

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Trackside Holdings Ltd. v. Lakeshore Ventures Ltd.*,
2026 BCCA 291

Date: 20260708
Docket: CA51102

Between:

Trackside Holdings Ltd. and 0720305 B.C. Ltd.

Appellants
(Defendants)

And

**Lakeshore Ventures Ltd., Dockside Management Ltd.,
Beau-Fort Industries Ltd., 0733354 B.C. Ltd., B.F. McLaren Ltd.,
Lasco Holdings Ltd., 574215 B.C. Ltd., Bob Plowright Realty, 613459 B.C. Ltd.,
390697 B.C. Ltd., R. Craig Barton, James S. Barton, Harry Geddes,
David Moon, Jeffrey Reimer, Darlene Wenham and Kathleen Renwick**

Respondents
(Plaintiffs)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Edelmann
The Honourable Justice Brundrett

On appeal from: An order of the Supreme Court of British Columbia, dated
October 6, 2025 (*Lakeshore Ventures Ltd. v. Trackside Holdings Ltd.*,
2025 BCSC 1937, Vancouver Docket 229612).

Counsel for the Appellants: J.B. Maryniuk

Counsel for the Respondents: G.E.H. Cadman, K.C.
L. Morris

Place and Date of Hearing: Vancouver, British Columbia
May 12, 2026

Place and Date of Judgment: Vancouver, British Columbia
July 8, 2026

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Justice Edelmann
The Honourable Justice Brundrett

Summary:

This is an appeal from the dismissal of an application for summary judgment to cancel a certificate of pending litigation and dismiss a claim to an interest in land. The appellants submit the chambers judge erred in failing to properly identify, and apply, the test for constructive trust because an interest in land was not sufficiently pleaded or established on the evidence. Held: Appeal allowed. The pleadings and evidence adduced by the respondents in support of the certificate of pending litigation do not establish the basis for an interest in land arising from a constructive trust. The respondents' constructive trust claim is therefore dismissed, and the certificate cancelled.

Reasons for Judgment of the Honourable Mr. Justice Willcock:**Introduction**

[1] Trackside Holdings Ltd. ("Trackside") and JC Land Corp. ("JC") appeal the dismissal of their application for summary judgment under R. 9-6 of the *Supreme Court Civil Rules* striking the respondents' claim to an interest in land and cancelling the certificate of pending litigation intended to secure that interest. This appeal calls upon us to consider whether the chambers judge erred in concluding:

- a) the respondents have an arguable case for an interest in land arising from a constructive trust; or
- b) the material facts pleaded are sufficient to ground a claim to an interest in land, the threshold for registration of a certificate of pending litigation per s. 215(1)(a) of the *Land Title Act*, R.S.B.C. 1996, c. 250.

Evidence

[2] The affidavits filed on the summary judgment application established the following uncontested facts:

- a) Each of the respondents (with possibly three exceptions) invested in a land development project (the "Project") pursuant to participating loan agreements with the same wording (the "Agreement") in 2006. The Project was to develop properties in Chilliwack and Langley (the "Property") by constructing roads, installing site servicing, and obtaining rezoning; and to market lots for sale.

The Property was acquired in 2005 and subsequently subdivided for the Project.

- b) The Agreement described the respondents (the “Investors”) and Rogers Management Ltd., (the “Developer”), as “non-recourse Lenders to the Project”. The Investors contributed money, the Developer contributed its prior investment in land held by Trackside and JC, as well as contracts, development costs, and expertise. These contributions to the Project were described, collectively as the “Investor’s Capital Invested”.
- c) Trackside and JC were the borrowers and legal owners of the Property. They undertook to manage the development and sale of the lots. The Property was to be “placed into the Project”. Legal title was to be held by “bare trustees companies owned by Trackside and JC”. Schedule “B” to the Agreement (attached as Appendix A to these reasons) referred to 0720305 B.C. Ltd. (“072”) as the “Bare Trustee” of some of the Chilliwack properties. 072 was not a party to the Agreement.
- d) The Investor’s Capital Invested was loaned “on a non-recourse basis to Trackside with Trackside funding JC as required”. It was contemplated that the Project would generate sales, rentals, and miscellaneous income from the development and sale of lots in proposed subdivisions.
- e) The Investors and the Developer agreed to “share in the financial results of the Project” on terms set out in the Agreement. Deductions would be made from the Project’s income in the following order:
 - i. Repayment of project expenses to the Developer.
 - ii. Loan finder’s fees to the Developer at the rate of 2% on all of the Investor’s Capital Invested.
 - iii. Guarantee fees to the Investors and the Developer.

