateral intention is inadmissible. Lord Wilberforce put it this way in Prenn v. Simmonds, supra at 241.

In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of Dr. Simmonds's intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.

140 The factual matrix in which these contracts were made was that TVL was a real estate development company that established a club so that it could raise money to develop real estate, and it raised that money from unsophisticated individuals who sought a guaranteed return and the chance to participate in profit in real estate development.

141 Although there were a number of investors, and each of their dealings with TVL was a little different and occurred at different times, I find on the evidence that the essential terms of the agreements were the same for all investors in this trial. Although there were, of course, individual contracts between TVL and each investor, it was not suggested by any counsel that the investors actually made contracts that were different in substance. That is consistent with the patterned nature of TVL's dealings with its investors.

142 TVL, a real estate development company, had from time to time, a number of projects. Investors could select one particular project of TVL in which to invest by acquiring what were called shares. TVL was acquiring the land, often by option.

143 The only written document exchanged by the parties was the speedy memo that was a document signed on behalf of TVL that acknowledged receipt of the investor's money for a particular number of "shares" in a particular project. The term "shares" is an ambiguous term in the circumstances, and in this section I will consider what it meant and later whether it connotes a trust.

144 As to the meaning of a share, I find that the basic terms were agreed and well understood by all parties. (The proper legal characterization of the arrangement, whether it was a trust, a debtor/creditor arrangement or perhaps something else, is another question.) The terms were simply that the monies paid by the investor to TVL were repayable to the investor on demand at any time with interest at twenty percent per annum. If the investor chose to remain an investor until completion or sale, the investor was entitled to twenty percent interest on his investment plus a share of the profits from that real estate project. That was what a share amounted to. There was no agreed basis on which the profit would be determined other than it was to be left to the discretion of the principal of TVL.

145 Although there was nothing in writing on this point, I find that, through a course of conduct, it was accepted by the investors that the decisions as to the development of the property, the expenditures incurred in that development, and the timing of sale of the property or lots in the project were matters left entirely at the discretion of TVL.

146 There was no agreement that the investors would become registered owners of the property. There was no further document as to what their share represented. Although there were a number of ambiguous aspects of what a share represented, I will introduce one here: did the parties agree, as a matter of contract, that the purchase of a share would amount to a beneficial ownership interest in the land or, rather, did it result in TVL, having owned or acquired the land, retaining beneficial ownership and having certain contractual obligations to the investor?

147 I find that there was some but not extensive discussion over the legal characterization of the relationship between the parties. That was probably because the basic terms were quite simple. The investors left most matters in Mr. Taylor's hands.

148 After the demise of TVL, many of the witnesses attempted to reconstruct matters and characterize the legal relationship as either an ownership interest or a loan with a right to participate in the profits or something else, when they had not done that earlier.

149 At the relevant time, the investors tended to focus on what they saw as the central element of the investment; that is, they could get a significant return on their money, with the possibility of an even greater profit if they stayed in until the conclusion of the project.

150 The question of whether the investors and TVL had a trust relationship is a question that includes a consideration of all of the circumstances demonstrating the parties' intention. I will return to that question.

151 Apart from the allegation of trust, the plaintiffs allege two other terms of the agreement: first, that Taylor Ventures would not commingle the funds from the investors in a project with its own funds and the funds from investors for other projects; second, that TVL would not mortgage the properties other than to obtain the initial financing to acquire the property.

152 As to the first allegation, I find, on a consideration of all of the evidence, that although the investors invested in particular projects, there was no express agreement on the part of TVL with the investors not to commingle the funds or to hold them separate and use them only to acquire the land or for the specified project. There was discussion with three investors that their funds would be used for the acquisition of specific projects but I do not find, even on that evidence, an agreement by TVL not to commingle those funds with others it received.

153 If there was no express term barring the company from commingling funds, is that term to be implied in the circumstances?

154 Prof. Fridman, in The Law of Contract in Canada, 3rd Ed. (Toronto: Carswell, 1998) notes at p. 475 that implying or importing a term into the contract:

> "... is not something which the courts will do easily or cavalierly. There has to be strong evidence to support the conclusion that the implication of a term by implication is permissible in the circumstances. It would seem that there are three main instances when this may be done: (i) when it is reasonably necessary, having regard to the surrounding circumstances, and in particular the previous course of dealing with between the parties, if any; (ii) when there is an operative trade or business usage or custom that may be said to govern the relationship of the parties; and (iii) when some statute of its own motion implies a term into the kind of contract that is in question."

155 More recently, Lord Simon of Glaisdale articulated, in B.P. Refinery (Westernport) Pty. Ltd. v. Shire of Hastings (1977), 16 A.L.R. 363 (P.C.) a five-part test that was adopted by Lambert J.A. in London Drugs Ltd. v. Kuehne & Nagel International Ltd., (1990), 45 B.C.L.R. (2d) 1, 70 D.L.R. (4th) 51 (C.A.), aff'd [1992] 3 S.C.R. 299, 73 B.C.L.R. (2d) 1. In B.P. Refinery, at p. 376 Lord Simon said:

> [F]or a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.

156 What were the circumstances? TVL operated one account into which it made all of the deposits and from which it paid all expenses. All share redemption and profit-sharing cheques were drawn on that account. The investors may not have known that but they knew the investment club had many other investors and projects and that Taylor had an obligation to repay those investors, plus twenty percent interest, on demand.

157 Applying the principles that I have set out, I find that there was not an implied obligation on the part of TVL not to commingle the funds that it received from the investors. I think that the imposition of such a term would be clearly inconsistent with the at least two of the five requirements, namely that (1) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; and (2) it must be so obvious that "it goes without saying".

158 The plaintiffs argue that the defendants have not established that TVL had the right to commingle investor monies with its own. In my view, that is not the proper approach. The conclusion that I reach is that it has not been proven that there was an agreement, express or implied, that the monies would be kept in a separate account designated for the particular project or group of investors or that it was a breach of the agreement to deposit all the investors' monies in a single bank account as TVL did.

159 Second, it is alleged TVL agreed not to mortgage the property in which an investor acquired shares. There was no express written term to this effect in the agreement.

160 The plaintiffs say that such an agreement was implied from the nature of the arrangement as it was explained to the investors from time to time or made by the ongoing representations of TVL that were intended to be of contractual effect when inducing investment and continued investment. They were told that the investment club could succeed because it did not require bank financing and that, because there was no financing, the company and the investors could withstand some difficult times. It appears to have been a strong and repeated theme by Ralph Taylor that the strength of the club of investors was in pooling their funds and not requiring banks. I prefer the evidence of the investors and Floyd Taylor on this point, although Ralph Taylor's version is not strongly to the contrary.

161 The defendants say that not only was there no express term to that effect, but that the acquisition and development of the property were matters entirely within TVL's discretion, and financing was at times needed. That it was obvious that bank financing was not in breach of the arrangement, the defendants say, is shown by the fact that no one objected when mortgages were placed on properties by TVL at various points. The defendants say that nearly all of the investor projects were mortgaged or encumbered at material times and that it is unlikely that Ralph Taylor would say that they were free and clear when a search could have easily revealed the opposite. I do not accept that submission.

162 While it may have been somewhat unrealistic that the various real estate projects could successfully proceed without financing from a bank or other financial institution and while it appears that some financing at the outset to acquire some properties was inevitable, it was a constant theme of Ralph Taylor's discussion with investors that the club would be strong and succeed because it did not need or use banks and could wait out a downturn in the real estate market. The fact that there were, on occasion, references on the agendas to bank mortgages could have alerted the very careful eye of an investor, but the overwhelming verbal message from Ralph Taylor for TVL was that the club could make it on its own.

163 While there is some evidence to the contrary, I find that, on a consideration of the whole of the evidence, there was an obligation that was undertaken by TVL not to mortgage the properties in which the investors were investing, unless a mortgage was needed to acquire a property or the investors consented. That term is formed by the ongoing representations that I find were made to the investors by TVL in connection with their investments. It was made frequently and had been made to the investors in connection with their earlier investments with TVL.

164 I conclude it was, as well, an implied term. If an officious bystander, having come across the parties and having heard what Mr. Taylor said repeatedly before he entered into agreements with investors, had asked the parties if it was a term of the contract that Mr. Taylor would obtain investors' consent if TVL needed bank financing for investor projects, both parties would agree without hesitation that this was a term of their agreement. I would expect, given the amount of discretion and trust placed in Ralph Taylor by the investors, that they probably would have given consent readily in most circumstances if asked. Mr. Taylor, however, never sought that consent.

3. WHAT WAS THE LEGAL RELATIONSHIP BETWEEN TAYLOR VENTURES LTD. AND THE INVESTORS?

165 The plaintiff investors make three essential submissions.

166 First, the investors' counsel argue that this is a classic or "true" trust case, in which the investors gave money to TVL to buy an interest in a specific piece of real estate and TVL became the agent of the investor and held the purchased property in trust for the investor.

167 Second, the plaintiffs say that even if the money was a loan, it was a loan for a specific purpose - that is to say, it became what is referred to as a Quistclose trust. They say that if the monies they gave TVL were loans, those loans were tied to specific projects and to the profits that those specific projects might generate, and as such, a trust arose with respect to the particular funds.

168 The third position of the plaintiffs is that TVL was a fiduciary because it acted as a professional adviser and manager with absolute discretionary power over the investors' funds or over their interest in or connection to the properties.

169 The defendants' general position is that there was no trust because the land was not held in trust for the investors, nor was money accepted for a specific purpose in a manner that would give rise to a purpose or Quistclose trust. The defendant Credit Union says that for a trust to exist there must be three certainties - certainty of intention, certainty of subject matter, and certainty of object - and that, in this case, at least the first two certainties are not present. They say that, in substance, the relationship between TVL and the investors was one of debtor and creditor.

170 The defendants also argue that, in the circumstances, there was no fiduciary relationship. The defendants say that this was a commercial arms-length relationship upon which courts are reluctant to impose fiduciary obligations. The defendants say that Ralph Taylor and TVL were entitled to act in their own self-interest, not in the best interests of the plaintiffs. They say the only obligation was a contractual one to provide a specific percentage return on the investment, with a possible share at the end.

171 The first question that I must answer is whether the land was held in trust for the investors associated with the particular project.

172 This is a foundational question because the plaintiffs argue that there was a breach of trust for which the Credit Union may be held liable, either because it participated in or assisted in the breach or because, as a result of the breach, it received trust property in some form. On this second point, the plaintiffs argue that the trust property may have been received by way of mortgages over the investors' land, by receipt of the proceeds of mortgages which may have been paid towards TVL's line of credit, by the receipt of interest reserve funds secured by those mortgages, or by the receipt of proceeds after foreclosures.

173 The plaintiffs rely on Mr. Justice Tysoe's comments in Eron Mortgage Corp. v. Eron Mortgage Corp. (Trustee of) (1999), 70 B.C.L.R. (3d) 381, 10 C.B.R. (4th) 257 at paragraph 34:

> "... A gives money to B for the purpose of acquiring an asset which B is to hold for A and that B does acquire that asset and holds it for A (whether using A's funds or otherwise). A is entitled to the asset because it is held in trust by B for A ..."

and at paragraph 38:

> "I agree with the submission of Mr. Fredricksen that when a trustee has been given monies to acquire an asset and the trustee appropriates or earmarks such an asset for the beneficiary, the beneficiary will have a trust interest in the asset without the necessity of tracing his or her money in the asset."

174 The plaintiffs acknowledge that the three certainties - of intention, of subject matter and of object - must be present for a trust to exist but say that, in this case, they are.

175 The plaintiffs say that the certainty of the investors' intention that these monies and the particular properties were to be held in trust is revealed in the simplicity of the deal. The plaintiffs put it this way in their argument:

> Essentially Taylor said to the investors and the agreement was:
>
> 1. With your money and my expertise we will go into the land development business together and make a profit.
> 2. We will own the land jointly but for convenience TVL will hold the title.
> 3. I will issue shares and give you a speedy memo that will identify how many shares you buy, the price, and the name of the project you choose to invest in.
> 4. We should make at least 20% profit but it likely will be more, perhaps 40% or more.
> 5. I will have sole discretion over how the profit is calculated but I will guarantee you a return of at least 20% on your money per annum.
> 6. I will also give you the option of selling your shares back to me anytime you ask and if you exercise this option I will give you your money back along with an annual return of 20%

7. I will have sole discretion over what properties to buy and what to pay for them but you can choose which property to invest in.
8. I will have sole discretion over when and how to do the development, and when and at what price to sell, but I agree never to encumber the title so we will always have the security of the land.

176 The plaintiffs argue that although TVL had discretion, that discretion was clearly defined and delineated and all the terms were settled.

177 As to the subject matter of the trust, the plaintiffs say this was also certain and put it this way:

(a) Each investor was offered a choice of properties. Those properties were identified by location and description - e.g. 180 acres Nanaimo.
(b) Each investor chose a specific property - again, e.g. 180 acres Nanaimo.
(c) Each investor chose the number of shares he wished to buy and received a speedy memo identifying his purchase and number of shares.
(d) Ralph Taylor testified he took investors to see the specific properties in question.
(e) Ralph Taylor kept his copy of the Speedy Memo in a file kept for each property.
(f) Each property was identified in agendas and newsletters.

It is clear that the subject matter was certain. The property was identified. The investors associated with each property were known. The number of shares held by investors in each property was known to Taylor Ventures and recorded in the records kept by Taylor Ventures. The area of discretion was clearly delineated. (Taylor's breach of his discretionary power does not mean his discretionary power was uncertain.)

178 The key issue here is the parties' intention when the investors placed funds with TVL under their agreement. This must be determined by considering the whole of the evidence surrounding the transaction and, from that evidence, the proper characterization of the transaction.

179 The plaintiffs say that the existence of a trust is a question of fact. An agreement to pay interest (which the plaintiffs' counsel later argued was properly characterized as a minimum percentage of profit) and the possibility that TVL may have, with or without authorization, commingled the investors' money with its own are simply factors to consider and are not determinative. The plaintiffs argue that the clear implication of the speedy memos, in light of all of the evidence, is that the money would be invested only in the project the plaintiffs chose and that any commingling was a breach of the agreement and cannot be used to prevent the establishment of a trust. The plaintiffs say that commingling, if not a breach of contract, is not a particularly relevant factor as the plaintiffs do not have to trace funds to establish that a share in a project was intended to represent an interest in the land.

180 Mr. Laxton, for the plaintiffs, argues that the evidence against these transactions being intended to be loans is overwhelming. He says the only evidence in support of that position related to discussions between Ralph Taylor and Barry Forbes, the president of the Credit Union, rather than to communications with the investors. Mr. Laxton submits the term "loan" was never used by TVL in dealing with the investors and no T-5s were ever issued to reflect that the amount paid was interest.

181 The intention of the parties, Mr. Laxton says, was clear and certain: TVL was to hold the land in trust for the investors.

182 The plaintiffs say that the defendants' arguments that there was no intention to form a trust are not made out in the evidence. The fact that share values were not tied to the value of the land but increased in accordance with accrued interest was, according to Mr. Laxton, simply a significant part of the "con", since if Ralph Taylor dealt with actual land values, he would have had to make full disclosure or risk doing so, which would have led to questions about how the development was being financed. The offers of security to investors investing $50,000, Mr. Laxton argues, do not indicate that they did not intend to have an interest in the land but were made to help TVL sell shares, to disarm investors who were expressing concerns about security, and to create the impression of wealth and liquidity. The contention that the shares were like term deposits, Mr. Laxton said, was something made late in the day - in 1994 and not earlier.

183 Mr. Laxton submits that it is not relevant that some of the plaintiffs called their investments unsecured debt when filing proofs of claim in the bankruptcy proceedings and that others identified their losses as business debts when claiming ABILs on their tax returns. These claims and filings, he says, did not occur until after 1997 and were attempts by people who had lost substantial monies to recoup their losses. Those claiming in the bankruptcy simply completed forms supplied by the trustee. Those seeking to claim losses for income tax purposes did so on the advice of accountants. Subsequent conduct late in the day in attempts to recoup their losses, is not, in Mr. Laxton's submission, relevant to the issue of the true intention of the investors.

184 The plaintiffs' counsel says that they did not merely assume that the land would be held in trust; rather, they were told they were buying an ownership interest in land associated with the project and were led to believe that Ralph Taylor would be using the money for the purchase of the land, and the land would be free and clear.

185 Counsel argues that the large discretionary power given to TVL did not make the deal or the subject matter uncertain, but rather, because the parties agreed on the ambit of the discretion, the deal was both complete and certain. The interest of the investors, he says, was determinable as a percentage of the total shares issued by TVL for the particular project.

186 The defendants argue that the three certainties required to establish a trust are not satisfied in this case.

187 First, the Credit Union's counsel says that, objectively and on a consideration of all the evidence, although there were general discussions, there was no intention that the property or the money would be held in trust for the investors. The defendants' general position is that the properties were not held in trust but rather that there was a contractual agreement to pay interest on the principal amount on demand plus a share of the profits determined at TVL's discretion. All the defendants take that position. The defendants say that receiving compensation for the use of their money speaks loudly against and is inconsistent with the investors retaining a beneficial interest in the funds or the property. They say the transaction, in substance, was a loan, regardless of what it was called. More precisely, they say it was a participating loan, in the sense that the investors were able to receive their money back with interest, and also participate in possible profits.

188 The defendants say that the payment of interest has long been considered an indication of an intended debtor/creditor relationship. They say the absence of an obligation not to commingle the funds with others, or the funds of TVL generally, also points away from an intention that there was to be a trust.

189 Second, the defendants say there was no certainty of subject matter. The investors were only entitled to an unascertained share of the profits, not an identifiable interest in land. In any event, the portion of the property they arguably were entitled to was, at best, uncertain. This subject matter was made more uncertain, they say, because there was no restriction on TVL's ability to raise money by selling further shares and thereby diluting any interest the investors might have had in the land. In that respect, they say, the alleged trust property failed to be clearly defined.

190 Mr. Webster, for the defendant lawyers, argues that there is no certainty of object. He says that the plaintiffs did not expect to get back the property. He also argues that the plaintiffs only had a contract for a guaranteed return, regardless of what became of the alleged trust property.

191 Overall, the defendants say, that to find a trust on the evidence, or based on the subjective intentions of the plaintiffs, strains the doctrine of trusts beyond its due and proper limits.

192 Was there a trust established when the investors gave money to TVL for shares in a project which TVL acquired or could acquire?

193 The plaintiffs must establish three certainties to create a trust: (1) certainty of intent; (2) certainty of subject matter; and (3) certainty of object.

