Clerk's Stamp:
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OCT 25 2013
JUDICIAL CENTRE
OF CALGARY

COURT FILE NUMBER	1201 15430
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	STANLEY EISENBERG, BRENDA EISENBERG, JACK EISENBERG, LYNN EISENBERG and EISENBERG'S PROPERTIES LTD.
DEFENDANT	910234 ALBERTA LTD., RANDY CALMUSKY, THERESA CALMUSKY, KYLE CALMUSKY, CALE HUMENIUK, JORDAN RINTOUL AND RYAN CALMUSKY
DOCUMENT	**BRIEF OF GRANT THORNTON LIMITED, in its capacity as Receiver/Manager of 910234 Alberta Ltd.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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File No. 56679-3

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I. INTRODUCTION

1. This Bench Brief deals with the issue of the liability of Randy Calmusky to the estate of 910234 Alberta Ltd. ("**910**") and its investors and Setting the amount of costs previously granted as against Theresa Calmusky on July 11, 2013.

II. RELEVANT FACTS

910 Assets in Trust and Assets Removed by Randy Calmusky

2. 910 was in the business of raising monies from investors and using those funds to lend to various borrowers in the construction industry. The relationship between 910 and the investors was governed by standard form mortgage service agreements drafted by 910 and executed by 910 and the investors (the "**Agreements**"). A sample copy of an Agreement is attached as **Tab A**.

Questioning of Randy Calmusky held May 3 and 10, 2013 ("**Calmusky Questioning**"), at pp. 22
Affidavit of Stanley Eisenberg sworn December 4, 2012, Exhibit "B"

3. Pursuant to the Agreements, the funds raised from the investors and the proceeds from the loans into which those funds were invested were to be held as trust property by 910 as trustee for the benefit of the various investors. Property acquired through realizations was similarly held in trust.

4. There was no provision in the Agreements for any compensation or remuneration in favour of 910. 910 planned to derive its revenue from the differential between the interest rate payable to investors under the Agreements and the interest paid by borrowers to 910. 910 was entitled to be reimbursed from loan proceeds for any legal or other expenses it incurred in administering the specific loans in question but aside from that, was not entitled to funds from investors on loan proceeds. All interest and/or principal received from borrowers was to be paid to investors.

Calmusky Questioning, at pp. 28-29

5. Randy Calmusky was the sole owner, director, officer and employee of 910. There was no written employment agreement between 910 and Randy Calmusky. Randy Calmusky has admitted that he simply caused 910 to pay him whatever he felt was appropriate from time to time.

Calmusky Questioning, at pp. 118-120

6. Randy Calmusky also caused 910 to pay various "expense" items which benefited Randy Calmusky, including meals, entertainment, golf club memberships, travel and vehicle expenses. These expense payments did not relate to any particular loans, but rather were for personal benefits to Randy Calmusky.

Receiver's Supplemental Sixth Report dated September 26, 2013 ("**Supplemental Report**"), at para. 32-38

7. From 2001 through 2012, Randy Calmusky caused 910 to pay him the sum of $1,041,349 as wages and expenses (not including legal expenses, which the Receiver acknowledges can properly be attributed to the loans of 910).

Supplemental Report, at para. 35

8. 910 did not enjoy a profit, due to a lack of a positive differential between the interest paid to investors and the interest paid by borrowers. Therefore, 910 had no income of its own with which to pay any amounts to Randy Calmusky for wages, expenses or any other person. Accordingly, the funds taken from 910 by Randy Calmusky could only have been funded from the investors' trust funds, the Toronto Dominion Bank line of credit ("**Line of Credit**") in the name of Randy and Theresa Calmusky or cash deposits by Randy Calmusky since these were the only sources of funds available to 910.

Supplemental Report, at para. 45

9. Randy Calmusky also caused 910 to transfer real property in Langdon, Alberta, obtained by 910 through foreclosure actions to Randy Calmusky and his relatives. Randy Calmusky subsequently obtained mortgages against those properties and sold the properties to third parties. At no time did Randy Calmusky return any excess proceeds of the mortgages or profits on the sale of the properties to 910. The Receiver has calculated the value of mortgage surpluses and profits on the sale of property at $415,627.

Receiver's Sixth Report dated August 27, 2013 ("**Sixth Report**"), at para. 50-56
Supplemental Report, at para. 48

10. Randy Calmusky caused the sum of $210,806, arising from the collection of a judgment against Mika Developments, obtained by 910, to be paid to himself personally. He did not remit those amounts to 910.

Sixth Report, at para. 66
Supplemental Report, at para. 48

11. Based on the analysis of cash and other property received by Randy Calmusky, and after deducting the net amount of funds advanced to 910 from the Line of Credit and all funds deposited personally by Randy Calmusky to 910's account, the Receiver has calculated that Randy Calmusky has removed a total of $966,421 from the estate of 910, which funds were the property of the investors. This amount does not include the "Trico Properties" which were preserved through the present Attachment Order.

Costs

12. On July 11, 2013, this Honourable Court granted an Order requested by the Receiver, which was opposed by Theresa Calmusky. Ms. Calmusky's counsel raised several issues including the interpretation of several sections of the *Bankruptcy and Insolvency Act* ("BIA"), the Alberta *Business Corporations Act* ("**ABCA**"), the Receivership Order, previous Applications, the standing of the Receiver and the entitlement of the Court to grant a *nunc pro tunc* Order. Written Submissions were provided by the parties and a half day contested Application was required.

13. Following of the granting of the Order, counsel for the Receiver made several inquiries with counsel for Ms. Calmusky with respect to the appropriate amount of costs, but has received no response, whether in respect of the specific amounts suggested by the Receiver or in respect of general comments.

III. ISSUES

14. The issues in this Brief are:

   (a) Did Randy Calmusky remove the assets from 910?

   (b) Is Randy Calmusky liable to repay the funds?

   (c) What are the appropriate costs arising from the July 11, 2013 Application?

IV. LAW AND ARGUMENT

The Funds Were Property of the Investors Held in Trust by 910

15. It is submitted that there is no doubt that the funds and real property described in the Statement of Facts above were trust property. Under the Agreements, 910 (referred to in the Agreements as the "Administrator") sold a portion of the relevant mortgage loan to the investor (described in the

Agreement as a "Purchaser". The Administrator agreed to service the loan "for and on behalf of the Purchaser".

16. The Agreements state that if any property secured by the loan is acquired by 910, that it would acquire title as trustee on behalf of the Purchaser.

17. Finally, the Agreements state:

> It is understood and agreed by the parties hereto that the relationship between them shall be that of trustee (the Administrator), the beneficiary (the Purchaser"). All monies collected by the Administrator on account of principal, interest or otherwise in respect of the loan and such monies shall be held in trust for the beneficial use of the Purchaser.

18. Randy Calmusky was the sole shareholder, director and officer of 910. He was the signatory on behalf of 910 for every Agreement. Mr. Calmusky admitted that he was aware of the terms of the Agreements and used the same standard template for all of his investors.

19. The only paragraph in the Agreements related to remuneration of 910 is paragraph 8.10 which limits remuneration to "all out of pocket expenses incurred in administering the loan".

20. The foregoing results in the following conclusions:

(a) All principal, interest and property received in connection with each loan was the property of the investors held in trust by 910.

(b) The only reduction in the amounts held in trust were to be reimbursements for out of pocket expenses "incurred in administering the loan". This did not include general overhead or other expenses of 910.

21. The evidence further discloses that the only way 910 would receive any income would be to receive interest from borrowers over and above the interest rate stipulated in the Agreements. 910 would then retain the differential between the 2 interest rates. However, the Receiver's analysis shows that there was in fact a negative interest differential. Accordingly, 910 had no income from the loans.

22. The only other areas of funding for 910 were the Line of Credit and cash injections by Randy Calmusky. The Receiver has analyzed and calculated the net amount advanced by the Line of Credit to 910 (totalling $743,758) and has further accounted for cash deposits by Randy Calmusky to 910's accounts (totalling $326,603).

23. Randy Calmusky took money and real property from 910 which he knew was being held in trust. The amounts advanced by the Line of Credit and Randy Calmusky personally did not cover the value of the trust property which was removed. Accordingly, Randy Calmusky removed trust property in the net amount of $966,421 (on the most generous analysis by the Receiver).

Oppression

24. Pursuant to s. 242 of the ABCA **[Tab 1]**, a complainant may apply to the Court for an Order relating to oppressive or unfairly prejudicial acts by a corporation or its directors. A Court may make any interim or final order it seems fit, including an order varying or setting aside a transaction and compensating the corporation or any other party, an order compensating an aggrieved person, or an order directing the corporation or any other persona to pay to a security holder or any part of money paid by the security holder for securities.

25. The test set out in the legislation is whether acts or powers have been exercised are "oppressively or unfairly prejudicial to or unfairly disregard the interests" the complainant. The Courts held that the test of unfair prejudice or unfair disregard encompasses the protection of the underlying expectation of stakeholders.

864789 Alberta Ltd. v. Haas Enterprises Inc. [2008] ABQB 555, at para. 47-49 **[Tab 2]**

26. A complainant's reasonable expectations include:

(a) That the corporation will not be used as a vehicle for fraud;

(b) That the corporation will not convey away, for no consideration, exigible assets which will leave the stakeholder unpaid and unable to realize on assets to satisfy the obligations;

(c) That the directors for the corporation will manage the company in accordance with their legal obligations, namely to act honestly and in good faith in the best interest of the corporation and to exercise the diligence expected of a reasonably prudent person; and

(d) That the corporation will honour the understandings and expectations which it created and encouraged.

Builder's Floor Centre Ltd. v. Thiessen, [2012] ABQB 86, at para. 43 **[Tab3]**

27. Where a corporation and its directors transfer assets which reduce the pool of assets available to pay stakeholders, it has acted in an oppressive and unfairly prejudicial manner.

Ibid at para. 46

28. The remedy for oppression is "any Order that the Court sees fit". In this case, it is appropriate for Mr. Calmusky to return funds which he has removed from 910 to the detriment of its investors. It is submitted that this is akin to setting aside the payments to Mr. Calmusky or compensating the investors for repayment of part of the money paid by those investors for their securities. These remedies are specifically included in the oppression of the ABCA.

Thiessen, supra, at Tab 2, para. 62-63

Breach of Fiduciary Duty/Trust

29. As set out above, it is clear that the funds and other property held by 910 were held in trust for the benefit of investors. 910 was the trustee and Mr. Calmusky was the directing mind of 910. As a director, he acted in a fiduciary capacity with respect to 910 and owed an obligation to act in the best interests of 910 and its stakeholders.

30. Where trust property has been removed, the property remedy is to restore the property or its value to the trust. Where a third party to the trust (in this case Mr. Calmusky) receives trust property with the knowledge that it is subject to a trust, it holds that property as a constructive trustee and is liable to compensate the beneficiaries.

Northland Bank v. Barnieh, [2001] ABCA 137, para. 15 **[Tab 4]**

31. The test for "knowing receipt" of trust property, which is a species of unjust enrichment, is as follows:

(a) The property is subject to a trust;

(b) The property was removed in breach of the trust; and

(c) The recipient did not take the property as a *bona fide* purchaser for value without notice.

Eaton v. HMS Financial Inc. [2010] ABQB 635, para 24-29 **[Tab 5]**

32. A recipient may be held to have knowledge of the nature of the property in the following ways:

(a) Actual knowledge;

(b) Willfully shutting one's eyes to the obvious;

(c) Willfully and recklessly failing to make such inquiries as an honest and reasonable man would make;

(d) Knowledge of circumstances which indicate the facts to an honest and reasonable man; and

(e) Knowledge of circumstances which would put an honest and reasonable man on inquiry.

Eaton, supra, at Tab 5

33. It is submitted that this case is similar to the case in *Ernst & Young Inc. re Central Guaranty Trust Companies*, [2010] ABQB 26 **[Tab 6]**. In that case, it was established that property was held in trust. The trustee deposited the funds with a third party. The third party, knowing the funds received were intended to be trust funds, paid sums to the trustee for its own use and used some funds for the third party's own benefit, contrary to the trusts purpose.

34. The receiver of the trustee in *Guaranty Trust* made an application for the monies to be returned to the trust and disbursed in the receivership action. The Court agreed that the appropriate remedy was restitution of the funds removed to the trust. The actual amount was to be ascertained by the receiver since it had not been prepared at the time of the application.

35. It is submitted that, in light of the foregoing cases, the appropriate remedy for the breach of trust by 910 and the knowing receipt of trust property by Randy Calmusky, is the restitution and repayment of the value of that property by Randy Calmusky to the estate of 910, for distribution to its investors by the Receiver.

Costs of the July 11, 2013 Application

36. It is submitted that the opposition to the Application by the Receiver was unfounded and unnecessary, and that the many issues to which the Receiver was required to respond were wholly without merit.

37. This Honourable Court has indicated that Schedule C is presently inadequate to properly address the purpose and appropriate quantum of party party costs (in relation to the actual legal fees incurred).

See *LSI Logic Corp. of Canada Inc. v. Logani* [2001] ABQB 986, at para. 7-23 **[Tab 7]** and *Indutech Canada Limited v. Gibbs Pipe Distributors Ltd.* [2012] ABQB 425, at para 3-8 **[Tab8]**

38. Column 5 is the appropriate Column of Schedule C for an application confirming the Receiver's power to assign 910 into bankruptcy, given the approximate size of the estate of 910, which exceeds $1.5 million.

39. It is also submitted that a multiple of Column 5 is appropriate given inflation since Schedule C was enacted and the issues raised in the Application. Further, the fact that the Application was wholly unnecessary and should have been achieved on a consent basis is a factor the Court should include in determining the correct amount of costs.

40. It is therefore submitted that an appropriate award of costs for the contested Application, with Written Submissions, is $4,000.00. This is an amount equal to 2 times item 8(1) of Column 5.

V. CONCLUSION

41. For the foregoing reasons, the Receiver submits that:

(a) Randy Calmusky should pay the amount of $966,421 to the Receiver in compensation for amounts received by Randy Calmusky in breach of trust;

(b) Costs ordered against Theresa Calmusky for the July 11, 2013 Application should be set at $4,000.00, plus reasonable disbursements;

(c) The Receiver should receive costs of the within Application as against Randy Calmusky in the amount of $5,000.00, plus reasonable disbursements, or such other amount as the Court directs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FIELD LLP

Per: ______________________

Douglas S. Nishimura, solicitor for the Receiver, Grant Thornton Limited

TABLE OF AUTHORITIES

TAB A

MORTGAGE SALE AND SERVICING AGREEMENT

THIS Agreement made in duplicate this 11th day of September, 2006.

BETWEEN:

THIS IS EXHIBIT "B" to the Affidavit of Stanley Eisenberg Sworn before me this 4th day of December 2012

A Commissioner for Oaths/Notary Public In and for the Province of Alberta

Jeffrey L. Oliver
A Notary Public

910234 ALBERTA LTD.,
47 Woodhaven Manor S.W., Calgary, Alberta, T2W 5P6
(hereinafter called the "Administrator")

OF THE FIRST PART

-and-

STANLEY EISENBERG
(hereinafter called the "Purchaser")

OF THE SECOND PART

WHEREAS the Administrator has entered into a Loan Agreement dated February 20, 2006 with Woodmaster Homes Ltd. (the "Borrower") wherein, inter alia, the Administrator has agreed to advance to the Borrower the sum of TWO MILLION, AND FIFTY THOUSAND DOLLARS ($2,050,000.00) (hereinafter referred to as the "Loan") which is secured by a first mortgage on the lands set forth in Schedule "A" hereto;

AND WHEREAS the Administrator has agreed to sell to the Purchaser and the Purchaser has agreed to purchase from the Administrator a portion of the Loan on the terms and conditions hereinafter set forth;

AND WHEREAS the Administrator has agreed to administer and service the Loan in trust for and on behalf of the Purchaser;

NOW THEREFORE this Agreement witnesseth in consideration of the mutual covenants contained herein and for valuable consideration the parties hereto covenant and agree as follows:

ARTICLE I
SALE AND PURCHASE OF LOAN

1.01 The Administrator hereby sells, transfers and assigns unto the Purchaser, its successors and assigns, and the Purchaser hereby purchases from the Administrator that portion of the Loan as set forth below:

Consideration	Undivided Interest
$20,000	%

The Purchaser shall beneficially own the Loan as a tenant in common with all other participants in the Loan and who have entered into similar Mortgage Sale and Servicing Agreements with the Administrator, each as to an undivided interest.

ARTICLE II
WARRANTIES

2.01 The Administrator hereby represents and warrants as of the date hereof as follows:

(a) that the particulars set out in Schedule "A" with respect to the Loan are true; and

(b) that the Loan is in good standing and not in default.

ARTICLE III
ADMINISTRATION OF LOAN

3.01 The Administrator agrees to administer and service the Loan for and on behalf of the Purchaser in accordance with the terms of this Agreement. The Administrator agrees to give to the administration and service of the Loan the same standard of care as normally given to its own loans.

3.02 Without in any way limiting the generality of the foregoing, the Administrator agrees that such administration and service with respect to the Loan will include:

(a) keeping a loan account;

(b) collecting principal, interest and other monies (if any) to which the holders of the Loan are entitled;

(c) remitting to the Purchaser promptly as received all payments on account of principal, interest and other monies (if any) to which the Purchaser is entitled after making all deductions authorized pursuant to this Agreement;

(d) furnishing the Purchaser annually with a statement of account showing receipts and disbursements and balance of the Loan outstanding at the first day of such month;

(e) giving notices to the Purchaser in respect of amounts overdue;

(f) maintaining fire and other insurance (where applicable) to protect the interest of the Purchaser in all property charged by the Loan;

(g) taking of such steps as may be necessary for the exercise of any remedy available to the Purchaser in the event of default occurring under the Loan;

(h) providing any necessary services in connection with instituting and conducting a judicial action with respect to any default under the Loan.

3.03 No addition, amendment or other alteration shall be made to the terms of the Loan without the prior written consent of the Purchaser.

3.04 The Loan documents and the security given thereunder shall be registered in the name of the Administrator only.

ARTICLE IV
DEFAULT

4.01 If the Loan is in arrears the Administrator may take such action and exercise all such rights and remedies as it considers advisable in its sole discretion, in the circumstances to protect the Loan security or enforce payment of the Loan debt.

4.02 The Administrator may advance moneys which the Administrator deems necessary in order to protect the security and all benefits respecting the Loan. Any and all moneys advanced by the

Administrator shall be advanced and shared by all participants in the Loan to the extent of their proportionate participation in the total Loan.

ARTICLE V
ACQUISITION OF TITLE

5.01 If the Administrator acquires title to the property secured by the Loan it shall acquire title as trustee on behalf of the Purchaser and the Administrator shall forthwith give notice of such acquisition of title to the Purchaser and upon the advice of the Purchaser deliver a registrable transfer for the property to the Purchaser.

ARTICLE VI
TRANSFER OF LOAN

6.01 Upon written request of the Purchaser, and at the expense of the Purchaser, the Administrator agrees to prepare, executed and deliver to the Purchaser good and proper assignments or transfers of the said Loan in favour of the Purchaser or their nominee together with any other documentation relating to the said Loan necessary to effect registration of same. The Purchaser shall be entitled to register the assignments or transfers of the said Loan at any time but in such event the Administrator shall continue to administer and service the said Loan for and on behalf of the Purchaser in accordance with the terms of this Agreement.

ARTICLE VII
ASSIGNMENT OF LOAN BY PURCHASER

7.01 Nothing herein shall prevent the interest in the Loan or this Agreement from being sold, transferred or assigned by the Purchaser to a third party or third parties but the Purchaser shall give notice to the Administrator of such sale, transfer or assignment within fifteen (15) days of the date thereof and such notice shall advise the Administrator of the name and address of the transferee, assignee or purchaser.

7.02 It is understood that if the Purchaser sell, transfer or assign any or all of their interest in the Loan it shall be a term of such sale, assignment or transfer that the Transferee, Assignee or Purchaser shall execute a similar servicing Agreement with the Administrator covering this Loan.

ARTICLE VIII
REMUNERATION OF ADMINISTRATOR

8.01 The Administrator shall be reimbursed for all out of pocket expenses incurred in administering the Loan, including but not limited to the cost of all solicitors, agents and other experts retained by the Administrator, and monies advanced by the Administrator to protect the security, provided the Administrator acts in accordance with this Agreement. Such costs will be payable pro rata by the Purchaser in accordance with the ownership interest in the Loan and the Administrator is hereby authorized to deduct and retain from payments that are to be made to the Purchaser such costs.

ARTICLE VIX
USE OF AGENTS

9.01 In administering and servicing the said Loan, the Administrator may retain solicitors, experts and agents. The Administrator shall be entitled to rely on the opinion and advice of such solicitors, experts and agents.

ARTICLE X
DISCHARGE OF LOAN

10.01 The Administrator shall have the right to execute and deliver a good and proper discharge of the Loan and the security granted upon payment to it, in accordance with the terms of such Loan, of all principal and interest together with any other monies secured by such Loan.

ARTICLE XI
TRUSTEE-BENEFICIARY RELATIONSHIP

11.01 It is understood and agreed by the parties hereto that the relationship between them shall be that of Trustee (the Administrator) and Beneficiary (the Purchaser). All monies collected by the Administrator on account of principal, interest or otherwise in respect of the Loan and such monies shall be held in trust for the beneficial use of the Purchaser.

11.02 It is expressly understood and agreed that the Administrator's participation is in no way deemed a loan by the Administrator or a borrowing by the Administrator and the repayment of the Loan is in no way, either directly or indirectly guaranteed by the Administrator.

ARTICLE XII

TERMINATION OF AGREEMENT

12.01 Provided that the Administrator has received all remuneration, costs, charges and expenses to which it is entitled hereunder, this Agreement shall be terminated upon the happening of:

(a) repayment to the Purchaser of all monies secured by the said Loan, or renewal thereof, less deductions authorized hereunder; or

(b) the termination of this Agreement by mutual consent in writing of all parties;

whichever shall first occur.

ARTICLE XIII

NOTICES

13.01 All notices, reports, requests, instructions, demands and other communications (hereinafter referred to as "notices") provided to be given hereunder by one Party to the other Party shall be deemed to have been properly given if such notice is personally delivered to the office of the other Party or if such notice is sent by prepaid regular first class mail addressed to the office of the other Party. The addresses of the respective offices of the Parties for such purposes are:

The Administrator:	910234 Alberta Ltd. 47 Woodhaven Manor S.W. Calgary, Alberta, T2W 5P6
The Purchaser:	Stanley Eisenberg 3120 Palliser Dr. S.W. Calgary, Alberta T2V 4B7

13.02 Any such notices sent by prepaid regular first class mail addressed as aforesaid shall be deemed to have been given to the Party to whom it is addressed on the fourth business day following the date of mailing. Either Party may change the address of its office for the foregoing purposes by giving the other Party notice of such change of address as provided aforesaid.

ARTICLE XIV
GOVERNING LAW

14.01 This Agreement shall be governed by and construed in accordance with the laws of the Province of Alberta, Canada.

ARTICLE XV
ENUREMENT

15.01 This Agreement shall extend to, be binding upon and enure to the benefit of the Parties hereto and the assignees of the said Loan pursuant to paragraph 6 hereof, and their respective successors and assigns.

ARTICLE XVI
PARAGRAPH HEADINGS

16.01 The headings of paragraphs in this Agreement are provided for convenience only and shall not effect the interpretation of the paragraphs.

IN WITNESS WHEREOF the Parties hereto have executed this Agreement.

910234 ALBERTA LTD.

Per:____________________________

____________________________ ____________________________

Witness to Purchaser's Signature [Signature of Purchaser]

AFFIDAVIT OF EXECUTION

CANADA	)	I, RANDY CALMUSKY,
	)	[Print name of witness]
PROVINCE OF ALBERTA	)	of the City of Calgary, in the Province of Alberta,
TO WIT:	)	MAKE OATH AND SAY:

1. That I was personally present and did see STANLEY EISENBERG. [Print name of Purchaser(s)] ________________ named in the within Instrument who is/are personally known to me to be the person(s) named therein, duly sign and execute the same for the purposes named therein;

2. That the same was executed at the City of Calgary, in the Province of Alberta, and that I am the subscribing witness thereto;

3. That I know the said party and he/she/they are/is in my belief of the full age of eighteen years.

SWORN BEFORE ME at the City of Calgary, in the Province of Alberta, this ___ day of ________ 2004.)

[Witness signature]

____
A Commissioner for Oaths in and for the Province of Alberta

My Commission Expires:

SCHEDULE "A"

LANDS

Parcel 1
Lot 5 Block 6 Plan 0510162

Parcel 2
Lot 2 Block 28 Plan 0412056

Parcel 3
Lot 10 Block 6 Plan 0510162

Parcel 4
Lot 20 Block 4 Plan 0510162

Parcel 5
Lot 1 Block 6 Plan 0510162

Parcel 6
Lot 16 Block 11 Plan 9912644

Parcel 7
Lot 2 Block 30 Plan 0412056

Parcel 8
Lot 22 Block 4 Plan 0510162

Parcel 9
Lot 13 Block 5 Plan 0510162

Parcel 10
Lot 15 Block 4 Plan 0514068

Parcel 11
Lot 20 Block 7 Plan 0514068

TERMS

Borrower:	Woodmaster Homes Ltd.
Property Mortgaged:	See Schedule "A"
Priority of Mortgage:	First Mortgage
Loan Amount:	$2,050,000
Interest Rate:	Eleven (11%) per annum
Interest Paid:	Monthly
Term:	One (1) Year

TAB 1

Part 19
Remedies, Offences and Penalties

Definitions

239 In this Part,

(a) "action"means an action under this Act or any other law;

(b) "complainant"means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor

(A) in respect of an application under section 240, or

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

1981 cB-15 s231;2000 c10 s3

Commencing derivative action

240(1) Subject to subsection (2), a complainant may apply to the Court for leave to

(a) bring an action in the name and on behalf of a corporation or any of its subsidiaries, or

(b) intervene in an action to which a corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing the action on behalf of the corporation or subsidiary.

(2) No leave may be granted under subsection (1) unless the Court is satisfied that

(a) the complainant has given reasonable notice to the directors of the corporation or its subsidiary of the complainant's intention to apply to the Court under subsection (1) if the directors of the corporation or its subsidiary do not bring, diligently prosecute, defend or discontinue the action,

(b) the complainant is acting in good faith, and

(c) it appears to be in the interests of the corporation or its subsidiary that the action be brought, prosecuted, defended or discontinued.

(3) Notwithstanding subsection (2), when all the directors of the corporation or its subsidiary have been named as defendants, notice to the directors under subsection (2)(a) of the complainant's intention to apply to the Court is not required.

RSA 2000 cB-9 s240;2005 c8 s54

Powers of the Court

241 In connection with an action brought or intervened in under section 240 or 242(3)(q), the Court may at any time make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order authorizing the complainant or any other person to control the conduct of the action;

(b) an order giving directions for the conduct of the action;

(c) an order directing that any amount adjudged payable by a defendant in the action shall be paid, in whole or in part, directly to former and present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary;

(d) an order requiring the corporation or its subsidiary to pay reasonable legal fees incurred by the complainant in connection with the action.

1981 cB-15 s233

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver–manager;

(c) an order to regulate a corporation's affairs by amending the articles or bylaws;

(d) an order declaring that any amendment made to the articles or bylaws pursuant to clause (c) operates notwithstanding any unanimous shareholder agreement made before or after the date of the order, until the Court otherwise orders;

(e) an order directing an issue or exchange of securities;

(f) an order appointing directors in place of or in addition to all or any of the directors then in office;

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

(h) an order directing a corporation or any other person to pay to a security holder any part of the money paid by the security holder for securities;

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

(m) an order directing rectification of the registers or other records of a corporation under section 244;

(n) an order for the liquidation and dissolution of the corporation;

(o) an order directing an investigation under Part 18 to be made;

(p) an order requiring the trial of any issue;

(q) an order granting leave to the applicant to

(i) bring an action in the name and on behalf of the corporation or any of its subsidiaries, or

(ii) intervene in an action to which the corporation or any of its subsidiaries is a party, for the purpose of prosecuting, defending or discontinuing an action on behalf of the corporation or any of its subsidiaries.