- iv. Bank or other third party debt and interest (other than the Investor's and Developer's Capital Invested).
 - v. A "preferred rate of return of [9%] to Investors and the Developer" of the Investor's Capital Invested.
 - vi. A project "Developer Fee" to the Developer.
 - vii. Return to the Investors and the Developer pro rata "until 100% of Capital Invested is returned".
 - viii. The balance of available funds, if any, was to be divided between the Investors (25%) and the Developer (75%).
- f) In the event insufficient cash was available to pay the next point in this list, the Agreement provided the distribution of cash would end, and:
- The Investors acknowledge that in the event there is insufficient cash to return 100% of the Capital Invested, they shall have no recourse against the Developer, Trackside, JC or any other participant in the project.
- g) The Agreement further provided that by July 31, 2009, the Developer would call a meeting of all the Investors to discuss the Project, and report on its status. At that meeting the Investors and the Developer might either:
- (a) terminate the Project by sale of the remaining properties to members of the Investors/Developer group; or
 - (b) agree to extend the Project under modified "Participating Loan Agreements" and sell the remaining net assets of the Project as soon as practically possible to third parties. In each of these circumstances, the Project would end with the sale of the last property, and the remaining net assets would be distributed according to the listed priorities above.
- h) Eventually, the Project ran into financial trouble. There was evidence before the chambers judge with respect to the financial status of the Project in the form of Reports to Investors between 2006 and 2009, and proposals to

restructure the indebtedness to “Participating Loan Investors” in 2009 and 2010. The income generated was insufficient to repay any of the Investor’s Capital Invested. There was no evidence the parties took the steps contemplated in the Agreement to terminate or extend the Project in July 2009.

- i) Many years later there was one remaining lot in Chilliwack that had not been sold. That property, Lot B District Lots 269 and 288 Group 2 New Westminster District Plan EPP 1165, (the “Land”) is still registered in the name of the appellant 072. It has significant value.

Pleadings

[3] On December 2, 2022, the respondents filed a notice of civil claim concerning the Land and the Agreement. The following allegations are made in the notice of civil claim:

- a) In 2006, the Defendant, Trackside, “pursuant to the terms of a Participating Loan Agreement (the “Agreement”) solicited and received funds from [the Plaintiffs] for the express purpose of acquisition and development of properties [in Chilliwack]”.
- b) The Agreement provides that “Trackside ... will hold the Properties of the Project through bare trustee subsidiaries” and, under the heading “Property Ownership & Security for Investment During Development”, that “Legal Title to the Properties are held by wholly owned subsidiaries of Trackside . . . as bare trustees”.
- c) Schedule “B” to the agreement states “0720305 B.C. Ltd. Holds Property in trust as Bare Trustee”.
- d) 072 holds the Land as bare trustee “on behalf of ...Trackside and for ... the Plaintiffs as Investors of Capital in the Project”; the Land is still registered in the name of 072.

- e) The Agreement provides that “ ... the Project will end with the sale of the last Property and distribution of all remaining net assets ...”; the Land is the last property of the Project and has not been sold.
- f) None of the Investor’s Capital Invested by the Plaintiffs has been repaid by Trackside; there has been no distribution to the Plaintiffs of all remaining net assets.
- g) Until the “last Property” is sold, “there is a continuing obligation on Trackside to account to the Plaintiffs for return of their Capital and a continuing obligation on [072] to hold the ‘last Property’ as Bare Trustee for...the benefit of the Plaintiffs as Capital Investors in the Project”.

[4] The Investors assert there is also a continuing obligation on 072 to hold the “last Property” as bare trustee for, *inter alia*, their benefit as “Capital Investors in the Project”. They plead:

- a) “[072] continues to hold the Lands in Trust as a Bare Trustee on behalf of the Defendant, Trackside for the benefit of and by way of constructive trust and security in favour of... the Plaintiffs to the extent of their Invested Capital, being in aggregate the sum of \$3,550,000.00”; and
- b) “...each of the Defendants is obliged to account to the Plaintiffs for the return of their invested Capital out of the proceeds from the sale of the Lands”.

[Emphasis added.]

[5] The relief the Investors seek accordingly includes a declaration that 072 holds the Land in trust, together with the Defendant, Trackside, “by way of constructive trust” in their favour, as well as judgment against Trackside and 072 in the amount of \$3,550,000.00.