194 In Air Canada v. M & L Travel Ltd., [1993] 3 S.C.R. 787, the Supreme Court of Canada found that the required these certainties could be found in the agreement between the airline and the defendant travel agent. At p. 803-04, the court said:

In concluding that the relationship between M & L and the airline was one of trust, the Court of Appeal relied on Canadian Pacific Air Lines, Ltd. v. Canadian Imperial Bank of Commerce (1987), 61 O.R. (2d) 233. Although the Court of Appeal's decision in that case (1990), 71 O.R. (2d) 63 (note), was brief, the reasons of the trial judge, at p. 237, went into greater depth:

> In order to constitute a trust, an arrangement must have three characteristics, known as the three certainties: certainty of intent, of subject-matter and of object. The agreement ... is certain in its intent to create a trust. The subject-matter is to be the funds collected for ticket sales. The object, or beneficiary, of the trust is also clear; it is to be the airline. The necessary elements for the creation of a trust relationship are all present. I find that such a relationship did exist between CP and the two travel agencies.

This analysis is clearly applicable to the facts of the present case. That the intent of the agreement is to create a trust is evident from the following wording: "All monies, less applicable commissions to which the Agent is entitled hereunder, collected by the Agent for air passenger transportation (and for which the Agent has issued tickets or exchange orders) shall be the property of the Airline, and shall be held in trust by the Agent until satisfactorily accounted for to the airline." The object of the trust is the respondent airline, and its subject-matter is the funds collected for ticket sales.

195 How is it to be determined whether the parties here intended to create a trust or a debtor/creditor relationship? In Air Canada, supra the intention was clear from the instrument. Formality, however, is not necessary.

196 Halsbury's Laws of England, 4th ed. reissue, vol. 34 describes the law as follows at para. 548: "A trust can be created by any language which is clear enough to show an intention to create it." The words usually used in the payment or the acquisition of property to show that intention are "in trust", but any expression in the circumstances that shows that intention will suffice.

197 In this case, the monies were not paid over specifically to TVL in trust. The documentation for the transaction, as I have noted, was sparse: a speedy memo, which set out the same thing in all cases. It read:

[name, address and phone number of investor] [date]

Rec'd [dollar amount] for [number] share(s) in [property].

Taylor Ventures Ltd.
[signature of R. Taylor or Floyd Taylor]
526-4905

198 The document did not expressly say that the land was held in trust for the investor. There is a reference to shares but there were no share certificates or title certificates. Although there was no specific trust document or specific agreement that it was held in trust, there was obviously a connection between the investor and the particular property or project chosen.

199 The plaintiffs rely on the statement by Mr. Justice Tysoe in Eron Mortgage, supra that I have quoted above. It seems to me however, that this statement, with its focus on money given by one party to another "for the purpose of acquiring an asset", takes us back to the original question: did the investors give TVL money with the intention that TVL would buy (or pay for) and hold land in trust for them?

200 The plaintiffs say that the factual matrix reveals that the investors wanted to participate as owners in real estate development. Since TVL was to have title, they say, the intention must be that the land would be held in trust.

201 The defendants disagree. They ask me to cut through the extensive oral evidence, which they say represents either subjective belief or an attempt to reconstruct past events, and determine what was at the heart of the transaction. They argue that intention can be found, objectively, by considering the essential nature of the transaction, which they say was a loan or a participating loan. They point out that an investor was entitled to demand the return of his or her money, plus twenty percent interest, at any time and only those who stayed on until completion were entitled to a share of the profits.

202 Both types of legal relationships - trust and loan - are, of course, quite common. In the dealings between Ralph Taylor and the investors, however, no party used either term, at least in connection with this type of investment.

203 In the absence of express terms indicating a trust, I must look to other factors to determine if a trust was intended. In this case, several factors seem of particular relevance: (1) the payment of interest, (2) the ability of TVL to commingle investors' funds with its own and those of investors in other projects, (3) the circumstances surrounding the investment, including the communications between Ralph Taylor and the investors and, (4) to a lesser degree, the parties' conduct.

204 The Credit Union says I should look to the first two factors and find that, in substance, the intention was that this was to be a debtor/creditor relationship, not a trust. The evidence on these two points is relatively clear. First, all the parties agree that the investors were to receive a twenty percent per annum return on their money, although the plaintiffs say it is wrong to characterize this as interest. Second, as I have found above, there was no agreement, express or implied, obliging TVL to keep funds separate. While neither of these factors is, in itself, determinative, they are relevant to the determination of the parties' intention.

205 In Waters' Law of Trusts in Canada, 3rd ed., (Toronto: Carswell, 2005) the author discusses, at pp. 86-87, the role the payment of interest and the commingling of funds play in distinguishing trust beneficiaries from creditors:

> This preference of trust beneficiaries over creditors makes it important to distinguish the trustee-beneficiary relationship from the creditor-debtor relationship. The distinction is clear enough when the trust arises from the intention, express or implied, of the settlor, but when does the law deem a person a constructive trustee of the funds or assets which he holds for another? The answer, as Ontario Hydro-Electric Power Commission v. Brown and Maralta Oil Co. v. Industrial Incomes Ltd., [1968] S.C.R. 822, show, is when the duty of the holder of the funds or assets is to keep that property distinct from his own personal property. For this reason the banker is a debtor vis-a vis its customer; it mixes the customer's money with its own, and is under an obligation only to pay out an equivalent sum on demand. The depositor, even if he be an express trustee depositing trust moneys, has only a personal action against the bank; that is the essence of a claim against a debtor. A trustee on the other hand must keep the assets subject of the trust separate, and be ready to hand over those assets when the time comes.
>
> The question which provides the most difficulty is whether the particular holder of title to assets who acknowledges another's interest is trustee or debtor. A trustee must keep the assets of the trust distinct, but in the normal commercial transaction nothing specific is said about this. <u>The duty to keep the assets distinct, if it exists, must be spelled out of the nature of the transaction, the environment in which the parties agree, the type of persons who are the holders of title and the transferor, and whether or not interest payments are to be made by the holder of the assets. If interest is to be paid, the relationship is nearly always that of creditor and debtor.</u> [emphasis added]

206 The plaintiffs say that this was hardly a normal commercial transaction. The plaintiffs say the payment of interest, rather than indicating a debtor/creditor relationship, was, in the case at bar, a guaranteed portion of profit. They rely on McEachern v. Royal Bank of Canada, [1991] 2 W.W.R. 702, 111 A.R. 188 (Q.B.) for

the proposition that that the payment of interest is by no means determinative. In that case, which involved a breach of trust by a mortgage broker, Justice Andrekson referred, at p. 726, to the passage from Prof. Waters I have set out above and to this passage from the Restatement of the Law, Trusts 2d, vol.1 (St. Paul: American Law Institute, 1959), paragraph 12 at pp. 37-38:

> If there is an understanding between the parties that the person to whom money is paid shall pay "interest" thereon (at a fixed or at the current rate, and not merely such interest as the money, being invested, may earn) the relationship is practically always a debt and not a trust. Interest is paid for the use of the money, and if the payee pays interest he is, in the absence of a definite understanding to the contrary, entitled to use the money for his own purposes. It is theoretically possible, of course, for a trustee to pay "interest" from his own funds, but in the absence of a clear agreement to that effect such an intention would not be found.

207 Despite these authorities, Andrekson J. concluded that neither the commingling of funds nor the payment of interest for the use of the funds was determinative of the true nature of the agreement and that, notwithstanding the commingling, there was nevertheless a restriction on the use of the funds. As a result he found there could be a trust. In reaching this conclusion, he looked to the surrounding circumstances and found that, although the agreement was silent as to whether the broker could treat the funds as its own, both the plaintiff and the sales manager for the broker believed the broker could not. He found that the funds were deposited with the broker for the specific purpose of buying insured mortgages for the plaintiff and that the payment of interest was simply a way to lure the plaintiff's funds from another bank. He held that the funds were impressed with a trust.

208 In Citadel General Assurance Co. v. Lloyd's Bank Canada, [1997] 3 S.C.R. 805, the Supreme Court said this about the commingling of funds at paragraph 16:

> The fact that the trust funds in Drive On's account were commingled with other funds does not undermine the relationship of trust between the parties. As Iacobucci J. wrote for the majority of this Court in Air Canada v. M & L Travel Ltd., supra, at p. 804, "[w]hile the presence or absence of a prohibition on the commingling of funds is a factor to be considered in favour of a debt relationship, it is not necessarily determinative"; see also R. v. Lowden (1981), 27 A.R. 91 (C.A.), at pp. 101-2; Bank of N.S. v. Soc. Gen. (Can.), [1988] 4 W.W.R. 232 (Alta. C.A.), at p. 238.

209 In Bank of Montreal v. British Columbia Milk Marketing Board (1994), 94 B.C.L.R. (2d) 281 (S.C.), Newbury J. (as she then was), considered a pooling scheme in which the defendant board acted as a clearing house for money owed under the scheme by vendors to producers. When one vendor, McKinnon Holdings, ran into financial difficulty and failed to pay its producers, the board withheld money it owed McKinnon. Following the bankruptcy of McKinnon, the Board claimed this money on the basis that it was the producers' property as beneficiaries of a trust. The plaintiff bank, meanwhile, claimed the money as a secured creditor. The question was whether the amount that the Board withheld was the Board's as beneficiaries of a trust.

210 As Newbury J. noted at paragraph 9, the Board argued that funds paid by vendors to the Board

> "cannot be considered as moneys belonging to McKinnon" and, since McKinnon had no property interest in respect of the milk not used by it, it must have held the producers' milk either as their trustee or as a bailee in possession. More importantly, they say, an implied trust meeting the common law requirements of certainty of intent, subject-matter and object, existed in respect of any money received or receivable by McKinnon from the Board for the producers' benefit.

211 Newbury J. said at paragraph 10-11:

> ... The law is clear that for a trust to be created, there must be sufficient evidence of an intention on the payor's part that the funds or property received by the trustee are not to become part of his own property but are to be or remain the property of the beneficiary. For this purpose, there must be an obligation whether imposed by express terms or im-

plied from other circumstances, on the part of the trustee to keep the property separate. This was the point made by Channell J. in the well-known case of Henry v. Hammond [1913] 2 K.B. 515 as follows:

> It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law .... I am aware that, if the defendant is bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognized his obligation, the obligation itself being the essential thing. This principle seems to me to reconcile all the cases." [at 521 ...].

These comments still appear to represent the law today in Canada. In The Law of Trusts in Canada (2nd ed., 1984), Professor Waters notes the following in comparing trust and agency:

> ... it is essential if the agent is to be an express trustee, or to be made by law a constructive trustee, that there be property which the agent was required to keep separate from his own assets. If the agent, who is collecting moneys from third parties for the principal, or is required to pay over the principal's money to a third party, is to be a trustee of any kind, it is vital that it be shown the agent was required, contractually or otherwise, to keep those moneys identifiable from other assets. Otherwise, the agent is a debtor only. [at 46 ...].

On this point Waters cites Thomson v. Merchant's Bank (1919) 58 S.C.R. 287; H.E.P.C. Ont. v. Brown (1960), 21 D.L.R. (2d) 551 (Ont. C.A.) and Re H.B. Haina & Associates, Inc. (1978) 86 D.L.R. (3d) 262 (B.C.S.C.). I note as well that Henry v. Hammond was expressly approved and applied by our Court of Appeal in Salo et al. v. Royal Bank of Canada and Patrick & Miles Logs Ltd., [1988] B.C.J. No. 999 (Vancouver Registry No. CA005921, dated May 5, 1988) in characterizing the relationship between a logging firm and its logging broker as one of debtor and creditor rather than trustee and beneficiary. In this regard, the Court noted that apart from a direction by the logging firm that its logs were to be kept separate from other logs acquired by the broker, the principal exercised no control over the manner in which the broker performed its function of broker, no direction or control over the manner in which it dealt with the proceeds received from the sale of the logs, and never instructed the broker to keep the proceeds from such sales separate from its own general funds.

212 In the above passage, Newbury J. notes that there must be "sufficient evidence" of the payor's intention that the fund be kept separate for a trust to be created. That comment, of course, relates to the funds that were the subject of the alleged trust.

213 The payment of interest is an important factor in this case in indicating the true intention of the parties. While it is not determinative, in the circumstances of this case, it is an objective fact that normally indicates that a debtor/creditor relationship was intended, at least with respect to the funds. It is argued by the defendant that the fact that the investors generally described the main terms of their deal with Taylor Ventures as the return of their investment plus interest and a share of profits if they stayed in, rather than as a particular interest in land, also indicates that the investors did not intend that the land was to be held in trust for them.

214 On the other hand, the investors only received interest if they redeemed their share and TVL did not issue T-5's to investors as they did in the case of specific twelve percent loans from investors. TVL appears to have suggested or encouraged investors to treat money on redemptions as capital gains.

215 The fact that Ralph Taylor suggested and some investors accepted that the investments were like term deposits may suggest a debtor/creditor relationship. But this suggestion was made late in the day and was hardly a consistent theme of the communications between the parties. I do not think it is of much significance.

216 What of the absence of an obligation to keep the monies that were advanced separate from the other assets of Taylor Ventures? In this case, I think the fact of commingling is a less significant factor than it might be if the issue was whether there was a trust intended for the particular funds rather than the property. As the plaintiffs argue, the fact that the monies were commingled by TVL, even if not prohibited, does not speak to the parties' intention as to whether the real property was to be held in trust. In other words, even though the investor may not have limited TVL in its ability to use the particular funds, the proper question to ask in determining whether this is, in substance, a trust is whether the parties intended that TVL would hold for the investor a beneficial share in land in a particular project.

217 On the question of the surrounding circumstances, while the evidence of the conduct of the parties, both at the time of investment and thereafter is relevant to some degree, the evidence that speaks most loudly in determining intention is evidence dealing with the discussions between the parties before the investments was made. How did Ralph Taylor explain to the investors what a share represented or what their interest was?

218 My review of that evidence indicates that, while there were only a few occasions when the parties spoke of the investors' money buying the land, there were more frequent references to individual plaintiffs acquiring an ownership interest. While Ralph Taylor denied making some of the comments attributed to him by the plaintiff investors, I prefer the evidence of the investors who testified over his evidence. None of the plaintiffs was shown to lack credibility or to be inconsistent on this point. They appeared to try to recount the origins of the transactions as best they could. On the other hand, I had serious reservations about the credibility of Ralph Taylor, who I found would often rationalize or be selective in his recollection of what he said to possible investors. I do not think that it is a correct characterization of the plaintiffs' evidence to say that, in discussing ownership of land through the investments, they were just stating their assumptions. The thrust of their evidence was that Ralph Taylor said that they were acquiring ownership in land and that that is what their share in a designated project amounts to.

219 Towards the end of the trial, Ralph Taylor was asked about this evidence, which was given by Ms. Miller:

> Q. Well, I guess I should ask you why is it you believe that you had an ownership interest in the land?
>
> A. I was told by Mr. Taylor that that's what the money was used for and that by owning the land the money would be secure.

220 Mr. Taylor was asked if he told her that. He replied: "I would tell that to the group." He was then asked:

> Q. If you go - sorry, and the group, you would tell that to all the investors?

A. Yes

221 What was the share referred to on the speedy memos intended to represent? It is clear that it did not represent a share in Taylor Ventures. But did it represent an interest in a property or a share in a project or the profits from a project?

222 Mr. Shields asked Ralph Taylor this on cross-examination.

Q. You certainly would have said this is our land and that's TVL and the investment club comprised of the investors?

A Yeah, it was our project.

Q. And --
A. And the land is part of the project.
Q. I understand, but you would have said, you do not deny, that this is our land, referring to the land people had invested in jointly, the investors [sic - and] TVL?
A. Yes.

223 The oft-repeated speech of Ralph Taylor was that banks were to be avoided and that in bad times the club could wait it out. He tried to suggest that he said things like property was hard to finance, banks were hard to get mortgages from and second mortgages were costly but I think that he was more direct than that. I think he said banks were to be avoided and the club could avoid them because of how they raised the money. The phrase "we can wait it out", may be taken to suggest that Taylor Ventures and the investors could sit on their interest in land until bad times passed. Again, this is just a factor that suggests, to some degree at least, an intention that the legal title holder, TVL, holds the interest in trust for the group of interested investors.

224 The investors' evidence regarding what Ralph Taylor told them about what they were buying is important. It must be carefully considered in determining the intention of the parties to these transactions. But I must be alive to the many possible meanings of his statements; a phrase such as "the land does not go away" may simply indicate the nature of the business in which the investor and TVL are involved or it might suggest that the investors had something tangible of value.

225 The defendants say that TVL's occasional use of terms such as "'we' will develop the land" and "'we' (or you) own the land" could be taken to mean either that TVL owned the property, with the investors participating in some fashion, or that the investors beneficially owned the property.

226 The defendants point to evidence that suggests that the investors never expected that they would actually receive the land and the deal was always only for a percentage return on their investment and a possible share of the profits, that share to be determined by TVL.

227 The defendants suggest that the surrounding facts, taken as a whole, point away from a finding that the parties' intention was that the plaintiffs' shares would represents an ownership interest in the particular land. Mr. Webster argues that the fact that the investor could be paid back plus twenty percent is inconsistent with a trust. He asks this question: if the investors expected that the properties in which they invested were held safely for them, how did they expect to get twenty percent and their principal when the subdivision development properties did not generate any income prior to sale? His answer is that the investors relied on TVL's other projects to generate revenue, which is inconsistent with an intention that the property be held in trust for them but rather consistent with a commercial debtor/creditor relationship that they had with Taylor Ventures.

228 The defendants also point to other surrounding circumstances. They point out that, according to Ralph Taylor, some investors asked about liabilities before they invested and were told that there were none. If they were to be owners, the defendants say, even unsophisticated investors would expect to be liable for costs related to the property, such as taxes or insurance.

229 On a similar note, the defendants point to the fact that share values were calculated from time to time, not with reference to the market value of the property, but simply by taking the amount of the investment and adding accrued interest. This, they say, suggests a debtor/creditor relationship, not a trust.

230 Those facts, I agree, are all consistent with a relationship in which the investors sought a good interest return on their investment plus a share of the profits if they stayed in and are inconsistent with a relationship in which the investors intended to receive an interest in land. The authority that TVL exercised in connection with all of the projects is also more consistent with the land belonging beneficially to TVL with an obligation to account for profits than it is with belonging to the investors.

231 Although I do not place great weight on subsequent conduct of the parties, such as investors claiming a loss with Revenue Canada or filing proofs of loss in the bankruptcy, should weight be given to the fact that no investor complained that they already owned the land when Taylor said, frequently and clearly, that security was available for those with over $50,000 invested? I think that at best the weight attributed to that factor should be modest because the fact of an interest in land and an offer of security are not necessarily mutually exclusive.

232 In another case involving TVL, a similar issue was addressed. In Taylor Ventures Ltd. (Trustee of) v. 554925 B.C. Ltd., (2004) 7 C.B.R. (5th) 8, 2004 BCSC 1612, (TVL (Trustee) v. 554925), Burnyeat J. considered an application by a Trustee in bankruptcy of TVL that a transfer of a certain lot to the defendant numbered company, which was owned by a Mr. van Gaalen, was a fraudulent conveyance.

233 The numbered company claimed that the transfer was pursuant to an agreement, made in 1993, that TVL would hold the property in trust.