(4) This section does not confer on the Court power to revoke a certificate of amalgamation.

(5) If an order made under this section directs an amendment of the articles or bylaws of a corporation, no other amendment to the articles or bylaws may be made without the consent of the Court, until the Court otherwise orders.

(6) If an order made under this section directs an amendment of the articles of a corporation, the directors shall send articles of reorganization in the prescribed form to the Registrar together with the documents required by sections 20 and 113, if applicable.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles is effected under this section.

(8) An applicant under this section may apply in the alternative under section 215(1)(a) for an order for the liquidation and dissolution of the corporation.

1981 cB-15 s234

Court approval of stay, dismissal, discontinuance or settlement

243(1) An application made or an action brought or intervened in under this Part shall not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the corporation or its subsidiary has been or may be approved by the shareholders of the corporation or the subsidiary, but evidence of approval by the shareholders may be taken into account by the Court in making an order under section 215, 241 or 242.

(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the Court given on any terms the Court thinks fit and, if the Court determines that the interests of any complainant may be substantially affected by the stay, discontinuance, settlement or dismissal, the Court may order any party to the application or action to give notice to the complainant.

(3) A complainant is not required to give security for costs in any application made or action brought or intervened in under this Part.

(4) In an application made or an action brought or intervened in under this Part, the Court may at any time order the corporation or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements, but the complainant may be held accountable for the interim costs on final disposition of the application or action.

1981 cB-15 s235

Court order to rectify records

244(1) If the name of a person is alleged to be or to have been wrongly entered or retained in, or wrongly deleted or omitted from, the registers or other records of a corporation, the corporation, a security holder of the corporation or any aggrieved person may apply to the Court for an order that the registers or records be rectified.

(2) If the corporation is a distributing corporation, an applicant under this section shall file notice of the application with the Executive Director.

(3) In connection with an application under this section, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order requiring the registers or other records of the corporation to be rectified;

(b) an order restraining the corporation from calling or holding a meeting of shareholders or paying a dividend before the rectification;

(c) an order determining the right of a party to the proceedings to have the party's name entered or retained in, or deleted or omitted from, the registers or records of the corporation, whether the issue arises between two or more security holders or alleged security holders, or between the corporation and any security holders or alleged security holders;

(d) an order compensating a party who has incurred a loss.

1981 cB-15 s236;1988 c7 s3;1995 c28 s64

Court order for directions

245 The Executive Director may apply to the Court for directions in respect of any matter concerning the Executive Director's duties under this Act, and on the application the Court may give any directions and make any further order that it thinks fit.

1981 cB-15 s237;1988 c7 s3;1995 c28 s64

Refusal by Registrar to file

246(1) If the Registrar refuses to file any articles or other document required by this Act to be filed by the Registrar before the articles or other document become effective, the Registrar shall, within 20 days after its receipt by the Registrar or 20 days after the Registrar receives any approval that may be required under any other Act, whichever is the later, give written notice of the Registrar's refusal to the person who sent the articles or document, giving reasons for that refusal.

(2) If the Registrar does not file or give written notice of the Registrar's refusal to file any articles or document within the time limited in subsection (1), the Registrar is deemed for the purposes of section 247 to have refused to file the articles or document.

1981 cB-15 s238

TAB 2

Court of Queen's Bench of Alberta

Citation: 864789 Alberta Ltd. v. Haas Enterprises Inc., 2008 ABQB 555

Date:20080909
Docket: 0703 02341
Registry: Edmonton

Between:

864789 Alberta Ltd. and Donald Gibson

Plaintiffs

- and -

Haas Enterprises Inc., Alberta Custom Tee Ltd., Alberta Custom Tee (2006) Ltd., Haas Leasing Inc. and Peter Haas

Defendants

Reasons for Judgment
of the
Honourable Madam Justice D.L. Shelley

Terms Used in this Judgment

[1] In this Judgment the following words and expressions shall have the following meanings:

- "*ABCA*" means the Alberta Business Corporations Act, R.S.A. 2000, c. B-9;
- "ACT" means Alberta Custom Tee Ltd.;
- "ACT 2006" means Alberta Custom Tee (2006) Ltd.;
- "Applicants" means collectively 864789 and Gibson;
- "864789" means 864789 Alberta Ltd.;
- "Enterprises" means Haas Enterprises Inc.;
- "Gibson" means Donald Gibson;
- "Haas" means Peter Haas;
- "Leasing" means Haas Leasing Inc.;

- "Respondents" means collectively Enterprises, ACT, ACT 2006, Leasing and Haas;
- "USA" means a Unanimous Shareholders Agreement within the meaning of the *ABCA*.

Nature of the Application

[2] The Applicants allege that:

(a) The actions of Enterprises and Haas have been and continue to be oppressive and unfairly prejudicial to their interests;

(b) The business and affairs of Leasing and ACT have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or unfairly disregards their interests;

(c) The powers of Haas as a Director of Leasing have been exercised in a manner which is oppressive or unfairly prejudicial to or that unfairly disregards their interests; and

(d) There has been a breakdown of confidence and good faith between the Applicants and the Respondents.

[3] Therefore the Applicants have brought this application pursuant to Sections 242 and 243 of the *ABCA,* seeking relief under what is commonly referred to and will sometimes be referred to by me as the "oppression remedy".

[4] In their Notice of Motion the Applicants sought various remedies, some of which, for reasons which will be outlined later in this Judgment, are no longer viable. As a result, the Applicants suggest that one of the following remaining remedies are the most appropriate in the circumstances:

(a) an Order directing Enterprises to complete the purchase of 864789's shares for $301,737.50 or, alternatively,

(b) directing that those shares be valued and redeemed as at August 15, 2005.

Background

[5] In November 1993, Gibson began employment with ACT as a general labourer. In 1997 he became plant manager, with duties that included "sales and purchase, staffing, scheduling, product design". At that time, Gibson acquired (through his holding company, 864789) 10.1% of the shares in ACT and entered into a USA (the "1997 USA"). Prior to that, ACT had been a

wholly owned subsidiary of Leasing. Haas was the sole Director of Leasing and one of ACT's Directors.

[6] The Applicants allege that Gibson acquired "managerial duties" for Leasing in 1999. Although the Defendants deny this in their Statement of Defence, they do not explicitly dispute this in the materials filed in connection with the application. Rather, they assert that Gibson was never a Leasing employee, as he never received either a T4 slip or pay cheque from Leasing. Gibson has never been a Director of ACT or Leasing.

[7] As a result of a restructuring done in 2000, 864789's shares in ACT were exchanged for 10.1% of the shares in Leasing. As a result, Gibson, 864789, Haas and Enterprises entered into a new USA (the "2000 USA"). Save for changes in some names and dates, its provisions were essentially identical to the 1997 USA.

[8] The 2000 USA included the following provisions:

> "3. No dividend will be declared on any Common Shares or Preferred Shares of the Corporation (or shares of ACT) without the consent of all parties to this Agreement. . . .
>
> 9. In the event the Controlling Shareholder of 864789 is terminated for any reason as an employee of the Corporation, then 864789 agrees to sell and HEI agrees to purchase all of 864789's shares as determined by paragraph 15 of this Agreement (hereinafter referred to in this paragraph as the "Valuation"). The payment for and transfer of 864789's shares shall occur as follows:
>
> (a) Within 30 days of the termination of the Controlling Shareholder of 864789 as an employee the Corporation, HEI shall pay to 864789 1/3 of the Valuation amount and 864789 shall transfer ½ of its shares to HEI. HEI shall also cause the Corporation to repay to 864789 all outstanding shareholder loans by said date;
>
> (b) Within 1 year of the event set out in subparagraph (a), HEI shall pay an additional 1/3 of the Valuation amount to 864879 and 864879 shall transfer the remaining 50 percent of its shares in the Corporation to HEI; and
>
> (c) Within 1 year from the event set out in sub-paragraph (b), HEI shall pay to 864789 the remaining 1/3 of the Valuation. . . .
>
> 17. The Controlling Shareholder of HEI agrees to consult with the Controlling Shareholder of 864789 on any major decisions affecting the Corporation or ACT

> and in particular as they relate to any expenditures which would be considered to be out of the ordinary course of business."

"Corporation" was defined as Haas Leasing Inc. and "HEI" was defined as Haas Enterprises Inc. Gibson was the Controlling Shareholder of 864789 and Haas was the Controlling Shareholder of HEI. Enterprises, Haas, 864789, Gibson, Leasing and ACT were parties to the 2000 USA.

[9] Gibson's employment was terminated on August 15, 2005. This was confirmed in at least two letters, each dated August 22, 2005 and sent by the Respondents' solicitors:

1. The first was sent to 864789, to the attention of Gibson, advising that "your employment with Alberta Custom Tee Ltd. and Haas Leasing Ltd. has been terminated for cause". It went on to confirm that the provisions of Sections 9 and 15 of the 2000 USA had come into effect;

2. The second was sent to KPMG LLP, copied to 864789 to the attention of Gibson, confirming that Gibson's employment with ACT had been terminated. This letter further confirmed that this termination was a triggering event referred to in paragraph 9 of the 2000 USA, and therefore a valuation of Leasing's shares was required for the purposes of the buyout contemplated in paragraph 15.

[10] The Applicants had suggested that an informal valuation be done; but Leasing, Enterprises and Haas insisted on a formal valuation by a certified business valuator and indicated their preference that KPMG be the valuator, as KPMG had acted earlier for the Haas group of companies. KPMG began the valuation process. While it was underway there was an exchange of numerous letters between counsel, which addressed items of contention including: disagreements over setoffs against the shareholder's loan account arising from alleged amounts owed by Gibson personally, and whether such amounts were referable to the construction of a garage at Gibson's residence or to a car purchase; and whether a minority shareholder discount ought to be applied to the purchase price of the shares. In July of 2006 counsel for the Respondents presented a draft statement of adjustments which stated that it related to the purchase of shares of 864789 pursuant to the 2000 USA.

[11] KPMG proceeded to complete the valuation. Their valuation report was issued October 23, 2006, valuing the fair market value of all of the shares of Leasing in the range of between $2,668,000 and $3,300,700 (or $1,334 to $1,653.50 per share), after deducting net shareholder loans payable. KPMG had no comment as to the applicability of a minority discount.

[12] Under cover of a letter dated October 31, 2006, the solicitors for Haas, Enterprises and Leasing delivered a cheque for $135,765.10 to the Applicants' solicitor. The letter confirmed that the cheque was being tendered in connection with the purchase of 864789's shares in Leasing pursuant to paragraph 9 of the 2000 USA. It also confirmed that a further payment of $90,623.07 would be payable in one year's time. The Applicants directed their solicitor to return

the cheque, taking the position that payment of $181,667.29 was called for under the agreement, which sum represented two-thirds of the valuation amount determined by KPMG. The letter also demanded payment of an additional amount of $100,579.16 on or before August 15, 2007. Counsel for the Respondents immediately advised counsel for the Applicants that they would be recommending that the funds be paid in to court, with a request that 864789's shares be transferred to Enterprises. The letter further confirmed that "We are ready, willing and able to pay the funds forwarded to you without limiting your right to argue the amount or consideration properly payable and the outstanding shareholder loan account.... you have refused our client's funds and also refused to transfer the shares which are now beneficially owned by our client" (emphasis added).

[13] On December 15, 2006 the Respondents' counsel sent a letter to the Applicants' counsel advising that the Respondents now took the position that Gibson had never been in the employment of Leasing and that the earlier correspondence indicating that his employment had been terminated by Leasing was an error. The Respondents further took the position that, as a result, they no longer had a "right to acquire" 864789's shares in Leasing.

[14] Also on December 15, 2006, there was a meeting of the Board of Directors of ACT in which the Directors discussed the corporation's reduced earnings and a potential liability claim from a customer. The Board then approved a sale of the inventory and leasehold improvements and a transfer of the employees of ACT to ACT 2006, effective November 1, 2006. The Applicants were informed of these decisions in January 2007.

[15] The Applicants filed a Statement of Claim in these proceedings on February 22, 2007. On June 21, 2007, the Applicants were provided with various documents relating to the transactions conducted at the December 2006 Directors' meeting. On July 9, 2007, 864789 was served with a Notice of Special Meeting of Shareholders, the purpose of which was to conduct a vote on a special resolution to dissolve Leasing and to distribute its assets. The Applicants' counsel wrote to the Respondents' counsel objecting to the meeting but the Applicants did not attend it.

[16] ACT and Leasing were dissolved on September 6, 2007. On that same date the Applicants filed a Notice of Motion seeking, among other remedies, an Order restraining the Respondents from winding-up ACT and Leasing. The following day, on September 7, Justice Topolniski of this Court granted an Order restraining ACT and Leasing from making any distribution of assets and adjourned the balance of the application.

Issues

[17] I must determine:

1. Whether the termination of Gibson as an employee (of either or both ACT and Leasing) in August 2005 triggered Section 9 of the 2000 USA. In connection with this determination, I must also determine whether:

(a) Gibson was an employee of Leasing;

(b) The parties to the 2000 USA intended Section 9 to refer to Gibson's employment with ACT and whether a definitional issue arose as a result of the parties inadvertently overlooking the consequential amendment which was required to the replacement of the 1997 USA with the 2000 USA. If so, I must determine whether rectification is appropriate;

2. In the alternative, whether a separate purchase agreement arose (either expressly, impliedly, or through a course of conduct) as a result of the correspondence sent by the Respondents and their counsel to the Applicants and their counsel following the termination of Gibson's employment and 864789's management agreement in August 2005. If so, I must determine who is bound by such agreement;

3. Whether the actions of some or all of the Respondents following the termination events that occurred in August 2005 (including the transfer of assets and employees and the winding up of ACT and Leasing) constituted oppressive conduct on the part of one or more of the Respondents;

4. Depending on my determinations in relation to the above issues, if one or more of the Applicants are entitled to a remedy pursuant to Section 242 of the *ABCA*, the appropriate remedy in the circumstances of this case.

Legislation

[18] Section 242 of the *ABCA* reads, in part, as follows:

Relief by Court on the ground of oppression or unfairness

242(1) A complainant may apply to the Court for an order under this section.

(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver- manager;

. . .

(g) an order directing a corporation, subject to section 34(2), or any other person, to purchase securities of a security holder;

. . .

(i) an order directing a corporation, subject to section 43, to pay a dividend to its shareholders or a class of its shareholders;

(j) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(k) an order requiring a corporation, within a time specified by the Court, to produce to the Court or an interested person financial statements in the form required by section 155 or an accounting in any other form the Court may determine;

(l) an order compensating an aggrieved person;

. . .

(n) an order for the liquidation and dissolution of the corporation;

. . .

(p) an order requiring the trial of any issue; . . .

Position of the Parties

Position of the Applicants

[19] The Applicants take the position that Section 9 of the 2000 USA was clearly triggered by the events that occurred in August 2005. They take the position that the parties' intention is clear, given the history of the provisions in question, the factual circumstances surrounding the replacement of the 1997 USA with the 2000 USA, the rules and responsibilities of Gibson with the Haas group of companies and the actions of the parties subsequent to the August 2005 events. They further submit that acceptance of the Respondents' argument, that Gibson was not an employee of Leasing and that termination of his employment in August 2005 did not trigger the buy/sell provision contained in Section 9, would render the 2000 USA meaningless and absurd for two reasons:

1. It is clear that the parties contemplated Gibson's employment with one or more members of the Haas group. Relying on the Supreme Court of Canada decision in ***Toronto (City) v. W.H. Hotel Ltd.***, 56 D.L.R. (2d) 539, the Applicants argue that I ought to resist interpreting the 2000 USA in such a manner as would result in commercial absurdity. As interpretation in the manner suggested by the Respondents would lead to an "absurdity, repugnancy or inconsistency which reasonable people cannot be supposed to have contemplated under the circumstances, it ought if possible to be modified so as to avoid such a result" (quoted by the Supreme Court of Canada, from the decision in ***Diederichsen v. Farquharson Brothers***, at paragraph 13 of ***Toronto v. W.H. Hotel***).

2. The word "employment", as used in Section 9 of the 2000 USA, ought to be interpreted broadly to give effect to the intention of the parties. Although the Applicants agree that Gibson was not paid directly by Leasing, but continued to be paid by ACT after the 2000 restructuring, Gibson did provide services to Leasing after the time of the restructuring.

[20] Clearly, all of the parties acted, immediately upon the termination events that occurred in August 2005, as if Section 9 had been triggered and it was only after Gibson refused to accept the amount offered for 864789's shares that ACT, Leasing and Haas sought to avoid Enterprises' obligations under the 2000 USA. 864789 was justified in rejecting the cheque that was tendered

as the first payment under the 2000 USA because it represented the low end of the valuation that had been completed by the valuator chosen by Leasing, Enterprises, ACT and Haas. In addition, it represented only the first payment called for under the agreement, when in fact both payments were due by the time the cheque was tendered.

[21] The Applicants assert that following their rightful return of the inadequate cheque tendered pursuant to Sections 9 and 15 of the 2000 USA, the Respondents engaged in oppressive conduct in a number of ways, including:

1. By failing to consult with Gibson, as required pursuant to Section 17 of the 2000 USA, when it proceeded to construct a $1,800,000 building, distribute profits, restructure the corporations, sell their assets, assign Haas' personal debt to ACT, terminate equipment leases and hire new employees;

2. By failing to distribute dividends and bonuses as required pursuant to Section 2 and 4 of the 2000 USA;

3. By denying 864789 access to business and financial information to which it was entitled; and

4. By transferring all of the assets of ACT and Leasing and then winding them up in order to frustrate the 2000 USA and impede the Applicants' recovery should they be granted judgment in the action which had been commenced by them.

[22] Although the Applicants acknowledge that they received notice of a shareholders' meeting in 2007, Gibson did not attend because he felt that doing so would have been inconsistent with his position that he was no longer a shareholder of Leasing because the 2000 USA required a buyout of 864789's shares effective August 2005.

[23] Because the transfer of assets and winding-up of Leasing immediately prior to the issuance of Justice Topolniski's order makes restoration of their interests impossible, the Applicants also take the position that the only practical remedy left to impose is to require the Respondents to complete the share purchase contemplated by Section 9 of the 2000 USA. They submit that it is appropriate to use the existing KPMG valuation, establishing the purchase price at the mid-level suggested by them rather than the low level originally offered by Enterprises. The Applicants submit that there is no question that there is authority to do so pursuant to Section 242(3)(g) of the *ABCA*.

[24] In support of their position that some or all of the Respondents have engaged in oppressive conduct entitling them to the remedy suggested, the Applicants rely on, in particular, ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.***, 60 Alta. L.R. (2d) 122, ***Stech v. Davies***, 80

A.R. 298; ***Westfair Foods Ltd. v. Watt***, 115 A.R. 34, ***Mikulak v. Rubin***, 2001 ABQB 594, and ***820099 Ontario Inc. v. Harold E. Ballard Ltd.***, 1991 CarswellOnt 142.

Position of the Respondents

[25] The Respondents' main concern is that in most applications of this nature it is clear from the outset what the appropriate remedy is. In this case, the Respondents argue that the Applicants are seeking summary judgment without actually applying for it and are cleverly disguising a summary judgment application as an oppression remedy application. They argue that the Notice of Motion did not include the specific remedy sought at the application.

[26] The Respondents argue that two issues are particularly germane:

1. The proper interpretation of Section 9 of the 2000 USA. In relation to this issue, the Respondents argue that the Applicants are seeking rectification without pleading it; and

2. Whether Gibson was an employee of Leasing. The Respondents argue that this is a triable issue requiring examinations for discovery and a trial. They argue that granting the remedy sought by the Applicants would preclude litigation of live issues.

[27] The Respondents submit that the events of 2005 were normal negotiations between the parties undertaken at a time when the Respondents mistakenly believed that there was a contractual obligation to repurchase 864789's shares pursuant to the 2000 USA. They argue that the letter sent by Haas' lawyer, confirming termination of Gibson's employment with Leasing, did not make him an employee of Leasing. Instead, they rely on the fact that Leasing never issued a paycheque or T-4 slip to Gibson as proof that he was not an employee of Leasing and, accordingly, that Section 9 could never have been triggered by his termination.

[28] Furthermore, the Respondents submit that the negotiations which followed the events of August 2005 were never concluded because the parties were never *ad idem* with respect to the value of 864789's shares in Leasing. They point to the fact that the parties heavily disputed the value of the shares as weighing against my ability to determine a value in connection with this application.

[29] With respect to the Applicants' assertion of oppressive conduct on the part of the Respondents, the Respondents submit that the cases do not lay out a clear black and white test for oppression. They submit that the question of whether oppressive conduct has occurred turns largely on the facts of each case. Further, they point out that the cases dealing with oppression do not eliminate the concept of majority rule. In this case, the majority shareholder voted to sell the assets of Leasing for legitimate reasons for fair value and it is not open to the minority shareholder to question that decision, particularly since 864789 chose not to exercise its right, under Section 191 of the *ABCA*, to dispute the transaction at the shareholders' meeting

of which it had notice.

[30] In addition, the Respondents submit that the Applicants have failed to provide any evidence of their reasonable expectations or that their reasonable expectations were not met. They take the position that the reasonable expectation of a 10.1% shareholder, viewed objectively, is that it would be provided with reasonable notice of important decisions but that the will of 89.9% majority shareholder would prevail over the desires of the minority shareholder. The Respondents submit that the oppression remedy should be used only in response to unfair or harsh treatment of a minority shareholder and ought not to be used to override the decision of the majority.

[31] The Respondents submit that, following the sale of the assets, the proceeds of the sale were paid out by dividend. 864789 did not receive any of those proceeds because Leasing took the position that it was entitled to set off 865789's entitlements against amounts owed by that shareholder to Leasing.

[32] The Respondents concede that the obligation to consult imposed by Section 17 of the 2000 USA was breached, but argue that the breach was meaningless because the provision requiring consultation did not require Leasing or Haas to follow or have regard to the results of that consultation process.

[33] The Respondents submit that the only rights the Applicants have belong to 864789, as Gibson was not a shareholder or director. As a shareholder in Leasing, 864789 is a creditor which is asserting an unproven claim. The appropriate remedy is to have that dispute proceed to trial and to allow the corporations to continue operating.

[34] In support of their position, the Respondents rely on ***Keho Holdings Ltd. v. Noble***, 78 A.R. 131, ***Brant Investments Ltd. v. KeepRite Inc.***, 80 D.L.R. (4th) 161(affirmed by the Ontario Court of Appeal, (1991) 3 O.R. (3d)), ***Alberta Treasury Branches v. SevenWay Capital Corp.***, 2000 ABCA 194, ***IGM Resources Corp. v. 97978 Alberta Ltd.***, 2004 ABQB 925, and ***Mikulak***.

Reply Position of the Applicants

[35] The Applicants dispute the Respondents' contention that all corporate notices were done properly. Rather, the only notice given of the shareholders' meeting was given in July 2007, after the Applicants commenced their action, seeking to retroactively approve the sale of assets that had already occurred.

[36] The Applicants also submit that rectification of the 2000 USA was clearly pled in the Statement of Claim. They dispute that the application is an indirect attempt to obtain summary judgment in respect of an unproven debt claim. Rather, they submit that they are seeking an appropriate remedy under Section 242 because the Respondents' actions have eliminated most of the other remedies originally sought by them. They submit that the requested remedy will

provide prompt and effective resolution of the dispute, one of the aims of Section 242 of the *ABCA*.

[37] Contrary to the Respondents' submission that Gibson is not entitled to seek a remedy, they point out that he was the General Manager of ACT and Leasing and was also a party to the 2000 USA, having rights and obligations under it. He is therefore properly a complainant in these proceedings.

[38] In relation to the Respondents' claim for a set-off in relation to amounts it claims are owed as shareholders' loans, the Applicants suggest that a hold-back could be established pending litigation of that amount if I consider it necessary to do so. Given the Respondents' propensity to restructure and to transfer assets, the Applicants suggest that, if a trial is ordered for all issues, some form of security ought to be required from the Respondents pending resolution (the Respondents suggest the sum of $600,000), as well as the funding of the Applicants' costs on an interim basis.

Analysis

1. Was Section 9 of the 2000 USA triggered?

[39] For the following reasons, I have concluded that the buy/sell provision contained in Section 9 of the 2000 USA was triggered by the events that occurred in August 2005.

(a) Was Gibson an employee of Leasing?

[40] The uncontradicted evidence of Gibson was that he provided services to both ACT (before and after the 2000 restructuring) and Leasing (after the 2000 restructuring). He was plant manager responsible for all aspects of managing the business, including but not limited to the purchase of equipment for Leasing. Prior to the restructuring in 2000, Gibson received paycheques and T-4 slips from ACT. That practice continued after the restructuring. However, a person who is employed by a number of corporations that are part of a corporate group may receive a paycheque from only one of them. The manner in which a corporate group chooses to issue paycheques and T-4 slips to its employees is not determinative of this issue. The Respondents do not dispute Gibson's description of the services provided to the corporations comprising the Haas group but rest their argument solely on the manner in which that group chose to issue payment. I reject that argument and find that the services provided by Gibson to Leasing made him an employee of Leasing within the meaning of the 2000 USA.

(b) Did the parties intend Section 9 of the 2000 USA to refer to Gibson's employment with ACT, resulting in a definitional issue arising as a result of the parties inadvertently overlooking the consequential amendment which was required when the 1997 USA was replaced by the 2000 USA? If so, is rectification appropriate?

[41] In addition to the foregoing reason, it is very clear that the parties intended Section 9 of the 2000 USA to refer to Gibson's employment with the Haas group, be it ACT, Leasing, or both. Clearly, they intended Section 9 to come into play when Gibson was no longer involved in either or both corporations. Acceptance of the Respondents' argument would indeed render the 2000 USA absurd and meaningless. The parties had counsel prepare a replacement USA at the time of the restructure and it can only be assumed that they intended it to have some effect. Therefore, if I am wrong in my conclusion with respect to Gibson's employment status with Leasing, and the 2000 USA ought to have referred to his continuing employment with ACT, rectification is not only appropriate, it is necessary, to give effect to the obvious intentions of the parties in entering into Section 9 of the 2000 USA.

[42] The parties' intentions are made abundantly clear from their actions immediately following the termination letters sent by counsel for Enterprises, ACT, Leasing and Haas. These were all parties involved in the negotiation and drafting of the 2000 USA. I reject their suggestion that they mistakenly ordered a valuation and entered into considerable discussion concerning the value of the shares required to be purchased and sold under Section 9 of that agreement because they did not realize that the agreement did not apply in these circumstances. Rather, it is hard to resist the suggestion of the Applicants that, when 864789 refused to accept the cheque which was tendered to it on a unilateral basis following receipt of the valuation, they began looking for a basis to avoid purchasing the shares pursuant to Section 9.

2. In the alternative, did a separate purchase agreement arise (either expressly, impliedly, or through a course of conduct) as a result of the correspondence sent by the Respondents and their counsel to the Applicants and their counsel following the termination of Gibson's employment and 864789's management agreement in August 2005? If so, who is bound such an agreement?

[43] Given my conclusion that Section 9 of the 2000 USA was triggered by the events that occurred in August 2005, no separate purchase agreement arose as a result of the correspondence that was exchanged following the termination events of August 2005. Rather, that correspondence was pursuant to, and in furtherance of concluding the purchase and sale referred to in, Section 9 of the 2000 USA.

3. Did the actions of some or all of the Respondents following the termination events that occurred in August 2005 (including the failure to consult, the transfer of assets and employees and the winding up of ACT and Leasing) constitute oppressive conduct on the part of one or more of the Respondents?

[44] As the Respondents have pointed out, the goal of Section 242 of the *ABCA* is to protect minority shareholders from unfair treatment without usurping the function of the Board of Directors and without supplanting the legitimate exercise of control by the majority (***Brant v. KeepRite***). It is not my function to substitute my business judgment for that of the Board of Directors. Rather, I am required to evaluate both the method and effect of the impugned conduct. Further, "just because the majority outvotes the minority does not make for oppression. There

must be some unfair disregard for the legitimate rights of the minority. . .amounting to some visible departure from the standards of fair dealing or a violation of the conditions of fair play" (*IGM Resources*, quoting from ***400280 Alberta Ltd. v. Franko's Heating and Air Conditioning (1992) Ltd.***, 26 Alta. L.R. (3d) 421). The oppression remedy should not be used by a minority shareholder as a means of taking control of a corporation from the majority.