Proceedings

[6] On December 2, 2022, the Investors also registered a certificate of pending litigation against the Land.

[7] Trackside and 072 applied for summary judgment dismissing the constructive trust claim pursuant to R. 9-6 of the *Civil Rules* and for an order pursuant to R. 9-5 and s. 215(1) of the *Land Title Act*, cancelling the registration of the certificate of pending litigation on the basis that the pleadings do not assert, and the evidence will not support, a claim to an interest in land. Their position is that the Agreement simply entitles the Investors to a share of income after deductions, of which there was none, and did not create a trust or any other interest in land.

[8] In the alternative, they sought the dismissal of the certificate of pending litigation pursuant to s. 252(1) of the *Land Title Act*, on the ground that the respondents had taken no step to advance their claim in over a year since the filing of the certificate.

[9] The chambers judge dismissed the applications, in reasons indexed as 2025 BCSC 1937 [RFJ], holding in part, at paras. 36–37, that:

- a) while the Agreement provides Trackside will hold the Property “through bare trustee subsidiaries”, the organizational chart at Schedule “B” could be interpreted to support the allegation that the Investors have an entitlement to the Project and the Property making up the Project; and
- b) while the Agreement states that the Investors have no recourse against the Developer, Trackside, JC, or any other participant in the Project, it does not state there is no recourse against the Land.

[10] The chambers judge was ultimately “unable to find that the claim clearly discloses no genuine, triable issue of fact or law respecting the plaintiffs having an interest in the property”: RFJ at para. 38.

[11] For the claim under s. 252 of the *Land Title Act*, she held that the delay required for this relief had been established. However, she determined she should exercise her discretion not to set aside the certificate of pending litigation because (RFJ at paras. 45–52):

- a) there was some reasonable excuse for the respondent's delay (they had been promised and were awaiting a more responsive amended statement of defence to their claim);
- b) there was no specific hardship occasioned by delay; and
- c) there was a reasonable prospect the respondents' claim to an interest in land might succeed.

Grounds of Appeal

[12] The appellants' factum is drafted in a manner that does not adequately identify the grounds for appellate review. It identifies the 'Errors in Judgment' as follows:

37. The chambers judge erred by:

- (a) dismissing the application to dismiss or strike the claim for a constructive trust and cancel the certificate of pending litigation; and
- (b) declining to cancel the certificate of pending litigation pursuant to s. 252(1) of the *Land Title Act*.

[13] Appellants are required to complete Part 2 of a factum by entering a concise statement that sets out clearly, and particularly, in what respect the judgment or order appealed from is alleged to be in error. The factum does not do so.

[14] Fortunately, there is an "overview" of the appeal in Part 3 that more adequately describes the legal error alleged: the appellants say the judge did not identify or apply the legal tests for constructive trusts and for claiming an interest in land. They say, "[t]he claim fails to plead, and the evidence fails to disclose, the requisite material facts to sustain a *bona fide* triable issue for constructive trust [and] provides no basis for the CPL."

[15] The arguments, then, in relation to this first ground of appeal are:

- a) the pleadings are inadequate to support a claim to an interest in land and the certificate of pending litigation should be cancelled for that reason; and
- b) even if a claim is adequately pleaded, there is no genuine issue for trial with respect to a constructive trust, and that claim should be dismissed and the certificate of pending litigation cancelled pursuant to s. 254 of the *Land Title Act* as a consequence (*Xiao v. Fan*, 2018 BCCA 143 at paras. 13, 22–27).

Applicable Law

Standard of Review

[16] Rule 9-6 of the *Civil Rules* provides, in part:

- (4) In an action, an answering party may... apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.
- (5) On hearing an application ... the court,
 - (a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,
 - ... [and]
 - (c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, ...

[17] When hearing the application for summary dismissal of the constructive trust claim on the merits, the chambers judge was permitted to consider the evidence adduced on the application. However, the judge was not permitted to weigh the evidence beyond determining whether it was incontrovertible. The judgment under R. 9-6 is reviewable on a deferential standard, requiring the appellants to establish palpable and overriding error unless they can identify an extricable question of law, in which case the standard of review is correctness: *Beach Estate v. Beach*, 2019 BCCA 277 at para. 49; *Wilkinson v. Chartier*, 2025 BCCA 53 at para. 36; *Lyons v. Canadian Imperial Bank of Commerce*, 2025 BCCA 22 at para. 12; *Sherwood Real Estate Corporation v. Kingsnorth* 2026 BCCA 80 at para. 35.