234 In that case, Ralph Taylor had testified: "Well, I would find a piece of land that looked right for a development and then offer shares for sale to people that wanted to participate in the project". Mr. van Gaalen provided $200,000 to TVL in 1993 with the cover letter noting, "[e]nclosed $200,000 is for a 1/3 interest in the development of 10 acres ... as per plan shown to me." In return he received a letter from TVL saying "[r]eceived $200,000 for 1/3 interest in 44 Lot Sub-division at 1825 Extension Road, Nanaimo".

235 In January 1998, an arrangement was agreed upon between TVL and Mr. van Gaalen whereby title to the property would be transferred to 554925 B.C. Ltd., the nominee of Mr. van Gaalen and Mr. Stinson, who was the other participant in this project and who had assigned his interest to Mr. van Gaalen.

236 The question was whether 554925 B.C. Ltd. had established that a valid trust had been created by the original agreement between TVL and the two investors. Burnyeat J. said that there was nothing in the two July 8, 1993 letters, (the letters I have quoted above), the subdivision plan, and the Statement of Adjustments from the original purchase to allow him to conclude that it was the intent of TVL to create a trust. He said that he could not be satisfied that the language used by TVL was "in any way 'imperative' or that the intention of TVL in July through September, 1993 was to establish a trust".

237 If the only evidence in the case at bar was the speedy memo, then Justice Burnyeat's decision would properly support the argument that there was insufficient evidence of intention to form a trust; clearly, that decision provides persuasive support to the defendant's argument that a document as basic as a speedy memo is, by itself, insufficient evidence to make out the intention to establish a trust. In the case at bar, however, there was other evidence, such as the evidence of the investors as to what was said to them, that was put forward in support of the argument that this arrangement was a trust.

238 In this case, the investors were told by Ralph Taylor that the share they had purchased in a property or a project would represent an ownership interest. They were told that they would be part owners or owners with TVL. And while the investor could demand payment at any time, the evidence suggests that TVL or another investor would acquire that interest. To that extent, the ability to redeem shares is not inconsistent with a trust.

239 There are factors, such as the payment of interest and the ability of TVL to commingle funds, that might, on reflection and in hindsight, point to a conclusion that some other relationship was intended. Considering the evidence that I have set out in this part of the judgment, I think that there is a reasonably good argument that the parties had the intention to create a trust.

240 That conclusion, however, can only be a provisional one, and requires a consideration of the next certainty. Certainty of intention and certainty of subject matter are obviously related. In his text, Professor Waters considers the case of Perry v. Perry, [1918] 2 W.W.R. 485, in which a testator, having divided his property between his widow and sons, expressed a desire that his daughter "shall inherit from her mother a

share" with "the balance to be divided in equal shares...". While the phrase dealt with the subject matter, the court found that the imprecise language also rendered uncertain the intent of the testator. As he observes at p. 150-51:

> [Did] this mean a share of the mother's own property or a share of the property devised to her by the testator? And, if that was uncertain, what "balance" was to be divided? Language and property description interacted, therefore, in determining the intent of the testator.

241 With that in mind, I must turn my attention to the question of the second certainty, certainty of subject matter.

242 The parties disagree as to whether there was certainty of subject matter. I have set out their arguments above.

243 Under the terms of their agreement with TVL, were the plaintiffs entitled to a specified or a determinable interest in land? Or were they entitled to an unascertained future share of profits in a particular project, payable only if they stayed in until the project was completed and did not, in the interim, demand that TVL return their investment with the promised twenty percent per annum interest?

244 In TVL (Trustee) v. 554925, Burnyeat J. also addressed the issue of the required certainty of subject matter and found that there was no certainty of subject matter because the documents said by the defendants to have established the trust referred to a "1/3 interest in the development of 10 acres ... into 44 lots". In this regard, he said, at paragraph 38, "there is no certainty about whether the subject matter of the alleged trust is an interest in the development including the profits coming from the development or whether it is an interest in the Property itself". At paragraph 45, he added:

> I am satisfied that this transaction was no different than the other transactions between TVL and Mr. van Gaalen whereby he paid money in order to receive a "share". None of the usual indicia of the development of a property by partners or by a trustee on behalf of beneficiaries is present. Mr. van Gaalen never saw the Property, he had no idea about the taxes, he had no knowledge about the third "partner", and there appears to have been no dealings between Mr. van Gaalen and TVL relating to the Property for the four years between 1993 and 1997.

245 Even if the particular land in which the investor bought shares is identified and there were expressions of intention that the investor have a beneficial ownership interest in the land, that is not the end of the matter. As noted by Waters, above (at p. 117):

> [E]ven if the trust property is thus clearly defined, the shares in that property which the beneficiaries are each to take must also be clearly defined. Certainty of subject-matter as a term refers to both of these required certainties.

246 As Waters also notes (at p. 119):

> When the courts say that there must be certainty of subject-matter, they mean that the property must either be described in the trust instrument, or there must be "a formula or method given for identifying it". This latter form of certainty more often occurs with fixing the quantum of beneficiaries' interests, but it can occur with the whole trust property.

247 This raises the question: even if it was the intention of the parties that the investors were to have a beneficial interest in the land to be acquired, how is that particular interest of the investor to be determined? The defendants say that if the subject matter is based on a formula, it must be determinable at the time of the sale to the investor, since if there is a trust, that must be the time that it was created. In order to achieve this certainty, they say, the investor must have purchased a specific percentage of an interest in land rather than something that might be large or small depending on the number of shares sold. The plaintiffs say that the subject matter is determined by calculating the percentage interest of the investor based upon the records of TVL. They say that the evidence shows that there was more than enough money raised by share

sales for each of the investor projects in question and the record of the total shares sold operates as the denominator to determine the interest of the investor in the underlying land to be purchased.

248 I find that the understanding was that the legal title to the property would be held by TVL. There was, of course, no written formula determining how each particular investor's interest in the property would be determined. When shares in a project were sold, it is unclear how many would be sold, but the plaintiffs say that the interest of the investor can easily be determined as a percentage of the shares sold when the time for selling ended.

249 However, there are a number of aspects of the evidence that raise uncertainty as to the determination of an investor's possible interest.

250 First, it seems probable that if the investor's interest was properly characterized as an interest in land, as opposed to that of a creditor who might share in the profits of a project, it is probable that TVL also had a share in the project or the lands. However, whatever interest TVL had in a particular project or land was not precisely determined between the parties.

251 Let me refer to the plaintiffs' evidence in this respect. Mr. Dunlop understood that TVL was to get a share of the project. Ms. Miller understood her share of the profits depended on whatever cut TVL was going to get from the project, and she knew that TVL was going to get some sort of share in the project but did not know what that share was going to be. Mr. Keller understood that his share of the project would depend on whatever TVL was going to take from the completed project. Mr. Berger had no idea what share of the profits were to flow to TVL but he understood TVL was to get part of the profits. Mr. Ogren said he did not have any understanding as to how Ralph Taylor was going to calculate the profits. Mr. Mountain said he was aware that TVL was going to get a share of the project but had no idea of what that share was going to be, and he left it entirely up to Ralph Taylor to do what he had to do to complete the project. Ms. Roberton agreed that Ralph Taylor expected to make a profit on behalf of Taylor Ventures on each project, that it was up to him to calculate the profit and that his calculations would determine how much each investor received. Mr. Koretchuk knew that TVL was going to get a share of the profits of the project, but had no idea of what that share was going to be. Mr. Burgess said that he assumed that TVL had shares in the projects and he knew he was going to get something out of it, but had no idea how that was to be calculated. Ms. Atchison did not have any understanding as to how Ralph Taylor was going to calculate the profits and she left that up to him.

252 It might be argued that TVL only had a share of the profits and not a share of the beneficial interest in land, if that is what the investors had. I find that the reason there was no formula or specific determination agreed to by the parties on the formula to determine the precise interest each investor had in the land was because the focus of the discussions between TVL and the investors was on the guaranteed return and the percentage of profits from the sale or development of the project, not what each party would own if the issue became who owns what share of the land.

253 If TVL did not own the land in a project entirely, I find that it is by no means certain that TVL did not have an interest in the land, and that it is uncertain what percentage each of the parties owned in that land.

254 Even if there were a limited number of shares sold, I find, on all of the evidence, that the interest of the particular investor is not sufficiently determinable by an agreed formula. I do not find that the broad discretion that the investors gave TVL was sufficiently certain to provide an agreed basis for determining any interest an individual investor might have in the lands.

255 Another aspect of uncertainty of subject matter is the fact that if the shares were to represent an interest in land, there was no certain agreement that there would be no further shares sold. Ralph Taylor said he could sell more shares but the topic was not really discussed. There was no clear agreement proven that he would not sell more shares; some investors thought that he could, while others thought when the deadline for sales passed, he could not sell more shares. It was certainly not an implied term that he would not sell more shares. The investors' concern was not the dilution of their shares in terms of an interest in land, but the recovery of interest and a greater amount for profits if they stayed in until the project was sold.

256 There was no certainty of subject matter and that conclusion also leads me to conclude that there was insufficient certainty of intention that there was to be a trust.

257 I conclude that the required certainties of intention and subject matter are not met here. The arrangement between TVL and the investors was a commercial debtor/creditor relationship and did not satisfy the requirements to be a trust.

258 The next issue is whether there was a Quistclose or purpose trust.

259 The plaintiffs argue that the advance by the investors to TVL was for a specific purpose and that, even if it was a loan, it was a loan for a specific purpose and, as such, TVL was not free to use the money for any other purpose. The plaintiffs say that the purpose trust gives rise to fiduciary obligations and creates a resulting trust in their favour, which was breached to the extent that TVL failed to use funds for the designated purpose. The essence of this argument, therefore, is that there is a trust in connection with the purchase or investment monies as opposed to the properties.

260 The plaintiffs say that the Quistclose trust exists, whether the monies from the investor is a loan or not, because the funds provided by the investors were restricted to being used to purchase a specific property, because TVL accepted that the plaintiffs' money would be put to that use exclusively and because it was not the intention of the parties that the money would become the property of TVL.

261 The defendants say that this concept of a Quistclose trust only applies to the funds, not to the lands. It is not enough that the investor has some motive in advancing the money; a trust will not be imposed on TVL unless the investor intended to restrict TVL's freedom to dispose of money by requiring that it should not be applied for any purpose other than that stipulated. They submit that there was no specific declared use of the funds, and that a reference to a project in the speedy memo was not enough to mean that the funds would be used solely for the purchase or development of that project. The defendants say that there was no requirement that the funds be kept in a separate account, nor was there evidence that the funds could only be used to buy the land but not be used for other relevant purposes of TVL, such as taxes, option payments, insurance or the redemption of other investors' interests.

262 The defendants say that, when a loan or advance is made, the mere declaration of a specified purpose is not enough to create a purpose trust, but that there must be something in addition that indicates that the recipient is not to have the full beneficial interest in the fund.

263 The origins of the Quistclose trust were described in Re Westar Mining Ltd. (2003), 9 B.C.L.R. (4th) 61, 2003 BCCA 11 at paragraph 11-12, where Mackenzie J.A. said:

> A purpose trust is often referred to as a Quistclose trust in recognition of the influential judgment in Barclay's Bank, Ltd. v. Quistclose Investments Ltd., [1968] 3 All E.R. 651 (H.L.). Quistclose also involved a special banking arrangement. The respondent Quistclose had advanced funds to Rolls Razor Ltd. to allow it to pay a declared dividend. Quistclose accompanied its cheque to Rolls Razor with a letter to the appellant bank confirming that the cheque would be deposited to a separate account and that the funds "will only be used to meet the dividend due ....". Rolls Razor went into voluntary liquidation before the dividend was paid and the bank claimed the monies on behalf of Rolls Razor's creditors. The House of Lords, in a unanimous judgment delivered by Lord Wilberforce, held that the monies had to be returned to Quistclose because they were advanced exclusively for the payment of a dividend which could not be paid after the voluntary liquidation. Lord Wilberforce concluded that the advance of the funds for a specific purpose created an equitable right in Quistclose to see that the fund be applied for that purpose, and created a secondary trust in favour of Quistclose when that specific purpose could not be carried out.

> Quistclose does not modify the certainty of intention, subject matter, and object required of trusts generally.

264 Newbury J. (as she then was) also considered the issue of a Quistclose trust in Bank of Montreal v. British Columbia Milk Marketing Board, supra. She said at paragraph 12:

> Mr. Stark on behalf of the Board cited the decision of the House of Lords in Barclay's Bank Ltd. v. Quistclose Investments Ltd. [1970] A.C. 567, and the judgment of Southin J. (as she then was) in Lowndes Lambert Group Ltd. v. Specialty Underwriting Services Ltd. (1986) 11 B.C.L.R. (2d) 308 (B.C.S.C.). These stand for the proposition that where A gives money to B for the specific purpose of paying C, that money is impressed with a trust and may not be appropriated by him. I certainly do not doubt this principle, which in the words of Lord Wilberforce is supported by "longevity, authority, consistency and ... good sense". In both Barclay's Bank and Lowndes, however, it would appear that the recipient of the funds was required, either by express terms or the past course of dealings between the parties, to keep the money separate from its own funds. Certainly in Barclay's Bank, the funds had been advanced by a lender into a separate account opened specially to enable the borrower to pay a dividend to its shareholders. The Court in Lowndes did not refer specifically to the question of segregation of funds in its description of the facts, but the correspondence quoted at p. 310 of the judgment refers to "trust accounts designated by the Superintendent of Insurance." Both cases, moreover, were concerned with funds paid on express conditions of trust which the payees thereof later tried to repudiate. The case at bar is concerned with whether a trust may be implied from the course of dealings imposed by G.O. 131 and the language thereof.

265 In Twinsectra Ltd. v. Yardley, [2002] 2 All E.R. 377, a firm of solicitors received money on the undertaking that the monies would be retained until such time as they were applied in the acquisition of property on behalf of the client, that the loan monies would be used solely for the acquisition of property on behalf of the client and no other purpose, and that they would repay the sum within four calendar months after receipt of the loan monies by them. The solicitor did not retain the monies until it was applied in the acquisition of property by Mr. Yardley, the client. Instead, on being given an assurance by Mr. Yardley that it would be so applied, they paid the money to a Mr. Leach and he, as solicitor, simply paid it out upon Mr. Yardley's instructions and did not take steps to ensure that it was utilized solely for the acquisition of property by Mr. Yardley.

266 The House of Lords was divided as to whether evidence of dishonesty was required in order to impose liability on an accessory to a breach of trust, but were unanimous as to what was required to make out a **Quistclose** trust. These requirements were set out in the dissenting reasons of Lord Millet at paragraph 68-72:

> Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases.
>
> Such arrangements are commonly described as creating "a Quistclose trust", after the well-known decision of the House in Quistclose Investments Ltd. v. Rolls Razor Ltd [1970] AC 567 in which Lord Wilberforce confirmed the validity of such arrangements and explained their legal consequences. When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the

> lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee-in-bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case.

[emphasis added]

267 Ms. Milton, for the Credit Union, argues there must be, in addition to a declaration of specific purpose, some indication that the borrower is not to have the full beneficial interest in the funds. This, she says, has usually been shown by the borrower having a requirement to keep the loan monies separate from other assets and return them if the purpose is not made out.

268 In Re Westar Mining Ltd. Mackenzie J.A. referred to Milk Marketing Board and said that because the vendor was not required under the terms of its dealings with the Board to separate funds received from the Board for producer payments from the other property of the vendor, or to use the funds received exclusively to pay producers, "... the essential elements of mutual intention to create a trust and certainty of subject matter were not satisfied". He went on to say at paragraph 16, that:

> Conversely, in the present case, the payments by Poscan were required to be paid into a separate joint venture account to be used exclusively to pay the operating expenses of Greenhills. The Bank recognized the separate status of the account. The payments by Poscan under the Joint Venture Agreement were separated from Westar's other assets, in contrast to the payments to the vendor by the Milk Marketing Board that, with the agreement of the Board, were mingled with the vendor's other property.

269 The argument that there was a Quistclose trust fails for three reasons. First, there was no obligation on the part of TVL to segregate the funds, a factor that Westar indicates is important. Second, the evidence, as a whole, does not establish a mutual intention that the monies could not be applied for other purposes of TVL. Third, the agreement to pay interest for the use of the money points to a debtor/creditor relationship with some flexibility to TVL rather than a restriction on the use of the particular funds.

270 The three certainties for the establishment of a purpose trust are equally applicable here, but I find that they were not satisfied. In particular, I find that the requirement for certainty as to intention that the beneficial interest in the fund would remain in the investor is not met in this case. Although two or three of the investors said that the monies were to be used to acquire the properties, I do not find, on the whole of the evidence, the required certainty of intention that the beneficial interest in the monies remain with the investors. Moreover, to the extent that some plaintiffs assumed their funds would only be used for particular projects, I think it is clear from Westar that this subjective intention is not sufficient to establish a purpose trust.

271 Therefore, my conclusion is that the evidence in this case does not establish that there was a Quistclose or purpose trust, with respect to the monies paid to TVL by the investors.

272 The plaintiffs argue that, even if there was not a trust or a Quistclose trust, there was nevertheless a trust-like or fiduciary relationship and TVL was a fiduciary. They say this because TVL acted much like a professional advisor to the investors, with absolute discretion over the investors' funds and the development of the projects in which they had an interest.

273 The defendants deny that there was a fiduciary relationship.

274 The plaintiffs say that, even if a trust were not found and the relationship was a contractual and a commercial one, if the ingredients that give rise to a fiduciary duty are present and there is the vulnerability of the plaintiff investors, the traditional fiduciary principles are invoked. The argument, as I understand it, is that even if there was not a trust or purpose trust, the broad discretion given TVL in the management of projects

and the lack of knowledge and sophistication and the vulnerability of the investors to that discretion resulted in a fiduciary relationship which TVL breached by entering into the impugned transactions.

275 The plaintiffs say that TVL would only be in breach of fiduciary duty if it placed its interests ahead of those of the investors. They blame TVL, not for the failure of their investments, but for acting disloyally by secretly selling investor projects to major investors, who then mortgaged them with the connivance of Ralph Taylor, even as Mr. Taylor was purportedly still developing them as investors' projects.

276 The defendants say that the parties were not fiduciaries because the concept of a fiduciary relationship has no place in an arms-length commercial relationship.

277 The defendants say that TVL was acting, as it was entitled to, in its own self-interest and its obligation was not to act in the best interests of the plaintiffs but to provide a specific percentage return on the investors' money with a share of the profits. TVL, they say, never relinquished its own self-interest; rather, the interests of the investors and TVL were simply aligned in the goal of making a profit. They say that the investors were not vulnerable but could have negotiated security rights if they wished to do so.