[45] In ***First Edmonton Place***, the Court reviewed the history of what was then a recent amendment to the *Canada Business Corporations Act*, seeking guidance on the proper interpretation of Section 242 of the *ABCA*. The Courts concluded that the goal of the Legislature was to balance the interests of minority and majority shareholders. The oppression remedy was enacted to provide broad remedial discretion to the Courts, with Section 242 to be given a liberal interpretation in favour of complainants without, however, the Courts venturing into management of corporations. So while majority rule of corporations remain fundamental to corporate law, it is clear the majority must act fairly. In determining whether oppression has occurred, Courts should look beyond strict legal rights to the relationship between the parties.

[46] In ***Westfair***, the Court provided guidance as to the requirement that the majority treat the minority justly and fairly. The Alberta Court of Appeal observed that within a corporation "there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the corporate structure". It observed that directors must have regard for all shareholder interests that are deserving of protection, in particular, "nourished hopes" or "reasonable expectations". The Court observed that reasonable expectations are ones that are raised in one party by the words or conduct of the other and that these are deserving of protection. The Court further observed that whether an expectation is reasonable ought to be assessed on "<u>all</u> the words and deeds of the parties . . . not necessarily only those confined to paper, and not necessarily only those made when the relationship first arose" (emphasis added).

[47] As has been pointed out by the Respondents, each case must be decided on its specific facts and the categories of "unfair", "oppressive" or "prejudicial" conduct within the meaning of Section 242 are not watertight compartments. In interpreting and applying Section 242 then, the Court must guard against too narrow an interpretation, which might result in overly restrictive meanings to the intended remedy conferred by the legislation. Therefore, the Court has "tremendous latitude" in making orders under the oppression remedy and "a judge should be able to use his [or her] ingenuity to effect the remedy most suitable to the situation" (***820099 Ontario v. Ballard***).

[48] The principles governing the conduct referred to in Section 242 as "oppressive, unfairly prejudicial or unfairly disregarding of the interests of a stakeholder" were outlined in ***Mikulak***:

(a) use of the word 'interests' suggests that the conduct can affect something broader than a shareholder's strict legal right (i.e., shareholder expectations);

(b) shareholder expectations must be reasonable;

(c) the Court ought to focus on the impact of the conduct; and

(d) it would be unfair not to provide a remedy when the interests of shareholders have been detrimentally impacted.

The Court reiterated that the oppression remedy was not, however, designed to act as a dispute resolution mechanism for quarrelling shareholders.

[49] The conduct referred to in Section 242 refers both to the manner in which corporate affairs and directors' powers are carried out and to the effect of that conduct. To constitute oppressive conduct under Section 242, it is not necessary to prove bad faith intentions; rather, bad faith is a factor to be considered when determining the unfairness of a result, as well as the appropriateness of a remedy.

[50] In addition to the cases referred to me by counsel, I consider the case of ***Downtown Eatery (1993) Ltd. v. Ontario***, 54 O.R. (3d) 161, to be factually similar and relevant to the case before me. In that case two individuals owned and operated a group of corporations. One of the corporations was the defendant in a wrongful dismissal case. After the commencement of the action, the directors restructured the group, transferred the assets of the defendant to other corporations and caused the defendant to cease conducting business. The judgment eventually obtained against the defendant corporation was therefore worthless. The Ontario Court of Appeal held that, even though the restructuring was not motivated to avoid paying the judgment, there was no question that the draining of assets was unfairly prejudicial and disregarding of the interests of the plaintiff. It held that the directors were under an obligation to ensure that the defendant corporation retained a reserve to cover this potential liability, that it was a reasonable expectation for them to do so as the time they terminated the operations of the defendant corporation and stripped it of its assets. They held that the wrongful termination was not oppressive. Rather, they were business transactions which left the corporation unable to pay the potential judgment that violated Ontario's equivalent of Section 242 of the *ABCA*.

[51] In the case before me, the restructuring of Leasing and ACT left the corporations unable to pay a potential judgment for the breach of contract actions which have been commenced by the Applicants. Haas, as Director, did not maintain any reserve for this potential liability. Such failure disregarded 864789's and Gibson's reasonable expectation that, in terminating the business of Leasing and ACT and transferring all of their assets, a reasonable contingency fund would be maintained to cover this liability. The effect of not maintaining such a fund is itself oppressive, regardless of whether, as the Applicants claim, the Respondents deliberately planned to impede successful recovery on a judgment. While the Respondents are correct in asserting that the Directors had the authority to sell the assets of the corporations based on the will of the majority shareholder, it was not the selling of the assets that was the wrong. The harm done was preventing 864789 and Gibson from being able to collect on a judgment should either or both obtain one. So, whether or not the Respondents are accurate in their assertion that they had a *bona fide* unrelated purpose in transferring the assets (that being a potential lawsuit which they believed might be commenced by a third party), the effect of their actions was to unfairly and

prejudicially affect Gibson's and 864789's interests. This, then, is not a case (like some of those relied on by the Respondents) in which a minority shareholder is attempting to wrest control of a corporation from its directors or majority shareholder. Rather, it is one in which the complainants have brought an application under Section 242 in light of actions by the director and majority shareholder which impacted their interests in an unfair and prejudicial manner.

[52] Having concluded that there was oppressive conduct unfairly and prejudicially affecting the interests of 864789 Alberta Ltd. and Gibson, which of the Respondents are liable for this conduct? All of Enterprises, ACT, Leasing and Haas were parties to the 2000 USA and aware of their obligations under it as well as the Applicants' rights and obligations under it. They were all aware of the claims of the Applicants (in the case of 864789, its claim to have its shares purchased pursuant to Section 9 of the 2000 USA and, in the case of Gibson, his claim for wrongful dismissal). Some of the oppressive conduct occurred following the issuance of the Statement of Claim. Some occurred on the eve of the application before Justice Topolniski, a step taken to obtain remedies that would have prevented the transfer of assets which occurred almost simultaneously with the hearing of that application.

[53] Relevant on this point is the case of ***Gottlieb v. Adam***, (1994) 21 O.R. (3d) 248, cited with approval in ***Budd v. Gentra Inc.***, [1998] 111 O.A.C. 288, in turn cited with approval in ***McAteer v. Devoncroft Developments Ltd.***, 2001 ABQB 917. In ***Gottlieb***, *supra,* a minority shareholder and director initiated a buy/sell provision contained in a shareholder agreement. He paid for the shares but did not pay out a shareholder loan, in violation of the agreement. He then removed the majority shareholder as shareholder, director and officer. As argued by the Respondents in this case, the question was whether the Applicant was limited to a claim for damages for breach of the shareholder agreement. However, the Court held that the breach of a shareholder's agreement can be effected in such a manner as to constitute oppressive conduct under Section 242. The Court observed that:

> "The oppressive conduct related to a shareholder's agreement, a private contractual arrangement between the parties rather than an element of the corporate structure of the company. While the facts, viewed in isolation, might seem to make the oppression remedy inapplicable, further consideration leads to the opposite conclusion. The minority shareholder employed her capacity as a director to carry out the appropriation of the shares of the majority holder. It is the use of the director's position in this manner, to effect that appropriation, that is oppressive."

[54] This position is supported by ***Linamar Corp. v. Wescast Industries Inc.***, [2004] O.J. No. 2449, citing ***GATX Corp. v. Hawker Sibbeley Canada Inc.***, (1996) 27 B.L.R. (2d) 251, which all confirmed that "the interpretation of rights under a shareholders' agreement constitutes part of the affairs of a corporation and is subject to the application of the oppression remedy". These cases also confirm that the breach of a shareholders' agreement or breach of an obligation to perform the agreement in good faith can constitute oppression.

[55] ***Itak International Corp. v. CPI Plastics Group Ltd.***, [2006] O.J. No. 2637, is a case on point with the issues in this application. In that case, a shareholder agreement entitled the applicant to retract its shares, thereby obligating the respondent to purchase them. The respondent's directors refused to do so. Although the directors claimed the refusal was based on the negative impact the retraction would have on the other shareholders, the Court held that the directors had not met the standard of the business judgment rules. The Court went on to declare the decision of the directors, to cause ***CPI*** to be in breach of its contractual obligations, oppressive in unfairly disregarding the reasonable expectations of the applicant. At paragraph 47 of its judgment, the Court stated:

> "Agreements between the parties tend to constitute the best evidence of the parties' reasonable expectations. Oppression proceedings that are based on the enforcement of prior contractual agreements tend to be clearer than other such proceedings in that such contracts may inform the court's decision as to the reasonable expectations of the parties."

[56] In the case before me, I have concluded that Haas, sole director of Enterprises, caused Enterprises to refuse to purchase 864789's shares as it was required to do pursuant to Section 9, because 864789 refused to accept a lower purchase price that it suggested was payable pursuant to the valuation and an amount which did not reflect the full amount then owing under the terms of the 2000 USA. Instead, he took a position which, if accepted, would have rendered the 2000 USA meaningless and of no effect. In addition to refusing to proceed with the purchase of the shares required under the 2000 USA during the approximately one-year period in which he led the Applicants to believe that Enterprises was in the process of fulfilling these obligations, he proceeded to cause Enterprises to make and implement significant decisions regarding acquisitions and restructuring without consulting with the Applicants as required under the 2000 USA. Again, he now argues that that obligation was meaningless and was not intended to impose any obligations on the parties to the 2000 USA. I reject this argument, as to do otherwise would be to accept that all of the parties to both the 1997 USA and the 2000 USA, and their counsel, negotiated agreements without any intention that significant provisions were to have any effect.

[57] Shares were issued to 864789 in 1997 and then in 2000 for a reason. The two USAs were also entered into for a reason. Presumably the reason was to ensure Gibson's hard work and effort in the Haas group of companies, the shareholder interests (through his corporation, 864789) being the incentive to encourage his efforts to increase the profitability of those corporations. The USAs provided an escape to all parties, in case they decided to part ways. It was a reasonable expectation that the shares would be purchased when Gibson was no longer personally involved in day-to-day operations. It is telling that immediately upon terminating Gibson's involvement in operations, the Respondents then in existence quickly moved to value the shares held by Gibson through his holding company, 864789. They ceased consulting with or issuing dividends and profits to the Applicants, on the basis that 864789 had ceased to be a shareholder by virtue of Section 9. It was only after the refusal to accept payment on the Respondents' terms (which conflicted at least in part with the agreement) that the agreement provisions became, according to the Respondents, either inapplicable or unenforceable.

[58] I therefore conclude that oppressive conduct was committed not only by Enterprises but also by its director, Haas. Some of the conduct was facilitated by the related corporations, Leasing and ACT, as well as another related corporation (ACT 2006) which received the assets on wind-up of Leasing and ACT.

4. Given my determinations in relation to the above issues, which of the Applicants are entitled to a remedy pursuant to Section 242 of the *ABCA*, and what is the appropriate remedy in the circumstances of this case?

[59] The Respondents had argued that the Applicants' failure to exercise 864789's dissent rights under s. 191 of the *ABCA* disentitled it from pursuing any remedy under Section 242. Under Section 191 a shareholder may dissent if the corporation resolves to sell all or substantially all of its assets, as Haas Leasing did in this case. The Applicants took the position that exercise of the dissent rights at the time of the special meeting would have been inconsistent with their position that 864789 had ceased to be a shareholder pursuant to Section 9 of the USA.

[60] A similar issue arose in ***Brant Investments v. KeepRite***. Under the *Ontario Business Corporations Act* a shareholder has dissent rights similar to those set out in Section 191, as well as oppression remedies similar to those set out in Section 242. The issue is whether a shareholder is entitled to pursue both remedies. The Court concluded that a shareholder may pursue either or both of these remedies. The same conclusion was reached in the ***Alberta Treasury Branches*** case. This issue was also considered in ***IGM Resources***, with the Court concluding that:

> ... if a claimant has two parallel remedies, the claimant is generally entitled to elect which one to pursue.

[61] 864789 is clearly entitled to a remedy pursuant to Section 242 of the *ABCA*. The position taken by Enterprises, ACT, Leasing and Haas following 864789's refusal to accept the cheque tendered to it and the actions taken thereafter have resulted not only in 864789 having failed to receive payment to which it was entitled, the windup-of Leasing has rendered the shares valueless and created a significant impediment in the Applicant's ability to recover on any judgment they might obtain. Ordering the completion of a purchase of nonexistent shares in a nonexistent corporation is no longer a viable alternative. This potential remedy, otherwise available pursuant to Subsection 242(3)(g) of the *ABCA*, was eliminated by the Respondents at the same time that they frustrated the Applicants' obtaining of an order restraining the directors and shareholders of the Respondent corporations from winding-up the Respondent corporations or conducting any transactions outside of the ordinary course of business. Similarly, the original relief requested included a request for an order appointing a receiver or receiver/manager of Leasing and ACT, a remedy that was also frustrated by the winding-up of those corporations on the eve of the hearing of the related motion.

[62] Subsection 242(3)(l) allows me to order compensation to any aggrieved person. The purpose of such an order is to restore the aggrieved person to the position it would have been in

had the oppression not occurred. In ***McAteer***, two company directors had engaged in a series of oppressive conduct, the corporation became insolvent, and a shareholder brought a claim under Section 242 of the *ABCA*. In discussing the appropriate remedy, the Court stated, at para. 466:

> In this case, there is no value left in DDL to salvage. The only logical remedy to compensate Mason for the improper conduct of McAteer and Billes is to value her interest and to restore her to the position she held at a point in time when the conduct had not yet occurred.

[63] The most appropriate remedy in the case before me is to restore 864789 to the same position it would have been in had the oppressive conduct not occurred. Had Haas not used his position as director to cause Enterprises to breach its contractual obligation to purchase 864789's shares, and had the corporation not then been stripped of its assets and wound up, 864789 would have been in a position to receive the full purchase price of the shares as at August 15, 2005, as originally contemplated by and required under the 2000 USA.

[64] KPMG was familiar with Leasing, as well as the other Haas corporations, and spent several months completing its valuation. It provided a range of values. The only disagreement between the parties at the time was which part of the range should be used in completing the purchase. Enterprises offered the low end and 864789 requested something at the higher end of the range. At the low end of the range, the shares would have been purchased at approximately $270,000; at the high end of the range, for approximately $333,000. Although this is a fairly tight range, the parties did not have an opportunity to present any evidence or argument in support of a particular value in the context of this application. Therefore an assessment will be required for such purpose.

[65] There are other claims outstanding between the parties, although they were not discussed at length before me. One involved disputes over the shareholder loan account and, in particular, questions arising out of the construction of a garage at the Gibson residence and a car purchase. As the Respondent pointed out repeatedly, Mr. Gibson was not the shareholder. It appears Mr. Gibson's alleged personal loan was treated as a loan made to 864789 and was taken into account when the share value was established by KPMG, although this is not entirely clear from the materials and there was some question about the status of this issue at the application. In addition, in the Statement of Claim Gibson brought an action for wrongful dismissal, which I assume remains to be dealt with. These claims cannot be resolved in this application.

[66] However, should Gibson be successful in obtaining any further judgment against one or more of Leasing, ACT or Haas, recovery would be frustrated as a result of the oppressive conduct referred to earlier in this judgment. Therefore, although Gibson satisfies the definition of a complainant (on the basis of the reasoning adopted in the cases referred to earlier in this judgment) his entitlement to a remedy has not yet been established. The only appropriate remedy to grant to him, pending the obtaining by him of any judgment to which he might be entitled, is to require the posting of security. The Applicants suggested that an order restraining the Respondent corporations still in existence from conducting business out of the ordinary course

would be appropriate in light of past oppressive conduct. The posting of security will allow the remaining corporate Defendants to continue with their operations while at the same time ensuring that the winding-up of Leasing and ACT will not render any such judgment valueless. Given the claims advanced by the Applicants, \$600,000 is a reasonable amount.

Conclusion

[67] In the result:

1. The Applicants are granted a declaration, pursuant to Section 242 of the *ABCA*, that the affairs of Leasing and ACT were carried on in a manner that was oppressive or unfairly prejudicial to, or unfairly disregarded the interests of, the Applicants;

2. 864789 will be granted judgment against Leasing and Haas, with interest thereon from August 15, 2005, in an amount to be determined at an assessment. Counsel should contact my assistant to arrange for the assessment to be scheduled before me at the earliest available date; and

3. Enterprises and Haas, or either of them, are ordered to post security in the amount of \$600,000, by no later than November 9, 2008. The Respondents may apply to have the amount reduced by any payment made on the judgment granted herein or upon a resolution of the remaining matters in dispute by way of either trial or agreement.

[68] If the parties are unable to agree on costs in relation to this application, they may speak to the matter following the conclusion of the assessment or may contact my assistant to arrange for a separate application to address the issue.

Heard on the 23rd day of May, 2008.
Dated at the City of Edmonton, Alberta this 9th day of September, 2008.

D.L. Shelley
J.C.Q.B.A.

Appearances:

N. J. Pollock, Q.C.
for the Plaintiffs

E. R. Feehan
for the Defendants

TAB 3

Court of Queen's Bench of Alberta

Citation: Builders' Floor Centre Ltd. v. Thiessen, 2012 ABQB 86

Date: 20120203
Docket: 1003 18830
Registry: Edmonton

Between:

Builders' Floor Centre Ltd.

Plaintiff/Applicant

- and -

John Thiessen, John Thiessen Operating As Autumn Ridge Homes Inc. and Autumn Ridge Homes Inc.

Defendants/Respondents

Reasons for Decision
of
R. P. Wacowich, Master in Chambers

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[1] This is an application to set aside a Fraudulent Conveyance and Fraudulent Preference and to obtain an oppression remedy. The application pleads *The Fraudulent Conveyances Act*, 1571 (13 Eliz. 1) c. 5 ("*Statute of Elizabeth*") *The Fraudulent Preferences Act*, RSA 2000, c. F-24, the *Civil Enforcement Regulation*, Alta. Reg. 276/195, Part 1. 3 and the *Business Corporations Act*, RSA 2000, c. B-9, ss. 122, 239, 242, 243.

Facts

[2] This action was commenced by Builders' Floor Centre Ltd. (Builders') against John Thiessen (Thiessen), John Thiessen operating as Autumn Ridge Homes Inc., and Autumn Ridge Homes Inc., (Autumn) by way of a statement of claim filed on November 3, 2010. The action alleges a debt arising from goods and services supplied to the defendants at their request for the

months of December 31, 2008 to February 26, 2009 for which a sum remains owing. The goods claimed by the plaintiff were supplied to the defendants for the improvement of a property near Wetaskiwin, Alberta.

[3] On November 6, 2007, Builders' prepared a flooring installation quote for Autumn at the request of John Thiessen in his capacity as an officer of Autumn. John Thiessen was the director, president and secretary-treasurer of Autumn. He was also a director and shareholder of J & V Holdings (1999) Ltd., a corporate shareholder in Autumn. On April 4, 2008 and September 17, 2008 pursuant to an agreement between Builders' and Autumn two deposits totalling $17,500.00 were paid by Autumn towards the flooring installations. In November and December of 2008 Builders' began to supply and install flooring and window blinds at the property in question. Up to December 18, 2008 Autumn was the registered owner of the property with a mortgage registered against title for the principal sum of $682,077.00.

[4] On December 18, 2008 Autumn transferred the property for $1.00 to John Thiessen and Verna Thiessen, his wife, as joint tenants. At the time of the transfer John Thiessen swore an affidavit of transferee that the actual value of the property was, in his opinion, $800,000.00. At the same time as the transfer, John and Verna Thiessen registered a mortgage against the property in favour of the Toronto Dominion Bank, the same mortgagee as for Autumn, for the principle sum of $682,077.00.

[5] The officer for Builders' deposed that Builders' had no knowledge of the transfer to the Thiessens. Thiessen indicates that in the course of casual conversations he had with two employees of Builders' he advised that the property had been transferred to his name and that of Verna Thiessen.

[6] On June 22, 2009 Autumn provided a $10,000.00 cheque to Builders' issued from the Bank account of Autumn as part payment of outstanding invoices for goods and services supplied to the property by Builders'.

[7] On April 4, 2011 Builders' obtained a default judgment against Autumn for $43,540.90 inclusive of all interest and costs and registered a writ of enforcement for that amount in the Alberta Personal Property Registry. An application was made to set aside the default judgment but on August 26, 2011 Master Breitkreuz denied the application. No payment has been made in respect of the default judgment.

[8] At the time of the transfer the property was the only asset owned by Autumn. Autumn had a line of credit with TD Canada Trust which was used by Autumn for building purposes for the property. The line of credit had a maximum limit of $50,000.00 which was overdrawn at the time of the transfer. Autumn was never in a position to pay debts as they became due outside of what funds could be provided by John and Verna Thiessen. At the time of the transfer Autumn had no assets except a TD bank account containing $10.00.

<u>Is the Transfer of Land a Fraudulent Conveyance under the *Statute of Elizabeth*, and if so what remedies are available?</u>

[9] In Alberta fraudulent conveyances are addressed under two statutes: the *Fraudulent Conveyances Act*, 1571 (13 Eliz. 1) c.5 (*Statute of Elizabeth)* and the *Fraudulent Preferences Act*, RSA 2000, c. F-24.

[10] ***Krumm v. McKay***, 2003 ABQB 437 succinctly explains the purpose of these statutes:

> The purpose of the *Statute of Elizabeth* and the *Fraudulent Preferences Act* is to strike down all conveyances of property made with the intention of defrauding creditors, except for conveyances made for good consideration and *bona fide* to persons not having notice of the fraud. The legislation is to be interpreted liberally, and includes any kind of transfers or conveyances made with the requisite intent to defraud or hinder creditors, no matter what the form. Para. 13.

[11] To prove a fraudulent conveyance there must be a conveyance with a fraudulent intent and a conveyance against creditors. Dealing first with fraudulent intent, when a transfer involves nominal consideration an applicant need only show that the transferor intended fraud. There are two ways of showing fraudulent intent: first as a presumption of law, and second as a fact in evidence. (***Krumm v. McKay***, para. 14)

[12] The applicant submits that when default judgment is obtained against a defendant the defendant is deemed to have admitted all facts and all allegations contained in the action (***Agricultural Financial Services Corporation v. Zaborski***, 2009 ABQB 183). The action here included an allegation that Autumn fraudulently conveyed the property to John Thiessen to avoid payment of its lawful debts. While this statement of law is accepted, it is my view that direct evidence contrary to the presumption may be relied on. In the result, the default judgment presumes the allegation of fraud in the statement of claim to be correct. However, it is still necessary to examine the facts to determine if there is evidence to establish there was no fraudulent intent.

[13] Courts have recognized the use of "badges of fraud" to prove a *prima facie* case of fraudulent intent. ***Krumm v. McKay,*** para. 21, 38; ***Gerrow v. Dorais***, 2010 ABQB 560, para. 37.

[14] The following acts are identified as badges of fraud, and are submitted by the Applicant to be relevant to the present case:

> 1. The transaction was secret;
> 2. The consideration is grossly inadequate;
> 3. A close relationship exists between the parties;
> 4. The transfer was of everything owned by the debtor;
>
> ***Gerrow v. Dorais***, para. 34

5. The debtor continued in possession of the property after the transfer;
6. The transferor continued to represent that the property was his own asset even after the conveyance had been completed.

M.A. Springman, George R. Stewart, and J. J. Morrison, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Thompson Reuters Canada Limited, 2009) ("Springman") at 13-20.8, 13.20.9, and 13-20.12(3).

[15] It was the Applicant's position that the transfer, the transaction, was secret. However, there was no agreement for Autumn to advise Builders' of any transfer of the property. Also, the transfer was registered at Land Titles and available to any party who cared to search the property.

[16] While the transfer was not secret, Autumn did nothing to bring the transfer to the attention of Builders' and, more importantly, on June 22, 2009, well after the transfer to the Thiessens, Autumn provided a $10,000.00 cheque to Builders' on its account as part payment of outstanding invoices for goods and services supplied by Builders' to the property. I do not consider casual comments made by John Thiessen to employees of Autumn as notice to Autumn of the transfer. Clearly, Autumn represented that the property was its own asset well after the conveyance.

[17] It is also clear that the consideration of $1.00 is grossly inadequate for an $800,000.00 property. Also there was a close relationship between the parties, the transfer was everything owned by the debtor, and to an extent the debtor Autumn, through John Thiessen, continued in possession of the property. Autumn further represented to continue to be the owner by virtue of the $10,000.00 payment and by virtue of the Thiessens continued dealing with Builders' presumably on behalf of Autumn.

[18] In ***Krumm v. McKay*** the Court found that the most persuasive badge leading to a finding of fraud was the close relationship between the debtor and the transferee. This includes transactions between individuals and corporations they control. This is the case here.

[19] The second issue with regard to the applicability of a finding of a fraudulent conveyance is whether the conveyance was made against both "creditors and others".

[20] In ***Kumm v. McKay***, the court defines the term "creditors and others":

> In *Murdoch v. Murdoch et al* [citation omitted], Bowen J. defines the words "creditors and others" under the *Statute of Elizabeth* as wide enough to include any person who has a legal or equitable right ... by virtue of which he is, or may become, entitled to rank as a creditor."

[21] ***Chan v. Stanwood***, 2002 CarswellBC, 1982, 2002 BCCA 474, 216 D.L.R. (4th) 625, 6 B.C.L.R. (4th) 273, 175 B.C.A.C. 86, 13 C.C.L.T. (3d) 74, 289 W.A.C. 86, indicates that the

intent of a transferor and transferee are the same when one is the directing mind of the other, for instance an individual incorporation.

[22] The fact that Autumn acted with fraudulent intent is proven as a fact in evidence by the badges of fraud previously referred to herein. Further, the transferees were privy to the fraud as the intent of the transferor and transferee are the same when one is the directing mind of the other.

[23] Builders' qualifies as a "creditor and other" as defined in ***Krumm v. McKay***. This includes any person with a legal or equitable rate by which he is, or may become, entitled to rank as a creditor. At the date of the transfer Builders' had a viable debt claim against Autumn in contract, unjust enrichment or *quantum meruit* and therefore qualifies as a "creditor or other" under the *Statute of Elizabeth*.

[24] The Applicant has requested an order :

1. Declaring that the transfer of land by Autumn is void as a fraudulent conveyance under the *Statute of Elizabeth;*

2. Directing the Registrar of Land Titles to return the title to the land to the name and status of the registered owner as it existed prior to the transfer; and

3. Directing that the Applicant may seize and sell the land and apply the proceeds to the Applicant's writ of enforcement, after payment of any priority interests.

Statute of Elizabeth, at 2-3
Alberta Rules of Court, AR 124/2010, R 9.25(1)

[25] Based on my analysis of the facts and the law the order will be granted as requested. Although it is not strictly necessary, I will examine the remaining issues raised by the Applicant.

Is the Transfer of Land a Fraudulent Preference?

[26] *The Fraudulent Preferences Act* renders void any conveyance of real property made by a debtor with the intent to defeat, hinder, delay, or prejudice the debtor's creditors at a time when the debtor is in insolvent circumstances.

[27] The issue is much the same as that under the *Fraudulent Conveyances Act* but for the fact it requires that the debtor be insolvent. ***Krumm v. McKay***, para. 35.

[28] It is clear that Autumn was in insolvent circumstances and unable to pay its debts at the time of the transfer. Autumn had no assets other than the property, its bank account was

overdrawn and John Thiessen indicated that Autumn was never in a position to pay its debts outside of funds provided by John and Verna Thiessen on its behalf. As such, a fraudulent preference has been established by Autumn to the Thiessens.

[29] Counsel for the Thiessens submitted that in actuality John and Verna Thiessen were the owners throughout and Autumn held the property in trust for them. This was based on the fact that all payments were made by the Thiessens to Builders'. Also the Thiessens took the risk in having the property transferred to them and becoming the mortgagor on the property. It was indicated that this allowed them to obtain more funding for the benefit of creditors.