[18] The application to cancel the certificate of pending litigation pursuant to s. 215(1) of the *Land Title Act* on the ground that the pleadings do not claim an interest in land, was to be determined on the pleadings alone. It is a question of law whether the pleadings disclose a claim to an interest in land. The decision on that question is reviewable on a standard of correctness: *GMC Properties Inc. v. Rampart Estates Ltd.*, 2023 BCCA 172 at para. 51; *Batth v. Sharma*, 2024 BCCA 29 at paras. 16, 22.

Substantive Constructive Trust

[19] This appeal turns upon whether the chambers judge erred in holding the respondents pleaded, and have a prospect of establishing, the Land is impressed with a substantive constructive trust.

[20] A constructive trust arises when the law imposes upon a party an obligation to hold property for the benefit of another, regardless of any parties' intention. Despite the development of remedial constructive trusts as a means of addressing unjust enrichment, it is still possible to establish a substantive constructive trust in a wide variety of circumstances, where good conscience so requires. It is important for us to articulate those circumstances in order to determine whether the judge made a material error in this case when she concluded that the evidence before her supported an arguable claim to such a proprietary remedy, or in concluding that the pleadings as they stood supported such a claim.

[21] Justice Lambert, writing for the Court in *Atlas Cabinets and Furniture Ltd. v. National Trust Co. Ltd.* (1990), 45 B.C.L.R. (2d) 99, 1990 CanLII 1312 (C.A.), noted that substantive constructive trusts arise where the acts of the parties in relation to some property are such that those acts are later declared by a court to have given rise to a substantive constructive trust at the time when the acts brought the trust into being.

[22] In *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 1997 CanLII 346, Justice McLachlin (as she was) observed that the law of constructive trust in the common law embraces situations in which English courts have traditionally found constructive

trusts. In these cases, “good conscience” was the “unifying concept” relied upon by the courts: at para. 29. The definition of circumstances in which “good conscience so requires” should be informed by the situations where constructive trusts have been recognized in the past, and also by the principled foundation for recognizing such trusts. This principled foundation is to do justice between the parties, and to maintain the integrity of institutions dependent on trust-like relationships. It is not a question of merely what might seem “fair” to a trial judge: at paras. 33–35.

[23] While recognizing that the law of constructive trusts must evolve incrementally on a case-by-case basis, McLachlin J. noted at para. 36 that constructive trusts have been found to arise in two specific circumstances:

- a) where property is obtained by a wrongful act of the defendant, notably breach of fiduciary obligation or breach of duty of loyalty; and
- b) where the defendant has not acted wrongfully in obtaining the property, but where he would be unjustly enriched to the plaintiff’s detriment by being permitted to keep the property for himself.

[24] In Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters’ Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at 553, the authors consider constructive trusts of two types: remedial trusts, those arising from unjust enrichment; and substantive trusts, those they describe as trusts arising from *profitable (or gainful) wrongdoing*. They describe four conditions that must be satisfied in order to establish a substantive constructive trust (as set out in *Soulos*):

- a) The defendant must have been under an ethical obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in their hands;
- b) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of their equitable obligation to the plaintiff;

- c) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant must remain faithful to their duties; and
- d) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.

[25] While the authors do not suggest the conditions for substantive constructive trusts can be satisfied without “gainful wrongdoing”, they do discuss the incremental loosening of the first requirement for a substantive constructive trust (being the pre-existence of a relationship of confidence), the “elimination of the restrictive effect of the first element”, and the possibility that fraudulent misrepresentation might satisfy the first element: at 530–532.

[26] Fraudulent misrepresentation has, in fact, been held to amount to such gainful wrongdoing as to give rise to a substantive constructive trust. For instance, in *Batth*, the plaintiffs pleaded that in reliance upon fraudulent misrepresentations they loaned money to the defendant who wrongfully used a portion of the money to acquire or increase the equity in the properties. The judge reasoned that this was a pleading of a substantive constructive trust, sufficient to constitute a claim to a proprietary interest. This Court agreed, holding that “an institutional or substantive constructive trust ... can arise when a party fraudulently uses money provided by the plaintiff towards the payment or maintenance of the property”: at para. 31.