278 In Frame v. Smith, [1987] 2 S.C.R. 99, Madam Justice Wilson, then in dissent, said at paragraph 59-60, in a passage about fiduciary relationships that has since been frequently cited with approval:

> A few commentators have attempted to discern an underlying fiduciary principle but, given the widely divergent contexts emerging from the case law, it is understandable that they have differed in their analyses: see, for example, E. Vinter, A Treatise on the History and Law of Fiduciary Relationships and Resulting Trusts (3rd ed. 1955); Ernest J. Weinrib, "The Fiduciary Obligation" (1975), 25 U.T.L.J. 1; Gareth Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968), 84 L.Q.R. 472; George W. Keeton and L. A. Sheridan, Equity (1969), at pp. 336-52; Shepherd, supra, at p. 94. Yet there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a fiduciary obligation on a new relationship would be appropriate and consistent.
>
> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

279 In Gladstone v. Attorney General of Canada, [2005] 1 S.C.R. 325, 2005 SCC 21, the Court made clear, at paragraph 24, that the determination of whether there was a fiduciary relationship was a principled analysis:

> The concept of fiduciary duty is not an invitation to engage in "results oriented" reasoning. It is a principled analysis. At its core is the obligation of one party to act for the benefit of another. This obligation may derive from various sources such as statute, agreement, or unilateral undertaking. In Guerin v. The Queen, [1984] 2 S.C.R. 335, Dickson J. (as he then was) stated at p. 384:
>
>> I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

280 In Hodgkinson v. Simms, [1994] 3 S.C.R. 377, the Supreme Court of Canada found a fiduciary relationship existed between the plaintiff and the defendant accountant even though there was a contractual relationship. La Forest J., for the majority, said as follows at paragraph 28-29:

> Finally, I note that the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations; see Johnson v. Birkett (1910), 21 O.L.R. 319 (H.C.); McLeod v. Sweezey, [1944] S.C.R. 111; P.D. Finn, "Contract and the Fiduciary Principle" (1989), 12 U.N.S.W.L.J. 76. In other contractual relationships, however, the facts surrounding the relationship will give rise to a fiduciary inference where the legal incidents surrounding the relationship might not lead to such a conclusion; see Standard Investments Ltd. v. Canadian Imperial Bank of Commerce (1985), 52 O.R. (2d) 473 (Ont. C.A.), leave to appeal refused, [1986] S.C.C.A. No. 29. However, as Prof. Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; see supra, at p. 88.
>
> ... As I stated in M. (K.) v. M.(H.), [1992] 3 S.C.R. 6, at p. 62, over the past ten years or so this Court has had occasion to consider and enforce fiduciary obligations in a wide variety of contexts, and this has led to the development of a "fiduciary principle" which can be defined and applied with some measure of precision. One may begin with the following words of Dickson J. (as he then was) in Guerin v. The Queen, [1984] 2 S.C.R. 335, at p. 384:
>
> > . . . where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power,
> > the party thus empowered becomes a fiduciary . . . .
> >
> > It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

[emphasis added]

281 There is some reluctance on the court's part to find a fiduciary relationship in the context of an arms-length commercial relationship. Mr. Justice Sopinka for the majority on this issue in Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, said at paragraph 27:

> The consequences attendant on a finding of a fiduciary relationship and its breach have resulted in judicial reluctance to do so except where the application of this "blunt tool of equity" is really necessary. It is rare that it is required in the context of an arm's length commercial transaction. Kennedy J., in "Equity in a Commercial Context" in Equity and Commercial Relationships, ed., P.D. Finn, The Law Book Company, 1987, explains why:
>
> > It would seem that part of the reluctance to find a fiduciary duty within an arm's length commercial transaction is due to the fact that the parties in that situation

> have an adequate opportunity to prescribe their own mutual obligations, and that the contractual remedies available to them to obtain compensation for any breach of those obligations should be sufficient. Although the relief granted in the case of a breach of a fiduciary duty will be moulded by the equity of the particular transaction, an offending fiduciary will still be exposed to a variety of available remedies, many of which go beyond mere compensation for the loss suffered by the person to whom the duty was owed, equity, unlike the ordinary law of contract, having [sic] regard to the gain obtained by the wrongdoer, and not simply to the need to compensate the injured party.

282 After endorsing the view that it would undermine the sound doctrine of equity to make unreasonable and inequitable applications of it, Sopinka J. said at paragraph 29:

> ... equity's blunt tool must be reserved for situations that are truly in need of the special protection that equity affords.

283 In Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142, Binnie J. noted that, even where there is discretion, business people are capable of agreeing to the scope of the power to be exercised. He said at paragraph 30:

> Even prior to Lac Minerals the Court expressed the view that the policy objectives underlying fiduciary relationships did not generally apply to business entities dealing at arm's length. In Frame v. Smith, [1987] 2 S.C.R. 99, Wilson J. stated, at pp. 137-38:
>
> > Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in the dealings of experienced businessmen of similar bargaining strength acting at arm's length: see, for example, Jirna Ltd. v. Mister Donut of Canada Ltd. (1971), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd [1975] 1 S.C.R. 2. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, i.e., any "vulnerability" could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.
>
> To the same effect, see Lac Minerals per Sopinka J. at p. 595, Hodgkinson v. Simms, [1994] 3 S.C.R. 377, at p. 414, per La Forest J., and the comment of Professor Davies that "[s]trong evidence should be required before a breach of confidential information situation is metamorphosed into one of fiduciary relationship" (Davies, supra, at p. 7). Despite these warnings, a majority of this Court in Hodgkinson v. Simms, supra, held that where the ingredients giving rise to a fiduciary duty are otherwise present, its existence will not be denied simply because of the commercial context. The vulnerability of clients to their professional advisors invoked traditional fiduciary principles. In this case there is nothing in the relationship between a juice manufacturer and its licensee to suggest that the former surrendered its self-interest or rendered itself "vulnerable" to a discretion conferred on the latter. The overriding deterrence objective applicable to situations of particular vulnerability to the exercise of a discretionary power (M.(K.) v. M.(H.), supra, per McLachlin J. at p. 86) does not operate here. If different policy objectives apply, one would not expect the remedy necessarily to be the same.

284 Was this contractual and commercial relationship, if not a trust, also a fiduciary relationship?

285 Beyond the rather sparse terms of the contractual arrangement, TVL had significant discretion in terms of what to do with the investor projects.

286 TVL had wide discretion from the investors as to how it handled each development. The decision of when or whether to develop or sell the property, the determination and appropriate split of profits, indeed, the entire management of the projects in all critical respects was left to the discretion of TVL. Obviously, numer-

ous kinds of dealings with a property could affect the practical interests of the investors. Although I have found an obligation not to mortgage the projects to financial institutions, beyond a mortgage to acquire the property initially, I find that the manner in which possible profits might be realized was something the investors left to TVL. They trusted Ralph Taylor and granted him discretion to act as he saw fit.

287 The defendants argue that this is one of those commercial relationships where the parties' rights and obligations were circumscribed by contract and there is no room for a possible fiduciary obligation. The parties, it is true, were dealing at arm's length, and the plaintiffs received a promise of significant interest and additional profit if they remained until the completion of the project. This was not a relationship, they say, where Ralph Taylor gave up his self-interest for that of the investors. Even if there is vulnerability, the defendants argue, the discretion that the plaintiffs granted TVL was simply part of the bargain under which they received the promise of a substantial return on their monies. Having granted that discretion as part of the bargain, the defendants say, the plaintiffs cannot now rely on it as the basis for a claim that TVL had a fiduciary duty to them. In other words, they say, insofar as the investor-related projects were concerned, TVL was given free rein to conduct its business in any fashion it saw fit in order to realize the profit required to pay the investors the agreed return and perhaps something more.

288 If there is not a trust, the relationship between the plaintiffs and TVL clearly does not fall into one of the standard categories that attract fiduciary responsibilities, such as trustee-beneficiary, solicitor-client or doctor-patient.

289 I recognize that it may be rare for there to be fiduciary relationships between two independent contracting commercial parties, but I think that the situation here is unusual. As stated in Hodgkinson v Simms: "the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests".

290 This was a commercial relationship, but fiduciary duties have been imposed on developers in commercial arrangements: Hardman Group Ltd. v. Alexander (2003), 212 N.S.R. (2d) 304, 15 C.C.L.T. (3d) 52 (S.C.). It is also significant that this was not a normal commercial relationship. It was a bargain between an experienced real estate developer and unsophisticated investors.

291 The information concerning all aspects of the developments was entirely in Ralph Taylor's hands. The investors placed substantial trust in TVL and gave it enormous discretion as to the development of the projects in which their club invested, not only in the manner in which the land was acquired and developed but in the type and amount of costs that were incurred and in the calculation and division of profits.

292 Influenced, perhaps, by his early track record or by his personality, the investors placed a great deal of trust in the man behind TVL, who presented himself as having the expertise, know-how and drive to make it where others failed in the real estate development business. Ralph Taylor told the investors that they could go it alone without bank financing, but the investors really left it to Ralph Taylor to decide how to develop or sell the properties and maximize the profits that they hoped to share in. Aside from the understanding that TVL would not increase their risk by granting mortgages to banks, there were no agreed controls over this discretion, only that TVL would exercise it honestly in their joint benefit to try to maximize profit for them.

293 Given the absence of any restrictions by the investors on the actual use of the funds given to TVL, given the wide discretion as to the development and possible sale of the properties, and given the lack of any outside regulatory control or other form of active supervision, I find that there was significant vulnerability on the part of the investors to the exercise of this discretion by TVL.

294 My conclusion is that the level of discretion granted TVL and the degree to which the investors were vulnerable was sufficient to give rise to fiduciary obligations on the part of TVL. While the parties' interests may have generally coincided, there was, I find, an obligation of the developer to act honestly and in the best interests of the investors, or their joint interests, in exercising its discretion when it might affect the interests of the investors. Therefore, I find that there was a fiduciary relationship between TVL and the investors.

4. DID THE IMPUGNED TRANSACTIONS BREACH ANY OBLIGATION TAYLOR VENTURES LTD. OWED THE INVESTORS?

295 Having found there was a fiduciary duty owed by TVL, I will consider whether TVL acted in breach of that fiduciary duty. Although I found that there was no trust, I will nevertheless consider whether, if I had found a trust, TVL's actions would have been a breach of trust. Thereafter, I will consider the question of the liability of Westminster Savings Credit Union and Mr. Thomas on the accessory principles.

296 While the investors have a number of complaints about the conduct of TVL, the central allegation, and the one that is relevant insofar as the claim against the Credit Union defendants is concerned, relates to the nine transactions where TVL sold lands it had or was acquiring to so-called nominee purchasers and one to a related company. The allegation is that TVL secretly sold and mortgaged the designated investor properties without advising the plaintiffs or accounting to them for any of the proceeds, in order to hide the real nature of the scheme.

297 The plaintiffs' allege that TVL, having exhausted its borrowing power with the Credit Union, devised this scheme to raise money by selling the investors' lands without appearing to do so. They allege TVL carried it out with Mr. Thomas' knowledge and assistance. Investors' lands worth $25 million, they say, were sold to nominee purchasers - all numbered companies - and the Credit Union then gave those purchasers mortgages over development land, even though they were not developers. While it would appear, from an examination of the Credit Union documents, that the buyers had generally, to the Credit Union's knowledge, paid fair market value, Mr. Laxton argued that, in fact, the nominee purchasers did not put up any money, did not pay any interest or taxes and did not do any of the development work. Ralph Taylor, he says, hoped to persuade the nominee purchasers to sell the properties back to him when TVL's financial position improved and, in the meantime, carried out whatever development work the company could afford, in order to create the impression that nothing had changed. The impression of normalcy, he says, was key to the whole plan.

298 In the end, TVL did not repurchase the properties. Mr. Laxton makes this argument: as a result, the investors got nothing and ultimately lost some $16.7 million plus accumulated interest, while the nominee purchasers collectively received a gift of the equity of $11,995,000 in return for the $2,149,935 they had invested in TVL. While this gift was not part of TVL's plan, the Credit Union was caught in the middle and had to try to justify what it had done as legitimate corporate lending. But, he argues, the Credit Union also benefited from the scheme. It received $11.15 million in new mortgages, with the attendant fees, as well $4 million in payments against TVL's overdraft. Meanwhile, he alleges, TVL diverted upwards of $9 million to the rink project and about $3 million or more to a project of Ralph Taylor's son.

299 The issue is whether the conduct of TVL in connection with the sale and mortgaging of the ten designated investor properties is a breach of trust or fiduciary duty.

300 It is useful to me set out a portion of a chart prepared by the plaintiffs' counsel that describes the sale of properties underlying investors' projects to third party numbered companies (the so-called nominee purchasers) and the mortgages that were taken out on those properties.

Summary of Projects and Mortgage Particulars

[Editor's note: Table 1, Summary, could not be reproduced online. Please contact Quicklaw Customer Service at 1-800-387-0899 or service@quicklaw.com and request the following document: 06bc0159summary.doc.]

301 The various projects listed above - 180 Acres, Laguna View, Chilliwack Mountain, 43 acres, 3.5 acres, Delta Industrial Park and the Special Investment Club - were all projects in which the plaintiffs had shares.

302 Why is it asserted that these transactions were in breach of the fiduciary duty owed to the plaintiffs? The argument is that, although the investors gave wide discretion to TVL, that discretion had to be exercised honestly, in good faith and in the interests of the investors (or in the joint interests of TVL and the investors) in the development of the projects in which they had shares. It is asserted that the TVL's discretion was exercised dishonestly and disloyally in each of these transactions.

303 What were the impugned transactions all about?

304 Ralph Taylor introduced each of the so-called nominee purchasers to the Credit Union. Ralph Taylor's evidence was that TVL was trying to raise money and he could only raise money by selling or mortgaging properties, or selling more shares. He said he did not want to sell the land without control, as the profit was in the development, but to raise larger sums, he said, one must provide collateral. He testified that he suggested to some of his larger investors that he would sell them a piece of property, which they would mortgage, that TVL would get the mortgage money and would oversee the development, and the so-called

that TVL would get the mortgage money and would oversee the development, and the so-called nominee purchaser would have his investment secured by the equity in the property. Since TVL maintained control, he described this as a "win-win" situation: the nominee purchaser received security, while TVL received funding in the form of the mortgage funds as well as any equity in excess of that required to satisfy the claims of the nominee/purchaser investors.

305 TVL took projects that were investors' projects - or at least part of investor projects - and used them to raise monies which were then used for TVL's general expenses, including development costs, share redemptions, and costs associated with the ice rink.

306 Ralph Taylor, I find, never mentioned to these plaintiffs that these projects were being sold to nominee companies and were being mortgaged by those companies to the Credit Union, and, of course, he did not explain why this was being done.

307 Ralph Taylor may have done this to raise money to complete his ice rink and for the general expenses of TVL. If there was a trust, I find that these transactions were without the consent of the beneficiaries, and the sale and mortgaging of the properties was beyond any discretion that was granted by the investors. If there was a trust, these transactions would be in breach of trust.

308 In terms of the fiduciary duty, the issue is whether TVL was acting honestly in the best interests of the investors in the project.

309 The defendants argue that no matter how bad Ralph Taylor may have been as a businessman, or how ill-conceived his plan was, the interests of the plaintiffs were foremost in his mind and that he never kept the mortgaging of the properties a secret. However, these particular transactions, including the resulting mortgages, were unique, and I find Ralph Taylor did keep them secret from the investors.

310 Ralph Taylor may have believed that completing the ice rink, which he hoped would generate income of $2 million per year, was the solution to any problems of TVL and would ultimately benefit the investors, in that they would be paid their agreed principal and interest. Yet even if he believed this, the question remains: was he required to obtain the consent of the investors - or at least make full disclosure - with regard to these transactions, which involved the sale and mortgage of property underlying projects that they had invested in?

311 Were these transactions and the attendant increased risk beyond the reasonable discretion that was given to TVL? I think that they were. But I find that even if there was not a trust, this was more than just a breach of the agreement between TVL and the investors. I conclude that there was a mutual understanding that, although TVL had a wide discretion, when the exercise of that discretion affected the investors' interest and the property and projects which they hoped would generate profits, TVL would exercise it honestly in their mutual interests.

312 Instead, what happened was that, without any notice or information to the investors, or their consent, the properties, which were either owned, being purchased, or under option to TVL and which the investors believed were being developed for the purpose of generating a profit in which they would share, were transferred to third parties as a security interest for monies that had been earlier advanced to TVL by the principals of the nominee purchasers. TVL did not carry out these transactions in the normal course of the business that the investors anticipated. Ralph Taylor did these transactions because TVL required funds and some large investors wanted some security.

313 I find that TVL retained a beneficial interest in the properties, and could redeem the properties upon paying what was owed to the party purchasing the land. However, these transactions removed TVL from title and, to a large extent, affected its control of these properties. The transactions placed those properties at risk, given the ability of the third parties - the so-called nominee purchasers - to deal with them, sell them, further mortgage them or at least have a prior interest that had to be satisfied, even if the property could, in fact, ultimately be developed or sold by TVL.

314 I find that TVL's sale of the investor properties to third parties as part of a scheme to provide some larger investors with security, and mortgaging the properties to raise funds for general purposes, including the ice rink, was, if there was a trust, in breach of trust and as well was in breach of a fiduciary obligation owed to the investors.

315 As a result of that breach, TVL would be liable for damages. Given the receivership and bankruptcy of TVL, however, that liability is academic and is not the real issue in this trial.

316 The question, then, is whether the defendants would be liable as accessories to the breach of trust and the breach of fiduciary duty committed by TVL.

5. IS THE CREDIT UNION LIABLE, ON PRINCIPLES OF KNOWING ASSISTANCE AND KNOWING RECEIPT, FOR A BREACH OF FIDUCIARY DUTY?

317 The plaintiffs allege that the Credit Union and Mr. Thomas are liable as accessories under the principles of knowing assistance or knowing receipt in connection with a breach of trust or breach of fiduciary duty.

318 Before I describe the legal principles and the arguments, I will discuss some of the evidence surrounding the Credit Union's knowledge of TVL's dealings with the investors, and in particular the transactions that are impugned in this litigation.

319 I will begin with a review of the evidence of Barry Forbes.

320 Mr. Forbes has held the position of president and chief executive officer of Westminster Savings Credit Union for 26 years. He is the chair of the credit committee.

321 Mr. Forbes said he did not have any direct business dealings with Ralph Taylor. He had lunch with him on several occasions and saw the financial statements of TVL from time to time. Mr. Forbes said that, in his experience, there were occasional excesses in the line of credit, but Ralph Taylor, he said, was good on his word to satisfy them. He indicated that he did not monitor the TVL account as it was operating properly. Although it was normal to do a credit bureau search on a guarantor, and Ralph Taylor was the guarantor of TVL's indebtedness, he did not know if that was done on Ralph Taylor in the 1990s.

322 He said his general knowledge of TVL's business was that Ralph Taylor said investors had lent him money, that he paid them a high rate of return and they could get it back at any time. His understanding, he said, was that the investors were participants in specific projects and participated in the profits of the project in which they invested.

323 Mr. Forbes was challenged on his characterization of the arrangement between TVL and investors as being loans. He admitted that none of the contemporaneous documents created by the Credit Union referred to the transactions as loans. He also admitted that, while he had said on discovery that Mr. Thomas and others at the Credit Union had referred to them as loans, he had not mentioned on discovery that Mr. Taylor referred to them as loans.