[30] I do not accept this submission. There is no evidence of any trust and a trust is not created simply by a party making payments on behalf of a company which it is an officer of. Further, as indicated, on June 22, 2009, Autumn provided a $10,000.00 cheque to Builders' from its bank account as part payment of outstanding invoices for goods and services supplied to the property by Builders'. This is contradictory to any argument that the Thiessens held the property throughout.

[31] I do not accept that the Thiessens were the owners of this property throughout through trust or otherwise. Simply put, payment by a director or shareholders on behalf of a corporation does not make the corporation's assets those of a director or shareholder. As indicated in ***Meier Estate Re***, 2004 ABQB 352, 366 A.R. 299:

> Few principles of law are better established then the proposition that corporate assets belong to the corporation, not the shareholder. The claimant points to a pattern of behaviour on the part of the testator that suggests that he frequently treated corporate property as his own, but the testator's cavalier approach to the distinction between corporate and personal assets is not sufficient to establish a trust. A sole shareholder has an interest in corporate assets, but that interest does not operate so as to vest beneficial ownership of those assets in him: ***Kosmopouls v. Constitution Insurance Co. of Canada***, [1987] S S.C.R. 2. As Hollinrake J.A. points out in ***British Columbia (Assessor of Area No. 25 - Northwest/Prince Rupert) v. N & V Johnson Services Ltd.***, [1990] B.C. J. No. 1964 (C.A.): "A company does not hold its assets in trust for its shareholders or any one of them."

[32] The transfer depleted Autumn of its only asset without any payment or asset being replaced in the estate of Autumn to stand in the place of the property.

[33] The applicant requests an order:

1. Declaring that the transfer of land by Autumn is void as a fraudulent conveyance under the *Fraudulent Preferences Act*;

2. Directing the Registrar of Land Titles to return the title to the land to the name and status of the registered owner as it existed prior to the transfer; and

3. Directing that the applicant may seize and sell the land and apply the proceeds to the applicant's writ of enforcement, afer payment of any priority interests.

[34] Based on my analysis of the facts and the law the order is granted as requested.

<u>**Is the Remedy of Oppression Established?**</u>

[35] The *Alberta Business Corporations Act*, s. 242(1), permits a complainant to apply for an oppression remedy. In order to have standing to commence an action based upon the oppression remedy, a creditor must come within the definition of "complainant". According to the *Alberta Business Corporations Act*, s. 239(b) a creditor can be a complainant, but only if the Court exercises its discretion to find that the creditor is a proper person to make an application for the oppression remedy.

[36] Section 239(b) (iii) (iv) requires a two-step analysis of the issue: first, was the applicant a "creditor" at the time of the conduct in question and second if the applicant was a creditor was it a proper person to whom standing should be granted.

[37] In ***Gignac Sutts & Woodall Construction Co. v. Harris,*** 1997 CarswellOnt 2915, the Court considered the meaning of "creditor" in the context of an oppression application. The Court addressed a fact situation where, at the date of the conduct complained of, the applicants' claims (a construction claim for reasonable compensation for services performed, and solicitor account) sounded in unjust enrichment. The amount in question had not been billed let alone payment demanded or action commenced. The Court held that the applicants were creditors for the purposes of the oppression remedy, giving wide meaning to the concept of "creditor".

[38] A Court has broad powers to determine that an applicant is a proper person to apply for the oppression remedy. This is a broad power of justice and equity whereby a Court may allow a person who would not otherwise be a "complainant" to take proceedings in order to "right a wrong done to the corporation which would otherwise not be righted" or to "obtain compensation himself or itself where his or its interests have suffered". ***First Edmonton Place v. 315888 Alberta Ltd.***, 1988 CarswellAlta 103, paras. 50-51.

[39] In order to obtain leave as a "proper person," an applicant must establish a *prima facie* case of having been subjected to oppressive conduct, or unfairly treated, or having his or her interests unfairly disregarded. ***First Edmonton Place v. 315888 Alberta Ltd.,*** para. 58

[40] Section 242 of the *Alberta Business Corporations Act* contains the statutory test for the oppression remedy:

> S. 242(2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates:
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any [...] creditor [...], the Court may make an order to rectify the matters complained of.

[41] Section 242 of the *Alberta Business Corporations Act* provides relief not only against acts that are "oppressive," but also acts that are "unfairly prejudicial" or "unfairly disregard the interests" of a creditor, making it clear that the remedy applies where the impugned conduct is wrongful or unfair, but not actually unlawful.

[42] In the context of creditor-applicants, the oppression remedy has been decided based upon concepts of unfairly disregarding the reasonable expectations of the creditor:

> [...] the test of unfair prejudice or unfair disregard should encompass the following considerations: the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, at the detriment to the interest of the creditor.
>
> ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.,*** 1988 CarswellAlta 103, 60 Alta. L.R. (2d) 122, 40 B.C.R. 28, 40 B.L.R. 28, para. 40.

[43] The following have been identified as reasonable expectations of creditors, and are relevant in the present case:

1. A creditor reasonably expects that a corporation will not be used as a vehicle for fraud;
2. A creditor reasonably expects that the debtor will not convey away, for no consideration, exigible assets which will leave the creditor unpaid and unable to realize upon assets to satisfy the debt;
3. A creditor reasonably expects that the directors of a corporation will manage the company in accordance with their legal obligations, namely to

act honestly and in good faith in the best interests of the corporation and to exercise the diligence expected of a reasonably prudent person.

4. A creditor reasonably expects that the debtor will honour the understandings and expectations which the debtor has created and encouraged.

M.A. Springman, George R. Stewart, and J. J. Morrison, *Frauds on Creditors: Fraudulent Conveyances and Preferences* (Toronto: Thompson Reuters Canada Limited, 2009) ("Springman") at p. 24 - 12.1, 24-13, 24-15, 24-16.

[44] The builder was a creditor in the context of the present application. In ***Gignac Sutts v. Harris*** it was held that a creditor includes any person with an existing claim or action against the corporation on the date of the impugned conduct. ***Gignac Sutts v. Harris,*** para. 66-68, 77. As stated in the fraudulent preference analysis in this decision, Builders' qualifies as a creditor as it is a person with a debt obligation owing, even if the obligation was not payable at the date of the impugned transaction. Also, this court has a broad equity discretion to grant Builders' leave as a proper person to bring an oppression application as it can establish a *prima facie* case of having been subjected to oppressive conduct, being unfairly treated and having its interests unfairly disregarded by Autumn. ***First Edmonton Place Ltd. v. 315888 Alberta Ltd.,*** para. 50, 51, and 58.

[45] A creditor does not have to prove that a respondent acted with bad faith or fraudulent intention. The court is concerned with the effect of the respondent's actions on the applicant. It is the impact of the conduct, not intention, which is to be assessed by the court. ***Gignac Sutts v. Harris***, para. 79.

[46] With regard to the oppression test , Autumn unfairly disregarded the reasonable expectations of the applicant as a creditor. Autumn disregarded Builders' reasonable expectation that Autumn would not be used as a vehicle for fraud upon the applicant. The conduct of Autumn in participating in the transfer reduced the pool of assets from which Autumn could pay its creditors. Its conduct unfairly disregarded Builders' reasonable expectation that Autumn would not be used as a vehicle to commit fraud upon the applicant. The transfer depleted Autumn of its only asset without any consideration. Also the directors of Autumn failed to manage Autumn in the best interests of Autumn. In my view, the actions of Autumn were oppressive and unfairly prejudicial to Builders' and unfairly disregarded the interests of Builders'. Accordingly, this court will make an order to rectify the matters complained of pursuant to s. 242(2) of the *Alberta Business Corporations Act*.

[47] The transfer of land by Autumn to Thiessens will be set aside and the Registrar of Land Titles will be directed to return the title to the land to the name and status as it existed prior to the transfer of land to Thiessens.

[48] If the parties are unable to agree, costs may be spoken to.

Heard on the 19th day of January, 2012.

Dated at the City of Edmonton, Alberta this 3rd day of February, 2012.

R. P. Wacowich
M.C.C.Q.B.A.

Appearances:

Patrick Kirwin
Jennifer C. Liddle
Kirwin LLP
for the Plaintiff

Jeff Bone
Legal Aid Alberta
for the Defendant

TAB 4

Northland Bank v. Barnieh, 2001 ABCA 137

Date: 20010604
Docket: 00-18660

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MADAM JUSTICE HUNT
THE HONOURABLE MR. JUSTICE COSTIGAN

BETWEEN:

NORTHLAND BANK AND DELOITTE & TOUCHE INC.
AS LIQUIDATOR OF NORTHLAND BANK

Respondents/Appellants by Cross Appeal (Plaintiffs)

- and -

HASSAN BARNIEH, BARNIEH INVESTMENTS LTD.,
DLN HOLDINGS LTD., DELINA HOLDINGS LTD., 276171 ALBERTA LTD.,
285917 ALBERTA LTD., 306766 ALBERTA LTD. and 319071 ALBERTA LTD.

Appellants/Respondents by Cross Appeal (Defendants)

APPEAL FROM THE DECISION OF
THE HONOURABLE MR. JUSTICE WILKINS
Dated the 31st Day of August, A.D. 1999

MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH

COUNSEL:

A.J. McConnell
For the Appellants/Cross Respondents

J.L. McDougall, Q.C.
B.R. Leonard, Esq.
For the Respondents/Cross Appellants

F.R. Foran, Q.C.
For the Respondents/Cross Appellants

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**

HUNT J.A. (for the Court):

[1] This appeal and cross-appeal arise from the collapse of the Respondent Northland Bank ("Bank") in the 1980s. The Bank's Liquidator ("Liquidator"), also a Respondent on the main appeal, sued a number of parties, all of whom settled except the Appellants.

[2] After a lengthy trial at which the Appellant Barnieh did not testify, the trial judge concluded that, as regards four transactions that occurred after October 31,1984, the Appellants had knowingly assisted the Bank in its breach of trust and knowingly received trust property. He rejected liability by the Appellants as to three transactions that occurred prior to that date, as well as any liability based on conspiracy or fraud. In his view, the evidence was equivocal as to whether, prior to that date, Barnieh was aware that the companies to which he was flipping properties were, as the trial judge put it, "puppets" of the Bank.

[3] The trial judge clearly found that the transactions in which Barnieh was involved with the Bank were, from the Bank's perspective, designed to falsely represent its financial picture. In particular, the transactions were intended to remove a series of bad loans from the Bank's books and inflate the Bank's loan portfolio.

[4] We dismiss the main appeal. It is largely based on the assertion that the trial judge made fact findings early in his judgment that render his later liability conclusions illogical.

[5] We disagree. This argument takes too narrow a view of the nature of the information Barnieh needed to have about the Bank's breach of trust. In order to be fixed with liability, it was not necessary for Barnieh to know the details of how the Bank documented the transactions so as to falsely portray its financial situation. Imposing that requirement would, contrary to the jurisprudence, effectively preclude liability on the basis of recklessness or wilful blindness.

[6] For example, in ***Carl-Zeiss-Stiftung* v. *Herbert Smith & Co. (No. 2)***, [1969] 2 All E.R. 367, quoted with approval by the Supreme Court of Canada in ***Air Canada* v. *M & L Travel Ltd.*** (1993), 108 D.L.R. (4th) 592, Sachs L. J. held at 378 that if there is a wilful shutting of the eyes, that is the same as actual knowledge.

[7] In ***Belmont Finance Corporation Ltd.* v. *Williams Furniture Ltd.***, [1979] 1 All E.R. 118, also cited in ***Air Canada***, Buckley L.J. stated at 130 that if the party:

> ... wilfully shuts his eyes to dishonesty, or wilfully or recklessly fails to make such enquiries as an honest and reasonable man would make, he may be found to have involved himself in the fraudulent character of the design, or at any rate to be disentitled to rely on lack of actual knowledge of the design as a defence.

In the same judgment, Goff L.J. stated at 136 that:

> ... wilfully shutting one's eyes to the obvious, or wilfully refraining from enquiry because it may be embarrassing is, I have no doubt, sufficient to make a person who participates in a fraudulent breach of trust ... liable as a constructive trustee...

[8] In ***Air Canada*** itself, Iacobucci J. described the test as follows at 606:

> Whether personal liability is imposed on a stranger to a trust depends on the basic question of whether the stranger's conscience is sufficiently affected to justify the imposition of personal liability: see ***Re Montagu's Settlement Trusts***, [1987] Ch. 264 at p. 285.

[9] These authorities make it clear that, in this case, specific knowledge of the Bank's internal workings or method of documenting the improper transactions was not required in order to find liability. It was enough that Barnieh knew that the Bank intended to dispose of its foreclosed properties at inflated values and that the purchasers of the flipped properties were puppets of the Bank. Thus, the trial judge did not err in finding the Appellants liable on the grounds that he did as regards the last four transactions.

[10] We turn now to the cross-appeal.

[11] We deal first with the third transaction, which closed on October 31, 1984. On the trial judge's own findings and the read-in evidence to which he referred, it was clearly established that, at the conclusion of Barnieh's meeting with Bank officials in late September 1984, he knew that:

1. the Bank's objective was to rid itself of foreclosed property at inflated values, and thus avoid taking losses;

2. all the elements of the transaction, including the sale to the purchasers and the acquisition by Barnieh of the trade property from the Bank, were tied together as part of a package deal; and

3. the companies to whom the properties were being flipped were merely the Bank in another guise (see evidence cited at AB 2517-8 and 2523-4).

[12] The test for knowing receipt is set out in the Supreme Court of Canada decision in ***Gold* v. *Rosenberg*** (1997), 152 D.L.R. (4th) 385 at 400. Knowing receipt requires proof only that the circumstances were such as to put a reasonable person on inquiry and the defendant made none, or the defendant was put off by an answer which would not have satisfied a reasonable person.

[13] In our view, this evidence overwhelmingly proves that, by the conclusion of the September meeting, Barnieh either had actual knowledge of the Bank's breach of fiduciary duty, or, at the very least, enough information to put a reasonable person on inquiry. To put the point another way, the evidence conclusively establishes that he either knew or should have inquired at that point, but failed to do so.

[14] Therefore, the trial judge made a palpable error when he concluded that the knowledge arose in Barnieh's mind after the first three transactions. It is clear that either it arose in his mind after the first two but before the third, or alternatively, he should have inquired after the September meeting and before the close of the third transaction on October 31, 1984.

[15] We are satisfied that the Liquidator has proven on a balance of probabilities that the Appellants were not *bona fide* purchasers for value without notice as to the Ranchlands/Chestermere transaction (the property acquired by the Appellants as part of the third transaction) and that they are liable on the basis of knowing receipt of those trust properties. As a result, they hold the property they acquired through that transaction as constructive trustees on behalf of the Bank.

[16] We are not persuaded, however, that there are errors of law or unreasonable fact findings in the trial judge's reasons concerning the first two transactions. Nor is there any reviewable error in the way in which he dealt with the issues of fraud and conspiracy.

[17] Therefore, we dismiss the appeal and allow the cross-appeal in part. The remedies as to the third transaction will be the same as those granted by the trial judge as to the last four transactions.

APPEAL HEARD on May 16 & 17, 2001.

MEMORANDUM FILED at CALGARY, Alberta,
this 4th day of JUNE, 2001.

HUNT J.A.

TAB 5

Court of Queen's Bench of Alberta

Citation: Eaton v. HMS Financial Inc., 2010 ABQB 635

Date: 20101005
Docket: 0501 08152
Registry: Calgary

Between:

Heike Eaton, Harlan Light, Douglas Alexander and William Barrett, as representative Plaintiffs

Plaintiffs

- and -

HMS Financial Inc. and Skyward Management Inc., Garth S. Bailey, Garth S. Bailey Professional Corporation, 990137 Alberta Ltd., 1037149 Alberta Ltd., operating as Cedar Management, 105382 Alberta Inc., 1070199 Alberta Ltd., 1079373 Alberta Ltd., 993638 Alberta Ltd., A-Z Investment Group, Abba Resources Unlimited, Academy Financial Inc., Academy Financial Planners & Consultants Inc., Ailanthus International Inc., Altruistic Holdings Ltd., Aspire Group International Realty Inc., Bailey & Dawes LLC, Bailey Daws LLP, Bogner Industries Ltd., B.P. Fritz Consulting Inc., The Carpenter's Shop Corporation, Casselman MCS Financial Inc., Cedar Pointe Consulting Group Inc., Chase Forbes Trust Ltd., CLJ Consulting LLC, Commonwealth Marketing Group Ltd., Community Credit Union Ltd., Companions Inc., D.K. Defreitas Professional Corporation, The Dakota Corporation, Dana I. Carlson, Datas Consulting, Defreitas & associates, Desmond K. Defreitas, Diverse Equities Inc., Ethan Equities Inc., First National Bank of San Diego, Five Continents Consulting, Five Continents Consulting Corporation, Fowlks & Snyder LLP, Global Trustees (NZ) Limited, Graceful Beneficence Guessworks, Guessworks Foundation, The Hillpro Group Inc., Horizon Bank International Limited, Horizon Fiduciary Inc., HSBC Bank Canada, International Investments Inc., Jesco Inc., Kamikey Services Inc., Kelso Enterprises Inc., Kirby Audit Services Inc., Kingdom Advisors, Klass "A" Strategies Inc., La alta Ltd., Linderhall PTY Ltd., M & M Computer Consulting, M & M Investments 101 Ltd., Magellan Moranda Investments, Marcol Management Ltd., Maritime, LLC, McCarthy Tetrault LLP, McCullough Financial Corporation, Michael Grosh Professional Corporation, Mountain Star Capital Corp., Mountain View Credit Union Limited, NDX Development LLC, Numa Ltd., Oxyoke Farms Ltd., Paget Capital Ltd., Paradise Bay Holdings Inc., Phoenix Global Resources Ltd., Pine Grove Management Inc., Richard Fowlks, RLM Consulting LLC, Sellars Financial Inc., Talisman Financial Investments Inc., Tamika Enterprises Inc., Thor Empire Trust, Titania Consulting Inc., TJ Kelly Inc., Tools of The Carpenter, Transmax Technologies Ltd., Triple-SSS Holdings Inc., Tyrolia Foundation, Vitron Consulting Inc., Singer Brothers Holdings, Zurich Ventures Inc., A. Gary Young, Guy Bailey, Alfred

Barnfield, Connie Bartel, Robert Bartel, Victor Bauman, Mylo Berstad, Nancy Buford, Cameron Campbell, Rick Childers, Blaine A. Cisna, Kevin Coombes, Ellen Kate Covey, Douglas A. Cowan, Margaret Dart, Stanley Defreitas, Don Dickerson, Eugene Leroy Duce, Arnold Dyck, Juan Exposito, Alfredo Farpon, Ray Fisher, Jack Folsom, Jim Folsom, Richard Fowlks, Barie Fritz, Crystal Anne Fyn, Phyllis Fyn, Robert E. Fyn a.k.a. Colonel Fyn, Allan A. Gray, Michael Grosh, David Guess, Neil Guess, Kendra Haskett, Arnold Henry, David Henry, Gord Hiebert, Samuel Higgins, Winston Indsarsingh, Colleen Jespersen, James Jespersen, Mark Jespersen, Sharrell Jespersen, Wayne Johnson, Terry Kelly, Barbara L. King, Arthur Klassen, Ed Knott, Ruby Leachman, George Lennox, William Lenz, Daniel Lescamela, Willie Lichtner, Lucia Ling, Barbara Lockhart, Ron Lowrie, Don MacGillivray, Danny R. MacNaughton, Norma A. MacNaughton, Peter Manousos, Michael McCullough, William McGrath, Dave Miller, Mohan Maharaj, Rosendo Mendez, Peter Mol, Brad Mooney, Peter Morrisseau, Tom Oldridge, Roy Overton, Gertrude M. Prete, Donald Rabby, Amin Famji, Bilkish Ramji, Stan W. Remin, Jeffrey Robinson, Katherine Rodrigues-Bailey, Daniel Romero, John Romero, Orest Rusnak, Arie Schalk, Randall Seabrook, Claude Seguin, Robert J. Sellars, William Serediuk, Peter L. Sheridan, Janet Stark, Murray Stark a.k.a. Harold Murray Stark a.k.a. Murray H. Stark, Delmer Strobel, Verna Strobel, Cheryl Taylor, Milton Teibe, Robert F. Terborg, Enrique Toscano a.k.a. Chico Toscano, Lee-Anna Toscano, Henk Ujiterlinde, Wilma Ujiterlinde, Heather Vance, Christine Williams, John W. Willock, Margaret Wright, Stan Wright, Claude Zinger, John Doe, Richard Doe and XYZ Corp.

Defendants

Reasons for Decision
of the
Honourable Associate Chief Justice John D. Rooke

I. Introduction

[1] On October 9, 2008, I certified this action as a class proceeding (2008 ABQB 631; [2008] A.J. No. 1127; 458 A.R. 282; 64 C.P.C. (6th) 295; 171 A.C.W.S. (3d) 35) (the "Certification Decision"). The resulting Certification Order was filed April 3, 2009.

[2] As a result of the withdrawal of claims by the Representative Plaintiffs (the "Plaintiffs") before and after, and rulings made in, the Certification Decision, the Defendant, Canadian Imperial Bank of Commerce ("CIBC"), asserts (and the Plaintiffs agree) that the only claims remaining against CIBC are "knowing receipt (sometimes also called participation) or [knowing] assistance in a fraud committed by some or all of the HMS Defendants", and that the "remaining

allegation with respect to whether a constructive trust might be imposed is dependent [on] the outcome of the allegations of knowing assistance or receipt".

[3] On October 30, 2009, CIBC brought an application for summary judgment for dismissal of the action as against CIBC. HSBC Bank Canada ("HSBC"), Community Credit Union Ltd. and Mountain View Credit Union Limited (collectively, the "Credit Unions") brought similar applications at the same time. The applications were heard on February 10 and 11, 2010 and decision was reserved. In March 2010, the Court was advised that the action, as it related to HSBC and the Credit Unions, had been settled (subject to Court approval, not yet heard), with the result that a decision is necessary only as to CIBC.[1]

[4] CIBC denies liability for either knowing receipt or knowing assistance in the Ponzi scheme that is the subject matter of this action. The Plaintiffs assert that CIBC's arguments on the summary judgment application are the same in substance as those used unsuccessfully in opposing certification and in seeking to strike under Rule 129; the Plaintiffs further argue that those arguments do not meet the tests for summary dismissal and should be rejected.

II. Summary of Decision

[5] CIBC's application for summary judgment is dismissed as to knowing assistance but granted as to knowing receipt. With respect to knowing assistance, there is evidence upon which a trial judge could find as a fact that, due to the nature of CIBC's response (or lack thereof or delay in responding), CIBC participated in a fraud committed by some of the Defendants, whether with actual knowledge of that fraud or wilful blindness to it. The merits of this claim will have to be resolved at trial. By contrast, with respect to knowing receipt, at least the last of the three necessary elements of proof is not present and the Plaintiffs have no reasonable prospect of success with this claim.

III. Facts

A. Background Facts

[6] Facts sufficient to set out the background of this case are provided in the Certification Decision. However, simply put, the Plaintiffs allege that Murray Stark ("Stark") and Robert Fyn ("Fyn"), through a company called HMS Financial Inc. ("HMS"), with the cooperation and assistance of others, ran a Ponzi scheme and defrauded the Plaintiffs. Specifically, the Plaintiffs allege that CIBC actively assisted in the Ponzi scheme through knowing receipt of funds and knowing assistance of the fraud being perpetrated. Evidence leading to the conclusion of a Ponzi scheme started to surface in the fall of 2001 and continued to do so into 2003 and 2004.

B. Evidence and Factual Arguments Brought Forward on this Application

---

1 However, Counsel for HSBC took the lead at the oral argument, and Counsel for CIBC relied on some of those oral arguments, which have been considered in rendering this Decision.

[7] CIBC asserted that it had no client relationship with HMS and no actual knowledge of any trust or fiduciary duty by its subject clients, nor of any fraud or breach of trust. Rather, CIBC maintains that it "learned from others - primarily law enforcement and regulatory authorities - that HMS was suspected of being a Ponzi scheme" and that

> ... CIBC investigated immediately and noted that activity in certain CIBC accounts was <u>consistent</u> with such a scheme. ... CIBC divested itself of those accounts that it learned might be associated with HMS. ... At no point did CIBC know that HMS was a Ponzi scheme. ... [I]f there was a fraud ... CIBC did not know of the fraud, did not participate in the fraud, and is not liable to the Plaintiff Class for any investments they may have lost. [Emphasis in the original.]

[8] CIBC backs up this argument by extensive reference in its brief to affidavits it filed and the steps it says it took.

[9] In March 2003, the RCMP received HMS promotional information requesting that clients send investment funds to HMS on a "strictly confidential" basis through a CIBC account held by Garth Bailey ("Bailey"), a lawyer who was subsequently disbarred for his involvement in this matter. Around the same time, the RCMP also became aware that Triple S Holdings Inc. ("Triple S") was involved. CIBC, through two of its Corporate Security personnel, William Prebushewski ("Prebushewski") and Carolyn Appelle-Williams ("Appelle-Williams"), was advised of the concerns about Bailey and Triple S in March 2003. In addition, CIBC says that "months later", it became aware that certain accounts held by Dana Carlson ("Carlson"), another lawyer, and by Skyward Management Inc. ("Skyward") "may have been in some way related to" HMS and that HMS was under investigation by the RCMP for possible involvement in a Ponzi scheme.

[10] Beginning in mid-March 2003, Mr. Prebushewski and Ms. Appelle-Williams, assisted by branch staff and others within CIBC, and by discussions with the RCMP and the Alberta Securities Commission, conducted investigations and determined that activity in the CIBC accounts of Triple S and Bailey were "consistent with" a Ponzi scheme. This was how Mr. Prebushewski characterized the HMS investment in a Corporate Security Interim Report in April 2003.

[11] Mr. Prebushewski recommended that CIBC staff meet with Bailey and, further, that CIBC divest itself of Bailey's business. However, branch staff were unable to set up a meeting with Bailey until May. On May 20, 2003, CIBC advised Bailey that they would be divesting themselves of his accounts, which they did on June 6, 2003, the funds being sent "as directed by Mr. Bailey".

[12] In November 2003, CIBC learned that Carlson had been a contributor of funds to Bailey's CIBC accounts in early 2003 and that Bailey, who by then had been asked to close his HSBC account, was forwarding monies from that account to Carlson's CIBC account. Activity in Carlson's accounts included sending wires around the country and into the US. A meeting took place with CIBC and Carlson in December 2003, at which time Carlson admitted a

relationship with Bailey and HMS. He was advised that CIBC would be divesting itself of his accounts, but the last activity in those accounts was not until February 2004, three months later.

[13] Skyward had CIBC accounts since May 2003, but CIBC claims it did not know of a possible link between Skyward and Bailey until January 19, 2004. Ten days later, on January 29, 2004, Skyward agreed that it would make no further deposits into the account and that it would move the funds to another financial institution within 30 days.

[14] CIBC acknowledged that it knew of "concerns and suspicions raised by the [Rosthern, Saskatchewan] Credit Union and RCMP". However, it asserts that it "investigated and ultimately divested itself of its business with these four Defendants", "as directed by the customer". CIBC also takes the position that at no time did it know that HMS "was in fact involved in a Ponzi scheme" or that any "CIBC clients had breached any trust obligations or fiduciary duties ... owed" to the Plaintiffs. CIBC denied that any of its clients complained to it or the RCMP, and no evidence on the record to the contrary has been brought to the Court's attention.

[15] CIBC also asserted that it provided information to the Government of Canada and that there is "no evidence" of any failure to comply fully with the *Proceeds of Crime and Terrorist Financing Act*, S.C. 2000, c. 17 (commonly known as "FINTRAC", for its reporting agency Financial Transactions and Reports Analysis Centre of Canada). More specifically, CIBC claimed that it met all "objective criteria" and flagged three occasions of "subjective criteria", but did not find that there were "reasonable grounds to suspect" money laundering or terrorist financing, and therefore did not report to FINTRAC.

[16] In general, the argument of CIBC was that there is "no merit to the Plaintiff's claims and no genuine issue to be tried".