[27] Justice Skolrood (as he was) in refusing to cancel the certificate of pending litigation in *Batth* explicitly identified the essential elements of a substantive trust claim as follows:

[43] ... Read as a whole, the [notice of civil claim] discloses a claim to an interest in the Properties. [The plaintiff] pleads that he paid money based on fraudulent misrepresentation and that money was then wrongly used towards the acquisition of, or increasing the equity in, the Properties. [He] seeks a tracing of the loan funds and any profits made from wrongful use of those funds. He also pleads that the [defendants] would be unable to pay monetary

damages. If his facts as pleaded are assumed true, they support the substantive constructive trust claim.

[Emphasis added.]

[28] It is settled law that parties are required to show a direct link between their contribution and the property that will be subject to the trust: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2010 BCCA 357 at para. 23; *Virk v. Singh*, 2022 BCCA 153 at paras. 76–81.

[29] A substantive constructive trust claim is not adequately pleaded by merely by asserting that the plaintiff's money has found its way into property held by the defendant. As the Court noted in *1077708 BC Ltd. v. Agri-Grow Farm Services Ltd.*, 2019 BCSC 977:

[39] An interest in land cannot be based solely on unsubstantiated assertions with no factual- whether they ultimately are proved to be true or not- underpinning. Such an extraordinary and powerful pre-trial tool must be grounded on more than mere conjecture.

See also *Wai v. Chung*, 2020 BCSC 34; *Lam v. WS Scott Station Development Limited Partnership*, 2025 BCSC 149.

[30] The question before us is, therefore: whether the chambers judge erred in finding that the elements of a claim to a substantive constructive trust had been pleaded or erred in concluding there is a genuine prospect of establishing a substantive constructive trust, given the elements of such a claim as defined in the jurisprudence.

Application of the Law

Pleadings

[31] As I have noted, the notice of civil claim asserts that the Agreement provides that the Investor's Capital Invested was to fund "acquisition and real estate development of the properties". It is alleged that the Property was to be held by subsidiaries of Trackside as "bare trustees" and that the Land in issue was to be

held by 072 as bare trustee “on behalf of the Defendant, Trackside and for, *inter alia*, the Plaintiffs as Investors of Capital in the Project”.

[32] The pleadings assert that until the last property is sold, there is a continuing obligation on Trackside to account to the Plaintiffs for return of their capital and a continuing obligation on 072 to hold it as trustee. The relief sought includes a declaration that 072 holds the Land in trust, together with the Defendant, Trackside, “by way of constructive trust in favour of the Plaintiffs”. The chambers judge was “unable to find that the claim clearly discloses no genuine, triable issue of fact or law respecting the plaintiffs having an interest in the property”: RFJ at para. 38.

[33] The appellants say the pleadings do not identify the basis upon which a constructive trust is alleged or the grounds for inferring such a trust. I agree. There is no plea that funds were used to purchase the Land. While there is an allegation that the money invested was to be used to acquire and develop property, there were no specific links pleaded between the funds and development of the Land nor identification of land acquired with the money invested by the respondents.

[34] However, the primary hurdle for the respondents is the absence of a claim of “gainful wrongdoing” by the appellants. There is also no allegation of breach of contract or breach of trust. The appellants say, given that unjust enrichment is not alleged, the fact there are no such allegations is fatal to the constructive trust claim.

[35] The only obligation raised in the pleadings is in para. 27, where the respondents say “[t]here has been no distribution to the Plaintiffs of all remaining net assets” but that is coupled with an assertion that the last property has not been sold, which is the triggering event for distribution, and no breach of that obligation is alleged.

[36] Further, the pleadings are silent with respect to how the Investor’s Capital Invested equates to “net assets” at the end of the Project, or how “net assets” are divided between the respondents and others (the *inter alia*) on behalf of whom the Land is said to be held. The interest asserted by the respondents appears to be an

entitlement to be repaid that portion of the Investor's Capital Invested that can be paid out of "remaining net assets" upon the sale of the last property. The appellants say that claim is inconsistent with the asserted proprietary right.