324 Mr. Forbes said that he reviewed the financial statements of TVL from time to time to get a general sense of their status but did not do a line-by-line analysis or a comparison of the property statements with the loan files, as that was not something that the Credit Union would do.

325 He is familiar with the mortgages on the ten properties in the so-called nominee purchaser transactions. According to him, nine of the loans were approved by the management credit committee and one was within Mr. Thomas' credit granting approval limit. He said most of the loans were asset purchase loans - loans to buy land - and one was a working capital loan. He said that once a commercial loan is approved, the information goes to legal counsel to ensure the security is in place. Thereafter, the funds are advanced. He expected a reporting letter from the Credit Union solicitors when each mortgage was registered and the money advanced. In a transaction where Ralph Taylor signed as a director, he said that the absence of a reporting letter was not troubling.

326 Generally, he said the asset purchase loans were straightforward. He said that the Credit Union was principally an asset lender and looked primarily to the asset for repayment. In the 1990s, the bank could lend up to seventy-five percent of the market value of a property. He agreed that the Credit Union obtained a professional appraisal from Kenny Rogers Appraisals in each of the ten cases and he was satisfied with the market value of the property in each case.

327 He was asked whether, in each of these ten cases, he would have to inquire of Mr. Thomas to determine if the borrowers had the requisite experience to develop the properties, but he pointed out that these

were not development loans. Mr. Forbes denied that the Credit Union would want to know that the development was ongoing or would happen quickly in order to satisfy itself that the loan was sound.

328 Mr. Forbes was asked whether the Credit Union verified the net worth reported by the nominee purchasers in their applications. He said that while it was normal to do a credit bureau search, that was not the case on every guarantee that the Credit Union took.

329 He did not know whether the Credit Union made such inquires of the financial wherewithal of Ralph Taylor or TVL. He agreed that getting tax returns is a way of testing some information, but that there were no tax returns from Mr. Taylor or TVL provided to the Credit Union. Mr. Forbes was asked on cross-examination to compare the figures and the financial statements for TVL with the tax returns and he ultimately agreed there were differences and these differences were substantial.

330 Mr. Forbes also described the various loan files of the Credit Union in connection with the ten transactions. He described the process by which loan applications are put together and approved. In the interest of consistency and clarity I will identify the properties first in relation to the investor project of which they were part and then by the general property description. I have set out the transactions in chronological order.

331 The first of the impugned transactions took place in 1992. The evidence in the Credit Union files showed that on July 3, 1992, a numbered company, 402847 B.C. Ltd., applied to the Credit Union for a loan of $700,000. The principal and sole shareholder of 402847 B.C. Ltd. was Ralph Taylor. The documents in the file showed that the purpose of the loan was to purchase 180 acres - 1099 Bruce Avenue, Nanaimo.

332 The application for credit prepared by the Credit Union indicated that there would be a first mortgage over the property and a guarantee of Ralph Taylor, who, according to the application, reported a net worth of $2 million.

333 The loan was approved by the management credit committee and the transaction completed in July 1992.

334 The property was ultimately sold pursuant to a court order in December 1999. According to Mr. Forbes, the Credit Union received the net proceeds and wrote off $37,000.

335 The next transaction took place in 1994, when, according to the Credit Union's files, 442391 B.C. Ltd. applied for a loan for $1.5 million.

336 The file contained a contract of purchase and sale dated July 11, 1994, transferring the property from TVL to 442391 B.C. Ltd. for $3 million. The Credit Union's file indicates that the transaction was half in cash and trades and the balance of the sale price was by the mortgage from the Credit Union.

337 The principal of the borrower 442391 B.C. Ltd. was Darrel Howlett, who is described in the Credit Union's files as a successful realtor/entrepreneur. He was required to provide a guarantee for $1.5 million. Credit bureau searches reveal a Beacon Score, which is a measure of a person's credit rating. Mr. Howlett's creditworthiness, as measured by his Beacon Score, was 637, which Mr. Forbes said was satisfactory. The internal Credit Union document indicated that Mr. Howlett reported a net worth in the $2 million range.

338 When the transaction completed in July 1994, there was an appraisal that assessed the property as being worth $3.3 million.

339 Mr. Forbes said that, ultimately, the property was listed for sale and sold for about $900,000 and that the Credit Union suffered a loss of about $600,000. It took steps against Mr. Howlett on his guarantee and that claim was settled.

340 This property appears to be part of the property known as 43 Acres Langley.

341 On this application, the borrower was 491503 B.C. Ltd., the principal of which was Allan McLean. Mr. McLean was known to the Credit Union, which had a credit bureau report dated November 1993. He reported a personal net worth of $1.25 million.

342 In the Credit Union documents, the transaction was described as the purchase of a commercial holding property in Langley. The price, according to the contract in the Credit Union file, was $1 million. The borrower sought a first mortgage of $465,000.

343 The Credit Union documents indicated that the principal of the borrower anticipated that the property would be upzoned over the next three years. The equity for the purchase, according to the Credit Union file, came from the sale of another property that the Credit Union financed.

344 The transaction completed in March 1995 when TVL transferred the property to 491503 B.C. Ltd. The Credit Union received an appraisal for $935,000.

345 The loan payments came from Mr. McLean's account until shortly before TVL's receivership, when they were paid by TVL.

346 The Credit Union file indicates that 485383 B.C. Ltd. applied in July 1995 for a loan allegedly to replenish working capital, employ an architect and commence preliminary work. The loan sought was $780,000.

347 The Credit Union documents indicated that the applicant acquired the property in 1990 by way of option and the principal of the numbered company was Vincent Taylor, Ralph Taylor's son. Then in his early 30s, Vince Taylor reported a net worth of nearly $1.9 million.

348 When the loan transaction completed in June 1995, the Credit Union received a first mortgage on the property, which was appraised at $1.246 million, and a guarantee from Vince Taylor.

349 Ultimately, this property was sold following the receivership. The Credit Union suffered a loss of about $145,000 and then, according to Mr. Forbes, received a settlement of Vince Taylor's guarantee.

350 According to the Credit Union files, the applicant in this 1995 transaction was 498951 B.C. Ltd, the principal of which was Cesare Maniago. The stated purpose of the loan was to exercise an option to purchase, at a cost of $640,000, and to cover pre-development costs and working capital of $860,000.

351 The Credit Union's security for the loan was a first mortgage and a guarantee from Mr. Maniago, who had a good credit rating with a Beacon Score of 721. Mr. Maniago's statement of net worth, according to the Credit Union files, was $1.9 million.

352 The loan transaction completed in July 1995 and the documents indicate that 498951 B.C. Ltd, as nominee of TVL, completed the option to acquire the property under the 1992 option agreement. A condition of the loan was an appraisal of a minimum value of $3.5 million.

353 This property was sold in the fall of 1997, prior to the receivership, and the Credit Union was paid in full.

354 According to the Credit Union files, the borrower was 509695 B.C. Ltd., the principal of which was Ewald Irion. The borrower was seeking a loan of $1.5 million for the purchase of land priced at $3.5 million. The source of funds was said to be cash and equivalents of $3.5 million.

355 The purchase was apparently of a development site in Walnut Grove. The Credit Union was to hold first mortgage security over that property. An appraisal in December 1995 showed the value of the property was $3.11 million. One of the lending requirements of the Credit Union was that the value be at least $3 million.

356 Mr. Irion provided a guarantee of up to $500,000. His Beacon Score was 673. According to Mr. Forbes that was satisfactory.

357 The loan transaction completed in December 1995. All interest payments came from TVL.

358 The property was sold by the receiver of TVL and the mortgage was repaid.

359 The next property was also referred to as Walnut Grove or 96th Avenue Langley. This was also part of what was a project called the 43 Acres Langley.

360 According to the Credit Union documents the borrower was 510705 B.C. Ltd., which was purchasing the subject property for $3 million from TVL, part for cash and equivalents and the balance by a mortgage from the Credit Union.

361 The Credit Union was asked to provide a $1.5 million mortgage. The report to the management credit committee indicated the security was a first mortgage over ten acres for proposed multi-family and commer-

cial property in Walnut Grove with a guarantee of Mr. Norbert Laakmann of $500,000, who was introduced to the Credit Union by TVL. Mr. Laakmann's Beacon Score was according to Mr. Forbes, a very high one - 804.

362 The transaction completed in January 1996. The property was appraised at $3.8 million.

363 The documents indicated that although the required appraisal was for over $3 million the transaction for tax purposes would be written up at $1.5 million. Mr. Forbes said that at the time he would have expected to see information, or at least been satisfied that information had been supplied that provided the rationale for the transaction, but he did not see that in the material. Mr. Shields argued that this was an example of Mr. Forbes avoiding a question and argued that Mr. Forbes said it would be of concern at discovery, but said that it would be cause for an inquiry or could be of concern at trial.

364 The next property was also sometimes referred to as the Montana Property.

365 The loan applicant was 512047 B.C. Ltd., of which Daryl Myers was the principal.

366 The purpose of the loan, according to the Credit Union documents, was to purchase eleven lots, the price being $605,000, part of which would be paid in cash. The loan sought was for $330,000.

367 The Credit Union wanted a first mortgage over eleven single residential lots and the guarantee of Mr. Myers who, according to the Credit Union file, had a net worth in the $1.1 million range.

368 The transaction completed in March 1996. The transferor on the lot sales was TVL.

369 This loan, like many of the others, was for a one-year term and was renewed. Mr. Forbes said payments were made from the TVL account.

370 Following receivership the property was put up for sale. The Credit Union received $270,000 plus $50,000 from another property, and suffered a small shortfall.

371 Mr. Forbes described this as a loan to retire an option. In March 1995, TVL entered into an option to purchase. The loan application documents say that the property was acquired in March 1995 at a cost of $2.3 million with option payments over the ensuing months and a present balance owing of $1.65 million.

372 According to the Credit Union file, the amount to retire the option was $1.65 million and the loan applied for by 512146 B.C. Ltd was $1.38 million.

373 According to the loan documents, there was to be a first mortgage over twenty acres at 7664 80th Street, Delta and a guarantee by Jacob Stobbe, the principal of 512146 B.C. Ltd. The Credit Union file indicated that he was the owner of Norlan Parts in Langley. Mr. Stobbe had a Beacon Score of 772, which Mr. Forbes said was a high score. The file indicates that Mr. Stobbe reported a net worth in the $1.65 million range.

374 On cross-examination, Mr. Forbes agreed that TVL had paid $700,000 towards the property between March 1995 and March 1996 and that the numbered company had applied for a $1.38 million loan to retire the option. He was asked what had become of TVL's equity and what value there was to TVL in selling the property to a numbered company. He said he had no idea.

375 The transaction completed and the Credit Union advanced the money in April 1996, after the Credit Union received an appraisal that the property was worth $2.355 million. $100,000 was forwarded to the numbered company's account and used as an interest reserve.

376 Mr. Forbes said that, prior to the commencement of this action, neither the investors nor TVL's receiver or trustee advised the Credit Union that the investors owned the lots, nor did they try to attach the proceeds paid to the Credit Union under the mortgage.

377 Mr. Forbes said that after the receivership of TVL, the property was sold and the proceeds in excess of the Credit Union mortgage debt were paid to the receiver.

378 The Credit Union's documents show an application by 512048 B.C. Ltd. for a loan of $1.5 million, including $900,000 to retire an option, $192,000 for development cost charges as well as funds for working capital and an interest reserve.

379 According to the Credit Union file, the security included a limited guarantee up to $500,000 from Carl Godecke, the principal of 512048 B.C. Ltd., who reported a net worth of $1.6 million. According to the Credit Union file, Mr. Godecke had been the owner of G & S Masonry for the last fourteen years.

380 Mr. Forbes described Mr. Godecke's Beacon Score for credit rating purposes as 731, which he said was a high score.

381 The transaction completed in April 1996 and Mr. Forbes said that the Credit Union received a first mortgage of $1.3 million, which was advanced, but the money for the development cost charges was not advanced. The Credit Union risk rating worksheet indicates the loan was 65.5% of equity, based on appraised value. Following the receivership, a second mortgagee on title paid out the Credit Union.

382 Generally, Mr. Forbes' evidence was that the mortgage loans had one-year terms which were routinely renewed if they were not in arrears. He said no suggestion was made to the Credit Union by investors or by the receiver that the investors had an interest in the lands.

383 Mr. Forbes acknowledged that the Financial Institutions Commission of B.C. ("FICOM"), the regulatory body for credit unions in British Columbia, found a number of irregularities in the lending practices of the Credit Union after the receivership. In 1998, FICOM said the Credit Union had exceeded its single-member loan cap in its dealings with TVL. FICOM found the total loan amount was $19 million, an amount which included eight of the ten loans to nominee purchasers which are the subject of this proceeding and which FICOM counted as connected loans.

384 Mr. Forbes agreed that the total connected loans of $19.5 million exceeded the loan cap, but he seemed to disagree that all the loans should be counted as connected. Mr. Forbes, however, never disagreed with FICOM as to its finding that there were connected loans well over the lending cap. Interest was being paid by TVL on loans approaching $13 million.

385 Mr. Forbes said that FICOM had raised concerns in 1997 about the Credit Union's loans to TVL, but that these dealt not with connected loans, but with whether there was experienced management involved in the Laguna View and Delta Industrial Park properties. He said the Credit Union advised FICOM that experienced management, in the person of Ralph Taylor, would be involved in the projects.

386 He said that the Credit Union responded to FICOM's 1998 report by stating that a review had revealed that the non-compliance with the cap was the result of placing too much reliance on the former manager of commercial loans, i.e. Mr. Thomas, and that none of the normal review processes had identified the problem.

387 On cross-examination, Mr. Forbes agreed several of the principals of the borrowers, which I have referred to as the nominee purchasers, were new to the Credit Union and the applications for credit indicated that they did not have any development experience.

388 I found Mr. Forbes to be a credible but cautious witness. Although there were some inconsistencies in his evidence, I found that he attempted and did give his evidence in a truthful manner.

389 Mr. Thomas is now 66 years of age. He is married and has a 42-year-old daughter, Allana.

390 He retired in 1997 after a career in banking spanning 30 years, the last 15 1/2 of these at the Credit Union. During his time at the Credit Union, he reported, although not directly, to Mr. Forbes.

391 Mr. Thomas' title at the Credit Union was Manager of Commercial Loans. He worked in the commercial branch, which was at a different location from the retail branch. Customers did not make deposits at the commercial branch. Mr. Thomas had the ability to track customer deposits, but said that he did not do so.

392 Each year, he wrote up between 150 and 200 loan applications. Most of these loans were, in his words, asset-based rather than income-based and most were secured by a first mortgage and, often, by a personal guarantee. Mr. Thomas had authority to make loans up to $350,000. Loans for amounts greater than that required approval of the Credit Union's management credit committee.

393 Mr. Thomas said that he had between 300 and 400 accounts in his branch. This high volume of files, he explained, was why he didn't do a line-by-line analysis of TVL's financial statements.

394 Mr. Thomas was the person at the Credit Union who most frequently dealt with TVL. He had done so since the late 1980s.

395 Mr. Thomas understood the shareholders of TVL to be Joan Taylor and Ralph Taylor and he knew that, initially, there were a small number of investors. He described his relationship with Ralph Taylor as a business relationship. While they met occasionally for coffee, he said that he did not socialize with Mr. Taylor, nor did he attend the meetings at Helen's Deli or the TVL Christmas parties. Occasionally he went to Ralph Taylor's home, but only because that is where Mr. Taylor kept his office.

396 Although the Credit Union had a personal guarantee from Ralph Taylor, it apparently never obtained a report from the credit bureau. If a report had been sought, the Credit Union would have discovered that Ralph Taylor was an undischarged bankrupt.

397 Mr. Thomas said that he was not aware of TVL operating a trust account, nor did he personally receive cheques for deposit into the TVL account. No one to his knowledge, he said, gave TVL money in trust.

398 He said that he was not aware of any problems with payments to creditors until the eve of TVL's receivership. He denied hearing of any problems or criticism of either TVL or Ralph Taylor with respect to creditors. The company had a line of credit of $500,000, which, at least in the later years, was secured, and while it sometimes exceeded that limit, Mr. Thomas said the account operated satisfactorily. The excesses did not concern him, he said, because such short term excesses were common in the development industry, and usually arose because of deferred real estate closings, and Ralph Taylor usually advised him in advance that they would arise.

399 Mr. Thomas annually received unaudited financial statements from TVL. In these statements was an item headed "due to shareholders", which he said he understood to be to a reference to a combination of the monies owed to the investment club members and to the principals, Ralph Taylor and his wife. He said his understanding, derived from discussions he had with Ralph Taylor, was that the land shown on the financial statements was owned by TVL. Mr. Thomas testified that Ralph Taylor told him numerous times that he had hundreds of clear title lots.

400 Mr. Thomas made the following notation on an application for a $900,000 working capital loan in 1993: "due to shareholders is $10 million owing to approximately 280 silent investors. The investors are participants in specific projects and participate on a profit sharing basis." He said he got that information from Ralph Taylor. He said that Ralph Taylor told him that they were club members. The application in 1993 indicates that the "trust and confidence expressed by this large group (of silent investors) supports our assessment that Taylor is an experienced, capable and knowledgeable builder/developer".

401 Mr. Thomas said that he had never heard anyone describe Ralph Taylor as a trustee. He said he was somewhat familiar with the term "fiduciary", but had never heard Mr. Taylor or TVL described as a fiduciary.

402 Although Mr. Thomas was subject to a lengthy and aggressive cross-examination and was often confronted with his evidence on discovery, I found him overall to be a truthful witness. I have reviewed his evidence a number of times but I did not see serious inconsistencies in his evidence. Although the plaintiffs' counsel asserted in argument that there were inconsistencies in Mr. Thomas's evidence about topics including the financial pressure from the rink project, whether funds were invested in specific projects or tied to particular property, or whether a lender would want to know the liabilities of a borrower, I did not find his testimony to contain significant inconsistencies so as to undermine the overall reliability of his evidence. One significant question I put to him was whether his evidence was that the ten properties in question are properties that the speedy memo investors were not participating in. He said that he agreed with that but on cross-examination he indicated that he didn't know or have knowledge what properties they were associated with and did not see the distinction between knowing they were not involved and not knowing if they were involved. Nevertheless, I found that he attempted to give his evidence honestly.

403 Mr. Thomas was occasionally long-winded in his answers and often would have to rely on reconstruction, as he did not have a full recollection of the events in this case, some of which took place 15 years ago. I think that Mr. Thomas, like other parties, was reasonably trying to characterize transactions that were not given definite labels at the relevant time.

404 Mr. Thomas was occasionally stubborn on cross-examination and did not always directly answer the question that was put to him. Occasionally, he was not forthcoming and became defensive when he thought a logical conclusion to a question on cross-examination might be harmful, such as when he was asked whether a lender would want to know all he could about an unsecured borrower. Generally, however, I found him to be a responsive witness.