[17] The Plaintiffs respond that "it is abundantly clear from the evidence of the [CIBC] that there are genuine issues for trial in relation to the level of knowledge possessed by ... [CIBC]", referencing CIBC's alleged knowledge that their customers had trust or fiduciary duties to others, were likely involved in the Ponzi scheme, and were using banking services and accounts to facilitate or perpetuate the Ponzi scheme. Accordingly, they submit that CIBC has "not met the high threshold of showing that there is no genuine issue to be tried".

IV. Test for Summary Judgment

[18] The high threshold for obtaining summary dismissal is not really in dispute, although the parties expressed it in different ways.

[19] Applications for summary judgment are brought under Rule 159(2) of the *Alberta Rules of Court*, which provides as follows:

> 159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim ... apply to the court for a

judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim ... and that the deponent knows of no facts that would substantiate the claim or any part of it.

[20] CIBC argues that summary judgment may be granted when this Court has "all of the facts necessary to conclude that the Plaintiffs' case has no chance of success": *Papaschase Indian Band No. 136 v. Canada (Attorney General)* [2008] 1 S.C.R. 372 at para. 10 (S.C.C.). It asserts that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.* [1999] 3 S.C.R. 423 at para. 27. CIBC also argues that a summary judgment application must be decided based on the evidence presently available: see my decision in *Jagar Industries Inc. v. Canadian Occidental Petroleum Ltd.,* 2000 ABQB 592, 273 A.R. 1 at paras. 21 - 26.

[21] The Plaintiffs, relying on *De Shazo v. Nation Energy Company Ltd.*, 2005 ABCA 241, 367 A.R. 267 at paras. 17-8 and *Huet v. Lynch*, 2000 ABCA 97, 255 A.R. 359 at para. 20, argue that the test is "whether it is plain and obvious that the action cannot succeed", that an action "is not to be dismissed unless it is beyond doubt that the claim cannot succeed" and that summary judgment should not be granted unless the Plaintiffs' claims "have no reasonable prospect of success".

[22] All of these tests are different ways of saying the same thing - it is beyond doubt that the Plaintiffs claims will fail.

V. Issue

[23] There is really only one two part issue:

1. Did CIBC
   (a) knowingly receive funds involved, or
   (b) knowing assist,
   in a fraud being perpetrated by one or more of the Defendants?

VI. Analysis

A. Knowing Receipt and Knowing Assistance

[24] The law in relation to knowing assistance and knowing receipt is not in dispute. It is important, first, to distinguish between the two. In this respect, CIBC notes that the Supreme Court of Canada emphasized the difference between these "distinct heads of liability" in *Gold v. Rosenberg* [1997] 3 S.C.R. 767. Though Iacobucci J. dissented in that case, Sopinka J., writing for the majority, also noted the distinction between knowing assistance and knowing receipt. Iacobucci J. articulated that distinction as follows at paras. 32, 41 and 48:

> As the name "knowing assistance" implies, the plaintiff must prove not only that the breach of trust was fraudulent and dishonest, but also that the defendant participated knowingly in that breach of trust.
>
> ...
>
> 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.
>
> ...
>
> Unlike knowing assistance, knowing receipt does not require the plaintiff to show that the breach of trust was fraudulent. And unlike knowing assistance, the defendant in knowing receipt is in no way implicated in any wrongdoing perpetrated by the rogue trustee.

B. Knowing Receipt

[25] As the above-quoted passage from *Gold* indicates, knowing receipt is a species of unjust enrichment. Iacobucci J. held at para. 53 of *Gold* that, to recover the disputed property in a knowing receipt claim, the plaintiff must prove the following:

(1) That the property was subject to a trust in favour of the plaintiff;

(2) That the property, which the defendant received, was taken (by some third party) from the plaintiff in breach of trust; and

(3) That the defendant did not take the property as a *bona fide* purchaser for value without notice.

[26] In its brief, CIBC conceded (for purposes of this application only) the first two criteria.

[27] Iacobucci J.'s third criterion imports the necessary element of knowledge. In that respect, Iacobucci J. held that a defendant will be taken to have notice if the circumstances were such as to put a reasonable person on inquiry, and the defendant made none, or if the defendant was put off by an answer which would not have satisfied a reasonable person.

[28] Though he expressed "serious reservations" about treating *Gold* as a knowing receipt case, Sopinka J. nevertheless enumerated at para. 74 the following criteria for establishing that a defendant was in "knowing" receipt:

> (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

[29] In addition, in *Citadel General Assurance Company v. Lloyds Bank Canada and Hongkong Bank of Canada* [1997] 3 S.C.R. 805, released concurrently with *Gold*, the Supreme Court of Canada considered the possibility that constructive knowledge on the part of a defendant could be sufficient for a claim of knowing receipt. In his oral submissions, Counsel for CIBC conceded that, in the context of knowing receipt, "constructive knowledge is enough".

[30] In any event, regardless of the requisite level of knowledge, the *sine qua non* of the third branch of knowing receipt is, of course, receipt. As Iacobucci J. stated in *Gold* at para. 40, "In a knowing receipt case, the plaintiff sues to recover his or her property which has come into the possession of the defendant, as a result of a breach of trust." Thus, the crux of this claim is whether CIBC received property from the accounts in question. The law is clear, and indeed it was common ground among the parties, that a bank cannot be said to receive property unless it does so for its own use and benefit. LaForest J., for the majority in *Citadel*, made this clear at pp. 821-2:

> In the banking context, which is directly applicable to the present case, the definition of receipt has been applied as follows:
>
> > The essential characteristic of a recipient ... is that he should have received the property for his own use and benefit. That is why neither the paying nor the collecting bank can normally be made liable as recipient. In paying or collecting money for a customer the bank acts only as his agent. It sets up no title of its own. It is otherwise, however, if the collecting bank uses the money to reduce or discharge the customer's overdraft. In doing so it receives the money for its own benefit...

[31] It is common ground that CIBC did not use funds from the accounts in question to reduce or set off any debts or other obligations owing to it. However, the Plaintiffs contend and CIBC concedes that, CIBC did receive funds from the accounts in the form of service charges. Is that sufficient to permit a finding that CIBC received property for its own benefit?

[32] Pursuant to my request at the hearing, HSBC provided specific submissions on this point. Though, as noted above, the action against HSBC subsequently was settled, those submissions are equally relevant in respect of CIBC and I have referred to them in arriving at my decision.

[33] Both at the hearing and in HSBC's subsequent written submissions, the Court was advised that there are no known Canadian authorities that address whether bank service charges are sufficient benefit to ground a claim for knowing receipt. Nevertheless, consideration of this issue must be informed by the character of knowing receipt as a kind of unjust enrichment and by the nature of unjust enrichment as a creature of equity. Iacobucci J.'s comments at para. 49 of *Gold* are instructive in this regard:

> ... the cause of action in knowing receipt arises simply because the defendant has improperly received property which belongs to the plaintiff. The plaintiff's claim

> amounts to nothing more than, "You unjustly have my property. Give it back." Unlike knowing assistance, there is no finding of fault, no legal wrong done by the defendant and no claim for damages. *It is, at base, simply a question of who has a better claim to the disputed property.* [Emphasis added.]

[34] Approaching the question from this perspective, it would be inequitable to allow a bank to reduce a defendant's debts to it using misappropriated funds belonging to another party. Thus, for the purposes of knowing receipt claims, such applications of funds have been found to constitute receipt by the bank for its own benefit. By contrast, the amounts charged by CIBC in this case were fees charged for the provision of banking services. There is, in my view, nothing "unjust" about these charges and I find that they are insufficient to ground the claim for knowing receipt.

[35] Therefore, the Plaintiffs' claim for knowing receipt has no reasonable prospect of success and CIBC's claim for summary dismissal of that claim is granted.

C. Knowing Assistance

[36] The plaintiff, to prove knowing assistance, must prove the same first two elements as knowing receipt, and a third which is that the defendant participated in and had actual knowledge of the trustee's dishonest and fraudulent breach of trust of fiduciary duty: *Gold* at para. 34. The focus of the argument was that the third element was missing.

[37] While, as noted above, knowing receipt does not import wrongdoing on the part of the defendant, knowing assistance requires greater participation. CIBC, in its brief, asserted that knowing assistance "effectively labels the financial institution as a fraudster, as it must have <u>knowingly</u> assisted the other rogues in the perpetration of their fraud." [Emphasis in original.] Similarly, in oral submissions, counsel for CIBC said that "knowing assistance is effectively saying that the bank was a fraudster, the bank acted fraudulently because they participated in and assisted in a fraud...".

[38] This hyperbolic interpretation is unnecessarily sensationalistic and does nothing to advance the analysis. As this is a summary dismissal application, the question before me is not whether CIBC committed fraud, but whether there is no reasonable prospect that a trial judge could find that CIBC received funds, knowing that they were likely related to a Ponzi scheme, but failed to take timely, effective action to assist in stopping the fraud, such that it could be said to have knowingly assisted the fraud.

[39] It is certainly true that a finding of knowing assistance implies wrongdoing. For that reason, the courts require a greater level of knowledge on the part of the defendant than is the case for knowing receipt. Iacobucci J. held at para. 33 of *Gold* that:

> ... liability is imposed, in cases of knowing assistance, on the basis that the defendant has participated in a fraud and "participation", in its relevant sense,

> implies actual knowledge of the fraud being perpetrated by the rogue trustee. La Forest J. reached a similar conclusion in *Citadel* when he described liability in knowing assistance as "fault-based" liability (at para. 46). Thus, the basis of liability, participation in a fraud, supports the test for liability which I set out in *Air Canada*, actual knowledge of the trust and its fraudulent breach.

[40] CIBC asserts in its brief (and the Plaintiffs do not dispute) that constructive knowledge is not sufficient, but that there must be actual knowledge:

> ... lack of honesty and good faith is at the heart of knowing assistance. It is why a defendant's "constructive" knowledge of a breach of trust is insufficient to establish liability for knowing assistance. It is not enough that the defendant [has] acted carelessly or failed to sufficiently investigate; knowing assistance requires that the defendant [had] acted dishonestly in furtherance of the underlying fraud.

[41] The Plaintiffs accept the standards of the law from *Gold* as to the tests for knowing assistance. However, they argue that actual knowledge can be proven directly or through recklessness or wilful blindness: see *Gold* at para. 32 and *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787 at 812-3.

[42] CIBC concedes that wilful blindness or recklessness may be sufficient to demonstrate the "want of probity" or honesty necessary to found actual knowledge. They note, however, that this does not reduced the level of knowledge required; it merely provides alternative means of proving the requisite knowledge.

[43] The Plaintiffs accept the definitions of recklessness and wilful blindness advanced by CIBC: see *Sansregret v. The Queen*, [1985] 1 S.C.R. 570 at 584; *R. v. Williams*, 2003 SCC 41, 2 S.C.R. 134 at para. 27; and *Witting v. Tauber*, 2006 ABQB 23 at paras. 52-3 (Binder, J.).

[44] Thus, as CIBC states in it Reply Brief, the "dispute between the parties ... centers on the application of the law to the facts".

[45] The Plaintiffs argue that CIBC had sufficient knowledge of the trusts or fiduciary obligations and breaches thereof to raise genuine issues for trial as to CIBC's liability for knowing assistance. In the end result, I agree.

[46] In their brief, the Plaintiffs argue that CIBC knew, as early as March 2003, that Bailey (and later Carlson) "were using their trust accounts in furtherance of an illegal ponzi scheme", but "took no effective steps" while funds flowed through the accounts and then, at the end, turned the funds over to the very "individuals CIBC had identified as the perpetrators" of the Ponzi scheme. The Plaintiffs also allege that CIBC knew that these two, as well as Triple S and Skyward, were connected to the HMS scheme and were "likely engaged in a ponzi scheme". Therefore, the Plaintiffs assert that a trial judge could find actual knowledge of trust and breach of trust.

[47] With respect to knowing assistance, the Plaintiffs allege that, notwithstanding the aforementioned knowledge as to Bailey, CIBC "chose not to freeze the accounts, despite its ability to do so under the terms of the Account Operating Agreement". Moreover, they point out that over two months elapsed between the time the matter came to CIBC's attention and the time of the account closures, during which period almost $1.5 million flowed out of the Bailey accounts and approximately $1 million was returned to Bailey.

[48] With respect to Carlson, the Plaintiffs contend that CIBC knew of Carlson's connection to Bailey and HMS, of the use to which Carlson was putting the accounts, and that Bailey was sending funds to Carlson's CIBC accounts in excess of $7.6 million, but took over three months to close Carlson's accounts.

[49] In its Reply Brief, CIBC takes issue with the Plaintiffs' "characterization of the 'evidence'" and goes to some length to provide references to the evidence to support its position. Further references to evidence were provided to the Court by letter from counsel for CIBC dated March 29, 2010. However, all of this goes, ultimately, to the very test for summary dismissal. It is for the trial judge to determine the facts from the evidence (and the arguments of its "characterization"). CIBC's reliance on argument as to what facts will or will not be found demonstrates that the Plaintiffs' claim does have at least some reasonable prospect of success, such that it's lack of success is <u>not</u> beyond doubt. The bottom line is that these are matters for trial.

[50] The application of the law to the facts of this case is not sufficiently certain to warrant summary dismissal. The issue in this application is whether CIBC has demonstrated beyond doubt that it did not have knowledge of the Ponzi scheme. CIBC asserts, based on affidavits and cross-examination, that it had no actual knowledge and it is argued that there is no evidence to the contrary; further, the Plaintiffs do not allege that CIBC acted dishonestly. Nevertheless, I am not satisfied that the question is beyond doubt. In my view, the third element of the test for knowing assistance, namely whether CIBC "had facts that would put a reasonable person on enquiry but did not enquire" (willful blindness) and take action to prevent the fraud in a timely fashion, is potentially relevant for determination at trial.

[51] As CIBC notes in its brief, the Supreme Court of Canada "requires actual knowledge, *or something akin thereto*..."(emphasis added). What is akin thereto is wilful blindness or recklessness, either of which may lead to culpability. I believe the question of whether CIBC was put on enquiry will be very germane to the issue of wilful blindness, at least for the period of time in which CIBC allowed the funds in issue to pass through its accounts. In that regard , I find that there is evidence on the record that might lead to a factual conclusion at trial that CIBC's knowledge and actions (or lack thereof or delay therein) were in the nature of wilful blindness, sufficient to result in a finding of knowing assistance.

[52] CIBC relies on *Citadel* as authority for the proposition that wilful blindness may not be sufficient. However, I note that the Alberta Court of Appeal's decision, as quoted by the

Supreme Court of Canada at para. 11, was simply that they did not "think this is an appropriate case in which to rely on wilful blindness". The Supreme Court did not disagree with this finding and went on to decide the case on the basis of constructive knowledge. Therefore, it is not beyond doubt that the within case may be an "appropriate case" in which to find wilful blindness. As such, summary dismissal is not appropriate; it will be for the trial judge to determine the facts from the evidence and to apply the law to those facts to determine liability.

[53] CIBC argues in its brief that it could not be a party to or know of a fraud because its account holders were not doing anything other than what the Plaintiffs wanted - forwarding investment funds to HMS - and that it was only later that HMS was shown to be a Ponzi scheme. However, that is of little import. Given the length of time before CIBC took steps to close the accounts - and the fact that it did so in a way that did not protect the Plaintiffs - I believe that a trial judge could find CIBC knew (directly or by wilful blindness) that this had all the markings of a Ponzi scheme. While CIBC denies such knowledge and attempts to put the onus on others while minimizing its sophisticated banking knowledge, in my view, there is ample evidence upon which a trial judge could conclude that this was wilful blindness.

[54] As to recklessness, I do not find at this stage that the evidence is as strong as for wilful blindness, in the context of the tests necessary: *Sansregret*. However, I leave that to the trial justice to also assess when all the evidence is heard.

VI. CONCLUSION

[55] The summary judgment application by CIBC is granted with respect to knowing receipt but dismissed with respect to knowing assistance.

[56] Costs, if any (probably off-setting), are payable forthwith, in any event of the cause, in such amount as the parties may agree, or failing agreement, as may be taxed. If any issue of taxation is beyond the jurisdiction of the Taxing Officer, application may be made to the Court for resolution.

Heard on the 10th and 11th days of February, 2010.
Dated at the City of Calgary, Alberta this 5th day of October, 2010.

John D. Rooke
A.C.J.C.Q.B.A.

Appearances:
Graham McLennan and Stuart Chambers
McLennan Ross LLP and

Craig Gillespie, Cuming & Gillespie
for the Plaintiffs

Webster Macdonald and Gavin Matthews
Blake, Cassels & Graydon LLP
for the Defendant, CIBC

TAB 6

Court of Queen's Bench of Alberta

Citation: Ernst & Young Inc. v. Central Guaranty Trust Company, 2010 ABQB 26

Date: 20100121
Docket: 9203 20725
Registry: Edmonton

Between:

Ernst & Young Inc.

Plaintiff

- and -

Central Guaranty Trust Company

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice Edward P. MacCallum

I. Introduction

[1] This matter is before me as a new trial consequent to a successful appeal of decisions rendered on February 8, 2001 and May 31, 2004, after a two-phase trial in this court.

[2] The first trial concerned alleged breaches of trusts involving a company which sold extended warranties on motor vehicles, International Warranty Company Limited (IW) and its trustee, Guaranty Trust Company of Canada (Guaranty Trust). The Plaintiff here is the Receiver of IW.

[3] Having found that the contractual arrangements were not trusts, the trial judge declined to consider the questions of breach and remedy. His judgment was set aside and a new trial was ordered to determine whether Guaranty Trust breached the trusts and, if it did, what remedies should follow.

[4] No *viva voca* evidence was heard by me. The record from phases one and two of the first trial was in evidence. I heard opening statements on October 13th, 2009 and received written argument in December. Closing argument was heard on January 13th and 14th, 2010. Save for evidentiary rulings, it was agreed that nothing of the trial judgments, phases one and two, survived.

[5] The Defendant persists in its view that the "so called" trust agreements did not create valid trusts because both the subject matter and the objects of the alleged trusts were uncertain. It reads the Court of Appeal decision, reported at 2006 ABCA 337, as holding not that there were valid trusts, but rather that Guaranty Trust is estopped from denying it. Accordingly, the Defendant uses the language of trusts without conceding their existence.

[6] On December 31, 1987, Associate Chief Justice Miller of this Court made the first of many orders relating to the receivership of IW, replete with references to "the trusts".

[7] In the case at bar the Court of Appeal said at page 5:

> ... a finding that the trusts were valid was at the heart of Miller, A.C.J.'s decisions.

[8] And went on to dispose of the issue:

> [56] Our conclusion that the issue of the validity of the trusts was settled by the principles of *res judicata*, collateral attack and abuse of process disposes of this appeal ...
>
> [57] As a result of this disposition, it is not necessary for us to consider the trial judge's conclusions relating to the validity of the trusts ... .

[9] It is unnecessary for me to go further on this point. I accept, on the basis of Miller A.C.J.'s orders, that there were valid trusts.

II. Glossary of Defined Terms

Guaranty Trust:	Central Guaranty Trust Company, the Respondent in this Appeal.
Importers:	Hyundai Auto Canada Inc., Toyota Canada Inc., Mazda Canada Inc., Honda Canada Inc., Volkswagen Canada Inc., Nissan Automobile Company (Canada) Inc.
Initial Trust Arrangement:	The initial trust arrangement dated March 26, 1986 between Royal Trust of Canada and IW.
IW:	International Warranty Company Limited.
IW Loan:	Loan from Guaranty Trust to IW in the sum of 1.5 Million Dollars that closed on October 28, 1987.
MPA:	Mechanical Protection Agreement, being extended warranties sold by IW to customers of the Importers in dealerships throughout Canada.
MPA Purchasers:	Consumers in Canada who purchased MPAs.
Phase I Decision:	Reasons for decision of the Honourable Mr. Justice W.E. Wilson from phase one of the trial proceedings (including supplementary reasons issued February 14, 2002)(2001 ABQB 92).

Phase II Decision: Reasons for decision of the Honourable Mr. Justice W.E. Wilson from phase two of the trial proceedings (2004 ABQB 389).

Receiver: The Appellant in this Appeal, and the Receiver appointed by Associate Chief Justice Miller December 31,1987.

Receivership Action: Court of Queen's Bench proceeding 8703 30594.

Trust Fund Period: January 1, 1986 through to and including August 31,1987.

1986 Trusts: The trust funds established with Royal Trust for each importer and two mixed funds, excepting Quebec, for 1986:

a) 1986 Conventional new and used trust
b) 1986 Honda Trust
c) 1986 Hyundai Trust
d) 1986 Mazda Trust
e) 1986 Nissan Trust
f) 1986 Toyota Trust
g) 1986 Volkswagen Trust
h) Dealer Owned Program Trust

1987 Trusts: The trust funds established with Royal Trust for each importer, and two mixed funds, excepting Quebec for 1987:

a) 1987 Conventional new and used trust
b) 1987 Hyundai Trust
c) 1987 Toyota Trust
d) 1987 Volkswagen Trust
e) 1987 Dealer Owned Program Trust

1986 Supplementary Trust: Supplementary trust established with Royal Trust and dated effective January 1, 1986.

Quebec Trust: The trust established by the Quebec Interim Trust Agreement.

Quebec Interim Trust Agreement: The interim trust agreement between IW and Guaranty Trust and IW dated March 6, 1987.

Trusts: The Initial Trust Arrangement, the 1986 Trusts, 1987 Trusts, 1986 Supplementary Trusts, and the Quebec Trust.

III. Fact Overview

[10] The nature of IW's business called for independent third-party protection for MPA Purchasers throughout Canada. At first that protection took the form of insurance and later the establishment of trusts with a professional commercial trustee. In Quebec, reserve accounts were at first needed, but later that province moved to a trust with a professional commercial trustee.

[11] An IW officer, with the co-operation of a Guaranty Trust officer, managed to subvert the system of third-party protection, thus engaging the liability of their corporate masters. Importer dealers sold MPAs, deducted commissions, and remitted the balance of premiums to IW. IW then deposited the money in established trusts with Guaranty Trust. The latter, knowing the funds received were intended to be trust funds for the benefit of MPA Purchasers, paid large sums from those trusts to IW for IW's own use, and some for Guaranty Trust's own benefit, contrary to the trusts' purposes.

[12] IW's receiver, Ernst & Young, the Plaintiff in this action, wants the monies with interest returned to the trusts, to be then disbursed in the Receivership Action to those entitled.

[13] Guaranty Trust was wound up in Ontario and by order of the Ontario Court on October 6th, 1993, this action was allowed to continue with the insurer of Guaranty Trust permitted to defend. The insurer, accordingly, is the real litigant in this case.

[14] Certain facts were agreed at the first trial and are set out in part:

Agreed Statement of Facts, Phase I (Vol. 3, Exh. 1)

[15] ...

> 3. I.W. entered into contracts ("Contracts") with several car manufacturers, including Mazda Canada Inc., Honda Canada Inc., Volkswagen Canada Inc., Nissan Automobile Company (Canada) Inc., Hyundai Auto Canada Inc., and Toyota Canada Inc. (collectively referred to as the "Importers").
>
> 4. Prior to 1986 I.W. insured its obligations under the MPAs with Commonwealth Insurance Company ("Commonwealth").
>
> **Establishment of the Trust Funds with Royal Trust**
>
> 5. In 1986, I.W. did not renew its insurance with Commonwealth.

6. In March 1986, I.W. entered into a written interim agreement ("Trust Arrangement") with Royal Trust.

7. I.W. established with Royal Trust separate funds. There was one fund for MPAs sold during the calendar year 1986 throughout Canada, except the Province of Quebec, for each Importer and a few mixed funds ("1986 Trusts") as described in the Glossary of Defined Terms.

8. I.W. established with Royal Trust another fund ("1986 Supplementary Trust") and entered into a written agreement ("1986 Supplementary Trust Agreement") for the administration of the 1986 Supplementary Trust.

9. I.W. funded the 1986 Trusts and the 1986 Supplementary Trust by depositing into the funds related thereto, from the sale of each MPA, a sum of money which was actuarially determined to be sufficient to meet future claims.

10. Royal Trust entered into separate written agreements ("1986 Trust Agreements") with I.W. for the administration of the 1986 Trusts.

11. I.W. established with Royal Trust separate funds, ("1987 Trusts") by Importer as well as mixed, for MPAs sold during the year 1987, across Canada, except for the Province of Quebec, as Described in the Glossary of Defined Terms. Mazda, Nissan and Honda elected to terminate their Contracts with I.W. Therefore, 1987 funds were not established for these Importers.

12. For the 1987 Trusts, Royal Trust agreed to continue to act on the terms and conditions set out in the 1986 Trust Agreements.

Establishment of the Quebec Trust

13. During 1986, in compliance with the Quebec *Consumer Protection Act*, I.W. established a reserve account ("Reserve Account") in the Province of Quebec to cover I.W.'s liabilities under MPAs sold in the Province of Quebec.

14. On March 6th, 1987, there were investments in the Reserve Account totalling $8,383,000.00. The Reserve Account was funded from sales of MPAs in the Province of Quebec during 1986 and January, 1987.

15. On March 6th, 1987, the funds in the Reserve Account were removed from the Province of Quebec and transferred to Guaranty Trust in Calgary. Guaranty Trust and I.W. established a fund and entered into a written interim trust agreement dated March 6th, 1987 ("Quebec Interim Trust Agreement").

16. To administer the Quebec Trust:

(a) when Guaranty Trust received trust funds from the Province of Quebec, Guaranty Trust set up a separate fund no. 3351703 which was called the 1986 Quebec Trust; and

(b) on July 31st, 1987, Guaranty Trust set up a further fund no. 3351716 which Guaranty Trust identified as the 1987 Quebec Trust on the initial form establishing the fund. Guaranty Trust transferred premiums from the sale of MPAs during 1987 from fund no. 3351703 and deposited them into fund no. 3351716.

17. Approximately February 27th, 1987, Guaranty Trust retained MacLeod Dixon to advise Guaranty Trust in matters relating to the transfer of trusteeship for the Trust Funds.

18. No further written agreements were entered into with respect to the Quebec Trust.

19. From March-June, 1987, Guaranty Trust received from I.W., monthly, from the sale of MPAs in the Province of Quebec, premiums for the months February-May, 1987. These premiums were deposited by Guaranty Trust into the Quebec Trust, account no. 3351703.

20. In this Agreed Statement of Facts, the 1986 Trusts, the 1986 Supplementary Trust and the Quebec Trust will collectively be called the "Trust Funds".

Change of Trustee From Royal Trust to Guaranty Trust

21. I.W. sought and obtained the consent of the Importers to change of trustee from Royal Trust to Guaranty Trust.

...

26. Guaranty Trust received fees for the administration of all the funds and the method of calculation of those fees was the same for all funds.

Withdrawals of Actuarially Determined Surplus
June, 1987 - $509,000.00 from the Quebec Trust

27. On June 3rd, 1987, Guaranty Trust received a request from I.W. to pay the sum of $509,000.00 from the Quebec Trust. Accompanying the letter was a copy of Section 172 of the Regulation adopted under the *Consumer Protection Act*, an actuarial certificate and a copy of I.W.'s renewed permit.

28. On June 16th, 1987, Guaranty Trust withdrew from the Quebec Trust during its term, the sum of $509,000.00 which Guaranty Trust paid to I.W.

...

October Reorganizations - $1,303,716.32 from the 1986 Trusts, 1987 Trusts and the Quebec Trust

34. By October 1987, I.W. reorganized its loans with Lloyd's Bank. The reorganization included a $1.5 million loan from Guaranty Trust to I.W. which was used to discharge I.W.'s indebtedness to Lloyd's Bank.

35. Guaranty Trust, signed a loan commitment for a $1.5 million loan to I.W. dated October 23rd, 1987.

36. On October 27th, 1987, the security for the loan was changed. Instead of assigning the residual interest in the surpluses on termination of the Trust Funds, I.W. decided to withdraw from the 1986 Trusts, 1987 Trusts, and the Quebec Trust actuarially projected surplus in the sum of $1.5 million which would be used to purchase time deposit certificates which would then be hypothecated to Guaranty Trust as security for the $1.5 million loan.