[37] The pleadings in this case bear some resemblance to those in *Goel v. Dhaliwal*, 2022 BCCA 87. The plaintiff in that case had entered into a joint venture agreement to develop parcels of land into residential lots. He commenced an action against the other party after a parcel of land was transferred out to a related party in breach of the agreement and he registered a certificate of pending litigation against one of the parcels. On an application to cancel the certificate, the principal issue was whether the pleading advanced an interest in land. The plaintiff alleged that a remedial constructive trust had arisen as a consequence of the defendant's unjust enrichment. Justice Voith, writing for this Court, held that the provisions of the joint venture agreement relied upon in the pleadings contemplated that the lots held by the parties would be sold. Accordingly, when the appellants sought a remedy, they were seeking an order that the lot in issue be sold and "[t]hey [did] not seek any interest in the land itself": at paras. 36–41.

[38] In my respectful opinion, the pleadings in this case are similarly inadequate to support, and inconsistent with, a claim to an interest in land. While such a claim is asserted, it is only a bare pleading. The constructive trust is said to exist "[b]y reason of the facts described" in the pleadings at para. 31. However, the facts alleged cannot support the claim to an interest in land arising by constructive trust. For that reason, I would cancel the certificate of pending litigation.

Evidence of Interest in Land

[39] In colloquy, the learned chambers judge drew counsel's attention to the Agreement. She noted that it calls for property to be held in trust, and that might be a basis for finding a substantive constructive trust "on the face of the contract itself, or by some interpretation of the contract itself". She said:

... When you look at the schedules, when you look at the language ... it's clear there is a constructive trust. Or there's at least, you know, a triable issue as to whether there's a constructive trust ...

[40] That approach is reflected in the reasons in which, as I have noted, the judge held that the organizational chart at Schedule “B” “could be interpreted to support the allegation that the investors have an entitlement to the project and the property making up the project”: RFJ at para. 36.

[41] The respondents say this is a finding of mixed fact and law, to which we should afford deference. They say there is a *bona fide* triable issue with respect to how Schedule “B” should be read, and it was for the chambers judge to interpret it.

[42] In my respectful view, the evidence does not support the conclusion that the question whether the respondents can make out a claim to an interest in land is a triable issue. In her reasons, the chambers judge did not address the gist of the appellants’ argument that the Agreement, read as a whole, cannot support a constructive trust claim. The ambiguity read into Schedule “B” is insufficient evidence to support the trust claim.

[43] The Investors in this case expressly acknowledged that: their investment might be lost; they had no security; and, while the return on their investments was projected to be significant, the Project faced substantial financial risks which they accepted meant their capital was at risk for loss. The return to the Investors was thus always conditional on the development being successful, and there being money left over after the claims of those who stood before them in priority.

[44] The provisions of the Agreement that were not pleaded, but in evidence on the summary judgment application, only weaken the respondents’ constructive trust claim.

[45] In their pleadings, the respondents cite the provision in the Agreement that “Legal Title to the Properties are held by wholly owned subsidiaries of Trackside . . . as bare trustees” and that that 072 “holds the Lands as Bare Trustee on behalf of the Defendant, Trackside and for, *inter alia*, the Plaintiffs as Investors of Capital in the Project”. But the Agreement in evidence expressly provides: “Trackside and JC ... will hold the Properties of the Project through bare trustee subsidiaries”

(emphasis added). The whole of the Agreement makes it clear that 072 holds property as bare trustee for Trackside, not as bare trustee for the Investors. The Agreement makes no reference to 072 holding property for the Investors.

[46] Schedule “B” is consistent with the scheme as far as it describes Trackside as the owner of each of two subsidiaries RMT Land Corp and 072, which hold the Chilliwack Property in trust as bare trustee while Trackside “operates” those properties of the Project. It also indicates that JC owns 86th Ave Land Corp which holds the Langley Properties in trust as bare trustee while JC “operates” those properties.

[47] Schedule “B” graphically illustrates that the “Participating Loan Investors” provide financing to the Project and in return receive 50% of the “Profits”. The description of the return to the Investors is a gross oversimplification, as might be expected from a graphic representation of the Project. There is in fact no reference to Schedule “B” in the text of the Agreement other than its description on page 9 of the Agreement as an “organization[al] chart”, which is also how the chambers judge described it: RFJ at para. 35. The respondents provide no alternative or further explanation or function for the Schedule.

[48] The respondents plead that 072 “continues to hold the Lands in Trust as a Bare Trustee on behalf of the Defendant, Trackside, for the benefit of and by way of constructive trust and security in favour of, *inter alia*, the Plaintiffs to the extent of their Invested Capital” (emphasis added). They allege that pursuant to the Agreement there is a continuing obligation on Trackside to account to the Plaintiffs for return of their Investor’s Capital Invested until the “last Property” is sold.