405 Some of the questions asked of Mr. Thomas dealt with matters that, I think, did not cross his mind at the material time. For example, he was asked to consider the effect on TVL of an ongoing obligation to pay investors twenty percent per annum on debt of $20 million. I think that the scope of TVL's business was beyond Mr. Thomas' experience and depth as a banker, which generally involved straightforward loans with asset-based security. He appears to have had a great deal of confidence in the ability of Ralph Taylor. He took him at his word and was not suspicious of Mr. Taylor's possible activities.

406 On the whole, I conclude Mr. Thomas was a credible witness.

407 Mr. Thomas had a personal involvement as a lender or an investor in TVL. He knew that the Credit Union did not permit him to lend his own money but he chose to do so anyway. When the Credit Union learned of his loan, after the TVL receivership, Mr. Thomas was required to resign.

408 In August 1993, he loaned TVL $150,000. He did not inform his employer of this loan at any time prior to January 1998. He advanced the money through his daughter, Allana Thomas, because he knew if he did it directly it would contravene the conflict of interest rules of the Credit Union. As he said, "My desire to assist Ralph superseded my good judgment."

409 Mr. Thomas had a speedy memo that Ralph Taylor had given his daughter but he was not interested in being associated in any way with a piece of property. He did not see copies of the speedy memos given to other investors, although he regularly saw Ralph Taylor carrying around a clip board with speedy memos.

410 There was reference in the documents to a payout of $210,000, but Mr. Thomas said he never got that amount. He said he received $165,000, which was deposited into his daughter's account at another bank. He and his wife each declared $5,000 on their tax returns, presumably as interest income.

411 Ultimately, Mr. Thomas did not get the balance of the interest he said he was entitled to. In the fall of 1997 or thereabouts, he received, through his daughter, a building lot from Mr. Taylor. The receiver of TVL challenged that transaction as a fraudulent preference and, ultimately, it was set aside.

412 Mr. Thomas was asked why Mr. Taylor's need for $150,000 could not be met by the Credit Union. Mr. Thomas said that he recalled telling Mr. Taylor that the Credit Union wouldn't be able to respond in time, nor would any other financial institution. Yet the documents tracking the deposit and payment of these funds appear inconsistent with TVL requiring the money forthwith. Mr. Thomas said he did not know why, in August of 1993, TVL did not have $150,000 to complete a transaction. All he recalled is that Ralph Taylor said that he needed it badly. He said the forty percent return was at Ralph Taylor's insistence and that he had no expectation of receiving it.

413 This was not the only loan made by Mr. Thomas or members of his family. In September 1994, with the knowledge of his employer, Mr. Thomas purchased a fractional interest in a mortgage through his RRSP. His wife contributed $70,000 from her RRSP, which allowed them to buy $175,000 of the mortgage. None of that principal or interest was ever repaid.

414 Around 1994, and on another occasion shortly after, Mr. Thomas's sister-in-law and mother-in-law loaned Mr. Taylor $200,000. On both occasions, they were repaid with interest.

415 In the summer of 1995, Mr. Thomas' brother-in-law, Mr. Brocker, expressed an interest in investing $360,000 in real estate in British Columbia. By drawing on his own and family members' RRSPs, Mr. Thomas was able to raise an additional $240,000 and he advanced $600,000 in total to Mr. Taylor in September 1995.

416 The final transaction occurred in September 1997. Mr. Taylor asked Mr. Thomas if some of his relatives had an interest in putting money into a mortgage. Mr. Thomas's sister-in-law and mother-in-law once again invested $200,000. This time, said Mr. Thomas, they lost approximately $40,000.

417 Mr. Thomas agreed that, overall, his family invested more than $1 million in TVL. It appears they lost more than $200,000.

418 He was asked if he ever got an agenda or newsletter from TVL. He said he got one from his daughter after the loan and tossed it away.

419 Mr. Thomas knew that TVL had investors. He testified that he understood that they were promised a certain return and a share of the profits of a project if they stayed in for the long term. He got that information from Ralph Taylor, who described them as club members. He said on cross-examination that the investors were lenders but I think that Mr. Thomas, like other witnesses, was reconstructing past events and was trying to characterize transactions that did not have labels during the relevant periods. He said that to the best of his knowledge the investors held no security. He said that he never had the understanding that the speedy memo investors became beneficial owners and that he had no knowledge of any trust.

420 Mr. Thomas denied knowing who the investors were, other than a few names. However, he acknowledged that he had given an inaccurate answer on discovery when he said he had no knowledge of the investors, as he acknowledged that he knew that the so-called nominee purchasers in the impugned transactions included investors in TVL. He agreed that he met nine investors whose companies were the purchasers in the impugned transactions and that he knew the names of a few others. However, he said the ten properties in issue were always proffered as TVL's clear title properties.

421 In 1994 or 1995, Mr. Taylor told Mr. Thomas that he had to visit the Securities Commission. Mr. Thomas said that Mr. Taylor later told him that everything was resolved.

422 Mr. Thomas was cross-examined on the content of agendas of investor meetings, but he denied that he was aware of the specific content at the material times. While he quarrelled with counsel on cross-examination about his understanding of TVL's operation, he ultimately agreed that the reference in the agendas to buying land, holding, selling and splitting the profits was the operation he understood TVL was involved in. He agreed that he knew that the people who had given money to TVL invested in specific projects. He said he was consistently told by Ralph Taylor that the investors were lenders investing at a specific rate of interest and that their moneys were attached to a certain piece of property, but he said he had no idea how they were attached. Mr. Thomas said that he did not think that there was any formal attachment, but that in some way they were designated to a certain project. He said that he did not know the particulars. He knew that TVL had, at various times, held anywhere from $10 million to more than $20 million from investors.

423 Mr. Thomas was asked whether, as a lender, he would want to know about the other liabilities of a borrower. He said that it was not as significant an issue when one was doing asset-based lending.

424 Mr. Thomas said that TVL furnished unaudited financial statements to the commercial branch on an annual basis and statements showed monies owing to shareholders, which he understood to be the both the shareholders of TVL and the club members, as he described the investors. Mr. Thomas denied there was anything in the financial statements that alerted the Credit Union to the fact that anybody other than TVL owned the assets.

425 Mr. Thomas says that he did not have any cause for concern over the integrity or honesty of Ralph Taylor or TVL and says that, if he had, he would not have recommended that his mother-in-law and sister-in-law re-invest money in TVL. He said he had no concerns until the fall of 1997 with respect to the solvency of TVL. Although he denied that he knew that TVL was using unconventional methods to raise cash, he agreed that his personal investment of $150,000, being from a loans officer, was an unusual transaction.

426 He denied that he was aware that there were strong financial demands on TVL in the 1990s as a result of the rink project.

427 Although Mr. Thomas said that he didn't know that Mr. Taylor had made substantial expenditures on the ice rink, he wrote to a lawyer in October 1997 saying that TVL's working capital had been depleted due to the financial demands of the ice rink. On cross-examination, he said that he learned this information from Ralph Taylor, I take it at the time of that correspondence. He was also aware that the Credit Union was not interested in financing the ice rink, but he said he believes this decision was made by Mr. Forbes, whom Mr. Taylor first approached with the project.

428 Mr. Thomas also gave evidence about the ten transactions that are the subject of these proceedings. He said that the Credit Union viewed the loans as asset-based transactions. He testified that the loans were done in accordance with the Credit Union's standard practice.

429 In order to loan more than $350,000 he required credit committee approval. Of the loans in question, he approved one and the others were all approved by the credit committee. He participated in the document write-up for approval of nine of the loans. He testified that these loans generally required an appraisal, involved amounts less than the market value of the property, and were supported by a guarantee of the principal of the numbered company.

430 Each package was put together for presentation to the credit committee for approval.

431 He described the loans as development loans, which are for such things as development costs charges, services and the like.

432 Mr. Thomas said he had a discussion with Ralph Taylor on each of these transactions. Mr. Thomas said that although they were transferred from TVL, he knew that Mr. Taylor remained involved in these properties in some way and in some cases there was a side agreement that allowed TVL to re-acquire the property. He knew that in some cases, TVL was paying, or later agreed to pay, the interest payments. He said he understood that, as the vendor of the properties, TVL would get the proceeds.

433 Mr. Thomas said that he understood from Mr. Taylor that a few of TVL's major investors wanted or put some pressure on Mr. Taylor for collateral or security for their unsecured loans. Mr. Taylor proposed to sell the major investors a piece of land, which Mr. Taylor professed to be clear title land owned by TVL, and concurrently arrange a mortgage on the property so that the equity - the difference between the amount of the Credit Union mortgage and the actual property value - would give the major investor the comfort that they were seeking. Mr. Thomas said that he had never heard that there were restrictions on mortgaging these properties. He said he treated these loans as arms-length transactions and the money was disbursed in the normal fashion. He denied having any knowledge of an alleged trust relationship and testified that the Credit Union would not have advanced money without the security of a first mortgage.

434 Mr. Thomas said that after three or four of these loans had been approved, Mr. Taylor phoned him and said the interest payments on these particular mortgages should be charged to the TVL account. According to Mr. Thomas, Mr. Taylor said that this was for ease of accounting and bookkeeping.

435 Mr. Thomas denied that, at any time prior to the receivership of TVL, any investor ever said they had an interest in the properties that are the subject of the ten loans. He said that he never identified any of the ten impugned properties as properties in which the speedy memo investors were somehow involved. Mr. Thomas said that he understood the properties were owned by TVL.

436 Mr. Thomas denied having the understanding that the speedy memo investors' money was advanced to TVL specifically and solely for the purchase and development of the project lands.

437 It was put to Mr. Thomas in cross-examination that these transactions were designed to get around the Credit Union lending cap. Mr. Thomas maintained that in his view they were or started out as stand-alone transactions, providing their own security and covenant and there was a source of repayment and in some cases an interest reserve.

438 Although Mr. Thomas and the Credit Union obtained credit reports on the various investors involved in the ten transactions, Mr. Thomas never requested one on Ralph Taylor. Mr. Thomas only had a cursory understanding of how Beacon Scores that measure credit ratings are determined.

439 I have described the loans in detail as part of Mr. Forbes' evidence and will discuss them further below from Mr. Thomas' perspective. In each case the monies were advanced by the solicitors for the Credit Union after the first mortgage security was registered.

440 This was a 1992 loan to 402847 B.C. Ltd., in which Mr. Thomas had no involvement. His recollection at this time was that the Taylors were long term members of the Credit Union and satisfactory customers. He said that it was not a concern to the Credit Union that the money was not repaid in a year if the payments were current.

441 Mr. Howlett was the principal of the borrower, 442391 B.C. Ltd. Mr. Thomas said that he met with Mr. Howlett, who completed a net worth statement. Mr. Thomas wrote up the loan application and it was approved by the credit committee. Mr. Thomas testified that no investor informed him that they had an interest in this property.

442 Mr. Thomas said that he knew Mr. McLean, the principal of 491503 B.C. Ltd., from two prior commercial transactions and would have spoken to him in conjunction with this transaction. Mr. Thomas said that he understood Mr. McLean was a club member of TVL. The Credit Union advanced the money with a first mortgage on title and a guarantee from Mr. McLean. Again the loan was not paid out in a year.

443 Mr. Thomas testified that he received the information for the application from Vince Taylor to purchase the property on 96th Avenue. He had dealt with Vince Taylor before. He considered this a stand-alone loan, and from his review of the file he acknowledged that the interest was paid from Vince Taylor's account or his corporate account. He said he was not told of any interest in this property by any investor.

444 This June 1995 transaction involved an application by 498951 B.C Ltd., of which Mr. Maniago was the principal, for a loan of $1.5 million to acquire land under option. Mr. Thomas said that Mr. Maniago had no development experience but that Mr. Taylor said he would continue to be involved. He says that Mr. Maniago's company was to pay the interest but subsequently there was a deal between Mr. Maniago and Mr. Taylor for TVL to pay the interest.

445 This loan application was by 509695 B.C. Ltd., the principal of which was Ewald Irion. Mr. Thomas says that he would have spoken to Mr. Irion before the application was approved.

446 Mr. Thomas spoke to Mr. Laakman, the applicant, before the loan to purchase this property was approved. He said that there was a side deal between the parties to the transaction that, while the appraisal would reflect a value of the property in excess of $3 million, value for tax purposes was $1.5 million. He said that he was not privy to that side deal. He said his focus was on the security and the guarantee that he received from Mr. Laakman.

447 This was an application by 512047 B.C. Ltd. to borrow $330,000 to purchase eleven lots. He said that the purpose of the loan to purchase the lots was because the principal of 512047 B.C. Ltd., Darrell Myers, wanted some security for loans to TVL.

448 Mr. Thomas said that he met with Mr. Myers, conducted a credit check and the funds were advanced on the strength of the first mortgage and the guarantee.

449 Mr. Thomas said that he would have had a discussion with Mr. Stobbe, the principal of 512146 B.C. Ltd. Part of the advance under the Credit Union's mortgage was an interest reserve, which paid the interest on the mortgage for a period of time.

450 Mr. Thomas did not specifically recall preparing the material for Mr. Godecke's application, but on review of the documents, he said it was prepared according to his standard practice, which would include obtaining financial statements, operating statements and reports on creditworthiness and personal net worth.

451 In certain circumstances, strangers or third parties to a breach of trust or breach of fiduciary duty may be held liable.

452 As Newbury J.A. said in 346920 Canada Inc. v. Strother (2005), 38 B.C.L.R. (4th) 159, 2005 BCCA 35 (Strother) at paragraph 75:

> The circumstances in which a "stranger" to a trust will be held responsible by Equity (often by means of a constructive trust) for a breach of trust by another, are clear enough where "knowledge" of a "fraudulent design" is shown, or where the stranger "knowingly" received or dealt with trust property.

453 In that judgment, Newbury J.A. discussed the liability of a stranger who innocently participates in a breach of trust. She said at paragraph 29:

> ... On the one hand, a "stranger" who participates innocently in a breach of trust or duty by another - i.e., without actual knowledge, recklessness or wilful blindness to the bre-

> ach - and who does not receive the profits thereof will not be held liable to account. ... On the other hand, a person who agrees with the wrongdoer/fiduciary on a "common action" which includes the commission of a breach, or a person who receives the profits of such a wrongdoing as the mere cipher of or vehicle for the wrongdoer, will be liable to account in the same manner as the wrongdoer himself. A person who is not an agent or accomplice of the wrongdoer but who receives a benefit resulting from the breach of duty may or may not be found to have known of the breach ...

454 The cases disclose three types of third-party liability. The first, liability as a trustee de son tort, arises when someone who is not a trustee acts like one. The court will treat that person as if he were a trustee, and hold the person liable for a breach of trust. This form of liability is not alleged in this case. The other two traditional types of liability arise when a third party knowingly assists in a breach of trust or when a third party knowingly receives trust property following a breach of trust. The plaintiffs have argued that the Credit Union is liable under either or both of these principles.

455 Knowing assistance and knowing receipt were the subject matter of three relatively recent decisions of the Supreme Court of Canada: Air Canada v. M & L Travel Ltd., supra; Gold v. Rosenberg, [1997] 3 S.C.R. 767; and Citadel General Assurance Co. v. Lloyd's Bank Canada, supra.

456 Air Canada is the leading case on knowing assistance The test for knowing assistance is as follows:

a. that there was a breach of trust;
b. that the trustee acted "fraudulently and dishonestly";
c. that the third party had knowledge of the breach;
d. that the third party assisted the trustee in carrying out the breach;

457 Actual knowledge on the part of the third party is required, but this includes recklessness or wilful blindness. In cases of knowing assistance, constructive knowledge is said to be insufficient to "bind the stranger's conscience". Receipt of a benefit by the third party may ground an inference that the third party knew of the breach but is neither sufficient in itself nor necessary.

458 As Iacobucci J. said in Air Canada at paragraph 40:

> The reason for excluding constructive knowledge (that is, knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry) was discussed in In re Montagu's Settlement Trusts [[1987] Ch. 264], at pp. 271-73, 275-85. Megarry V.-C. held, at p. 285, that constructive notice was insufficient to bind the stranger's conscience so as to give rise to personal liability. While cases involving recklessness or wilful blindness indicate a "want of probity which justifies imposing a constructive trust", Megarry V.-C., at p. 285, held that the carelessness involved in constructive knowledge cases will not normally amount to a want of probity, and will therefore be insufficient to bind the stranger's conscience.

459 Paul Perell explained the requirement of actual knowledge in his article Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty, [1998] 21 Advocates Q, 94 at 106:

> A stranger to a trust or fiduciary relationship may be liable under the equitable doctrine of knowing assistance if he, with actual knowledge, assists the trustee or fiduciary in a dishonest and fraudulent scheme. The personal liability of the stranger is justified because he or she has acted in a way that equity considers unconscionable.

460 The leading case of the trilogy dealing with knowing receipt is Citadel General Assurance Co. In that case, the defendant bank could not be held liable for knowing assistance because it did not have actual knowledge of the breach of trust. However, because it had constructive knowledge, it could be held liable on the basis of knowing receipt.

461 In order to find a third party liable for knowing receipt, a court must find that the party received or applied trust property for its own benefit and that it did so with actual or constructive knowledge of a breach of trust.

462 La Forest J. said at paragraph 30 of Citadel:

> In my view, the receipt requirement for this type of liability is best characterized in restitutionary terms. In Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, at p. 669, I stated that a restitutionary claim, or a claim for unjust enrichment, is concerned with giving back to someone something that has been taken from them (a restitutionary proprietary award) or its equivalent value (a personal restitutionary award). As well, in Air Canada v. British Columbia, [1989] 1 S.C.R. 1161, at pp. 1202-3, I stated that the function of the law of restitution "is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him.

463 The knowledge requirement for knowing receipt is lower than that for knowing assistance, the rationale being that if a stranger wishes to obtain a personal advantage in circumstances that would alert a reasonable person to the possible claims of a beneficiary, he may be liable if he does not inquire.

464 As La Forest J. explained at paragraph 49,:

> ... [R]elief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.