37. In the afternoon of October 28th, 1987, Guaranty Trust proceeded with the loan. During the term of the 1986 Trusts, the 1987 Trusts, and the Quebec Trust the sum of $1,233,533.82 was removed, as actuarially projected surplus, as follows:

-	1986 Toyota Trust Fund	$ 159,366.82
-	1986 Hyundai Trust Fund	$ 71,080.85
-	1986 Volkswagen Trust Fund	$ 12,282.20
-	1986 Dealers Own Trust Fund	$ 404.96
-	1986 Conventional New/Used Trust Fund	$ 52,210.38
-	1986 Nissan Trust Fund	$ 48,464.60
-	1986 Mazda Trust Fund	$ 87,235.72
-	1986 Honda Trust Fund	$ 2,503.56
-	1986 Quebec Trust Fund	$ 375,276.61
-	1987 Toyota Trust Fund	$ 25,021.22
-	1987 Hyundai Trust Fund	$ 77,882.86

-	1987 Volkswagen Trust Fund	$ 3,530.63
-	1987 Conventional New/Used Trust Fund	$ 103,130.43
-	1987 Quebec Trust Fund	$ 216,142.98
		$1,233,533.82

The sum of $1,233,533.82 removed together with the $266,466.18 withdrawn in September, 1987 was used to purchase two time deposit certificates which were hypothecated to Guaranty Trust as security for the loan.

38. On November 9th, 1987, a further $70,182.00 was withdrawn, as actuarially projected surplus, for the purposes of servicing the loan, during the term of the Trust Funds as follows:

-	1986 Toyota Trust Fund	$ 9,067.18
-	1986 Hyundai Trust Fund	$ 4,044.15
-	1986 Volkswagen Trust Fund	$ 698.80
-	1986 Dealers Own Trust Fund	$ 23.04
-	1986 Conventional New/Used Trust Fund	$ 2,913.62
-	1986 Nissan Trust Fund	$ 2,757.40
-	1986 Mazda Trust Fund	$ 4,963.28
-	1986 Honda Trust Fund	$ 142.44
-	1986 Quebec Trust Fund	$ 21,351.39
-	1987 Toyota Trust Fund	$ 1,423.59
-	1987 Hyundai Trust Fund	$ 4,431.14
-	1987 Volkswagen Trust Fund	$ 288.00
-	1987 Conventional New/Used Trust Fund	$ 5,867.61
-	1987 Quebec Trust Fund	$ 12,297.48

$ 70,182.50

39. On December 7th, 1987, Guaranty Trust attached the time deposits and repaid its loan. After repaying the loan in full there was a balance left over of $61,320.37. Guaranty Trust returned the balance of $61,320.37 remaining to the Trust Funds.

-	1986 Toyota Trust Fund	$ 7,922.30
-	1986 Hyundai Trust Fund	$ 3,533.51
-	1986 Volkswagen Trust Fund	$ 610.57
-	1986 Dealers Own Trust Fund	$ 20.12
-	1986 Conventional New/Used Trust Fund	$ 2,545.73
-	1986 Nissan Trust Fund	$ 2,409.23
-	1986 Mazda Trust Fund	$ 4,336.58
-	1986 Honda Trust Fund	$ 124.45
-	1986 Quebec Trust Fund	$ 18,655.43
-	1987 Toyota Trust Fund	$ 1,243.84
-	1987 Hyundai Trust Fund	$ 3,871.69
-	1987 Volkswagen Trust Fund	$ 175.52
-	1987 Conventional New/Used Trust Fund	$ 5,126.73
-	1987 Quebec Trust Fund	$ 10,799.72
		$ 61,320.37

Failure to Fund August Premiums into the 1987 Trust

40. I.W. did not pay to Guaranty Trust premiums from the sale of MPAs during the month of August, 1987 totalling $594,532.29. From October 1st, 1987 until I.W. closed its doors, December 16th, 1987, Guaranty Trust continued to make payments to I.W.

totalling $963,000.00 which I.W. advised were for claim reimbursements, and further payments to I.W. totalling $34,261.00 for cancellation of MPAs.

Supplementary Trust Fund

41. In October, 1987, Guaranty Trust held, as an asset of the 1986 Supplementary Trust, a GIC for the sum of $434,000.00.

42. At the request of I.W. on October 1st, 1987, during the term of the 1986 Supplementary Trust, Guaranty Trust cashed in the GIC and paid the net funds of $434,191.50 to I.W.

...

Execution of the 1987 Trust Agreements

45. In late November or early December, 1987, Guaranty Trust and I.W. entered into written agreements for the 1987 Trusts ("1987 Trust Agreements"). The 1987 Trust Agreements were entered into without advising or consulting the Importers.

Receivership

46. On December 16th, 1987, I.W. closed its doors. At that time there was approximately $18 million in the Trust Funds.

47. The Importers together with the Quebec Consumer Protection Office brought an application before the Alberta Court of Queen's Bench for the appointment of a Receiver. On December 31st, 1987, Justice Miller appointed Ernst & Young Inc. (then Clarkson Gordon). Guaranty Trust was named a Respondent to the application.

48. The Receiver filed a report to the Court of Queen's Bench on March 21st, 1988. In the report the Receiver raised withdrawals of surplus from the trust funds and recommended further investigation into the withdrawals.

...

56. An application was made and Justice Miller made an Order on July 12th and 14th, 1988.

57. Both Lloyd's Bank and Guaranty Trust appealed the Order of Justice Miller dated July 12th and 14th, 1988.

58. The Importers agreed to pay a further sum of $137,500.00 as if it were surplus. As consideration for the payment, Lloyd's Bank and Guaranty Trust agreed to abandon the appeals of Justice Miller's July 12th and 14th, 1988 Order. The Importers, the Receiver,

Lloyd's Bank and Guaranty Trust entered into a written settlement agreement ("Settlement Agreement") which was approved by Order of Justice Miller dated December 13th, 1988.

59. Following the Settlement Agreement Guaranty Trust filed a Notice of Abandonment of Appeal on or about June 30th, 1989.

60. Justice Miller made an Order on January 28th, 1992.

61. On March 13th, 1995, Justice Miller granted an Order.

62. The last MPA in respect of which MPA funds were paid to Guaranty Trust or Royal Trust has fully expired such that no further claims could be made after 1992.

[16] I accept the following facts as recited by the Plaintiff:

14. Prior to 1986, IW insured its obligations under the MPAs with Commonwealth Insurance Company ("Commonwealth"). In 1986, IW did not renew its insurance with Commonwealth, and instead, substituted trusts to provide protection for consumers throughout Canada, except Quebec. IW reverted to insurance with Elite Insurance Company ("Elite") on September 1, 1987 and which continued until it closed its doors in December 1987. The intervening time from January 1, 1986 to August 31, 1987, defined as the Trust Fund Period, is the subject of this litigation.

...

17. The 1986 Trusts were established in early 1986. Written trust agreements were executed with respect to all the 1986 Trusts except the 1986 Conventional New and Used Trust (the "1986 Trust Agreements"). The 1986 Trust Agreements defined the "Trust Beneficiaries" as IW and the MPA Purchasers, as to their respective interests in the trusts.

18. IW established the 1986 Supplementary Trust to provide further funds in the event the primary trusts were insufficient to meet the claims of MPA Purchasers and the administration costs.

Change of Trustee to Guaranty Trust

19. When IW did not obtain insurance for 1987, it established the 1987 Trusts. Mazda, Nissan and Honda elected to terminate their contracts with IW, and accordingly 1987 trusts were not established for those Importers.

20. Starting in October 1986, IW began discussions with Guaranty Trust to have Guaranty Trust take over trusteeship of the Trusts. Dale Mather, a Director of IW, required a loan of $1,600,000.00. IW implied to Guaranty Trust that if Guaranty Trust could provide the loan, Guaranty Trust would secure the trusteeship of the funds, approximately $21,000, 000.00, with an expectation that the trust values would rise to $65,000,000.00 by the end of the fifth year of the trusts.

21. On February 24, 1987, Guaranty Trust was appointed trustee for the 1986 Trusts, the 1987 Trusts and the 1986 Supplementary Trust, totalling approximately $23,000,000.00. Mr. Andrade, an officer of Guaranty Trust ... understood the nature of IW's business, the fact that the trusts had been established to replace insurance, that on average each warranty ran for five years, and that only the balance remaining in the trusts at the end of the five years, if any, was to be turned over to IW. Guaranty Trust also knew that the Importers had to agree to the trust arrangements.

22. Guaranty Trust retained MacLeod Dixon in relation to the trust issues. On May 20, 1987, MacLeod Dixon, in the course of reviewing and preparing draft agreements for the 1987 Trusts, advised Mr. Andrade at Guaranty Trust that:

(a) The definition of trust beneficiaries created a trust beneficiary relationship between Guaranty Trust and MPA Purchasers;

(b) Provisions in the trust had the combined effect of making Guaranty Trust liable to the MPA Purchasers "at the very time when Guaranty Trust will least desire to have any relationship with them, i.e., when the 'worst case' happens to IW";

(c) Should the worst case happen to IW it seems fairly clear that the MPA Purchasers are then entitled to look to Guaranty Trust to perform IW's obligations, at least until the trust is exhausted; and

(d) Guaranty Trust was faced squarely with having to make a business decision whether it wished to assume trusteeship of a trust which may have flaws in it.

The comments made by MacLeod Dixon with respect to the draft agreements it was reviewing applied equally to the 1986 Trust Agreements.

23. Prior to December 1987, Guaranty Trust used the 1986 Trust Agreements to administer the 1987 Trusts.

24. ... sometime between the end of November 1987 and early December 1987, IW and Guaranty Trust entered into agreements purporting to deal with the 1987 Trusts. Those agreements were executed after all the withdrawals at issue in this lawsuit had

been made from the 1987 Trusts. The 1987 Trust Agreements are significantly different from the 1986 Trust Agreements, in purporting to change the definition of trust beneficiaries, and providing a right to remove surpluses during the term of the trusts.

25. ...There is also no evidence that Guaranty Trust ever obtained the Importers' consent to the changes or even advised the Importers of those changes.

26. On December 16, 1987, IW closed its offices across Canada.

33. On December 31, 1987, Miller, A.C.J. appointed Clarkson & Gordon as Receiver of IW for the limited purpose of taking possession of the records of IW relating to the MPAs, investigating the affairs of IW for the purpose of determining the extent of the MPA obligations, and to then make recommendations to the Court for the most appropriate method of dealing with the MPA Purchasers.

34. The Receiver considered two alternatives to deal with the Trusts:

(a) Find someone willing to take over the adjudication and administration of the MPA claims until all the MPAs expired, which was due to occur in 1992; or

(b) Reach an agreement with the Importers for MPAs sold on their vehicles whereby the Importers would assume the obligations to the MPA Purchasers.

35. After appropriate investigations, the Receiver considered the first alternative was not viable, and recommended to the Court that wherever possible, agreements should be reached with the Importers to assume the MPA obligations. The funds in the Trusts supporting those obligations would then be paid to the Importers on terms and conditions the Court may direct.

36. In the Receiver's report of March 21, 1988 at page 13, the assumptions on which those recommendations were based are set out, which included:

(a) The trust agreements were valid;

(b) The MPA Purchasers were the beneficiaries of the various Trusts;

(c) Deposits to the Trusts did not include funds encumbered by a trust on behalf of other parties;

(d) Claims against IW for the cost of adjudicating and processing warranty claims were appropriate charges against the Trusts; and

(e) The Trusts were insufficient to meet the claims of MPA Purchasers and costs of adjudication.

...

38. In June 1988, Guaranty Trust applied to the Court seeking directions as to whether it had breached the Trusts in certain respects. It brought that application as trustee, and pursuant to the provisions of the *Trustee Act*.

39. The Receiver engaged an independent actuary, resulting in the Tillinghast Report. Guaranty Trust retained its own actuary, Terry Biscoglia, to review the Tillinghast Report and provide Guaranty Trust with independent actuarial advice. Evidence was put before Miller, A.C.J. on outstanding MPA claims (current and projected), the costs of administering and adjudicating claims, the net rate of return, and receivership costs.

The July 12 and 14, 1988 Order

40. The application before Miller, A.C.J. extended over July 12 and 14, 1988, and again on September 22, 1988 to settle the terms of the July 12 and 14, 1988 Order. That Order made the following determinations:

(a) A formal agreement between the Importers and the Receiver attached as a schedule to the Order was approved, and the parties were authorized to perform their obligations under that agreement;

(b) The Receiver was to calculate and determine the surplus if any in each of the trusts except the 1986 Supplementary Trust. Paragraph 4 of that Order set out the method for calculation of those surpluses;

(c) Guaranty Trust was ordered to pay to the Receiver all of the funds held by Guaranty Trust in the Trusts, and the Receiver shall:

  (i) Hold the amount received from the 1986 Supplementary Trust until further order;

  (ii) Pay the surpluses if any in the Trusts (except the 1986 Supplementary Trust) to Ogilvie & Company (then counsel for a bank creditor, Lloyd's Bank) who shall hold the surpluses pending further order;

  (iii) Pay the Receiver's costs to be charged to the Trusts except for the 1986 Supplementary Trust, prorated in proportion to the amount of funds in the Trusts as at December 31, 1987;

(iv) Pay each of the Importers the amount of the funds in their respective segregated trusts and their proportionate share in the pooled trusts (referred to as the 1986 Other New and Used, 1987 Other New and Used, 1986 Dealers Own, 1987 Dealers Own, and the Quebec Trust); and

(d) The Trusts were varied in accordance with Section 3 of the appended agreement. The variation included naming the Importers in place of the MPA Purchasers as the beneficiaries of each trust.

This Action

45. Miller, A.C.J.'s Order of January 28, 1992 authorized the Receiver, pursuant to Section 241 of the *Canada Business Corporations Act*, to bring an action on behalf of the MPA Purchasers, their heirs, successors and assigns, against Guaranty Trust. The Receiver was authorized to issue a Statement of Claim with the Receiver as the Plaintiff, seeking whatever determinations and claiming whatever relief the Receiver considered appropriate, including but not limited to those issues already directed by Order of Miller, A.C.J. dated June 16, 1988, and the issues set out in the Receiver's report.

46. This action was commenced with the Statement of Claim authorized by Miller, A.C.J. on October 14, 1992. In December 1992 Guaranty Trust filed a Statement of Defence.

47. Along the way, Guaranty Trust applied to Court on June 30, 1995 to allow Guaranty Trust to resign as trustee. Miller, A.C.J. ordered Guaranty Trust be discharged as trustee of the Trusts effective March 14, 1995, and the Receiver be appointed as trustee of the Trusts effective that day. Guaranty Trust was directed to provide to the Receiver an accounting of its administration of the Trusts for the preceding period. Since that time, the Receiver has filed with Revenue Canada income tax returns for each of the Trusts.

48. In the course of this litigation, an issue arose as to whether the Importers were obliged to produce information relating to the costs they incurred to adjudicate, administer and pay the MPA claims assumed by them. Clarke, J. determined that the question whether a trustee's liability is to restore trust funds improperly removed or whether the beneficiaries must prove their loss was an issue that should be resolved by the Trial Judge and accordingly, for discovery purposes, ordered that the Receiver produce documentation and answer questions relating to the Importers' costs of adjudication, administration and payment of claims. Any Importer who chose not to produce that information was prohibited from introducing such evidence at the trial of the action, but that Order did not prohibit any of the Importers from arguing that the trustee's liability is to reconstitute the trusts by returning to the trusts all funds improperly removed, or in the alternative, if the beneficiaries are required to prove their loss, that the

loss was decided in the Receivership Action by the Order of Miller, A.C.J. of July 12 and 14, 1988.

49. Two of the Importers, Toyota Canada Inc. and Hyundai Auto Canada Inc., produced the information relating to those costs. The others did not.

[17] I accept, from the Defendant's Written Submission, that IW was entitled to funds under the Importer Agreements when it paid out claims for which it was to be reimbursed and that upon termination of the Trusts, it was entitled to the remaining funds under the Importer Agreements of which the 1986 Nissan Trust Agreement is typical:

2.10

...

(b) On the termination of the Trust, the Trustee shall account to I.W. in respect of the Nissan Trust Fund and the Trustee's administration of it, and the Trustee (subject to section 2.11 and the receipt by the Trustee of the written consent thereto of Nissan Automobile Company) shall pay and transfer to I.W., absolutely and unconditionally any money and other property that remains in the Nissan Trust Fund, except that if immediately before the termination of the Trust, the Trustee is prohibited under subsection 2.04(1) from making any further payments to I.W. from the Nissan Trust Fund and there is then money or other property that is part of the Nissan Trust Fund, then the Trustee shall apply for advice and directions under the Trustee Act as to the manner in which the Trustee is to account for the Nissan Trust Fund and to whom it is to pay any remainder thereof. (1986 Nissan Trust Agreement, Article 2.10(b) (Vol. 3, Exh. 2, Document A15)

IV. <u>The Pleadings Issue</u>

[18] The Defendant questions, first of all, whether the Plaintiff is the proper claimant. A negative answer would end the lawsuit, so that is my starting point.

[19] The Defendant argues that the Plaintiff is the Receiver of IW and stands in it's shoes. It follows that the Receiver can have no better claim against Guaranty Trust that IW would have if it sued Guaranty Trust directly. IW could not have succeeded against Guaranty Trust because as a trust beneficiary, it consented to or acquiesced in the alleged breaches. The MPA Purchasers are not represented in the lawsuit. Instead of suing in a representative capacity, the Plaintiff chose to sue as Receiver of IW. So even though the Plaintiff pleads (in the Amended Amended Amended Statement of Claim) that the Plaintiff was authorized to bring an action on behalf of

the MPA Purchasers, it chose to sue simply as Receiver of IW. Being authorized to do something and actually doing it are different things.

[20] Furthermore, even if the action could be identified as representative, the case does not meet the criteria for a representative action. The class cannot clearly be identified due to uncertainty as to who may become a beneficiary; there is no evidence that all potential class members were notified; and the Plaintiff cannot have a better claim against Guaranty Trust than the MPA Purchasers would have had, had they sued Guaranty Trust directly. In fact, by the express terms of the trust agreements they could not do so – they were obliged to claim through IW.

[21] The short answer to that argument, it seems to me, is that given the insolvency of IW, the Receiver is simply doing what IW was obliged to do under the terms of the trusts – calling upon the trustee (Guaranty Trust) to perform. Once it does, the Receiver will evaluate the claims against IW by interested parties.

[22] But the Defendant goes further. Even if the Plaintiff could sue the MPA Purchasers, there is no evidence that any of them have claims. The Importers voluntarily settled outstanding repair claims and by this time coverage has expired. And the Importers lack status as beneficiaries. Miller, A.C.J. purported to make them so in his order of July 12th and 14th, 1988, but as a variation of trusts, the order was ineffective for lack of consent by persons beneficially interested. Finally, the Importers, as volunteers, would have no right to compensation for having taken the purely business decision to stand in for IW.

[23] It is the Receiver's job to evaluate claims against the trust, not mine. Perhaps it will see merit in some of the Defendant's arguments against the liability of IW to various claimants. But the fact that a beneficiary might not have a valid claim does not lessen Guaranty Trust's duty to maintain trust funds to meet the potential claims. If it has failed to do so and is in breach of trust, it must restore the funds to the trust and the Receiver will decide what to do with them.

[24] The Plaintiff sees the standing issue as merely a matter of pleading based on the fact that neither the MPA Purchasers nor the Importers have advanced a claim. And that is so, the Plaintiff argues, because the action as constituted was ordered by Miller, A.C.J. The parties were to be the Receiver and Guaranty Trust and the Receiver was named trustee of the trusts in place of Guaranty Trust. The issue of breach of trust was to be determined.

[25] The power of Guaranty Trust was vested in the Receiver for the benefit of the Importers who took the place of the MPA Purchasers as beneficiaries of each trust. An examination of Miller, A.C.J.'s receivership order shows it to have been made for the purpose of investigating the affairs of IW regarding the MPA's, the extent of IW's obligations thereunder, and the assets available to meet those obligations.

[26] On June 16th, 1988, Miller, A.C.J. directed an issue to determine whether disbursements from trust by Guaranty Trust of $509,000 and $1.5 million were made in accordance with trust

agreements. If not, the Court could order Guaranty Trust to pay back the money and the beneficiaries would be determined. The Receiver's costs with respect to the directed issue were to be a first charge upon monies recovered from Guaranty Trust. The Receiver and Guaranty Trust were named as parties.

[27] On July 12th and 14th, 1988, Miller, A.C.J. gave approval to an agreement between the Receiver and the Importers dated July 15th, 1988, under the terms of which the Importers agreed to honour claims of certain MPA Purchasers who bought agreements in the period January 1st, 1986 to June 30th, 1987. They did so "...in exchange for receipt of a share of the monies held in trust with respect to such mechanical protection agreements" (Page 6 of agreement appended to the order).

[28] Guaranty Trust was to pay over to the Receiver all funds held by and under trust agreements with IW. The order specified the use to which the funds were to be put by the Receiver, and without particularizing, it is clear that the Receiver's costs were payable and that both the MPA Purchasers and the Importers were beneficiaries. Equally clear is the position of the Importers. Although not obliged to pay MPA Purchasers, they elected to do so in exchange for a share of monies held in trust by Guaranty Trust under agreements with IW.

[29] On December 31st, 1988, Miller, A.C.J. approved a settlement agreement between the Importers, *inter alia* and the Receiver. The agreement set out the division of surpluses. On January 28th, 1992, Miller, A.C.J. approved an agreement between Elite (an insurer) and the Receiver covering the payment of certain MPA claims. The Court also directed an issue to be tried between the insurer and an Importer and directed the manner of payment out of certain funds held by the Receiver (by this time, Ernst & Young). The Receiver was authorized to sue Guaranty Trust under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, on behalf of the MPA holders. The Receiver commenced this action, No. 9203 20725, "seeking whatever determinations and claiming whatever relief the Receiver considers appropriate, including, but not limited to, those issues already directed by order of this Honourable Court dated June 16th, 1988, and those issues set out in the Receiver's report."

[30] It is plain, therefore, that the Receiver was given unfettered discretion in this action against Guaranty Trust to seek any determination and relief it considered appropriate in the matter of IW, and breach of trust by Guaranty Trust was one such matter. Guaranty Trust was wound up by order of the Ontario Court which further ordered on October 6th, 1993, that the Receiver could continue this action in this court.

[31] In his order of July 12th and 14th, 1988, Miller, A.C.J. varied the trusts in accordance with s. 3 of the appended agreement, vesting in the Receiver for the benefit of the Importers all of Guaranty Trust's powers as trustee.

[32] On January 28th, 1992, Miller, A.C.J. authorized the Receiver to bring an action on behalf of MPA Purchasers against Guaranty Trust advancing any claim the Receiver considered

appropriate including, but not limited to, those issues already directed by the Order of June 16th, 1988.

[33] On March 19th, 1995, Guaranty Trust was discharged as trustee on its own motion and the Receiver was appointed in its stead.

[34] It is clear from the above that the Receiver properly brought this action on behalf of the trust beneficiaries by court order and the Importers, by court order, became the beneficiaries of the trusts.

[35] There was no need to sue in a representative capacity given the orders of Miller, A.C.J. The Receiver, Ernst & Young is the proper claimant.

V. Conceded Breaches

[36] Guaranty Trust withdrew $2,606,430.50 from the Trusts, and repaid $61,320.37 for a net of $2,545,110.13. Of this, $509,000.00 is contested as a breach so that the net breach conceded is $2,036,110.13. Of this, I find that $1,570,182.00 was misappropriated by Guaranty Trust to repay a debt owing to it by IW.

[37] It should be noted that Guaranty Trust replaced Royal Trust in 1987 at the instance of IW for the ostensible reason that Guaranty Trust could invest trust funds at a higher rate. The real reason, as may be seen from the evidence (Exhibit 2, D-2, 3 and 4), was that Dale Mather, a director of IW, required a loan of $1.5 million which Royal Trust would not extend. If Guaranty Trust would loan it, they would get IW's book of business to administer, approximately $21 million and rising. Guaranty Trust got the book and made the loan in October of 1987. Carl Andrade of Guaranty Trust and Dale Mather of IW were complicit in this arrangement which saw Guaranty Trust withdraw $1,233,533.82 on October 28th, 1987 from certain trusts, in addition to the $266,466.18 withdrawn on September 15th, 1987.

[38] The last two sums totalled $1.5 million and the money was used to purchase deposit certificates which were hypothecated to Guaranty Trust as security for the loan. In addition, Guaranty Trust took an assignment of IW's interest in the residual balances on termination of the trusts. Andrade had been told by Guaranty Trust's lawyers that they refused to provide an opinion as to IW's ability to withdraw actuarially projected surplus from the trusts.

[39] In the result, I find that the sum of $2,606,430.50 was withdrawn, in breach of trust, as actuarially projected surplus while the 1986 Trust Agreements were still in force. They were changed in December of 1987 by IW and Guaranty Trust to provide that Guaranty Trust held the finds "in trust for IW" and gave a right to remove actuarially projected surplus – all this, apparently, without the consent or even the knowledge of the Importers. This self-serving ratification of what had passed could not undo the breaches of trust.

VI. Contested Breaches

A. The Quebec Trust

[40] Was the payment by Guaranty Trust to IW of $509,000.00 as "actuarially projected surplus" in June of 1997 a breach of the Quebec Trust?

[41] IW, the sole beneficiary of this trust (as argued by the Defendant) requested the payment, submitting the copy of the Regulation (s. 172) of the *Consumer Protection Act*, an actuarial certificate and a copy of IW's renewed permit. If I understand the argument, if this was a breach of trust, the beneficiary consented to it and may not subsequently claim from the trustee compensation to the trust for any loss (*Waters Law of Trust in Canada*, 1236-1237).

[42] However, at p. 1237, Professor Waters writes: "It is the beneficiary's personal conduct which bars him from making such a claim, and therefore does not bar any other beneficiary from suing the trustee."

[43] Even if IW instigated the breach and is barred from suing on its own behalf, other beneficiaries such as the Importers and the MPA Purchasers are not, and it is for their benefit, not IW's, that the Receiver sues. Were IW the only party who stood to gain, the Defendant would have a point.

[44] As for applying s. 26 of the *Trustee Act*, R.S.A. 2000, c. T-8, by impounding the interest of the beneficiary for the benefit of the trustee, that section was not meant to protect a trustee from his own malfeasance. Guaranty Trust is not a victim of accident or slip, but rather a participant with IW (through their respective officers Andrade and Mather) in a deliberate breach of trust.

[45] The Quebec Trust was an interim agreement intended to cover the transfer of trusteeship of certain assets (premiums on the sale of MPAs) from IW to Guaranty Trust pending the execution of a formal trust agreement.

[46] The Interim Trust Agreement reads:

Interim Trust Agreement

Agreement made March 6, 1987.

Between:

Guaranty Trust Company of Canada (the "Company")

- and -

International Warranty Company Limited ("I.W.")

Whereas I.W. currently holds the assets described in Schedule "A" (the "Assets") in the amounts and at the location noted in the said Schedule and desires to transfer the Assets to the Company immediately;

Whereas the Company has agreed to hold the Assets on certain trusts for I.W., for the payment of the claims made against I.W. pursuant to certain mechanical protection agreements entered into with persons who purchased or leased motor vehicles in the Province of Quebec (the "Agreements");

And Whereas I.W. and the Company wish to set forth their agreement to an interim trust arrangement for the Assets until a formal trust agreement between themselves can be prepared and executed.

Therefore this Agreement witnesses that in consideration of the mutual promises and covenants herein contained, and other good and valuable consideration, the receipt of which is hereby acknowledged by the parties hereto, I.W. and the Company agrees as follows:

1. I.W. shall transfer the trusteeship of Assets to the Company as of the date hereof.

2. The Company accepts this transfer and agrees to hold the Assets in trust for I.W., provided that until such time as a formal trust agreement between I.W. and the Company can be prepared and executed, the Assets shall not be disbursed for any purpose other than to meet I.W.'s claims and obligations under the Agreements in accordance with the Company's customary claim reimbursement procedures.

In Witness, the parties have executed this agreement on the date first written above.