[49] But, reading the Agreement as a whole, it is clear that the only financial duty owed to the respondents is an obligation to pay amounts determined to be due and payable from income generated during the Project, and available net assets at its end. It provides: “This Agreement sets [out] the rights of the Investors to profit sharing, return of Capital Invested, Project and financial reporting, approving of Project expansions and other matters”. The Investor’s Capital Invested is to be

returned to the Investors from the Project's income after paying expenses, and those who stand before the Investors in order of the priorities described in the Agreement. I note the Investor's Capital Invested is at point five on the priorities list.

[50] As described above, after setting out the order of priorities, the Agreement provides:

In the event that there is insufficient cash to pay the next point on the above list, then the distribution of cash ends. For example, if there is not sufficient cash to return all Capital Invested (Point #5) then there will be no profit sharing under Point #6.

The Investors acknowledge that in the event there is insufficient cash to return 100% of the Capital Invested, they shall have no recourse against the Developer, Trackside, JC or any other participant in the Project.

[51] The Agreement does not provide for the return of the Investor's Capital Invested at the end of the Project but, rather, that "the Project will end with the sale of the last Property and distribution of all remaining net assets according to the formulas set out herein" (emphasis added).

[52] There are therefore two conditions precedent to the respondents receiving any payment on the sale of the last property. First, there must be some remaining net assets. Second, the payments under the first four points on the priority list must have been made in full. This is far from an obligation "to account to the Plaintiffs for the return of their Capital".

[53] The chambers judge noted that the Agreement does not provide that there is no recourse "against the property". However, what recourse can there be if the Investors are not entitled to any repayment of the Investor's Capital Invested, and how can an interest in land arise from such a contingent obligation to make a cash distribution? I agree with the appellants' submission that the respondents have a contingent interest to a portion of a stream of earnings, and as in *Goel*, because the Agreement defines the Investors' interest in monetary terms it does not create an interest in the Property, including the Land.

[54] The appellants also point to evidence of the registration of title to establish that the Land was purchased in 2006, before the respondents invested in the Project, and so cannot have been acquired with the respondents' capital. That evidence is consistent with the respondents' characterization of the Project as an investment scheme about which there is nothing rare or extraordinary. There is no wrongdoing alleged on the part of the appellants or suggested in the evidence and no breach of contract or breach of trust is alleged. The Agreement defines the relationship between the parties as debt that will arise only if there are net assets at the end of the day and, therefore, may never materialize. It is insufficient to establish an interest in the Land.

Disposition

[55] I would allow the appeal, dismiss the claim for a declaration that 072 holds the Land in trust, together with the Defendant, Trackside, by way of constructive trust in favour of the Plaintiffs, and cancel the certificate of pending litigation on the Land.

"The Honourable Mr. Justice Willcock"

I AGREE:

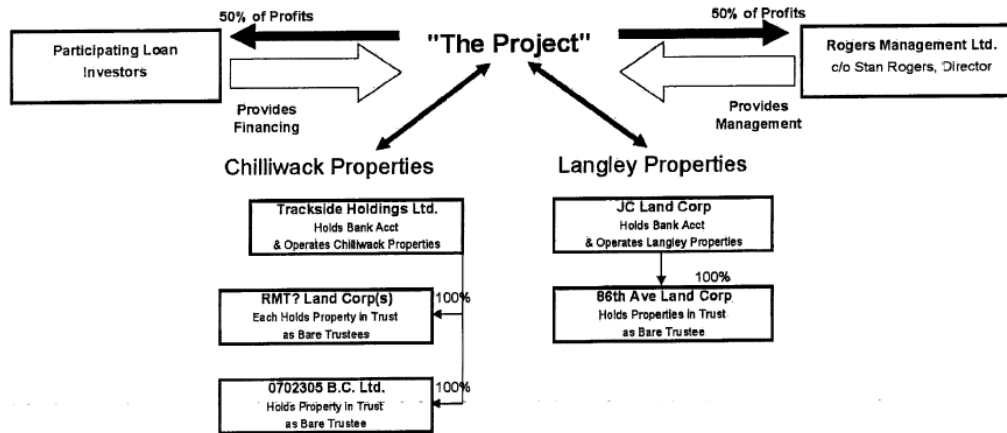
"The Honourable Justice Edelman"

I AGREE:

"The Honourable Justice Brundrett"

Appendix A

Trackside & JC Project Organization Chart



Schedule "B"