465 He set out the reasons for requiring a lower threshold of knowledge in cases of knowing receipt at paragraph 48-49 and paragraph 53. The emphasis added in the passages below is mine:

> ... [I]n "knowing receipt" cases, which are concerned with the receipt of trust property for one's own benefit, there should be a lower threshold of knowledge required of the stranger to the trust. More is expected of the recipient, who, unlike the accessory, is necessarily enriched at the plaintiff's expense. Because the recipient is held to this higher standard, constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability. Iacobucci J. reaches the same conclusion in Gold, supra, where he finds, at para. 46, that a stranger in receipt of trust property "need not have actual knowledge of the equity [in favour of the plaintiff]; notice will suffice".
>
> This lower threshold of knowledge is sufficient to establish the "unjust" or "unjustified" nature of the recipient's enrichment, thereby entitling the plaintiff to a restitutionary remedy. As I wrote in Lac Minerals, supra, at p. 670, "[t]he determination that the enrichment is 'unjust' does not refer to abstract notions of morality and justice, but flows directly from the finding that there was a breach of a legally recognized duty for which the courts will grant relief". In "knowing receipt" cases, relief flows from the breach of a legally recognized duty of inquiry. More specifically, relief will be granted where a stranger to the trust, having received trust property for his or her own benefit and having knowledge of facts which would put a reasonable person on inquiry, actually fails to inquire as to the possible misapplication of trust property. It is this lack of inquiry that renders the recipient's enrichment unjust.
>
> ...
>
> The respondents argued that imposing liability on a banker who merely has constructive notice of a breach of trust will place too great a burden on banks, thereby interfering with the proper functioning of the banking system. While this may be true in assistance cases where a banker merely pays out and transfers funds as the trustee's agent, the same argument does not apply to receipt cases where a banker receives the trust funds for his or her own benefit. Professor Harpum addresses this point in "The Stranger as Constructive Trustee" (1986), 102 L.Q.R. 114, at p. 138:

> Although there should be a reluctance to allow the unnecessary intrusion of "the intricacies and doctrines connected with trusts" into ordinary commercial transactions, considerations of speed and the importance of possession which normally justify the exclusion of these doctrines, are less applicable to a banker who chooses to exercise his right of set-off than they are to other commercial dealings. Where a banker combines accounts, he alone stands to gain from the transaction. Because of that benefit, more should be expected of him than if he gained nothing. [Footnotes omitted.]

In "knowing receipt" cases, therefore, it is justifiable to impose liability on a banker who only has constructive knowledge of a breach of trust.

466 While third party liability most commonly arises in cases of breach of trust, the principles have been extended in some cases to breaches of fiduciary duty: Waxman v. Waxman (2004), 44 B.L.R. (3d) 165 (Ont. C.A.) and Ruwenzori Enterprises Ltd. v. Walji (2004) 8 E.T.R. (3d) 209, 2004 BCSC 741.

467 In Ruwenzori, Justice Pitfield referred to Waxman as authority for the proposition that third party liability may attach when there is a breach of fiduciary duty as opposed to a breach of trust. At paragraph 199-200 he said:

> While Citadel arose in the context of a breach of trust, there is a parallel with the present case. The breach of trust in Citadel was a breach of fiduciary duty. Although neither of Zuli nor Yasmin was a trustee in fact, the nature of their liability arising from a breach of fiduciary duty is akin to that imposed on trustees. In Waxman v. Waxman, supra, the Ontario Court of Appeal discussed the applicable principle in the context of a fiduciary duty as follows at paras. 544-549:
>
>> The appellants argue that the trial judge made two errors of law in applying the doctrines of knowing receipt and knowing assistance.
>>
>> First, the appellants argue that these doctrines cannot apply where there is only a breach of fiduciary duty. Rather, they can only apply where the monies wrongly paid out are trust monies and here, the 1981 and 1982 bonuses are simply corporate funds paid out pursuant to signed corporate resolutions.
>>
>> <u>We do not agree that these two doctrines have such a narrow compass</u>. We agree with the trial judge that both are available in the context of a breach of fiduciary duty and not simply where trust monies are involved. Thus she did not err in applying these doctrines without concluding that either the 1981 and 1982 bonuses or the profit diversions constituted trust monies.
>>
>> Laskin J.A. made clear that a breach of fiduciary duty may trigger the imposition of liability on third parties in Gold v. Rosenberg (1985), 129 D.L.R. (4th) 152, aff'd on other grounds [1997] 3 S.C.R. 767. Speaking for this court, he said at 154:
>>
>>> Beginning with the judgment of Lord Selborne in Barnes v. Addy (1874), L.R. 9 Ch. App. 244, courts have imposed the obligations of a trustee on third parties who participate in another's breach of trust or breach of fiduciary duty. Third parties may be liable as "constructive trustees" if they knowingly receive trust property obtained in breach of trust (the "knowing receipt" cases) or if, without receiving trust property, they knowingly assist in its misapplication (the "knowing assistance" cases).
>>
>> Paul Perell, in his article "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty", (1999) 21 Advocates' Q. 94, makes the same point, namely that

> these equitable doctrines apply to both breaches of trust and breaches of fiduciary duty. An example of the latter application is found in MacMillan Bloedel Ltd. v. Binstead (1983), 22 B.L.R. 255 (B.C.S.C.), cited with approval in Soulos v. Korkontzilas, [1997] 2 S.C.R. 217 at 239.
>
> Moreover, in this context there is no reason in principle to differentiate between the beneficiary of a trust obligation and the beneficiary of a fiduciary obligation. Both are equally deserving of the protection of equity as against a third party who knowingly assists in the dishonest breach of that obligation or knowingly receives funds paid in breach of it.

> I adopt and apply Waxman as a proper statement of the law. Knowing assistance and knowing receipt provide the foundation for liability in the context of a breach of fiduciary duty

[emphasis added].

468 Newbury J.A. in Strother referred to the leading cases of Barnes v. Addy (1874) L.R. 9 Ch. App. 244, and Selangor United Rubber Estates, Ltd. v. Cradock (No. 3) [1968] 2 All E.R. 1073 (Ch.D.). She continued at paragraph 76:

> Analogizing from cases of express trusts to fiduciary duties, there would appear to be no good reason why a stranger to the fiduciary relationship (here, between solicitor and client) could not also be held liable in Equity where he had the requisite degree of knowledge. But in the more attenuated context where the stranger has not received trust property, courts are reluctant to make wrongdoers out of persons who simply participate in what may be called the "actus reus" of the fiduciary's breach.

[emphasis added].

469 To establish that the defendants are liable for damages for knowing assistance in a breach of trust or a breach of fiduciary duty, the plaintiff must establish that the fiduciary, TVL, fraudulently or dishonestly breached its fiduciary duty and that the Credit Union (or Thomas) had actual knowledge of the breach of trust or breach of fiduciary duty. Recklessness or wilful blindness would also suffice.

470 There is a debate in the law as to whether dishonest conduct on the part of the trustee is required (see, for example, the Privy Council's decision in Royal Brunei Airlines Sdn. Bhd. v. Tan, [1995] 3 All E.R. 97 (P.C.)). I conclude that TVL's breach, whether of trust or fiduciary duty, was a dishonest one.

471 TVL had wide discretion in the development of the projects for the benefit of the club members. The club members or investors interested in particular projects did not particularly inquire as to when and how Mr. Taylor sold the properties or developed them or raised money in order to develop them. However, if there was a trust, it was in breach of trust and certainly outside the ambit of any discretion that they gave Mr. Taylor for him, without disclosure or consent, to sell projects he had designated as investor projects to other major investors in TVL in order to provide them with some form of security and to raise funds for TVL. This is true even if there was an understood right of reacquisition by TVL. Ralph Taylor carried out these transactions without informing the investors. The substance of the transactions was contrary to how he said the club would operate and could succeed.

472 A number of English cases, including Royal Brunei, supra, have defined fraud as including taking "a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take". The definition covers what Ralph Taylor and TVL did here.

473 Even if there is a dishonest breach of trust or fiduciary duty, as I have found here, the plaintiff must establish that the third party had actual knowledge of the breach or was reckless or wilfully blind if that third party is to be held liable.

474 The plaintiffs' counsel's initial argument, which is set out above at paragraph 297 is that Mr. Thomas helped devise the scheme whereby TVL would raise money by selling the investors' lands without appearing to. This is an allegation of not just actual knowledge but active participation in a breach of fiduciary duty by the Credit Union and Mr. Thomas.

475 The evidence does not support the conclusion that Mr. Thomas and the Credit Union participated or were privy to such a scheme or were reckless or wilfully blind to any scheme that Ralph Taylor might have initiated.

476 The evidence establishes that Mr. Thomas and the Credit Union believed that TVL had the right to deal with the properties as it did and did not have actual knowledge that TVL could not do so.

477 From the Credit Union's loan approval documents, the transactions looked straightforward. In each case, TVL appeared to have either title to the property or an option to purchase. In each case, TVL appeared to want to sell its interest to the so-called nominee purchasers. The Credit Union was asked to provide mortgage funding for the sale to the purchaser. The Credit Union took the steps it would usually take in the circumstances. It required an appraisal to satisfy itself that there was enough value in the property for its mortgage loan. The purchaser was subject to the usual credit bureau search and report and was required to provide a personal guarantee of the indebtedness, or at least some substantial part of it. The Credit Union took fresh mortgage security from the borrower for monies that it advanced. In all of these transactions, it appears that the Credit Union's solicitors were involved to ensure that the Credit Union received the security it wanted and new monies were advanced under that security.

478 Ralph Taylor did not specifically disclose to the Credit Union or Mr. Thomas that the properties that were the subject of the impugned transactions were the lands designated for investor projects, nor did the Credit Union and Mr. Thomas learn that information from any other person. Although the transactions have some unusual aspects, they were straightforward in terms of the lending and loan approval practices of the Credit Union.

479 At some point, Mr. Thomas became aware that the nominee purchasers would have security for their investments in TVL through these transactions. The way that Mr. Thomas put it in his evidence, which I find was not contradicted by other evidence, was that some of TVL major investors wanted collateral or were pressuring TVL for security and, in order to provide them some comfort and some equity, TVL sold them a piece of land and arranged a mortgage with the Credit Union.

480 The purchasers behind the transactions appeared to be people of substance, generally with substantial personal worth and strong credit ratings. They spoke to Mr. Thomas and were prepared to provide the guarantees. None was called as a witness at trial.

481 At the time these transactions took place - as early as 1992, but mostly from July 1994 to April 1996 - it does not appear that the Credit Union or Mr. Thomas had actual knowledge of serious financial difficulties facing TVL. In some of the decided cases in which third parties were found liable for participating in a breach of trust, the mortgages were taken to shore up doubtful unsecured liabilities and the benefit received by the third party formed a basis on which to infer actual knowledge of the breach. In this case, the mortgages were done in a deliberate way, with the requisite loan approvals, appraisals, guarantees, and solicitors doing the normal title searches.

482 The plaintiffs argue that the defendants are imputed with the knowledge that Mr. Thomas's daughter had because she was acting as his agent with respect to his first investment. Since she was not called as a witness, plaintiffs' counsel asks me to draw an adverse inference, namely that she received all of the agendas and newsletters of TVL from August 1993 until the receivership. They argue that she received at least

one newsletter or agenda and was on the mailing list and that there was no evidence from her father, Mr. Thomas, that he ever discussed the newsletter with her. This, they say, amounts to wilful blindness.

483 The plaintiffs rely on 535951 B.C. Ltd. v. Penlea Investments Ltd., [2001] B.C.J. No. 32, 2001 BCSC 49, at paragraph 11-15 and on Bowstead on Agency, 15th Edition, at page 412 et seq. in support of the proposition that knowledge of the agent gained in the scope of his agency is imputed to the principal and the fact that the principal did not have actual knowledge is irrelevant. In 535951 B.C. Ltd., however, Maczko J. said that, although the knowledge of an agent gained in the scope of his agency is imputed to the principal, whether told to the principal or not, that imputation does not satisfy a requirement of "actual" knowledge in the particular contract in that case that treats the principal and agent separately.

484 Mr. McGowan, for Mr. Thomas, suggests that the purpose of advancing this argument is to attempt to argue that Mr. Thomas had sufficient knowledge to discern a trust or fiduciary relationship between TVL and the investors, despite his evidence that he only recalled receiving one newsletter. The defendants argue that even a review of the newsletters would not have swayed Mr. Thomas from any understanding of the underlying transaction other than that the investors were unsecured lenders with some association to the profits of a project.

485 In any event, the defendants say, the plaintiffs are not entitled to an adverse inference but have an obligation at least to establish that Allana Thomas had whatever knowledge they seek to impute to Mr. Thomas. The defendants argue, on this point, that it was not established whether Ms. Thomas continued to live at the address where she received the agenda in 1993. The defendants say that the evidence of agency is based on a thin answer to a question put to Mr. Thomas:

> Q. And you used your daughter as your agent for the investment of the $150,000, right?
> A. Yes.

They say that the plaintiffs failed to explore when the agency commenced, whether it was transactional or longer, whether it was limited to advancing and receiving the funds and whether she was formally an agent or a limited agent. Moreover, they say, the issue of agency was not pleaded, something the plaintiffs say is unnecessary as this is an evidentiary issue.

486 I do not find that it is an appropriate inference from the evidence, or from the failure to call Allana Thomas, that she received all the newsletters and agendas after the first investment. Moreover, it was not shown that the receipt of any such documents was within the scope of any agency that Mr. Thomas' daughter performed for her father.

487 In any case, even if Mr. Thomas, notionally, received the agendas and newsletters, I am not persuaded that he would have formed a different impression that he did of the relationship between TVL and the investors than he actually had. And even if the knowledge of Allana Thomas was imputed to her father, I do not think it can be imputed to the Credit Union, because the investment giving rise to the alleged agency was contrary to the rules of the Credit Union and outside the scope of Mr. Thomas' employment. See Halsbury's Laws of England, 4th ed. reissue, 2003, Vol. 2(1), at 60, paragraph 82.

488 I have concluded, on a consideration of all of the evidence, that the Credit Union and Mr. Thomas, even though they had knowledge of the existence of many investors, did not have actual knowledge of a trust or a fiduciary duty. I also find they did not have actual knowledge of a breach of trust or fiduciary duty, nor were they reckless or wilfully blind as to whether or not the transactions the Credit Union participated in with TVL were in breach of trust or in breach of a fiduciary duty owed to the investors. I conclude that Mr. Thomas and the Credit Union were not, in fact, aware of a fiduciary relationship that may have existed or that TVL was restricted on any basis from selling or mortgaging these particular properties, nor were they wilfully blind or reckless to these circumstances. Counsel for the Credit Union argued rhetorically, "How could the Credit Union or Thomas have actual knowledge of a fiduciary relationship when it arises outside the usual categories of fiduciary relationships?" It is, I think, a fair question.

489 Given my finding that Mr. Thomas and the Credit Union did not have actual knowledge nor were they wilfully blind as to whether there has been a breach of fiduciary duty by TVL, the claim against the defendants in knowing assistance must fail. I would make the same holding if I had found there was a trust.

490 I will address the question of the knowledge of Mr. Thomas and the Credit Union further when I consider the claim against them as third party accessories for knowing receipt.

491 Two questions arise in a claim of knowing receipt following a breach of trust or fiduciary duty. First, did the third party receive trust property or, in this case, property that was conveyed or dealt with by a party in breach of trust or a fiduciary duty? Second, did the third party have knowledge, actual or constructive, of the breach of that trust or fiduciary duty?

492 The plaintiffs say the Credit Union received trust property in the following ways: by mortgages on the investors' lands, by payments towards TVL's line of credit from both proceeds from the mortgage and share purchase funds which were deposited in TVL's business account, through "interest reserve" funds, and by funds realized through foreclosure on the mortgages.

493 The defendants say that Credit Union received nothing at all, because, in a situation like this, in which there is a fiduciary duty but not a trust, there is no trust property for the Credit Union to receive.

494 I have already found that there was no actual knowledge, recklessness or wilful blindness to the breach of fiduciary duty. The question remains whether either the Credit Union or Mr. Thomas had constructive knowledge of two things: first, that TVL owed a fiduciary duty to the subject investors; and second, that TVL breached that fiduciary duty by entering into any of the ten impugned transactions.

495 Determining whether the Credit Union or Mr. Thomas had constructive knowledge of the existence of a fiduciary duty and the breach of that duty involves a consideration of all the circumstances, including suspicious circumstances, their knowledge of the relationship between TVL and the investors and of TVL's financial circumstances, the apparent purpose of these transactions, and many other factors.

496 The plaintiffs point to a number of facts and circumstances that they say are suspicious. They say the defendants knew of these facts and circumstances and their failure to inquire more fully ought to lead to a finding that Mr. Thomas and the Credit Union had constructive knowledge of the existence of a fiduciary duty and its breach.

497 The plaintiffs say that the Credit Union had knowledge of both the fiduciary duty TVL had to its investors and the breach of that duty by virtue of its ten-year business relationship with TVL and the personal involvement of its representative, Mr. Thomas, who had invested more than $1 million of his own and his extended family's savings in the company between 1992 and 1997.

498 They say Mr. Thomas should have been put on inquiry as early as 1992, when the first of the impugned transactions took place and that, from that point forward, he should have refused to assist or be involved with TVL.

499 The plaintiffs say his 1993 loan, which even Mr. Thomas admits took place under unusual circumstances, should have alerted him to TVL's precarious financial situation.

500 They say that the news, received in 1994, that the Securities Commission was conducting an investigation into TVL's operation should have prompted further inquiries by Mr. Thomas and the Credit Union as to how TVL was raising tens of millions of dollar and the real nature of the relationship with the investors.

501 The plaintiffs argue that the Credit Union knew that the investors' interests were substantial and were in some way connected to the land. They point to the fact that, in preparing loan documents, Mr. Thomas noted that, "$10 million dollars is owing to approximately 280 silent investors. The investors are participating in specific projects and participate on a profit-sharing basis."

502 The plaintiffs' counsel says that the financial statements did not contain a proper note explaining how and why this substantial amount was due to shareholders, a shortcoming that he says should have alerted the Credit Union.

503 They say Mr. Thomas knew that the arrangement with the investors was almost entirely oral and that through the 1990s more than $20 million had been invested by the investors in TVL. The plaintiffs suggest that Mr. Thomas did not know whether TVL could sell or mortgage the land, and he and the Credit Union did not want to know.

504 The plaintiffs argue that Mr. Thomas had in the past been offered a speedy memo for his $150,000 and refused because he knew that a speedy memo meant that the money would be, in Mr. Thomas's words, "associated in some way" with a piece of land. Mr. Thomas took a promissory note and a duplicate Certificate of Title instead. The plaintiffs say that Mr. Thomas's refusal shows that he knew that the monies of the investors were in some manner tied to a particular piece of land.

505 Mr. Thomas, the plaintiffs contend, regarded the fact that the investors had some association or connection with a particular piece of property as a positive factor. When Mr. Thomas met the nominee purchasers in the impugned transactions, the plaintiffs say that Mr. Thomas would, as a matter of standard practice, inquire into the nature of their investments in TVL.

506 The plaintiffs say that the commingled account of TVL and the fact that money from all sources was deposited by TVL into its general chequing account at the Credit Union were also suspicious circumstances. Mr. Thomas knew, they argue, that there were only two sources of income: sales of property and payments by investors. The plaintiffs argue that at some point Mr. Thomas had to know that monies from the $500,000 line of credit went into this account, and the borrowings from the Credit Union and others were used to replenish working capital that had been depleted due to the demands of the rink project.

507 The plaintiffs say that Mr. Thomas had to know that there were significant inaccuracies in TVL's financial statements; specifically, that obligations known to the Credit Union were not reflected in the statements, including the debt owing by TVL to Mr. Thomas and the mortgage debts of $600,000 and $200,000 to Mr. Thomas and his family. They say that the Credit Union ought to have known that there were assets on the balance sheet that did not belong there. For example, the 1992 financial statements showed the Bruce Avenue property as belonging to TVL months after the property had been sold to a nominee purchaser and mortgaged by the Credit Union. The plaintiffs suggest the same thing occurred with respect to Laguna View and the Delta Industrial Park, both of which similarly appeared on financial statements after they were apparently sold by TVL to nominee purchasers.