[47] The Defendant reminds us that IW was the only beneficiary under this trust agreement and it is true that Guaranty Trust undertook to hold the assets "on certain trusts for I.W.". However, the purpose was to hold the assets "for the payment of claims made against I.W. pursuant to certain mechanical protection agreements ..." such that Guaranty Trust was simply replacing IW as trustee for the MPA holders.

[48] The Defendant concedes that the language of the Quebec Interim Trust Agreement – no withdrawals other than to meet IW's obligations in accordance with Guaranty Trust's "customary claim reimbursement procedures" – does not generally permit the withdrawal of surpluses. However, the Defendant says that Quebec law applies to the Quebec Trust and it permits the withdrawal of surplus in appropriate circumstances.

[49] The withdrawal of $509,000.00 was not for claim reimbursements, but rather as actuarially projected surplus. On the face of the trust agreement, this would be a breach, but the Defendant argues that Quebec law applies, and because it permits the withdrawal of actuarially projected surplus in certain circumstances, no such voluntary restriction as appears in the trust agreement can be binding upon Guaranty Trust or IW.

[50] Even if Quebec law applies, it seems odd that a contractual measure clearly meant for the protection of MPA Purchasers should be proscribed by Quebec consumer protection legislation. I think that this last issue should be decided before the conflict of laws question.

[51] Assuming then that Quebec law applies, the Defendant says that it complied with the requirements of that province's *Consumer Protection Act* in releasing $509,000.00 (two-thirds of the surplus money in the reserve account) which was at first held in Quebec but then transferred to Calgary.

[52] IW had represented to the Quebec Consumer Protection Office that the funds represented surplus and so could be paid out of reserve under s. 172 of the Regulation.

[53] Section 172 provides in part that:

> The sums deposited in the reserve account may be applied only to the following purposes:
>
> a) being a claim arising from a contract of additional warranty for which a sum was deposited in the account in accordance with s. 170;
>
> b) investing...
>
> Notwithstanding the foregoing, where the financial report transmitted to the president under s. 94.2 upon an application for renewal of a permit, shows that funds accumulated in the reserve account represent a sum greater than that declared to constitute a good and sufficient reserve by the actuary certificate, the

> merchant may, within 10 days of the coming into force of the renewed permit, apply the excess to a purpose other than those indicated in subparagraphs a) and b).
>
> The Regulation, s. 168-172 (Volume 12, Exhibit 26, Tab 5A).

[54] It may be seen, therefore, that while the Quebec Interim Trust Agreement limited disbursement of reserve funds by Guaranty Trust to purposes related to customary claim reimbursement procedures, the Regulation allowed disbursement of surplus. Further, pursuant to the *Consumer Protection Act*, the parties were required to abide by the law of Quebec - s. 261: "No person may derogate from this Act by private agreement."

[55] Therefore, argues the Defendant, any voluntary abrogation of IW's right to actuarially determined surplus was not binding on the parties. I very much doubt that the framers of the *Act* intended to disallow private agreements meant for the protection of MPA Purchasers. Surely, derogation from the *Act* refers to private agreements which dilute protections accorded in the *Act*, a public interest measure. The private agreement in question, between Guaranty Trust and IW, was executed on March 6th, 1987. Guaranty Trust's expert, Mr. Edwards, opined that these parties could not derogate from the *Act* by their agreement to restrict drawings from trust to claim settlement. He said:

> The *Consumer Protection Act* and all regulations adopted thereunder are of public order. Accordingly, it is prohibited to derogate from said law and regulations by private agreement.

[56] With respect, the private agreement does not derogate or detract from the *Act*, but rather enhances it. The parties are in this position: having agreed to limit their access to funds in the public interest, they are now saying that the limitation is ineffective because of the public interest statute, so IW must be allowed to access the funds (or some portion of them) for their own use. I prefer the evidence of the Plaintiff's expert, Mr. Boodman, who said (Exh. 29, Tab B):

> (c) The parties to a consumer contract can derogate from the rules under the *Consumer Protection Act* and its Regulations if the derogation enhances or increases the protection afforded to a consumer (para. 20).
>
> ...
>
> (f) It cannot be argued that a stipulation in any contract between a merchant and a financial institution is contrary to a rule of public order under the *Consumer Protection Act* or its Regulations (para. 23).
>
> (g) It is clear that the second paragraph of section 172 of the Regulations is not intended to impose an obligation upon a merchant to withdraw surplus funds from the reserve account. It is purely permissive. Therefore, even if

section 172 of the Regulations could be viewed as applying to the contract between a merchant and the financial institution in which the former establishes a reserve account, the provision is not mandatory and not of public order, and could be varied by the terms of the contract (para. 24).

(h) It is possible to derogate from the statute and Regulation if the derogation has the effect of improving or increasing the protection given to a consumer. Accordingly, it would be valid for the contract between a merchant and a financial institution governing a reserve account to provide that the merchant renounces his right to withdraw surpluses under section 172 of the Regulations. Similarly, a stipulation that the funds in the account may not be used for any purpose other than paying the claims arising from a contract of additional warranty would be consistent with the purposes of the *Consumer Protection Act* and its Regulations and would not contravene section 172 of the Regulations. That would be allowed and enforceable under the law of Quebec (para. 25).

[57] In contrast to the compelling evidence of Mr. Boodman, Mr. Edwards was admittedly unclear about the application of s. 172 of the Regulations to the Trust Agreement. I reject the opinion he stated and accept that of Mr. Boodman.

[58] Finally, the Defendant argues that the Quebec Interim Trust Agreement does not define "customary claim reimbursement procedures" so the Plaintiff has failed to prove non-compliance with them (Paragraphs 141 & 142 of written submissions). That is inconsistent with what was argued earlier in paragraphs 118 and 119, to wit:

> Guaranty Trust concedes that ... [customary claim reimbursement procedures] does not generally permit the withdrawal of surplus.

[59] I agree. Whatever the procedures might be, they relate to claim reimbursement, not withdrawal of surplus.

[60] Guaranty Trust and IW are in breach of their own trust agreement, even under Quebec law, if indeed it applies.

The Applicable Law

[61] The proper law of a contract is primarily governed by the express intention of the parties and failing that, their implied intention. If that cannot be discovered, the contract will be governed by the system of law that has the closest and most real connection to the contract. (J.G. Costel, *Canadian Conflict of Laws*, 5th ed. (Toronto: Butterworths, 2002) pp. 31.4-31.5.)

[62] The Agreement itself is silent on the point but the Defendant says that implied intent may be found in the evidence. To begin with, IW established a reserve account in Quebec to cover its liabilities under MPAs sold in that province. These assets became the subject matter of the Quebec Trust and the parties sought and received approval from the Quebec Consumer Protection Office as to the terms of the Quebec Interim Trust Agreement and the transfer of the reserve account from the Toronto Dominion Bank to Guaranty Trust.

[63] IW applied for and received a "Merchant's Permit to Deal in Additional Warranties" from the Quebec Consumer Protection Office and requested Guaranty Trust to remit to it the sum of $509,000.00 from the Quebec Trust, that being two-thirds of the surplus calculated by IW's own actuary, Crouse. The transfer was done.

[64] Guaranty Trust argues that this course of conduct clearly demonstrates that both IW and Guaranty Trust intended to be governed by Quebec law in administering the Quebec Trust and the Quebec Interim Trust Agreement. I would not go so far. The course of conduct to me demonstrates that both IW and Guaranty Trust did what they were obliged to do to effect the transfer of funds, but what they were doing was contrary to the terms of the Interim Trust Agreement. What I am interested in is evidence which demonstrates the intention of parties with regard to the applicable law applying to that agreement.

[65] The Interim Trust Agreement was drafted in response to the concern of Jacques Dagenais of the Quebec Consumer Protection Office about reserve funds being transferred from Quebec to Calgary.

[66] Guaranty Trust's solicitors in Calgary, MacLeod Dixon, assured him in the following terms that the funds were safe (letter of November 4, 1987):

> It occurs to us that it may well be in the interest of persons whom it is your office's duty to protect to permit Guaranty Trust to maintain the IW trust accounts out of Calgary, for two principle reasons. The first, the Calgary offices acknowledge expertise in the area of trust fund management should ensure that the value of trust property, held for the benefit of Quebec residents, is maximized.
>
> Secondly, and most significantly, it would be our view that IW trust is resident in Alberta by virtue of the fact that the account was opened and managed here. Our common-law rules relating to the residence of a trust would likely subject the IW trust monies to Alberta law relating to trustees and their responsibilities. These rules are well established, very onerous and our courts are very firm in their views regarding a trustee's duty to its beneficiaries.
>
> In short, Jacques, should your office ever decide to take action against or seek an accounting from Guaranty Trust, I suspect that you might be pleasantly surprised to learn how supportive our courts would be of your efforts.

[67] This letter was approved by Andrade before it was sent. Having thus attempted to justify the departure from the Quebec legislation requiring the deposit of funds in that province by saying that Alberta law applied, the present position taken by the Defendant in support of the application of Quebec law seems disingenuous (see Exhibits 2-G13, G14 and G15).

[68] I regard the above correspondence as a demonstration of an express intent to have Alberta law apply.

[69] It must be acknowledged that the trust fund was meant to govern the management of assets derived from MPAs sold in the Province of Quebec. That said, Guaranty Trust itself managed to transfer control to Alberta by apparently convincing the Quebec official that Alberta law should apply. In my view, this aspect of the matter trumps all others in the question of choice of law.

B. <u>Failure to Pay Premiums into Trust</u>

[70] IW did not fund August premiums amounting to $594,532.29 into the 1987 Trusts and the Quebec Trust. The Defendant argues that this does not constitute a breach of trust on the part of Guaranty Trust because the latter was not trustee of the funds until it received them. Section 25 of the *Trustee Act* provides that the trustee "is chargeable only for money and securities actually received by the trustee" and "is answerable and accountable only for the trustee's own acts, receipts, neglects or defaults".

[71] In my view, however, Guaranty Trust is answerable and accountable because it was party to IW's default in payment and paid out substantial funds to IW in the face of this.

[72] Two days before the $1.5 million loan transaction closed, Crouse of IW told Andrade:

> A valuation of the trust funds for which you are holding the assets, as at August 31, 1987, has revealed that a surplus in funding exists. The valuation had not taken into account August trust fund remittances, which were outstanding at the time of valuation. Notwithstanding the trust requirements for funding these premiums, the actual status of the combined 1986 and 1987 funds is such that this remittance need not be made. Payment of these premiums representing just under $600,000.00 will serve to enhance the surplus revealed by a valuation.

[73] Thereupon, Guaranty Trust withdrew from the Trusts and paid to IW up to December 7, 1987 actuarially projected surplus of $1,303,715.82 for the loan transaction as well as claim reimbursement payments totalling approximately $963,000.00. (See letter from John Crouse to Carl Andrade dated October 26, 1987, Exhibit 2 - D43 and 1986 Trust Agreements, Exhibit 2 - A9, A7, A11, A13, A15 and A16).

[74] I agree with the Plaintiff's argument that both IW and Guaranty Trust intentionally breached the terms of the Trust by allowing further withdrawals for IW's benefit and even by

allowing withdrawals for legitimate purposes related to the payment of MPA claims in the face of IW's failure to pay in August premiums.

VII. Remedies

[75] The appropriate remedy, says the Plaintiff, is restitution to the Trust.

[76] The Defendant argues that the remedy must equate to the actual losses that flow from the breaches. The idea is to compensate beneficiaries, not to punish the trustee. The quantum of damages is the actual loss caused to the trust estate by the breach. Losses are to be assessed as at the time of trial with the full benefit of hindsight. In the Defendant's submission, these losses can only be actual repair costs of the MPA Purchasers and there is no evidence of such claims remaining unpaid. Moreover, all trusts have now expired, and all MPA claims have been paid. IW is the residual beneficiary, so if Guaranty Trust were ordered to pay damages to the Receiver, the money would simply be returned to IW to whom Guaranty Trust has already paid over trust funds.

[77] In my view, the above argument ignores the obligation of IW to other possible beneficiaries, notably the Importers. If Guaranty Trust is in breach, it is not for Guaranty Trust to define the extent of IW's obligations. That is the Receiver's task.

The Effect of the Orders in the Receivership Action

[78] The Defendant says that there has been no final determination of the quantum of loss in Miller, A.C.J.'s orders and the Plaintiff is required to prove the actual losses in this case. I reject that argument. It is not my task in this action to calculate actual losses. That is why a Receiver has been appointed. If Guaranty Trust breached the trust, the remedy called for is restoration to the trust of the sum it misappropriated. The Defendant submits that the Importers have suffered no net loss. That is arguable, but the argument should be made to the Receiver. Similarly, if the Importers failed in their duty to mitigate, that is another issue for the Receiver to resolve.

[79] I accept the Defendant's argument that the trustee's liability, once breach has been proved, is to return to the estate the property over which the trustee had control and of which the trustee deprived the estate. The Plaintiff must prove the amounts withdrawn in breach of trust (and has done so here), but is not required to prove the loss or damage suffered by any of the beneficiaries. (David J. Hayton, *Underhill and Hayton*: *Law Relating to Trusts and Trustees*, 15th ed. (London: Butterworths, 1995) at pp. 828-830. See also *Guerin v. The Queen*, [1984] 2 S.C.R. 335, pp. 14-16).

[80] This lawsuit is about the return to the Trusts of monies wrongfully taken. The determination of entitlement to those funds will occur in the Receivership action. The Receiver's task will be greatly assisted by Miller, A.C.J.'s order of July 12th and 14th, 1988, which touched upon the dollar value of repair costs, administrative and adjudicative costs and whether the latter

are properly included in the calculation of the claim. That Order was followed by a settlement agreement dated December 13, 1988, so there is force to the Plaintiff's argument that the losses in this case are *res judicata*. But, again, that is the Receiver's business.

[81] On April 4th, 1997, Clarke, J. of this Court ordered that Importers who did not produce documents and answer questions relating to their costs to adjudicate, administer and pay claims were prohibited from introducing such evidence at the trial of the action.

[82] Toyota and Hyundai elected to submit evidence to the Receiver, but other importers did not. The Order, however, does not prohibit the Importers from arguing at trial as they have that:

(a) The Trustee's liability is to reconstitute the Trusts by returning to the trust funds all funds improperly removed; and

(b) In the alternative, if the beneficiaries are required to prove their loss, that the loss of all the Importers has been determined in the Receivership by the Order of Justice Miller dated July 12th and 14th, 1988, or alternatively that it is an abuse of process for Guaranty Trust to require the Importers to prove their loss in this action.

[83] Because I have decided that the trustee's liability is to reconstitute the Trusts by returning to the Trusts all funds improperly removed, it is not necessary to consider the alternatives.

VIII. Interest

[84] The Plaintiff asked for fair and equitable interest based upon the rate of return earned on investments by Guaranty Trust's insurer, compounded annually on the basis that had the insurer restored monies to trusts at the time of breach, it would not have had those monies to invest. Because it did not restore the funds, it may be assumed that the monies were invested and the Plaintiff considers it fair and equitable to be compensated in an amount equivalent to what the insurer earned. Because the insurer defended the action, it should pay costs. Recovery of same form the Defendant is blocked by the Ontario order.

[85] In the alternative, the Plaintiff asks for interest at the rate earned by Guaranty Trust on its loans as evidenced by the $1.5 million loan to IW which was at 2 % above Guaranty Trust's prime, compounded annually. It is worth noting that Guaranty Trust made this loan as the price of getting IW's business and I have heard no evidence as to whether or not 2 % over prime represented going commercial rates at the time.

[86] As a final alternative, the Plaintiff asks for the rate earned by Guaranty Trust for the trust funds invested in treasury bills and 91 day bonds, compounded as shown by Mr. Cohen (Exhibit 9). Because these were the investment vehicles used by Guaranty Trust when it received the

monies, to my mind they best serve the purpose of making whole the trusts. Restitution is not intended to be a windfall, so this alternative, the most conservative of the three, has been chosen.

[87] I decline to award interest under the *Judgment Interest Act*, R.S.A. 2000, c. J-1, because I find that an award of commercial rates best suits the objective of commercial fairness. Guaranty Trust benefited at least to the extent that IW used $1,570,182.00 of the projected surplus to repay a loan to Guaranty Trust. The latter was complicit in the misuse of trust funds by IW, a factor not to be overlooked in deciding whether compound interest is appropriate. For that reason, as well as in the interest of commercial fairness explained above, I order the payment of interest from the date of breach equivalent to the rate earned by Guaranty Trust from time to time for trust funds invested in treasury bills and 91-day bonds compounded as shown in Exhibit 9.

IX. <u>Costs</u>

[88] The Plaintiff asks for costs against the insurer of the Defendant as the real litigant in this matter.

[89] Costs against unnamed persons to an action are not unknown, but they are exceptional. When speaking about such persons, I will refer to them as "non-parties" to distinguish them from named litigants, including third parties in a civil action.

[90] What, exactly, is the insurer's status in this action?

[91] It derives from the order of Houlden, J. of the Ontario Court (General Division) Commercial List acting under the *Winding-Up Act*, R.S.C. 1985 c. W-ll in the matter of the winding up of Central Guaranty Trust (here, Guaranty Trust, the Defendant). That order, Exh. 30 in our action, is reproduced below:

ONTARIO COURT (GENERAL DIVISION)
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 6TH DAY
	)	
MR. JUSTICE HOULDEN	)	OF OCTOBER, 1993.

IN THE MATTER OF THE *WINDING-UP ACT*,
R.S.C. 1985, c. W-11, as amended

- and -

IN THE MATTER OF
CENTRAL GUARANTY TRUST COMPANY

ORDER

THIS MOTION made by Ernst & Young Inc. ("Ernst & Young") for an order granting leave to Ernst & Young to continue its claim in the Court of Queens Bench Alberta, bearing court file no. 920320725 (the "Action"), against Central Guaranty Trust Company ("Central Guaranty") and an order requiring that Deloitte & Touche Inc., the Provisional Liquidator of Central Guaranty (the "Provisional Liquidator"), produce to Ernst & Young copies of all insurance policies which may provide coverage for the claim contained in the Action or which are otherwise relevant to the action was heard on Monday, October 4, 1993 and Thursday, October 7, 1993, at Osgoode Hall, in the City of Toronto.

ON READING the affidavit of Ian Strang sworn September 22, 1993 and on reading the affidavit of Paul R. Basso sworn September 30, 1993 and upon hearing the submissions of counsel for Ernst & Young, the provisional liquidator of Central Guaranty and for American Home Assurance Company, and upon being advised by counsel for Ernst & Young that it asked to adjourn its motion as it relates to lifting the stay proceedings against Central Guaranty.

1. THIS COURT ORDERS that Ernst & Young be and hereby is granted leave to continue the action in Alberta.

2. THIS COURT requests the assistance of the Alberta Court of Queens Bench pursuant to the provisions of the *Winding-Up Act*, R.S.C. 1985, c.W-11, as amended in determining whether or not the provisional liquidator ought to produce to Ernst & Young copies of insurance policies which may provide coverage for the claim contained in the Action or which are otherwise relevant to the Action.

3. THIS COURT ORDERS that if judgment is issued in the Action in favour of Ernst & Young, it shall have no right to issue execution against the estate of Central Guaranty and none of the property, assets and undertakings of Central Guaranty, including the proceeds therefrom under the administration of the Provisional Liquidator, are subject to seizure, sale, garnishment or other judicial process and the Provisional Liquidator will not be liable for any of the expenses attendant to the conduct of the proceedings, including discoveries, the production of documents, nor should any costs be awarded against the estate but the plaintiff shall have the right to file and pursue a proof of claim in the winding-up proceedings.

4. THIS COURT ORDERS that the Provisional Liquidator not be required to defend the Action but that it permit the insurer of Central Guaranty to defend the Action.

5. THIS COURT ORDERS that any proceeds from insurance coverage arising out of a judgment or a settlement of the Action belong to the plaintiff and are free of any claims by the Provisional Liquidator.

6. THIS COURT ORDERS that if Ernst & Young settles the Action it may apply to this court for permission to continue to pursue its proof of claim in the liquidation proceedings.

7. THIS COURT ORDERS that the costs of this motion be in the cause of the Alberta proceeding.

[92] In its mandate to deal with the assets and liabilities of Guaranty Trust, the Ontario court was concerned with the case at bar, already commenced when the Order was made on October 6, 1993.

[93] The Court granted leave to Ernst & Young to continue its action in Alberta. It asked the Court of Queen's Bench of Alberta to decide whether insurance policies should be produced to Ernst & Young which might provide coverage for the claim. Application was made, but denied in the Alberta court.

[94] Justice Houlden went on to say that if judgment were granted in favour of Ernst & Young, then it would have no right to execute against the estate of Central Guaranty and none of the assets of Central Guaranty would be subject to judicial process: "...nor should any costs be awarded against the estate but the plaintiff shall have the right to file and pursue a proof of claim in the winding-up proceedings."

[95] Read narrowly, that means that the successful plaintiff could file proof of its costs in the lawsuit as proof of claim in the winding-up proceedings, ranking, I suppose, as a general creditor. The provisional liquidator of Central Guaranty, Deloitte & Touche was not required to defend, but Central Guaranty's insurer could, and did.

[96] Any proceeds from insurance coverage arising from a judgment or settlement were to be the plaintiff's and free from any claim of the provisional liquidator for Central Guaranty.

[97] No challenge to this order has been made. It seems to be a product of the federal legislation that any provincial superior court can exercise a supervisory role over a lawsuit in another province involving the company being wound up.

[98] The Plaintiff, therefore, is in this position:

1. It can sue the Defendant, but not ask for costs against the Defendant if successful.

2. If it gets a judgment, it cannot enforce it against the estate of Guaranty Trust, but if the judgment (or part of it) is insured, the insurance proceeds are the Plaintiffs, free of claims by the provisional liquidator.

3. The insurer has elected to defend the action anonymously. By order, no costs "should be ordered against the estate".

[99] So the Plaintiff must either ask me for costs against the insurer directly, or file a bill of costs against the estate in the winding-up proceedings.

[100] The Plaintiff has asked me to award costs against the Defendant and the insurer jointly. As I read paragraph 3, I cannot do that. It is the insurer or nothing.

[101] There is precedent for the award of costs against a non-party in special circumstances, provided fair notice is given. Counsel for the insurer says that the simple fact of defending does not imply fair notice of a claim for costs directly against his client, the insurer. That is debatable, but I will not rule on it because counsel for the Plaintiff assured me that he had informed the Defendant's counsel last September that he would ask for costs against the insurer. I accept that, and it satisfies the need for fair notice.

[102] ***Chapman Management & Consulting Services Ltd. v. Kernic Equipment Sales Ltd.***, 2006 ABQB 227 involved a claim for costs personally against the sole director of the plaintiff corporation. That dimension of corporate versus personal liability is absent in our case, but the principles of liability of non-parties apply.

[103] The court has wide discretion on costs, both under s. 21 of the *Court of Queen's Bench Act*, R.S.A. 2000, c. C-31 and Rule 601 of the Alberta Rules of Court. The latter speaks of parties liable for costs, but does not define "parties". It speaks of "third parties", but whether the reference is to persons named as third parties in the action, or to anybody not a plaintiff or defendant, named or otherwise, is a matter for speculation.

[104] I do not read the rule itself as giving the court discretion to award costs against persons not named as parties, but there is apparently inherent jurisdiction to do so. In *Chapman, The Alberta Civil Procedure Handbook* is cited in support of non parties being ordered to pay costs:

(a) Where that non-party is the person ultimately liable (example, on a chain of contracts), or

(b) Where it was the real instigator of the litigation and the one which would have received the fruits, or

(c) Where the non-party was guilty of serious misconduct relating to the suit.

[105] It can be said here that the insurer is the person ultimately liable under a contract of insurance. Were it otherwise, why would the insurer have defended?

[106] As well, the insurer is the real "instigator" of the litigation (albeit through the Defendant, not the Plaintiff) and if successful would have enjoyed the fruits of its defence in not having to pay the judgment up to the insured limits.

[107] Perhaps the overriding consideration, however, is this: the insurer has been added as an unnamed party by the Ontario Court at paragraph 4 of the Order.

[108] I was also referred to ***Loree v. James et al***, 2004 ABQB 559, in which the court set out circumstances which might justify an award of costs against a nonparty, citing ***358427 Alberta Inc. v. Monenco Advisory Services Ltd.***, 1999 ABQB 6.

[109] Clearly, the circumstances must be exceptional. They are here. Only rarely does one see an extra-provincial court directing what must be done in an Alberta lawsuit.

[110] A cause promoted by a non-party who puts up a man of straw to prosecute the litigation will not be shielded from costs. That is not our case.

[111] Where a statute "vests" the action in a non-party (ex. a government board) the non-party can be liable for costs (***Kowalchuk v. Adduri***, 2000 MBQB 9. That is not our case either, but the Ontario court left it up to the named defendant and its insurer (para. 4) to defend or not. Only the insurer elected to do so, and once having joined the action as an unnamed defendant, it is only fair that it bear the risk of costs.

[112] In passing, I read the Order as answering the provisional liquidator's desire to permit meritorious claims to be tried against Central Guaranty while at the same time protecting the estate against untested ones. For that reason, a judgment against Central Guaranty would not be subject to execution, because it might go by default. If an insurer, however, was liable under contract, it could defend in place of Central Guaranty. Thus, claimants would not be prejudiced and the provisional liquidator would be spared the costs of defending an insolvent estate.

[113] In the result, I regard the exceptional circumstances of this case as justifying an award of costs against the insurer, limited to the new trial, and based upon double Column 5 of Schedule C.

X. Disposition

[114] The Plaintiff will have judgment:

1. Against the Defendant for $3,139,642.42 with interest as explained in paragraph [87];

2. Against the Defendant's insurer for costs of this trial based on double column 5 of Schedule C.

Heard on the 13th day of October, 2009 and the 13th and 14th day of January, 2010.
Dated at the City of Edmonton, Alberta this 21st day of January, 2010.

Edward P. MacCallum
J.C.Q.B.A.

Appearances:

Donald R. Cranston, Q.C., Bennett Jones LLP and
Lawrence Theall, Theall & Associates
for the Plaintiff

Robert B. White, Q.C., Davis & Company
for the Defendant

TAB 7

LSI Logic Corporation of Canada, Inc. v. Logani ABQB 968

Date: 20011113
Action Nos.: 9501_15628 & 9901_04378

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY
IN THE MATTER OF Section 190 of the Canada Business Corporations Act, R.S.C. 1985, c. C_44, as amended

AND IN THE MATTER OF LSI Logic Corporation of Canada, Inc. and its shareholders

BETWEEN:

LSI LOGIC CORPORATION OF CANADA, INC.

Petitioner

_ and _

RAMESH LOGANI and all other Dissenting Shareholders as Listed in Schedule A to the Petition

Respondents

AND BETWEEN:

THE CANADIAN PACIFIC LIMITED PENSION TRUST FUND (REGISTERED IN THE NAME OF QUEEN & CO.), THE CANADIAN PACIFIC EXPRESS TRANSPORT PENSION TRUST FUND (REGISTERED IN THE NAME OF QUEEN & CO.), THE CANADIAN PACIFIC HOTELS MASTER TRUST "B" PENSION TRUST FUND (REGISTERED IN THE NAME OF QUEEN & CO.), THE TORONTO TERMINALS RAILWAY COMPANY PENSION TRUST FUND (REGISTERED IN THE NAME OF QUEEN & CO.), DAVID W. MARTIN, BRIAN W.F. McLOUGHLIN, MARY A. SARAH McLOUGHLIN, IVAR LIEPINS, LUTHER LEE, DEAN TEMPLE, WES MILLER, JYOTSANA PACHAI, GORDON WALDMO, LAI_FONG LEUNG, REBECCA WAN, AZZEDINE BOUBGUIRA, RAMESH LOGANI, GORDON SABISTON, JOSEPH SZAMMER, VALLY SZAMMER, DAMIR ANDREI SUSNJAR, NEIL ELLIOTT, DONNA DENISON, ALEX NGI, JAMES SOROKA, LAWRENCE PICK, PETER ARABCHUK, BEVERLY COWAN, ROBERT MacKECHNIE, HEATHER MacKECHNIE, ROBERT RUDDY, TIMOTHY McCOURT and WILSON WONG

Plaintiffs

_ and _

LSI LOGIC CORPORATION OF CANADA, INC., LSI LOGIC CORPORATION, 3096467 CANADA INC., LSI LOGIC NETHERLANDS BV, DAVID E. SANDERS, ALBERT E. PIMENTEL,

HORST SANDFORT, TRAVIS A. WHITE,
THOMAS G. SMILLIE and ALBRECHT W.A. BELLSTEDT

Defendants

MEMORANDUM OF DECISION ON COSTS OF
THE HONOURABLE MADAM JUSTICE A. FRUMAN

APPEARANCES:

E. David D. Tavender, Q.C.
Gordon L. Tarnowsky
Lindsay A.M. Holukoff

for LSI Logic Corporation of Canada, Inc.