508 The plaintiffs suggest that Mr. Thomas and the Credit Union knew that TVL was experiencing financial troubles because there were ongoing overdrafts at the Credit Union, and that TVL was being pressured by some investors for security for their investments. The plaintiffs say that the fact that TVL club members were pressuring for collateral security was not set out in the loan documents that were examined by the credit committee. The plaintiffs say the reasonable inference is that the transactions were entered into to provide a minority of TVL's investors with a fraudulent preference.

509 The plaintiffs say that the Credit Union ought to have known that the true purpose of the nominee purchaser transactions was to grossly exceed the internal lending limits policy of the Credit Union, or the lending cap on loans to connected or related parties. A connected loan, according to the Credit Union, is when the "source of repayment and security exclusive of individual guarantees or any part of the foregoing are coincident with forming part of or reliant upon the financial stability and/or performance of another borrowing account ...".

510 The plaintiffs say that it is also suspicious that the interest payments on a number of the loans were made by TVL, including the mortgages granted by the respective numbered companies of Messrs. Maniago, Irion, Stobbe, and Laakman. Moreover, the plaintiffs point to the fact that several of the nominees, namely, Messrs. Godecke, Maniago and Irion, had no development experience and that should have alerted the Credit Union to the odd nature of these transactions.

511 The plaintiffs say that the nominee purchasers gave the misleading impression that a down payment was made when, they argue, the only money paid to TVL was the loan proceeds.

512 The plaintiffs say that, on eight of the ten transactions that are impugned, at least a portion of the loan proceeds were deposited into the TVL account and used to pay overdrafts to the Credit Union. The plaintiffs suggest that on eight of the ten transactions the property was transferred at a value significantly less than the market value.

513 Given all of this, did the Credit Union and Mr. Thomas have constructive knowledge of TVL's breach of fiduciary duty? Were there circumstances and facts known to them that should have prompted further inquiry to determine if the transactions were in breach of a fiduciary duty owed by TVL to the plaintiff investors such that the failure to do so makes them liable as accessories?

514 It is important to consider the context in which this question of the third party's knowledge of a breach of fiduciary duty is addressed. It is in the context of analyzing a claim for knowing receipt, which is essentially a principle of law designed to prevent the unjust enrichment of third parties as a result of a breach of trust or breach of fiduciary duty. This desire to prevent unjust enrichment is why the knowledge standard is less than for knowing assistance.

515 As Sopinka J. noted in Citadel, liability in knowing receipt is not strict. It depends not only on the fact of enrichment - i.e. the receipt of trust property - but also on the unjust nature of the enrichment. The obligation of the third parties is to act reasonably.

516 The first question, then, is whether it would have been reasonable for a person in the position of this account manager, and this Credit Union, knowing what they knew and making the inquiries that they ought reasonably to have made, to have concluded that there was a fiduciary relationship between TVL and the investors or that there was a breach of that fiduciary duty.

517 In the circumstances, I find that the answer to that question must be no. Unlike the trustee-beneficiary or solicitor-client relationship, the relationship of developer and investor is not a relationship that is generally known to give rise to a fiduciary duty. It is, on its face, a commercial relationship and commercial relationships generally are not fiduciary relationships. The Credit Union knew that the investors advanced monies to TVL, that those monies were connected somehow to the land and that the investors were entitled to share in profits. They knew there were many investors.

518 The TVL balance sheets indicate a legal relationship of debtor/creditor, a relationship would be familiar and within the comprehension of Mr. Thomas and the Credit Union. They do not indicate a trust relationship. Even if Mr. Thomas, or his superiors, made inquiries and was fully versed in all of the facts concerning the relationship that TVL had with the investors I do not think that he would have concluded that this was a fiduciary relationship or that TVL was in breach of it. This is not the case of a third party financial institution benefiting from the breach of what are clearly trust arrangements or would clearly be seen to be trust arrangements if reasonable inquiries had been made. Indeed, it is doubtful whether a person with some legal training, knowing all of the facts as I have found them and placed in Mr. Thomas's position, would necessarily have concluded that there was a fiduciary relationship between TVL and its investors. Mr. Thomas had no legal training and appears only to have heard of the term "fiduciary" in passing.

519 In Strother, which, like this, did not involve an express trust or trustees, the Court of Appeal considered the liability of Mr. Darc in connection with an allegation that he had known of facts sufficient to put a reasonable person on inquiry of Mr. Strother's breach, and should therefore be made a constructive trustee of the benefits he received through the Sentinel Hill Syndications.

520 Newbury J.A. said at paragraph 80-81 of Strother (January 2005):

> Mr. Darc was not asked if he knew in 1997-99 that Mr. Strother's continuing to act for Monarch constituted a conflict of interest. That question, of course, would have involved an opinion on his part on a clearly legal question, and he was not a lawyer. As noted by Professor Finn, supra, the "professional or other relationship the third party has with the fiduciary can . . . affect the appreciation that should reasonably be attributed to that person, of the character of the matter in which he or she participates. The legal advisor, more so than the layperson, should be expected both to more readily recognize fiduciary wrongdoing when it occurs and to be more sensitive to the likelihood of it when facts exist from which it could be inferred." (At 215.) In Mr. Darc's case, the converse is true.
>
> Given these types of considerations and the seriousness of a finding of "knowing assistance" in furtherance of a fraud or of "knowing receipt" of the benefits of a breach of duty, I am not prepared to find, from the evidence I have described, that Mr. Darc knew that Mr. Strother was in breach of his duty as a lawyer; that he was reckless or wilfully blind; or that he should have been put on inquiry analogously to a recipient of funds subject to a trust, when he began to earn profits and fees from Sentinel Hill. In my view, it would have been reasonable for him to think, had he considered it, that the amounts he received were attributable to his own perseverance and skill, in combination with the skill

> of Mr. Strother, and to his ownership of shares in the enterprise rather than to a breach of duty by Mr. Strother.

521 Similarly, I think that it was reasonable for Mr. Thomas to conclude that these were lawful loans, made on the strength of security granted by the purchasers, rather than transactions made in breach of a fiduciary duty owed by TVL to the investors. To borrow the language of Newbury J.A. in her comments above, I do not think, in light of all the circumstances, that he should have been put on inquiry analogously to a recipient of funds subject to a trust.

522 The second question I must answer is whether the transactions were of such a nature that they would put the Credit Union on inquiry. In Citadel, for example, the court said that:

> [I]n light of the Bank's knowledge of the nature of the funds, the daily emptying of the account was in the trial judge's view "very suspicious". In these circumstances, a reasonable person would have been put on inquiry as to the possible misapplication of the trust funds. Notwithstanding the fact that the exact terms of the trust relationship between Citadel and Drive On may have been unknown to the Bank, the Bank should have taken steps, in the form of reasonable inquiries, to determine whether the insurance premiums were being misapplied

523 It is important to note that the transactions in this case were not typical of the type of transactions that often arise in knowing receipt cases, where the recipient financial institution obtains a benefit, such as fresh security for an outstanding loan, or simply applies monies to a customer's outstanding liability. Here, in all cases, the Credit Union advanced new monies on the strength of security granted by the purported borrower, albeit while committing a portion to interest reserves. The transactions were handled by the Credit Union solicitors and, in each case, the loan transactions were supported by personal guarantees from people apparently of substantial financial means and the advance was only made after an appraisal ensured that there was sufficient security in the land. In this respect, these transactions are quite different from the typical unjust enrichment that gives rise to knowing receipt liability.

524 It is also important to note that the transactions took place over a period of years and that the relationship between TVL and the Credit Union spanned a decade. Plaintiffs' counsel argues that the duration of the relationship is a key to a finding that the Credit Union had constructive knowledge, because, they say, there was a whole series of suspicious dealings and events that should have prompted further inquiries. The duration of the relationship, however, cuts both ways. In hindsight, various circumstances and events may suggest a pattern of behaviour that might lead a reasonable person to further inquiries. It is by no means clear, however, that the same pattern would be apparent to someone who viewed those same circumstances and events over time and as a series of discrete and, for the most part, unremarkable transactions.

525 I do not find that the Credit Union had knowledge at the material times that TVL was in financial distress or that the circumstances may have suggested that. Mr. Forbes' evidence was that the accounts with the Credit Union all operated satisfactorily, there were no negative comments or negative inquiries from lenders, and loans were paid as agreed. While TVL exceeded its line of credit from time to time, the evidence is that Ralph Taylor met those excesses as he promised and the line of credit revolved satisfactorily. Overdrafts exceeding the secured amount of the line of credit, which were later covered, were not an uncommon occurrence among the Credit Union's development industry clients.

526 Upon a consideration of all of the evidence, I find that Ralph Taylor did not tell Mr. Thomas that these impugned transactions concerned lands associated with investor projects and Mr. Thomas did not know that the lands were designated as investor projects. I do not think it is a fair characterization of his evidence that he did not want to inquire as to whether TVL could mortgage or sell the properties. I find that he reasonably believed that TVL could do so.

527 Although there were some unusual aspects, the transactions were generally straightforward from the Credit Union's perspective; they were simply deals where the Credit Union lent on the security of a land mortgage. Although many of the individuals behind the nominee purchaser companies did not have development experience, which might cause some concern, Mr. Thomas was told by Mr. Taylor that Mr. Taylor would remain involved and apparently could reacquire the property. The plaintiffs suggested in argument that the "cash and equivalents" allegedly paid by the nominee purchasers as part of the purchases were not made. I

do not find that assertion to be proven. More importantly, even it that was the case, I do not find it established that Mr. Thomas or the Credit Union had knowledge of that fact. I note that the apparent legitimacy of these transactions is supported by the fact that people of financial substance were willing to put up guarantees intended to be relied on by the Credit Union.

528 I turn to the interest payments on the loans. Mr. Forbes said that TVL paid the interest on the loan for the Bruce Avenue property associated with 180 Acres South Nanaimo, as it was owned by a related company and considered a connected loan. The documents show that, at all times, the interest payments were made by the borrowers on Chilliwack Mountain, 3.5 Acres and the part of 43 Acres Langley purchased by Mr. McLean, that interest was paid from interest reserves on the loans for Laguna View and Delta until six months before receivership and that on the four remaining loans TVL made most or all of the interest payments. According to Mr. Thomas, Ralph Taylor told him this was done for ease of accounting and bookkeeping and because some of the purchasers had additional offsets available.

529 As, over time, TVL told Mr. Thomas that it was committed to paying the interest for these loans, a more complete analysis by Mr. Thomas may have revealed that the Credit Union was extending too much money to borrowers connected to the company. Even if this fact were discovered, however, it would not have suggested a possible breach of fiduciary duty.

530 If Mr. Thomas had made inquiries about the ability of the borrowers to grant mortgages for the loans, as the Credit Union solicitors presumably did, he would have learned that the transactions would result in the borrower having the necessary registered interest in the land to grant the security that the Credit Union required before making loans.

531 The loan approval documents do not indicate that the transactions provided security to some of TVL's larger investors or that those investors were pushing TVL for that security. I agree that is an unusual aspect of these transactions. But the specific reason for this was not pursued in any depth in cross-examination of Mr. Thomas.

532 As I have said earlier, Ralph Taylor devised this scheme as a way to borrow more money from the Credit Union than it was willing to lend TVL, in light of the cap on related or connected borrowers. However, I find that Mr. Thomas was not aware of that scheme. He believed, incorrectly, that given the security and the guarantees, the loans were stand-alone rather than connected loans, and thus he believed that TVL had not exceeded the cap. While he was wrong on that, I do not think that the Mr. Thomas or the Credit Union were placed on inquiry as to whether the transactions in some manner offended TVL's arrangement with its investors.

533 Moreover, I do not find that Mr. Thomas or the Credit Union had knowledge that the transactions between TVL and the nominee purchasers were generally below market value. It appears, based on the Rogers appraisals, that three may have been significantly below market value. Of those, it appears, the Credit Union did not have knowledge of the sale price on Laguna View and the 1992 transaction, to the knowledge of the Credit Union, was to a related company. The plaintiffs also argue that Mr. Thomas must have been on inquiry from the suspicious circumstances, for example that properties that had been sold still appeared on the financial statements. However, given the kind of lending transactions that Mr. Thomas was engaged in and the fact that he apparently did not need to review the financial statements on a line-by-line basis, nor did he do so, these circumstances, which, if noted, might be suspicious, did not, I find, come to his attention.

534 The third question that arises is whether the plaintiffs have established that there was a receipt and that the Credit Union has been unjustly enriched. As noted in Citadel, liability on the basis of "knowing receipt" requires that strangers to the trust receive or apply trust property for their own use and benefit.

535 Iacobucci J. (although dissenting in the result) described the "essence" of a knowing receipt claim in Gold v. Rosenberg this way:

> The essence of a knowing receipt claim is that, by receiving the trust property, the defendant has been enriched. Because the property was subject to a trust in favour of the plaintiff, the defendant's enrichment was at the plaintiff's expense. The claim, accordingly, falls within the law of restitution ... unjust enrichment is the essence of a claim in knowing receipt.

536 The elements of unjust enrichment were stated in Garland v. Consumers' Gas Co. (No. 2), [2004] 1 S.C.R. 629, at paragraph 30 as follows:

(1) an enrichment of the defendant;
(2) a corresponding deprivation of the plaintiff; and
(3) an absence of juristic reason for the enrichment.

537 Although the Credit Union received mortgage security, the funds it advanced were new funds and the payments from the interest reserve were received to pay the interest obligation on those new funds. And if, as the plaintiffs allege, they made their way back to TVL to reduce overdrafts, my review of the TVL bank statements indicates, and I find, that the monies generally were re-advanced over the ensuing months. The evidence does not establish there was an enrichment to the Credit Union.

538 Often, a recipient takes a benefit at a time the trustee's or fiduciary's business is failing and the recipient fails to inquire into the true circumstances under which the transaction was conducted. Receiving money or taking security when a bank's customer's business is failing or the bank's loans are in a precarious position is a common suspicious situation in which equity will find that there is constructive knowledge of the breach of trust or, presumably, breach of fiduciary duty, where inquiries are not made. Here the transactions occurred at a time when the Credit Union believed that TVL's accounts were operating satisfactorily. The fact that Mr. Thomas continued to have his family members invest in TVL until shortly before the receivership may have been a serious conflict of interest, but it speaks to his belief in the health of TVL at the material times.

539 A particular difficulty with the plaintiffs' claim under the head of knowing receipt is the fact that, although the liability for knowing receipt has been extended to cases of breach of fiduciary duty as opposed to breach of trust, in both Waxman and Ruwenzori Enterprises the plaintiff's property was actually received by the third parties as the result of a breach of duty by the fiduciary. If, as I have found here, there was no trust - and, hence, no trust property - the third party Credit Union received nothing that belonged to the plaintiffs. There is no suggestion that Mr. Thomas personally received property of the plaintiffs.

540 A fourth question that I think arises is, if the Credit Union was under an obligation to make inquiries, what would reasonable inquiries have indicated?

541 In Gold v. Rosenberg, the court found that the bank acted reasonably in the circumstances and never received trust property in its possession, although it acquired a contingent interest in the property. Sopinka J. said this at paragraph 78 and paragraph 83:

> In certain circumstances, a third party in the position of the bank will not have discharged its duty to inquire unless the guarantor has been advised to obtain independent legal advice. ...
>
> ...
>
> A bank is only required to act reasonably in the circumstances. Corporate guarantees in situations in which the director of the corporation may be a beneficiary of a trust in relation to the shares of the corporation are common transactions. Is the bank obligated to advise each director, whose consent was necessary to obtain the guarantee, to obtain independent legal advice? I am of the opinion that, in the circumstances, advising Gold to obtain independent legal advice may be a counsel of perfection but goes beyond what is expected of an honest and reasonable banker. To quote Gibson J. in Baden, [1992] 4 All E.R. 161, at p. 268, this would impose "an impractically extensive duty of inquiry" on a bank which is otherwise acting reasonably.

542 The most likely inquiries would have been of the Taylor brothers. I find that such inquiries would not have revealed any document that would suggest that the transactions may be in breach of fiduciary duty. I expect that, consistent with his evidence at trial, Ralph Taylor would have told Mr. Thomas that TVL was entitled to sell these properties. If the Credit Union had inquired of Floyd Taylor, the accountant, I find that the

information he would have provided then would have been consistent with what appeared in the financial statements of TVL.

543 Perhaps if the Credit Union had contacted some investors, it may have received a different picture, which would have prompted further inquiries. The Credit Union, however, was not required to conduct an extensive investigation of TVL's business practices and particular obligations to its investors. It was only required to act reasonably.

544 Finally, the defendants are entitled to rely on s. 29 of the Land Title Act, R.S.B.C. 1996, c. 250, as an answer to a claim of unjust enrichment. Section 29 provides that, "[e]xcept in the case of fraud in which he or she has participated", a person dealing with a registered owner of land is not affected by an unregistered interest affecting the land or charge. Some authorities have found that actual knowledge is required to establish fraud (Woodwest Developments Ltd. v. Met-Tec Installations Ltd., [1982] 6 W.W.R. 624 (B.C.S.C)) while others have found that fraud can be based on actual or constructive knowledge combined with an element of dishonesty (Nicholson v. Riach (1997), 34 B.C.L.R. (3d) 381 (S.C), Burbank v. Garbutt, [2000] B.C.J. No. 15, 2000 BCSC 14). The proposition that mere knowledge is not enough can be found in both Nicholson (at paragraph 13) and Burbank (at paragraph 46). What they have in common is reliance on the decision of Taylor J. (as he then was) in Jager the Cleaner Ltd. v. Li's Investments Co. (1979), 11 B.C.L.R. 311 (S.C.):

> The various decisions in which it is stated, even in unqualified terms, that notice of an unregistered interest before closing bars the purchaser from protection of the Act, like all other decisions of the courts, are authorities only in relation to the facts of a particular case. While the language may in some cases be broad, I do not think that they can be said to lay down a rule of universal application. The question in every case must be whether a fraud would in fact be committed if the purchaser were to claim the protection of the Act; fraud, which is never lightly to be inferred, must, I think, be established by the particular facts of the case and cannot be presumed.

545 Given my conclusion that the defendants did not have actual knowledge, were not reckless or wilfully blind and did not act dishonestly as to any possible interest of the investors, the Credit Union has established a juristic reason for any enrichment that it received by way of the mortgages.

546 In summary, upon a consideration of all of the evidence, I conclude that the defendant Credit Union and Mr. Thomas are not liable for knowing assistance or for knowing receipt in connection with the breach of fiduciary duty by TVL.

547 The plaintiffs' claims are dismissed.

SIGURDSON J.

cp/i/qw/qlemo/qlbrl/qlmll/qlbxm