Leslie R. Duncan, Q.C.
Gordon J. McCue

for the Shareholders

Roderick A. McLennan, Q.C.
Donald W. Dear

for the Directors and Officers

[1] The plaintiffs are former shareholders of LSI Logic Corporation of Canada, Inc. They applied to strike fair value proceedings they had enthusiastically supported for more than three years. They also filed a new statement of claim, alleging oppression against LSI Canada and its directors and officers. LSI Canada stoutly defended its fair value proceedings, and moved to strike the oppression claim. The disagreement, which created a three-year diversion, culminated in five motions that I heard in a special chambers application in March, 2001.

[2] LSI was successful in all five applications: ***LSI Logic Corp. of Canada, Inc.* v. *Logani***, [2001] ABQB 710; [2001] A.J. No. 1083 (Q.B.), online: QL (A.J.). In the judgment I (i) dismissed the Shareholders' application to strike LSI Canada's fair value proceedings on the merits; (ii) decided that the Shareholders' application to strike was an abuse of process based on the doctrines of *res judicata* and election; (iii) determined that the Shareholders violated the implied undertaking in Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose and an express undertaking they had given not to use the information in any other litigation; (iv) decided they should not be relieved from the breach of their

undertakings and granted an injunction restraining the Shareholders from making use of confidential information disclosed to them in the course of discovery; and (v) struck or stayed various portions of the Shareholders' statement of claim in the oppression action.

LSI CANADA'S COSTS

[3] The parties agree that LSI Canada is entitled to its costs. They disagree on quantum. The Shareholders contend that LSI Canada should receive party and party costs based on single column 5 of Schedule C to the *Alberta Rules of Court*, Alta. Reg. 390/68; LSI Canada submits that partial indemnity costs are appropriate. The parties are more than half a million dollars apart.

[4] Costs are in the discretion of the court, and subject to the test of reasonableness, necessity or prudence: ***Guarantee Co. of North America* v. *Beasse,*** [1993] A.J. No. 1073 at para. 13 (Q.B.) online: QL (A.J.). There are three levels of costs: party and party costs; solicitor and client costs, which indemnify for costs that are essential to and arise within the four corners of the litigation; and solicitor and his own client costs, which may include services that are not strictly essential to the litigation: ***Trizec Equities Ltd.* v. *Ellis Don Management Services Ltd.*** (1999), 251 A.R. 89 at 106 (Q.B.) citing ***Sidorsky* v. *CFCN Communications Ltd.*** (1995), 27 Alta. L.R. (3d) 296 at 299 (Q.B).

[5] Although a court has broad discretion in awarding costs, absent any misconduct on the part of the litigants, courts generally award costs on a party and party basis to balance two competing interests. On the one hand it is unfair to require a successful party whose conduct is not blameworthy to bear any costs incurred in prosecuting or defending the action; on the other hand, citizens will be hesitant to assert valid legal rights or even defend an action if an unsuccessful party is required to bear all the costs: ***Trizec,*** *supra*, at 106; ***Reese et al* v. *Alberta Ministry of Forestry, Lands and Wildlife et al*** (1992), 133 A.R. 127 at 130 (Q.B.). See also: ***Sidorsky et al* v. *CFCN Communications Ltd. et al*** (1997) 206 A.R. 382 at 391 (C.A.).

[6] In ***Jackson and Parkview Holdings Ltd.* v. *Trimac Industries Ltd.*** (1993), 138 A.R. 161 at 172-73 (Q.B.), the court characterized the award of complete indemnity costs as "rare and exceptional" and noted examples of conduct that would attract such an award. Although impropriety is an issue in this case, the tests for complete indemnity costs are not met.

[7] Party and party costs are therefore appropriate. However, Schedule C is not to be applied mechanically in every case. It is "a very crude method by which to assess costs" and "cannot realistically achieve an appropriate level of costs in the context of complex [...] litigation": ***Trizec,*** *supra,* at 106 and 108. Schedule C is addressed to taxing officers: ***Miller (Ed) Sales & Rentals Ltd. v. Caterpillar Tractor Co.*** (1998), 216 A.R. 304 at 306 (Q.B.). A judge has more flexibility. Courts may fix all or part of the costs with or without reference to Schedule C (R. 601.(2)(a)); award a gross lump sum instead of, or in addition to, any taxed costs (R. 601.(2)(e)); award all or part of costs as a multiple or proportion of Schedule C or as a proportion of solicitor and client costs (R. 601.(2)(d)); and award costs to different parties on different scales (R. 601.(2)(f)).

[8] The Shareholders calculate LSI Canada's Schedule C costs at $36,800, and that is what they propose to pay. LSI Canada calculates the costs at $53,900. The discrepancy is primarily due to LSI Canada's inclusion of compensation for preparation and filing of written briefs, preparation for the hearing, and the attendance of a third counsel at the hearing. These items are properly included. However, both the Shareholders' and LSI Canada's calculated Schedule C costs are woefully inadequate given the complexity of the five motions, the level of research and preparation required, and the outcome achieved. A costs award should aim at providing 40% to 50% indemnity in a typical case: Report of the Schedule C Committee at 3; ***Trizec***, *supra*, at 106. The costs the Shareholders propose represent less than 5%.

[9] Rule 601.(1)(e) permits a court, in setting costs, to consider conduct that tended to shorten the proceedings. It recognizes that slavish adherence to Schedule C may encourage inefficiency by precisely compensating for each day's work rather than providing incentives for streamlining the trial process. In this case counsel devoted considerable time and effort to reduce the hearing time. Six pretrial conferences and case management meetings were held to define time lines and handle problems. LSI Canada sifted through three years of fair value litigation to assemble an Agreed Record consisting of three bulky binders of documents with a table of contents 13 pages long. Counsel entered into a statement of agreed facts consisting of 79 items. And counsel submitted lengthy, detailed written argument, accompanied by a shelfful of case law. As a result of intense preparation, the hearing was compressed into two days. The time of the actual hearing is not a proper gauge of the complexity of the issues.

[10] Costs based on a single column of Schedule C are not appropriate in this case. It is my preference to use Schedule C as a guide but also to consider the actual costs incurred, together with the factors identified in R. 601.(1) to arrive at a costs award that "reflect[s] the merits of the case, [...] the risks faced as a consequence of the litigation, the length and complexity of the [...] [submissions]" and the propriety of the proceedings: ***Trizec***, *supra*, at 109.

[11] Rule 601 permits a judge to consider, along with the result in the proceedings, the amounts claimed and recovered, (R. 601.(1)(a)), the importance of the issues (R. 601.(1)(b)) and the complexity of the proceedings (R. 601(1)(c)). In this case, the Shareholders courageously challenged LSI Canada's going private transaction and the court's authority to hear the fair value proceedings. Although their offensive manoeuvres were based on a shaky legal foundation, LSI Canada was nevertheless put to a defence on the merits, and mounted a collateral attack based on abuse of process. LSI Canada's challenges to the Shareholders' motion to strike and oppression claim were serious and well-founded and the Shareholders, understandably, mounted a vigorous defence. Many challenging legal and equitable principles were raised, requiring in-depth factual and legal analysis, and the subsequent reduction of that analysis into written briefs and oral argument.

[12] The issues in these skirmishes – fair value, going private transactions, jurisdiction, abuse of process, election, *res judicata*, express and implied undertakings, waiver and injunction – were important, and although no money judgment was sought, the outcome was economically significant. Had the Shareholders succeeded, LSI Canada, having spent three years mired in chambers applications, case management meetings, document production, witness examinations

and expert reports, would have had to begin again in a new proceeding that upped the financial stakes. The more than $4,000,000 LSI Canada paid to former shareholders for the fair value of their shares would be at risk. In turn, the Shareholders were faced with the possibility that their oppression action, in which they claimed damages exceeding $40,000,000, would be struck or stayed.

[13] LSI Canada's preparation for the case was necessarily thorough; it included an extensive brief and reply brief, the Agreed Record, and a detailed chronology of events to dovetail with those documents. It participated in the preparation of the statement of agreed facts. LSI Canada also prepared the affidavits of Messrs. Beck and Bellstedt as well as a lengthy affidavit of Mr. Sanders detailing the history of the privatization transaction, the process that led to LSI Canada's fair value petition, and the history of the conduct of the proceedings over the past three years. Counsel prepared their witnesses for cross-examination, assisted in the preparation of answers to undertakings, and conducted a lengthy cross-examination of the Shareholders' representative, Mr. Martin.

[14] The case for LSI Canada was led by Mr. Tavender, Q.C. With the complexity of the five applications it was entirely appropriate that he was assisted by Mr. Tarnowsky, who has participated in the fair value proceedings since their commencement, as well as Ms. Holukof and other associates, students and paralegals.

[15] The Shareholders challenge the reasonableness of LSI Canada's actual costs, noting that they are more than double the Shareholders' costs. The comparison is unfair, for the burdens upon plaintiffs and defendants in lawsuits are not necessarily equal. I accept that defending the fair value proceedings, with their complicated legal history, would have involved more effort than launching the claims. Moreover, it is evident that LSI Canada's counsel did more work than the Shareholders' counsel in terms of the number of witnesses they presented, the documents they reviewed and assembled, and the depth of their legal research. In any event, a party that is sued "is not expected to shop for cheaper services but is entitled to be represented by counsel of its choice": ***Apotex Inc.* v. *Egis Pharmaceuticals*** (1991), 4 O.R. 321 at 323 (Gen. Div.). Concerns about the nature of the legal services can be addressed through taxation.

[16] All of the factors I have considered to this point would support a costs award in the 40% to 50% indemnification range. However a court, in setting costs, is permitted to consider whether any step in the proceedings was improper, vexatious or unnecessary (R. 601.(1)(g)(i)). While courts should not discourage the assertion of valid legal rights by imposing heavy costs awards, the same is not true for vexatious proceedings. Regrettably, the Shareholders' litigation has a gloss of impropriety, which dictates a higher costs award.

[17] The Shareholders might have thought they had a chance of challenging the validity of the fair value proceedings on the merits. But they could not have thought that their challenge was timely or appropriate. They were well aware that they had actively participated in, taken the benefit of, and invoked the court's jurisdiction and assistance in the fair value proceedings for more than three years. They had obtained, from the very court whose jurisdiction they later challenged, a court order paying them $3.00 per share on account of fair value, in respect of a

transaction they later argued was *ultra vires* and unlawful. The Shareholders not only elected to follow the fair value proceedings instead of challenging them, they were also precluded from attacking the court's jurisdiction on the basis of *res judicata*. Their attempt to strike the fair value proceedings was an abuse of process.

[18] Equally serious, in launching the oppression claim the Shareholders breached the implied undertaking under Alberta law not to use information disclosed in the fair value proceedings for a collateral purpose, as well as their express contractual undertaking not to use information disclosed in the fair value proceedings in any other litigation. The Shareholders' counsel concedes that the violation of both the express and implied undertaking "may seem to be misconduct". He contends, however, that "there is no element of willful misconduct or lack of good faith" (Shareholders' costs brief at 8). This bare assertion is not supported by evidence that permits me to examine the Shareholders' motives in order to reach that conclusion.

[19] The implied undertaking applies as a matter of law to the Shareholders, as it applies to every other Alberta litigant. Its violation is an abuse of the court's process: ***Carbone* v. *De La Rocha*** (1993), 13 O.R. (3d) 355 at 369 (Gen. Div). Because the implied undertaking applies equally to parties and to their legal counsel, it cannot be assumed, in the absence of compelling reasons, that the undertaking was breached "in good faith".

[20] The express undertaking in this case was created by contract. It was agreed by counsel that the documents disclosed through the course of the proceedings were "not to be used except for the purposes of this litigation" (Agreed Record, Tab VIII hh). The parties agreed that the documents would not be disclosed to all dissenting shareholders, but only to members of the Dissenting Shareholders Committee who would agree to accept the non-disclosure conditions in writing before reviewing the documents (Agreed Record, Tab VIII ii). These express provisions leave little room for excuses.

[21] These breaches were serious; I refused to waive them and I granted an injunction against the Shareholders. LSI Canada was forced to prove these breaches in order to strike out portions of the oppression claim. It had no choice but to defend its fair value proceedings from a challenge that was an abuse of process. Whatever the Shareholders' motives might have been, LSI Canada should not be compelled to bear the costs of improper and unnecessary proceedings.

[22] Finally, I note that in February of 1998 the parties put in place an elaborate protocol for the management of information requests, expert reports, evidence at trial, judicial dispute resolution and case management, the intent of which was to "facilitate a summary and efficient resolution" of the fair value dispute in the Court of Queen's Bench (Agreed Record, Tab VIII rr). That protocol, negotiated by the parties, was the subject of a consent order, which has not been appealed. It invited the court to impose costs and other sanctions, including solicitor and client costs, "if at any time in the opinion of the Court either of the parties has not, without reasonable excuse, met the intent of the protocol." I do not rely on the protocol in imposing costs in this case. However, I do note that the Shareholders' three year diversion has resulted in anything but a summary and efficient resolution.

[23] I award LSI Canada 2/3 of its solicitor and client costs. I also award disbursements and GST as applicable.

THE DIRECTORS' COSTS

[24] The oppression claim launched by the Shareholders also named six former directors and officers of LSI Canada as defendants. They have been represented by Mr. McLennan, Q.C., and Mr. Dear throughout the proceedings. The Shareholders contend that the directors and officers should receive only their single column Schedule C costs, which they calculate at $19,300. The directors and officers calculate the Schedule C costs at approximately $30,000. However, the directors and officers claim full indemnity costs, and "repeat, rely upon and concur with positions taken" by LSI Canada in its brief (directors' and officers costs brief at 6).

[25] The Shareholders' oppression statement of claim contained relatively few allegations against the directors and officers. They filed a notice of motion to strike the claim against them on the basis that it disclosed no cause of action. A few weeks before the hearing, the Shareholders applied to amend the statement of claim to strengthen the allegations against the directors and officers. The possibility of an amendment application was not mentioned at the six case managements held to organize the hearing and, accordingly, it was not accounted for in the limited time booked for the special application. A strict timetable had been set months earlier for the filing of briefs. Had the Shareholders' untimely amendment application proceeded, briefs would have been delayed, jeopardizing the entire special chambers hearing. As a result, I adjourned *sine die* the Shareholders' motion to amend and the directors' and officers' application to strike, without prejudice to the directors' and officers' ability to apply for costs in relation to the adjournment. At the special chambers hearing I learned that the Shareholders' had filed but not served a new oppression statement of claim against the directors and officers.

[26] Prior to the adjournment, the directors and officers prepared a notice of motion and a detailed brief. No doubt they participated in the preparation of the agreed statement of facts and Agreed Record. Given the long history of this litigation and the number of documents, it would have taken considerable time for them to acquaint themselves with the file.

[27] Because of their common interest in the outcome of the litigation, the directors and officers participated in the special chambers application despite the adjournment. However, their oral argument was minimal, as they spoke only on the issue of striking the oppression claim, and substantially supported LSI Canada's more comprehensive arguments.

[28] In view of the circumstances of the adjournment of their motion to strike, and the nature and extent of their participation, I award the directors and officers 1/3 of their solicitor and client costs. I also award disbursements and GST as applicable.

[29] I am uncertain whether all issues between the Shareholders and the directors and officers are now at an end. In the event the directors' and officers' motion to strike, the Shareholders' motion to amend or the Shareholders' new oppression claim resurface in the future, the preparation and briefing done by the directors and officers for the adjourned applications may

prove to be of considerable value. As the level of costs recovery is quite low, should that occur, the directors and officers have leave to reopen the issue of these costs at that time.

JOINT AND SEVERAL LIABILITY FOR COSTS

[30] In considering whether to award costs on a joint and several basis against all the Shareholders, "the first point to consider is whether the plaintiffs in bringing this action acted jointly [...]": ***King* v. *On-Stream Natural Gas Management Inc.*** (1993), 21 C.P.C. (3d) 16 at 21 (B.C.S.C.). It is clear that they did. The Shareholders' statement of claim alleges that they have "a common interest in the [...] proceedings [...] having suffered the same wrong and having undifferentiated claims" (Agreed Record, Tab I, para. 2). The Shareholders pursued like remedies arising from the same alleged cause of action and in doing so have acted in concert and presented a united front: ***Filipovic* v. *Upshall***, [1998] O.J. No. 4498 (Ont. Ct. Gen. Div.), online: QL (O.J.). They appointed a Dissenting Shareholders' Committee to guide the litigation. They have always been represented by common counsel.

[31] The Shareholders submit that costs should be imposed on a several, not joint and several, basis. They argue that the imposition of joint and several costs will erode the dissent and fair value provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, and will deter shareholders with significant means from exercising dissent rights, presumably because they will be made to pay the freight for the entire lawsuit (Shareholders' costs brief at 10).

[32] But this litigation is not about shareholders exercising dissent rights under the *CBCA* to have a court determine the fair value of shares. It is an attempt by shareholders to walk away from fair value proceedings they have followed and benefited from for three years. Unlike fair value proceedings, the Shareholders in this litigation did not come together spontaneously because of common statutory rights. The litigation was devised by a small group of significant stakeholders who recruited other shareholders to join them. I do not suggest that they acted improperly in doing so. But they were free to make contractual arrangements, including fee and costs sharing arrangements, with shareholders who joined the litigation "to address the risk of what lay ahead and to provide for the contingency of losing": ***King**, supra* at 23. LSI Canada was not in that position. There is no reason that it should it be faced with the effort and risk of collecting separate costs judgments from 79 plaintiffs.

SUMMARY

[33] I award LSI Canada 2/3 and the directors and officers 1/3 of their respective solicitor and client costs, in each case together with all disbursements and GST as applicable. In the event of a disagreement whether legal fees were incurred to address issues "within the four corners of the litigation", costs and disbursements may be taxed by a Queen's Bench taxing officer. Costs are awarded against all Shareholders on a joint and several basis. They are payable forthwith, and in any event of the cause.

DATED at Calgary, Alberta this 13th day of November, 2001

FRUMAN J.C.Q.B.A.

TAB 8

Court of Queen's Bench of Alberta

Citation: Indutech Canada Limited v Gibbs Pipe Distributors Ltd., 2012 ABQB 425

Date: 20120629
Docket: 0401 09099
Registry: Calgary

Between:

Indutech Canada Limited

Plaintiff
(Defendant by Counterclaim)

- and -

Gibbs Pipe Distributors Ltd., Barry Gibbs Sales Limited, 724192 Alberta Ltd., 974038 Alberta Ltd., Borealis Fabrication Ltd., Barry Gibbs, Guy Gibbs, ABC Corp., Cladtech Canada Inc., Barry Kossowan, Kossowan Holdings Inc. and 1036795 Alberta Ltd.

Defendants

- and -

Gibbs Pipe Distributors Ltd.

Plaintiff by Counterclaim

Reasons for Cost Decision
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] Indutech submits that it is entitled to enhanced costs, an increase in the amount that would normally be awarded for certain cost items under Schedule C of the *Rules of Court*,

because the amount calculated in accordance with Schedule C is an unacceptable level of indemnity in this case.

[2] The amount of costs calculated in accordance with Schedule C would be $285,000, while actual legal fees are in excess of $950,000. Indutech seeks an increase in various cost items of approximately $225,000, or alternatively, a lump sum of $375,000 for specific items.

[3] Specifically, Indutech submits that the complexity of the litigation and the conduct of the Gibbs Group Defendants justify a higher award of costs. It does not pursue an enhanced costs claim against the defendants Barry Kossowan and Kossowan Holdings Inc., as it has reached a settlement with those defendants.

[4] The Gibbs Group Defendants submit that, as a general principle, costs should approximate 40-50% of solicitor and own client costs: *Marathon Canada Limited v. Enron Canada Corp.*, 2008 ABQB 770 at para. 30; *Trizec Equities Ltd. v. Ellis-Don Management Services Ltd.* 1999 ABQB 801; *LSI Logic Corp. v. Logani* 2001 ABQB 968.

[5] Further, they submit that deviation from Schedule C should only occur in exceptional circumstances, and the exercise of the Court's discretion must be based on relevant and appropriate principles.

Analysis

[6] The Court has considerable discretion with respect to the amount and type of costs awarded pursuant to Rule 10.31(1). Rules 10.33(1) and (2) set out considerations the Court may take into account in making its award. The considerations most relevant to this case are:

(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

(c) the complexity of the action; and

(d) whether a party has engaged in misconduct.

[7] The Court may also consider any other matter related to the question of reasonable and proper costs that it considers appropriate.

[8] Courts have recognized that costs calculated in accordance with the normal guidelines of Schedule C are sometimes inappropriate when applied to complex litigation: *LSI Logic* at para. 7.

[9] This was certainly complex litigation. The decision weighs in at 177 pages, and covers analysis of not only breaches of contract, but breach of fiduciary relationships and many of the

economic torts. The litigation was intensively case-managed prior to trial, and took five weeks of trial time. It involved many thousands of documents and approximately 40 days of examinations for discovery. The affidavit of the Chief Financial Officer of Indutech, filed in support of this application, sets out the scope and intensity of trial preparation, and how it was that Indutech discovered the full extent of the breaches of contract and fiduciary duty through the course of the litigation, requiring thorough review of the extensive records produced by the defendants. It was clear that Indutech had to recreate the history of four years of business transactions, a massive undertaking.

[10] Enhanced costs have also been awarded in cases where the defendants were found to have engaged in misconduct, including fraud, breach of trust and breach of fiduciary duties, all of which were present in this case: *Jackson v. Trimac Industries Ltd.*, A.J. No. 218 ABQB at pg. 11; *Pharand Ski Corp. v. Alberta*, 122 A.R. 395 QB.

[11] The Gibbs Group Defendants submit that where a party has been punished for misconduct by an award of punitive damages, as was the case here, courts have been disinclined to punish that party further through a costs award: *539618 Ontario Ltd. v. Stathopoulos* (1989), 17 A.C.W.S. (3d) 159 (Ont.H.C.J.) at para. 8.

[12] It may be more accurate to say that an award of punitive damages may be a factor in considering enhanced costs, since the rules and case authority in Alberta do not preclude the consideration of misconduct at the costs stage of proceedings, whether or not punitive damages have been found to be appropriate. Punitive damages reflect the misconduct of the Gibbs Group Defendants over the course of the Agency Agreement. An enhanced costs award reflects misconduct during the course of the litigation, and there is evidence of such misconduct in the findings of credibility made with respect to various of the Gibbs Group Defendants.

[13] Specifically, Indutech claims the following, some items of which are not contested:

(a) costs under Column 5 of Schedule C with two times Column 5 for all steps taken after August 10, 2009. This item was not contested.

(b) reimbursement of "all reasonable and proper disbursements". This item was not contested.

(c) costs for "Commencement of Proceedings" in the amount of $20,000. Indutech submits that the pleadings in this matter were "anything but boilerplate". The Gibbs Group Defendants disagree. Having worked through the pleadings, I must agree with Indutech. Since all cases are unique, it is of little assistance to compare pleadings with respect to other complex and protracted cases, as the Gibbs Group Defendants do in their submissions. The scope of the decision in this case speaks for itself.

I allow costs for "Commencement of Proceedings" in the amount of $20,000.

(d) costs for "Disclosure of Records" in the amount of $10,000. This item was not contested.

(e) costs for "Review of Opposing Party Documents" in the amount of $20,000. As noted by Indutech, it was necessary to thoroughly review between 15,000 and 20,000 pages of documents produced by the Gibbs Group Defendants and to cross-reference them to Indutech records. The resulting damages spreadsheets proposed for trial were invaluable in saving additional trial time and confusion. I allow this item in the amount of $20,000.

(f) costs for "Questioning" either in a lump sum of $225,000 or alternatively, three times Column 5 of Schedule C.

I accept that preparation for examinations for discovery required an inordinate amount of time, both because of the nature of the litigation and the many thousands of documents and because of the means the Gibbs Group of Defendants took to conceal the set-up of Indutech and the lack of candour of their main witnesses. I therefore allow 2 ½ times column 5 of Schedule C for this item, excluding Mr. Kossowan.

(g) costs for "Trial Preparation" in the amount of $50,000.

Indutech submits that this enhancement is justified given that reviewing and finalizing the damages spreadsheets that were entered as exhibits at trial was a time-consuming process. I agree that these time-sheets were invaluable, and without them, the trial would have been required to be much longer. I allow ths claim for enhanced costs.

(h) a second counsel fee. This item was not contested.

(i) full counsels' attendance costs for each half day of trial, without regard to the number of hours counsel were in attendance on any given trial day.

The Gibbs Group Defendants submit that this is inconsistent with the convention normally followed by a taxing officer. Indutech submits that this convention is unrealistic, and unduly under-compensates counsel. I agree. The number of actual hours of trial time is unpredictable and often beyond the control of counsel, who must prepare for a full half day in any event. I allow this time as requested by Indutech.

(j) costs for "Written Argument" in the amount of $40,000.

Indutech submits that the nature of the proceedings required extensive legal research, both with respect to liability and damages. I agree, and note that the briefs were thorough, updated the damages spreadsheets, and referenced emerging and complex economic torts. The Gibbs Group Defendants contrast the length of the written argument in *Marathon*, but each case is unique to its facts and issues. I allow this item of enhanced costs.

(k) expert fees for Mr. Copeland and Mr. Nelson. This item was not contested.

(l) costs for "Contested Applications". This item was not contested.

(m) costs for "Case Management Conferences". The Gibbs Group Defendants submit that these costs should be reduced because in *Marathon*, the Court reduced them to reflect the brief nature of some of the meetings. There is no evidence before me with respect to the length and nature of the case management meetings, and no reason to deny this item of costs or to discount it.

(n) full reimbursement of travel expenses incurred to attend at examinations for discovery in Edmonton in the amount of $6,297.56.

Some of the examinations for discovery were directed by the case management justice to be conducted in Edmonton, even though this was a Calgary action, because of the volume of documents produced by the Gibbs Group Defendants and to allow the Defendants to continue to conduct their normal business. This is not a situation of a party retaining counsel outside of the judicial district of the case, and the benefit was to the Defendants. The costs are reasonable and allowed. I note they do not include the travel costs of Indutech's Chief Financial Officer.

(o) post-judgment interest on taxable fees and disbursements from the date of the judgment. This item was not contested.

(p) costs of the special application for costs and the application for directions in the amount of $5,000. This is more than reasonable given the briefing required and the nature of the arguments made, and I will allow it.

[14] As I have allowed substantially all of the enhanced cost items claimed by Indutech, it is not necessary that I consider a lump sum of $375,000 in lieu of this relief.

[15] The relief claimed may well take the costs award above the "normal" level of indemnity, but this was not a typical case, for the reasons already identified. The factors of high complexity, the degree of success and the not-inconsiderable misconduct of the Gibbs Group Defendants make this an appropriate case for enhanced costs.

[16] If the partes are unable to resolve any issue concerning the calculation of interest, or any other issue relating to the implementation of this costs award as directed, they may submit written argument on those issues.

Dated at the City of Calgary, Alberta this 29th day of June, 2012.

B.E. Romaine
J.C.Q.B.A.

Appearances:

Gary B. Laviolette and J. Brown of Gowling Lafleur Henderson LLP
Solicitors for the Plaintiff (Defendant by Counterclaim) Indutech Canada Limited

D. M. McLaughlin and J.M. Doyle of Field LLP
Solicitors the Defendants Gibbs Pipe Distributors Ltd., Barry Gibbs Sales Limited, Barry Gibbs and Guy Gibbs and Solicitors for the Plaintiff by Counterclaim Gibbs Pipe Distributors